Realizing the Abidjan Principles on the Right to Education

NORRAG SERIES ON INTERNATIONAL EDUCATION AND DEVELOPMENT

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Realizing the Abidjan Principles on the Right to Education
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Edited by Frank Adamson, Sylvain Aubry, Mireille de Koning and Delphine Dorsi

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Human Rights, Public Education, and the Role of Private Actors in Education

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This volume documents the culmination of years of work across the legal and education fields by scholars and civil society organizations alike. Bridging these diverse spheres to deepen our collective understanding of and to develop pathways towards realizing the right to education for all requires a great deal of focus and effort that the editors would like to acknowledge for all involved. Chapters 1 and 10 provide narratives of the many actors that both contributed to creating and now continue to apply the Abidjan Principles, too numerous to list here, but greatly appreciated and admired for their dedication to advancing the right to education. Our editorial team would like to thank the authors and one another for the collegial, collective approach to the work, for bringing and valuing our different perspectives, and for our continued commitment to education justice. We also appreciate the helpful and nuanced feedback provided by Alexandra Draxler and to Gita Steiner-Khamsi and NORRAG for including this book in the series. Finally, we are grateful for the help of our support networks – family, friends, and colleagues – all of whom make this work possible and rewarding.

Abbreviations

Abidjan Principles	Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
APBET	Alternative Provision of Basic Education and Training
AUF	Francophone University Agency
Business Principles	Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework
CADE	UNESCO Convention against Discrimination in Education
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the European Union
CMO	Charter Management Organization
CRC	Convention on the Rights of the Child

CRPD	Convention on the Rights of People with Disabilities
DEEPEN	Developing Effective Private Education Nigeria
DFID	United Kingdom Department for International Development
EACHRights	East African Centre on Human Rights
ECHR	European Convention on Human Rights
ECtHR or Strasbourg Court	European Court of Human Rights
EDPRS	Economic Development and Poverty Reduction Strategies
EFA	Education for All
ESDP	Educational Sector Development Programme
ePPP	Education Public–Private Partnerships
ESSP	Education Sector Strategic Plans
ETO Principles	Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights
FPE	Free Primary Education
GDP	Gross Domestic Product
GPE	Global Partnership for Education
HDI	Human Development Index
HIPC	Heavily Indebted Poor Country Initiative
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP Principles	Guiding Principles on Internal Displacement
IFC	International Finance Corporation
ILO	International Labour Organization
IMF	International Monetary Fund
LDCs	Least Developed Countries
LFPS	Low-fee Private Schools
Limburg Principles	Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights
Maastricht Guidelines	Maastricht Guidelines on Violations of Economic, Social and Cultural Rights
MDGs	Millennium Development Goals
NGOs	Non-Governmental Organizations
OECD	Organisation for Economic Co-operation and Development
OIF	International Organisation of La Francophonie
PERI	Privatisation in Education Research Initiative
PISA	Programme for International Student Assessment
Poverty Principles	Guiding Principles on Extreme Poverty and Human Rights
PPPs	Public–Private Partnerships
SAPs	Structural Adjustment Policies
SDG	Sustainable Development Goal

Siracusa Principles	Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNESCO	United Nations Education, Scientific, and Cultural Organization
UPE	Universal Primary Education
UPR	Universal Periodic Review
Yogyakarta Principles	Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity

1. Developing human rights guiding principles on State obligations regarding private education

Sylvain Aubry, Mireille de Koning, and Frank Adamson

A NEW REFERENCE ON THE RIGHT TO EDUCATION

In 2019, civil society observers from around the world gathered in Ivory Coast as the human rights and education experts seated in front of them raised their hands and began to applaud, smiling and visibly relieved. Following two days of meticulous review and impassioned debate of nearly one hundred principles detailing the obligations of States to provide public education and regulate private involvement in education, their clapping signalled the unanimous adoption of the *Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education* (hereafter referred to as the "Abidjan Principles"). This moment, on 13 February 2019 in Grand Bassam (near Abidjan, in Ivory Coast), marked the culmination of three years of participatory consultations, rigorous background research, and successive drafts involving hundreds of people and organizations globally. It signified a landmark development for the right to education, with implications for education policies and delivery. In the context of new and increasingly complex governance arrangements and processes in education and with the growing involvement of various private actors and interests in the provision, management, and funding of education in particular, the Abidjan Principles offer a reference point and a much-needed tool to address the organization of education systems.

The days immediately following the adoption conference, hosted by the Ministry of Education of Ivory Coast, with the presence of the

United Nations (UN) Special Rapporteur on the right to education and former Minister of Education of Burkina Faso, Koumba Boly Barry, saw a heightened sense of momentum as the news travelled around the world. In the months that followed, the Abidjan Principles were recognized by the African Commission on Human and People's Rights (ACHPR, 2020) and the UN Human Rights Council respectively in resolutions addressing education (2019), analysed by the UN Special Rapporteur on the right to education and annexed to her report (UN Special Rapporteur on the right to education, 2019). A year later, further human rights bodies have recognized the Abidjan Principles, such as the Special Rapporteur on Economic, Social, Cultural and Environmental Rights of the Inter-American Commission on Human Rights, and they have begun informing significant global policy decisions, including the Global Partnership for Education's (a multi-stakeholder partnership and funding platform) private sector engagement strategy. In Uganda, a landmark High Court judgement faulting the government's policy on public financing for secondary education advised the State to seek guidance from the Abidjan Principles in developing its education policies. Within a year of their adoption, the Abidjan Principles stood out among human rights principles for the broad support they received, from experts[1] and human rights bodies alike.

Rigorous research laid the groundwork for the development of the Abidjan Principles. This volume brings together a suite of chapters based on background papers originally commissioned and used as internal references by the drafting committee for the process by the Open Society Foundations Education Support Program, in collaboration with the five organizations that served as a secretariat supporting the process to develop the guiding principles, including Amnesty International, the Equal Education Law Centre, the Initiative for Social and Economic Rights, the Global Initiative on Economic Social and Cultural Rights, and the Right to Education Initiative. These background papers did not comprehensively cover all topics or geographies; rather, they sought to unpack and clarify some of the most difficult and underexplored concepts and questions integral to the right to education and the involvement of private actors in education from the fields of social science and law. They were written to inform the Abidjan Principles and, as such, formed part

[1] The text was signed by over 50 eminent experts, including some of the most authoritative individuals in international human rights law.

of the internal process for their development. Importantly, they were not the only literature consulted by the drafters and are not exclusive to other points of view. This volume synthesizes their findings into chapter form to serve as a standalone resource for readers interested in education policy issues, whether from a legal, social sciences, or operational perspective.

This introductory chapter explains the rationale and logic behind this book. In doing so, it provides the background to the Abidjan Principles, why and how they were developed, and the significance of the process.[2] It delves into the topics covered by the background research and discusses how the chapters respond to key questions in relation to State obligations for the provision of public education and the regulation of private involvement in education, including liberties in education, the right to public education, and public–private partnerships (PPPs), among others.

HOW THE ABIDJAN PRINCIPLES CAME ABOUT

The growing involvement of private actors in education has expanded globally over the last decades, particularly since the neoliberal reforms of the 1980s and 1990s, accelerating in some regions during the 2000s (Verger et al., 2016; Srivastava 2016). This significant increase in the scale and scope of private involvement, and concomitant changes in the management, funding, and provision of education, has, in many places, transformed the State role and the governance and regulation education systems (Ball 2012). While private actors have increasingly come to dominate policy spaces, these decision-making processes almost entirely exclude those on the receiving end – including teachers, parents, and students. In many cases, whether as a result of commercial interests or inadvertently, these decisions have led to segregation and inequalities in education, poor labour conditions, and little recourse to accountability.

Private actors are involved in many different aspects of education. Increasingly, they not only deliver services contracted and subsidized

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[2] The Abidjan Principles are available in their full form at https://www.abidjanprinciples.org. The annex in this volume includes the ten Overarching Principles. (The drafting committee worked throughout the process on the full Abidjan Principles, open to consultation and comments. Towards the end of the process, the committee summarized the full Abidjan Principles into ten Overarching Principles to make them more accessible. The Overarching Principles should not, however, be read as capturing the full content and nuance of the full Abidjan Principles.)

by the State, but also insert themselves as key partners in shaping and implementing education policies, policy discourse, and practices. Arrangements involving the private sector range from the introduction of quasi-market mechanisms through, for example, voucher schemes and charter schools (both forms of PPPs in education), to modalities such as performance-related management and pay. The type of private actors involved has also become increasingly complex. The last decade has seen a rapid expansion of a range of new actors, from small local providers to transnational for-profit commercial school chains.

Private providers "may be for-profit or charitable, fee charging or free, driven by companies and entrepreneurs or by communities and non-governmental organizations, formal or informal, supported by the State or totally independent" (Aubry & Zondani, 2017: 200), each with different motives and relationships to the State (Robertson et al., 2012). In countries in the Global South, the rapid and de facto increase in private delivery has largely occurred in the form of low-fee private schools (LFPS) targeting poor households (Srivastava 2013; Verger et al., 2016), increasingly supported through PPP arrangements (Srivastava 2016), such as in Pakistan, Uganda, and Liberia. More recent expansions include private funding and investments by corporations, private foundations, social entrepreneurs, think tanks, consultancy firms, and other actors in the provision of schooling or education services (Fontdevila et al., 2019; Srivastava & Read 2019).

Various factors have driven these changes. Underpinning these developments is the idea that education systems will be more efficient and effective if they operate like free markets and are reorganized using principles of choice and competition (Ball 2012), the assumption that private education is better than publicly provided education, and the conception of education as primarily an individual good that contributes to forming human capital (Adamson et al., 2016). In developing countries, a key driving factor behind education privatization over the last decade has been the support for private schooling through development aid and private investments. Ultimately, these changes have led to the opening up of education sectors to "profit-making, trade and agenda setting by private, commercial interests" (Macpherson et al., 2014: 9), promoted and supported – through funding, technical assistance, and research – by key multilateral and bilateral organizations and agencies as fundamental to economic growth and competitiveness.

Intense policy debates have surrounded the impact of the growth of private involvement in education, abetted in particular by increased

empirical evidence scrutinizing the phenomenon. Numerous studies have documented the rise of different forms of private provision and involvement in different contexts around the world, attempting to engage and address the complexity of the issues, in terms of definition and forms, motivations and logics, and the contested meaning of dimensions being assessed, one obvious one being "quality". One initiative that sought to "contribute to a better understanding of the nature and effects of privatization in and of education" (Macpherson et al., 2014: 22) was the Privatisation in Education Research Initiative (PERI) that ran from 2010 to 2015. This initiative offered an open platform for experts, civil society, private actors, government, education practitioners, and other education stakeholders to provide and critically debate evidence on the private involvement in education. Through regional conferences, civil society workshops, summer schools, and research in developing countries, PERI sought to examine and discuss the social justice implications of the changes in the governance, provision, and funding of education services.

Building on PERI's work and findings raising major concerns about the impacts of education on equity, a number of civil society organizations from the education and human rights fields and other actors endeavoured from 2013 to strengthen the human rights perspective to the debate. A large part of the work initially entailed unpacking the scope of the right to education and determining what it means in practice. One of the main assumptions behind this approach is that, while open to interpretation, the nearly universally ratified and legally binding nature of human rights law related to education provides a broadly uncontested framework to address what Aubry and Dorsi (2016) term the "normative privatisation debate" to determine under what conditions private involvement in education may be acceptable or not. To do so, civil society organizations and researchers undertook reviews of case law, national law, and other sources of interpretation of the law, such as General Comments and resolutions, relevant to private actors in education.

In parallel, these organizations also conducted empirical research – through the review of laws, policies, and secondary literature – in over a dozen countries in the Global South to test and refine the human rights assumptions and assess the impact of the rapid expansion of LFPS, commercial school chains and various PPPs on the right to education. This research was presented, alongside State reports, to regional and UN human rights bodies, who provided their own analysis and recommendations. These quasi-legal interpretations, considered within the scope of international law, have in turn contributed to better understanding

of applicable human rights standards. At that time, the former United Nations Special Rapporteur on the Right to Education, Kishore Singh, also produced three landmark reports addressing education privatization (UN Special Rapporteur on the right to education, 2014, 2015a, 2015b), and the UN Human Rights Council started addressing the issue in its annual resolution on the right to education.

This body of work has enabled a deeper understanding of how human rights standards apply to issues of private involvement education and shaped an evolving human rights analysis framework (Aubry & Dorsi 2016), called the "Privatisation in Education Assessment Framework" (PAF). Developed jointly by the Global Initiative for Economic, Social and Cultural Rights and the Right to Education Initiative, this assessment tool sets out the legal criteria or conditions that the involvement of private actors in education should not negatively affect. Specifically, where private actors are involved in education, States should ensure that, in order to meet human rights standards, such private actors should: (1) not be a source of segregation, discrimination and inequalities; (2) provide an alternative and not undermine access to free quality education; (3) preserve the humanistic nature of education; (4) conform to minimum standards established and enforced by governments; and (5) be regulated by norms developed following due process and participation in education decision making. While this assessment framework provided an initial grounding, it was considered insufficiently comprehensive and rigorous, and lacked the political weight and legitimacy of a legal text that could be used, for example, in litigation. As such, in 2015 a process was initiated to develop a set of human rights guiding principles, with the aim of solidifying the initial unpacking of the human rights framework and developing a tool that could be implemented in practice (Aubry, 2018). This process would yield the Abidjan Principles.

WHAT ARE THE ABIDJAN PRINCIPLES?

The Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education – or the Abidjan Principles – consolidate and reassert the existing obligations of States to guarantee the right to education, as set out under human rights law and standards. Specifically, they aim to unpack and clarify the normative content of the right to education in the context of the involvement of private actors in education. The obligations of States to realize the right to education for all is set out in the 1948 Universal

Declaration of Human Rights and further elaborated in the legally binding 1966 International Covenant on Economic, Social and Cultural Rights. Further treaties, conventions, judicial and quasi-judicial decisions, and other legal sources refer to and elaborate on the right to education, and many national constitutions protect the right to education. In recent years, courts and human rights mechanisms have increasingly referred to – and expressed concern about – the challenges and implications of growing private sector involvement in education and have highlighted the obligations of States to protect education systems against commercialization. These include, among others, UN and regional human rights treaty bodies and UN Human Rights Council resolutions. Together these have contributed to providing clarity on how the right to education applies to particular situations and complex dynamics that affect its implementation, through General Comments, concluding observations, resolutions, and reports (GI-ESCR, 2017).

The Abidjan Principles bring this vast body of human rights law together and offer reference points or guidance – set out in 97 principles – on how the right to education should be realized in the context of the challenges posed by changing contextual realities in education, including the growth of private provision. In particular, the Abidjan Principles offer a way to navigate potential tensions between different dimensions of the right to education protected under the human rights framework at the heart of the current policy debates on education privatization. One of these is a tension that may exist between States' obligations to ensure the provision of free quality education for all without discrimination and segregation and the liberty of parents to choose or establish a private school separate from the State – which are both recognized under human rights law.

Human rights principles can carry considerable political and legal weight. As a text reflecting existing provisions contained in various sources of international law already binding on States, the Abidjan Principles apply to all governments legally bound by the right to education under domestic or international law – virtually almost all States in the world. As the UN Special Rapporteur on the right to education (2019: para. 35), Dr Boly Barry, put it, the Abidjan Principles "constitute a significant new tool" to guide States in the implementation of the right to education. Communities, education providers, multilateral organizations, human rights bodies and courts, and other stakeholders can also use them to advocate for the reform of laws, policies and practices, to claim

rights, and to hold States to account, as detailed by Adamson, Dorsi, and Carmona in the concluding chapter of this volume.

What Do the Abidjan Principles Say?

The 97 Guiding Principles that comprise the Abidjan Principles offer States and other actors a reference frame for addressing tensions that may emerge from changes in the governance of education and in the context of growing privatization and commercialization of education. Organized in six sections, they reassert State obligations to respect, protect, and fulfil the right to education. Section I covers general provisions, including offering a definition of public and private actors (Guiding Principles 2 and 3). Section II recalls the general State obligations with regard to the right to education, including regarding equality and non-discrimination (section II.B). Two particularly important sub-sections (II.C and II.D) outline the right to public education and related financing obligations. As discussed further in this chapter, the clarification of States' obligations to provide free, public education of the highest attainable quality is a major contribution of the Abidjan Principles.

Section III is at the core of the Abidjan Principles and it contains the Principles related to private sector involvement in education, including States' obligations to regulate the private involvement in education. This includes a noteworthy list of the minimum standards that States should address in the regulatory framework (Guiding Principle 55).

Section IV addresses financing issues related to private actors. It is arguably one of the most crucial parts of the Abidjan Principles, as it addresses an issue with deep implications for power relationships in education: the transfer of funds between public and private actors. It delineates landmark substantive, procedural, and operational requirements for any State that wishes to support private actors, which must be met.

Lastly, sections V and VI include the guiding principles related to accountability and monitoring, and to the implementation of the Abidjan Principles themselves. Importantly, the Abidjan Principles also apply in instances of international and bilateral aid and cooperation.

THE SIGNIFICANCE OF THE PROCESS

The development process of the Abidjan Principles was unique in its simultaneously rigorous and broadly participatory approach. From 2015 to 2018, a series of participatory regional, thematic, community, and

online consultations were convened involving hundreds of stakeholders from around the world, including policy makers, civil society, teachers, private sector providers, international organizations, human rights lawyers and education experts, and, crucially, affected communities. The drafting committee prepared a first iteration of the Guiding Principles based on material from these consultations and other research (including the background papers that informed the chapters) that a group of independent experts reviewed and finalized.

In facilitating the process for their development, the secretariat engaged a diversity of experts from various backgrounds and disciplines, and with different points of view, to try to ensure the balance and quality of the text. Several of the experts involved, including the drafting committee members, have intimate knowledge of the challenges that private schools face, experience in running such schools, and a deep understanding of the changes in education governance and implications for the delivery of free, quality education in various contexts. This diversity is important especially for these Guiding Principles as they address a highly complex issue involving a multiplicity of actors, dynamics, and relationships that play out disparately in different contexts. Important to note is the leadership for this process from the Global South, reflected in the secretariat organizations, the drafting committee, and the experts who adopted the text.

The consultation process intentionally sought to capture a variety of perspectives, positions, and experiences and to ensure that the text was reflective of different contextual realities. It tried to create a space for debate and critical reflection on a highly contentious and divisive topic by bringing different stakeholders together in dialogue with each other (de Koning, 2018) and to provide an opportunity for those who normally do not participate in policy decisions to weigh in on a tool that could help to affect their education. The consultation process also contributed to building some level of consensus among a diversity of actors, as well as ownership of the concepts in the text among these actors. This approach was critical for the contextual relevance of the Abidjan Principles and to support their implementation.

This methodology – involving multidisciplinary dialogue, the connection between empirical and normative reflections, encouraging diversity, and including the voices of those not often consulted or heard in policy spaces – rests upon an important assertion, from a legal perspective, that human rights law is made to be used in practice and in context, and to serve everyone equally. It is also the assumption behind this book.

PROVIDING THE FOUNDATION AND BACKGROUND TO THE ABIDJAN PRINCIPLES

The Methodological Approach

The chapters in this volume reflect not only the significance of the Abidjan Principles for education policy and delivery, by tackling some of the most pertinent dimensions of the debate on the growing involvement of private actors in education, but also the rigour of the process for the development of the Guiding Principles, in particular the depth of the conceptual and normative deliberations that informed their substance.

The diversity of the background papers behind the chapters of this book is also significant in at least three respects. First, this book is a truly multidisciplinary effort, across disciplines that rarely produce academic work together. Four of the chapters (Carmona; Mowbray; Zinigrad; and Fredman) were produced by authors in the legal field, while the other four were written by researchers in social sciences (Härmä; Verger, Moschetti, and Fontdevila; Oduor-Noah; and Lange).

The legal chapters propose a normative perspective on the issue unearthed by the empirical research, by exposing legal reasoning and analysis. They help understand what is acceptable or not under the existing legal framework. The social science chapters provide the empirical grounding to the work; the contextual realities that the normative framework should address. They synthesize existing literature, offering insights into some of the challenges within education systems today that human rights law could participate in responding to. They add to existing literature reviews that were also consulted as part of the development of the Abidjan Principles (e.g. Day Ashley et al., 2014; Aslam et al., 2017).

This multidisciplinary approach mirrors the Abidjan Principles process itself. The group of experts that adopted the Abidjan Principles, although mostly made up of lawyers to ensure the legal rigour and legitimacy of the text, also included non-legal education experts who provided inputs and advice to the drafter during the process and participated in the adoption. Their participation helped ensure that the education issues were addressed, that all the standards included were realistic, and that the language could be accessible to education policy makers and stakeholders.

As productive and essential as the collaboration between these two broad fields – social sciences and law – is, it is never easy. Collaboration and dialogue between disciplines requires participants to come out of

their comfort zone, to challenge themselves with new concepts, ideas, and approaches and to embrace new terminology and definitions. Readers of this book will themselves likely use one approach more often than another. The cross-analysis of issues of privatization in this book offers unique insights that may help further this dialogue.

Second, the chapters also reflect the geographical diversity sought out by the process for the development of the Abidjan Principles. The social science chapters review the situation in a range of contexts, including geographies with a dearth of evidence. Lange's chapter on the growth of private actors' involvement in francophone countries is, in this regard, a significant contribution to the field otherwise largely informed by evidence from anglophone countries and researchers. The authors themselves come from a diversity of countries and regions, including Kenya, South Africa, Israel, Chile, Argentina, Australia, and Europe.

Third, the chapters, as do the Abidjan Principles, seek to find a balance between perspectives on the issue of private involvement in education. Some of the authors work directly with or assist some private schools (such as Härmä), or to research and support parental freedom in education (Zinigrad). Others advocate directly for the improvement of public education (Oduor-Noah), or have extensively examined and critiqued market approaches in education (Verger et al.), while some of the authors are deeply involved in these debates (Fredman, Mowbray). The chapters in this volume explore a range of contradicting arguments, and, as such, this book offers a variety of perspectives across the chapters as well debates within them.[3] This balance is an integral and crucial part of this book, and of the human rights approach to this issue.

Choosing Topics for Further Study

In this context with a large amount of extant literature, the choice of the topics for these chapters was based on two criteria: (1) addressing information or analysis gaps to better inform the drafters of the Abidjan Principles; and (2) examining the most complex issues that the Abidjan Principles seek to address and that require further reflection.

Carmona's chapter on the history and process of human rights principles offers a valuable reflection on the process for the development of

[3] The full composition of the Drafting Committee can be found on: https://www.abidjanprinciples.org/en/support/drafting-committee.

the Abidjan Principles on the basis of a set of determining factors that may contribute to strengthening the legitimacy and implementation of human rights principles. The background paper behind the chapter was seminal for the secretariat and the drafting committee in informing and reflecting on the process. The chapters by Oduor-Noah (on the situation in East Africa) and Lange (on francophone countries) also largely respond to the first criterion. They provide a helpful synthesis of the situation on the ground and existing studies in those two regions. The five remaining chapters largely address the second criterion and help grapple with complex issues, such as parental rights, covered in the Abidjan Principles. The book is organized into two sections with the legal chapters in Part 1 and the empirical education chapters in Part 2. We describe each chapter's contribution briefly below to orient the reader.

PART I: THE CONTOURS OF THE HUMAN RIGHT TO EDUCATION

Chapter 2 on the Process and Legitimacy of the Abidjan Principles

Carmona's chapter explains and validates the legitimacy of the development process for the Abidjan Principles. Education stakeholders are often not familiar with guiding principles as an accepted legal tool within the field of human rights. Often referred to as non-binding "soft law", guiding principles are not treaties themselves, although they do contain treaty language, often drawing from multiple treaties. Furthermore, many outside the legal profession may not understand that principles can be crafted by different types of organizations. Carmona discusses how institutions such as the UN can commission guiding principles projects or, in this case, legal experts can adopt a set of principles independent of treaty bodies. Both examples are valid approaches with precedent. In the latter case, the chapter details how drafting bodies often present the guiding principles for recognition and use by formal UN and other international bodies, as has already happened with the Abidjan Principles.

Specifically, the chapter explains that the concept of legitimacy "exerts a pull toward compliance on those addressed" when they believe that an institution "operates in accordance with generally accepted principles of right process" (Carmona, Chapter 2, p. 34). She identifies five key elements on which the legitimacy of a guiding principles process depends:

1. independence and expertise of the drafters and signatories;

2. diversity of the drafters and signatories;
3. rigour and persuasiveness of the human rights principles;
4. practicality of the human rights principles; and
5. validation of the human rights principles (Carmona, Chapter 2, p. 34)

For each of these elements, she discusses how the Abidjan Principles have fulfilled, in some cases more than other guiding principles processes and documents, the requirements of these key areas. After outlining some critical decisions about the crafting of the text, Carmona foresees the possibility for endorsement of the Abidjan Principles by different stakeholders based on the comprehensive and long-view approach of the secretariat and the drafting committee.

Chapter 3 on State Obligations for Providing Public Education

Mowbray's chapter provides a ground-breaking contribution, from a legal point of view, on the relationship between human rights and public education. The legal community has long tiptoed around the question of whether a right to public services exists. Mowbray's breakthrough contribution draws from impressive and extensive research into the drafting history of human rights treaties and leaves little doubt that no other way exists to interpret human rights treaties than requiring that States provide, for everyone who wishes, a quality public education. Mowbray's chapter begins by "asking whether States have any obligation, under international human rights law, to provide public education". She concludes that this obligation does exist and that, because of laws of non-discrimination, States must make public education available to all. Mowbray makes this determination by questioning the understanding of "public" to include a range of institutions recognized by the State, run by the public, for the public interest. This enables inclusion of community schools, or schools run by local authorities, as well as the traditional schools run by the State. This analysis provided the backbone for the definition of public education (Guiding Principle 2) and understanding of the scope of the right to free, quality, public education (Guiding Principles 29 to 33) in the Abidjan Principles.

Furthermore, this obligation exists for States regardless of the presence of private actors, as described in her analyses of five different components of international law. Limitations exist, however, as States cannot require private schools to be free, nor interfere when they coordinate admission and provision towards certain types of students, such as those

of a particular linguistic background. Yet, because of these liberties of private institutions, a "purely private State education system would, according to the evidence, violate rights to equality and non-discrimination" (Mowbray, Chapter 3, p. 67). Because States also have "obligations not to take retrogressive steps with respect to enjoyment of the right to education" and States have public systems already in place, a shift towards a privatized system would likely represent a retrogression and therefore be "impermissible" (Mowbray, Chapter 3, p. 70). Overall, this chapter contributes an extremely important finding that States have a human rights obligation to provide free public education to all.

Chapter 4 on Parental Roles in Education

The increasing international focus on the right to education in this volume also requires a re-examination of the right of parents to influence the pre-tertiary education of their children, who are not fully entrusted with educational choices. International law splits this control between the parents and the State, as long as neither violates the child's right to education. For instance, the 1966 International Covenant on Economic, Social and Cultural Rights recognized:

> the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. (UNGA, 1966: 13.3)

The scope, meaning, limitations, and articulation with other human rights obligations of this principle was also a crucial question the drafters had to address. Zinigrad's chapter on parental rights in education makes critical contributions in this regard, proposing ways to balance different dimensions of the right to education. This chapter played a crucial role for the understanding of Guiding Principles 47 to 60.

In particular, Zinigrad's chapter analyses the parental side of the triangular relationship between parents, the State, and international law, addressing how parental interests or "choice" balances against the other two. He explains that parental rights can be interpreted in two main ways – as a *negative claim* and as a *limited positive claim*. As a negative claim, States "may, but are in no circumstances obligated, to realize the parental educational choices" (Zinigrad, Chapter 4, p. 81). As a limited

positive claim, States must provide "parents' children the education of their choice" for "protected minority groups, and especially so to indigenous peoples" (Zinigrad, Chapter 4, p. 84). This designation is especially important to protect the rights of minority groups. However, Zinigrad points out that the substantive parental right does not mean that the public system must include religious education favoured by the family and any private schools must conform to the State's educational standards.

Zinigrad concludes that, if the core education aim can include the parental prerogatives, then that choice receives precedence, unless the parents "oppose the promotion of tolerance, respect of rights, or basic civic virtue", in which case the parental right is limited (Zinigrad, Chapter 4, p. 101). Situated within the larger education debate about parental "choice", Zinigrad's analysis shows that the State must allow for and even facilitate it in some cases, but with strict guidelines about who receives it and how it is provided, as reflected in the Abidjan Principles.

Chapter 5 on State Responsibilities Regarding Private Education

Two chapters in this volume address the much espoused and contested phenomenon of PPPs. This particularly important area involves potential reallocation of resources from the public to the private sector. Global education and training expenditures are expected in some cases to reach US$10 trillion by 2030 (Holon IQ, 2018). A large part of education funding, especially at the primary and secondary levels, still comes from public sources, representing a potential important source of financing for private actors. In Chapter 5, Fredman analyses the legal standards at stake, while in Chapter 7, Verger, Moschetti and Fondevila review the literature on education PPPs from a political economy perspective. As complementary perspectives, the chapters by Fredman and Verger, Moschetti, and Fontdevila are a particularly crucial contribution to this politically sensitive debate, and help understand the logic behind Abidjan Guiding Principles 64 to 73.

In Chapter 5, Fredman examines the role of private actors in education, addressing the complex legal relationship between the State and private education. She explains that while the State must *permit* private education, the State is not required to *fund* it. However, the State is also not *prohibited* from funding private education and might actually be required to do so if not funding private education would create discrimination. Given that the State can fund private education, she then engages the question of *under what conditions* the State might fund private education.

To help determine the State role, she identifies the three-fold duty of the State to respect, protect, and fulfil the right to education.

Fredman writes that *respect* means the State cannot "obstruct the enjoyment of the right to education" while States also must *protect* "individuals from violations of their rights by third parties" (Fredman, Chapter 5, p. 119). Finally, States must also *fulfil* the right by ensuring the availability of education. She cites the comprehensive international guidelines that include providing a school system, physical infrastructure, curricula, and teachers. In addition, the State duty to *fulfil* includes provisions that it cannot discriminate in funding, cannot allow funding to contribute to other types discrimination, and must be transparent in funding decisions. While States must permit private education, they still must ensure that private actors abide by human rights stipulations, especially considering many possible types of discrimination (geographic, economic, gender, disability, etc.), and especially when the State actively funds these private actors.

PART II: WHAT EDUCATION RESEARCH REVEALS

The second part of this volume turns to research from the education field on different aspects of the role of private actors, including school choice, PPPs (or charter schools in the USA), and LFPS. Taken as a whole, this research reveals that private actors in education are currently operating in ways that contradict, at various levels and in different ways, human rights law and the obligations laid out in Part I of this volume. The conclusion of this volume then addresses strategies for bridging the current gap between international law and education practice.

Chapter 6 on Evidence about School Choice from a Human Rights Perspective

This chapter, by Joanna Härmä, explores the notion of school choice from a human rights law perspective, and with a practical, rather than a theoretical, approach, drawing on evidence about countries' experiences with school choice in its various forms. The chapter begins by outlining the seven decades of international treaty law establishing education as a human right, complemented by reaffirming commitments by the international community in Jomtien (1990), Dakar (2000), and Incheon (2015). However, instead of governments being the "guarantor, funder,

provider, and regulator", some have proposed market-based systems and school choice as a way to outsource these roles to private actors, a theory notably promulgated by economist Milton Friedman. Härmä clarifies that the assumptions underlying a true market approach – interchangeable options (no monopolies), clear information for parents, and low transaction costs – often do not exist in education marketplaces, undermining the internal logic of markets.

Härmä then examines the extent of market-based approaches to education globally, the evidence of their application, and contrasting findings from countries taking a public investment approach. She distinguishes between planned school choice deriving from policy, and unplanned, or de facto, school choice, arising when governments fail to fulfil their right to education obligation. The first type includes countries like Sweden and Chile, which have produced highly stratified and segregated schools systems with "disappointing learning outcomes". In the latter situation, families in many countries in the Global South are "choosing" LFPS, although Härmä (Chapter 6, p. 147) describes this as "school choice out of desperation – a coerced choice, rather than the positive exercise of a human right", due to the lack of free, quality public schools. Finally, Härmä cites the cases of Ontario, Canada, and Finland, both of which have used public investment models to create high-quality, equitable school systems that come close to fulfilling the obligations outlined in the Abidjan Principles.

Härmä's chapter addresses school choice and profit-making in education from both social science and normative perspectives. Her critical analysis of the limitations of school choice and profit in education helped shaped the use and understanding of the term "commercial" (which also largely stemmed from the human rights and policy field, including in particular UN Special Rapporteur on the right to education, 2014). Indeed, the Abidjan Principles recognize and distinguish "both commercial and non-commercial" private actors in education (Guiding Principle 3.a), and they establish the prohibition of the "commercialisation" of education (Guiding Principles 39.d, 48.c.iii, and 65.d). Significantly, and related to the previous area, they recall States' prohibition to fund or support any private instructional educational institution that "is commercial and excessively pursues its own self-interest" (Guiding Principle 73.b). These clauses could have far-reaching implications, and Härmä's chapter provides some of the insights that guided the reflection on this issue.

Chapter 7 on the Global Impacts of Public–Private Partnerships

This chapter by Verger, Moschetti, and Fontdevila addresses the question of how policy options moderate the effects of PPPs in education across several dimensions, with an overarching focus on learning outcomes and equity. These PPPs form the primary mechanisms of the school choice debate discussed by Härmä in Chapter 6. The authors conduct a scoping review of 199 studies from 1992 to 2018 on different PPP modalities, including vouchers, charter schools, and subsidies. They further classify different subtypes for each approach, including profit and student selection allowed or not (all three types); add-ons allowed or not (vouchers and subsidies); targeted or universal programmes and differential or uniform impacts (vouchers); and independent or organizational management (charters). The depth and rigour of this study addresses the often "generic" PPP debate that "fails to adequately differentiate the extent to which PPP modalities work, for whom, and in which sense" (Verger et al., Chapter 7, p. 158).

The authors evaluate each subtype using four possible directions of impact – positive, negative, neutral, or mixed – while acknowledging the need for more robust causal analysis. They find that PPP modalities generally increase segregation and school segmentation and that learning/outcome gains, while present, are largely explained by student sorting and peer effects as opposed to instructional innovations. The authors conclude that:

> if the aim of educational policy is to promote inclusion and equity, the implementation of most of the PPP programmes analysed in this chapter would not be advisable. If educational equality for all is the goal, most PPP programmes, by undermining equity, do a disservice to the aggregated effectiveness of the educational system. (Chapter 7, p. 183)

Furthermore, the authors propose different potentially successful strategies to school improvement, such as "teacher training and professional development, school cooperation networks or distributed leadership" (Verger et al., Chapter 7, p. 183). Given their global scale, these findings raise questions about how private actors interact with the equity-focused stipulations of the Abidjan Principles.

Chapter 8 on Private Actors in East African Education

This chapter addresses trends and key challenges emerging in East Africa and related to the growth of private actors in primary and secondary education, specifically focusing on Kenya, Uganda, Tanzania, Ethiopia, Rwanda, and South Sudan. East Africa, in particular, has been at the forefront of education privatization in recent years with various modalities of private involvement, including the unregulated expansion of commercial school chains. For a region well covered by social science literature (in particular Kenya and Uganda), Linda Oduor-Noah's review provides a deep insight into the evolving education dynamics, involving a range of governance approaches, private actors, and private involvement types that help explain the education context.

Beginning from an historical perspective, Oduor-Noah outlines the impact of Structural Adjustment Policies that restricted education spending by governments. She then charts multiple waves of universal primary education that governments did not or could not adequately fund and subsequent Western pressures for Global South countries to "liberalize" their governments through deregulation and privatization, often to meet unrealized demand for education. In East Africa, the primary mechanisms for this approach in education are LFPS and PPPs, which have grown in number.

Oduor-Noah identifies several key factors driving the growth of private actors, including barriers to public investment in education, perceived declines to quality of public education, national policy orientation, weak regulatory policy environs, and donor influence (discussed above). The impact of this growth on the right to education mirrors the international evidence presented by Verger et al. in Chapter 7 – mixed and inconclusive results for outcomes accompanied by issues of widening stratification and equity, revealing a questionable value for money of LFPS. Oduor-Noah (Chapter 8, p. 207) concludes by noting the public sector challenges and "cyclical nature of the policy mistakes … in the haphazard rolling out of education reforms" leading to increased private actor involvement while recommending increased attention to evidence and regulation of private actor involvement as a policy remedy.

Chapter 9 on Private Actors in Francophone Country Education Systems

In her chapter examining the under-researched phenomenon of private actor involvement in francophone countries, Marie-France Lange illustrates the complex political and cultural legacy of colonialism in French-speaking countries. Other literature reviews, such as Day Ashley et al. (2014), have almost exclusively consulted studies in English, resulting in a focus primarily on anglophone countries. Lange's chapter fills an important information gap that considers a major and largely understudied part of the world. She includes 17 countries from Sub-Saharan Africa and Haiti, while omitting those no longer primarily using French, such as in Southeast Asia. The chapter details several important education factors, potentially underrecognized by the anglophone reader, including religious and linguistic differences between Muslim, Christian, and indigenous groups, differences between French and Belgian colonial legacies, and differences between stable and fragile States (due to poverty, conflict, etc.). Within these contexts, Lange focuses on primary and secondary trends and forms in the growth of education privatization.

Similar to findings from Oduor-Noah's East African analysis, Lange identifies that "the actual role of aid-dependent States is reduced due to loan and grant conditions" to multilateral institutions, as well as accommodation of international agendas. Within countries, Lange discusses a "choice" strategy, also discussed by Härmä in Chapter 6, deployed by socioeconomically advantaged families to avoid public schools, increasing stratification and further disenfranchising schools with families who cannot afford different options. Her class analysis reveals that private schools target "very privileged social classes" with "quality private institutions", the middle classes with less successful, but "more affordable" schools, and "the most disadvantaged social classes" with "schools that do not enable knowledge transfer or the passing of exams" (Lange, Chapter 9, p. 240). Importantly, Lange (Chapter 9, p. 240) also notes that "the privatisation of education can also increase gender inequalities in terms of schooling, with parents making choices in favour of boys if school fees are too high." Despite the lack of awareness of privatization (some States do not even know how many private schools exist), much less a strong research and evidence base, Lange nevertheless describes a situation of unregulated, rapid growth of private actors across many francophone countries.

Chapter 10 on Current and Future Applications of the Abidjan Principles

This concluding chapter by Frank Adamson, Delphine Dorsi, and Magdalena Sepúlveda Carmona addresses the "what next?" question. It situates the Abidjan Principles within historical legal and education contexts as a starting point. It then identifies a series of pathways forward for the Abidjan Principles, including:

- increasing institutional recognition of the Abidjan Principles;
- expanding public and stakeholder awareness;
- building capacity and providing technical assistance to support States;
- conducting research on issues raised in the Abidjan Principles;
- promoting social accountability initiatives: monitoring, reporting, and advocacy;
- pursuing formal accountability mechanisms and litigation; and
- collaborating with other actors and movements.

It describes the various organizations and institutions that have already begun substantively referencing and using the Abidjan Principles. Finally, it situates the very emergence of the Abidjan Principles within the larger global project of preventing repetition of world wars by using the multinational institutions formed in their wake to guarantee human rights to everyone, including the right to education.

Taken together, the chapters in this volume offer insightful and original contributions that not only provide a glimpse of the richness of the debates and considerations behind the Abidjan Principles, but also deepen the reflection on some of the most important discussions in education governance. They push us to question how education systems could be governed and organized so that everyone can enjoy their right to education. Such reflection is important given the rapid growth of private involvement in education since the early 2000s particularly in the Global South, and it will remain crucial in the coming decade.

The crisis engendered by the Covid-19 pandemic in 2020 revealed the fragility of education systems, the dependency on and the limitations of private solutions to such crises, and the need to develop sustainable, resilient approaches that guarantee the fulfilment of the right to education for all and social justice in a changing world. There are reasons to fear that similar crises will occur again in the years to come, driven in particular by the ecological breakdown. By taking a multidisciplinary perspective,

empirical and normative, that tries to deal with complexity and propose concrete policy options, this book could provide an essential avenue to address this rapidly evolving context.

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PART I

The contours of the human right to education

2. Human rights guiding principles: a forward-looking retrospective

Magdalena Sepúlveda Carmona

I. INTRODUCTION

On 13 February 2019, a diverse group of human rights experts adopted the *Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education* (hereafter: Abidjan Principles) in Côte d'Ivoire. The adoption of these principles was preceded by four years of work that included research, participatory consultation, and a drafting process.

Recent years have witnessed the increasing involvement of private actors in education around the world. However, no clear standards existed to assess this phenomenon. The Abidjan Principles are presented as a document that 'unpacks and compiles' the existing legal obligations of States to guarantee the right to education as prescribed under international human rights law. According to their Preamble, the principles 'seek to promote quality education systems that guarantee equality, human dignity, and social justice, and should not be read in any way as endorsing the involvement of private actors in education or suppressing genuine liberty in education.'[1]

After their adoption, the Abidjan Principles gained quick recognition. They were endorsed by resolutions by both the United Nations Human Rights Council[2] and the African Commission on Human and Peoples' Rights.[3] They were also included in reports by human rights monitoring

1 Abidjan Principles [2019], 9.

2 A/HRC/41/L.26, 9 July 2019.

3 *Resolution on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services – ACHPR* / [2019] Res. 420 (LXIV).

bodies.[4] Moreover, in a critical implementation of the Abidjan Principles, the Global Partnership for Education (GPE), the only global fund solely dedicated to education in developing countries, decided that its funds cannot be used to support for-profit provision of education.[5]

The adoption of so-called 'principles' to further clarify the scope and content of human rights obligations is common practice. Since the late 1980s, academics, practitioners and human rights bodies have adopted several principles to further clarify the existing human rights norms and standards. Regardless of the material scope and process of adoption, all human rights principles may be considered 'soft law' instruments.[6] This means that, in principle, they are not legally binding, because States have not formally agreed to be bound by the provisions they contain. Yet, they can carry considerable political and legal weight. They can close protection gaps, reflect key human rights concerns, and establish the foundations for further development of the law by clarifying core issues, legal concepts, and the scope of protection. When supported by public advocacy, human rights principles can promote reforms of domestic law and practices and provide objective benchmarks by which to measure the performance of State institutions. They are critical to improve accountability for human rights violations and to ensure redress for victims.

This chapter seeks to position the Abidjan Principles within this broader process. What do they aim to resolve? How do they embed in the standard-setting process of human rights norms? Why can the Abidjan Principles and their adopters claim legitimacy? Is there any unique characteristic to this process that could explain its quick endorsement?

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[4] For example, the *Report of the Special Rapporteur on the right to education*, A/HRC/41/37, 10 April 2019.

[5] Global Partnership for Education (GPE), *Private Sector Engagement Strategy Paper (2019–2022) Engaging the private sector to support the delivery of GPE 2020*, June 2019. GPE still accepts some exceptions.

[6] While traditionally 'soft law' refers to those documents created within international organizations or at least promoted by them, the term has increasingly been used to include documents developed by non-governmental organizations (NGOs) and expert groups as well. See e.g. Christine Chinkin: 'Sources' in Daniel Moeckli et al. (eds.), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 75–95.

II. WHAT ARE HUMAN RIGHTS GUIDING PRINCIPLES?

Guiding principles are documents that – at the moment of their adoption – do not create legal obligations but instead seek to provide 'a contemporary interpretation' of existing legal obligations related to their topic. The Abidjan Principles claim that 'they are an authoritative statement that consolidates the developing legal framework and reaffirms the existing obligations of States in guaranteeing the right to education as prescribed under human rights law'.[7] This aligns with most human rights principles. Drafters of guiding principles often claim that their respective principles 'clarify' the normative content of treaties and other sources of international law,[8] reflecting 'the present state of international law'.[9]

Despite this important standard-setting role, information about the adoption process of various guiding principles remains piecemeal. This section tries to fill that gap by examining the legal weight of these documents, their objectives, and the various ways by which existing documents have been drafted.

Legal Weight

The term 'soft law' can be misleading. Though 'soft law' texts are not themselves legally binding, most human rights guiding principles draw on principles and norms contained in various sources of international law (such as international treaties and customary law). This means that even when principles are not binding *per se*, they often carry an authority stemming from the international law from which the provisions are drawn.

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7 *Abidjan Principles* [2019], 9.

8 Sources of international human rights law are listed in Article 38(1) *Statute of the International Court of Justice: Treaties, custom, general principles of law and subsidiary means for determining the law, judicial decisions and the writings of jurists*.

9 *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework; Guiding Principles on Extreme Poverty and Human Rights* [2011]; and *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* [2012].

Their influence manifests in various ways. Some guiding principles have become the basis for legally binding treaties. For example, the Kampala Convention, adopted by the African Union, reflects the *Guiding Principles on Internal Displacement* (IDP Principles).[10] The *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (Limburg Principles)[11] and *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (Maastricht Guidelines)[12] both highly influenced the drafting of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (ICESCR).[13]

More often, guiding principles become points of reference in national legislation, national and international jurisprudence, or in other international instruments. Several principles have filled these roles, such as the IDP Principles,[14] the *Basic Principles and Guidelines on Development-Based Evictions and Displacement* (Forced Evictions Principles),[15] the *Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework'* (Business Principles),[16] the *Guiding Principles on Extreme Poverty and Human Rights* (Poverty Principles),[17] and the *Maastricht*

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[10] These principles were developed in 1998 by the Representative of the Secretary-General on internally displaced persons, Francis M. Deng, upon the request of the former Commission on Human Rights. E/CN.4/1998/53/Add.2, 1 February 1998.

[11] The Limburg Principles 1986 were adopted by a group of international experts convened by the International Commission of Jurists (Geneva, Switzerland), the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America). (1987) 9 *Human Rights Quarterly* (HRQ) 2, 122–146.

[12] The Maastricht Guidelines 1997 were adopted on the tenth anniversary of the Limburg Principles by a group of more than 30 experts who met in Maastricht at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). Theo van Boven, Cees Flinterman and Ingrid Westendorp (eds.), 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 3, 691–704 .

[13] Human Rights Council, Resolution 8/2 of 18 June 2008.

[14] See note 10.

[15] A/HRC/4/18, annex 1, 5 February 2007.

[16] A/HRC/17/31, 21 March 2011.

[17] A/HRC/21/39, 18 July 2012.

Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (ETO Principles).[18]

Therefore, while guiding principles do not constitute a formal source of human rights law, they may lead to formal validation of or significantly influence State behaviour, when they are carefully researched and drafted. In so doing, these documents may lay the groundwork for the gradual formation of customary law or treaty provisions.[19]

Moreover, as Van Hoof notes, 'there exists a considerable "grey area" of soft law between the white space of law and the blank territory of non-law.'[20] In this sense, some 'soft law' instruments may be closer to law than others.

Closing Protection Gaps and Other Objectives

If guiding principles only reflect 'the present state of international law', why are they considered necessary or desirable? Human rights guiding principles are usually created to fill gaps in protection. While existing treaties may provide protection in certain respects, guiding principles may be required to frame the rights of an affected group more clearly or in human rights terms.

Sometimes, principles seek to interpret and apply existing norms to a specific vulnerable group. Such is the case, for example, of the Poverty Principles, the IDP Principles, and the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (Yogyakarta Principles).[21] Principles might also be necessary to curtail specific practices that violate human rights to which the world community was previously not sensitive (or insufficiently so). For example, the ETO Principles[22] were adopted to fill the protection gap created by the States' tendency to limit their human rights

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[18] Adopted on 28 September 2011. Available at: http://www.etoconsortium.org.

[19] Antonio Cassese, *International Law* (Oxford University Press, 2001), 160–161.

[20] G.J.H. Van Hoof, *Rethinking the Sources of International Law* (Kluwer 1983), 188.

[21] The Yogyakarta Principles [2006] were adopted by distinguished group of international human rights experts who met in Yogyakarta, Indonesia. Available at http://yogyakartaprinciples.org.

[22] See note 18.

obligations to their own territory. The Business Principles[23] further seek to protect individuals from business-related human rights harms, a reality rising in severity within the context of globalization.

The Abidjan Principles seek both objectives. They aim to clarify the normative content of the right to education in relation to the private involvement in education. They also provide guidance on how States should regulate the increased involvement of private actors in the provision of education in recent years.

The diagnosis of existent gaps is based on pragmatic analysis (facts on the ground) and international law. Yet, the claim of the existence of a protection gap is often contested. Governments tend to argue that existing standards provide protection for groups particularly exposed to risk, or against a particular behaviour. Conversely, members of such groups and civil society organizations often argue that the clarification of standards is needed.

Beyond clarifying legal grey areas and gaps, those seeking the establishment of new guiding principles might have several additional objectives. They might also seek to raise awareness about violations of rights; address technical issues; identify legal lacunae (loopholes); inform policy development; provide guidelines for States' behaviour; or offer practical guidance for those directly affected to seek redress. In addition, by elaborating on the implications for States of existing standards and integrating them within a single, coherent, and comprehensive document, guiding principles can be essential tools for advocacy and for enhancing accountability. It is often expected that human rights principles will also play a role in the normative and jurisprudential development of States.

III. THE PROCESS OF DEVELOPING AND ADOPTING PRINCIPLES WITHIN AND OUTSIDE AN INTERGOVERNMENTAL PROCESS

In most cases, standard-setting processes are the result of intergovernmental negotiations. Thus, human rights principles are often negotiated within an intergovernmental body, mainly the United Nations (UN) Human Rights Council or the former Commission on Human Rights. These processes often begin with a decision of the intergovernmental

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[23] See note 16.

body that requests a subsidiary body or a special procedure (independent experts, special rapporteurs, or special representatives) to develop the text in consultation with several stakeholders.

When human rights principles are developed through an intergovernmental process, the initiation of the process can impact the level of States' engagement and the resources allocated. If intergovernmental bodies request the drafting of principles, the resolution establishing the process determines who is entitled to participate in negotiations (e.g. UN agencies and NGOs with consultative status), and the resolution might even set a deadline for completing the work. The processes tend to benefit from broad participation from States – whose access is unrestricted – and to receive enough financial support.

In contrast, when the process within an intergovernmental body is not initiated by a formal request (e.g. when it is initiated by a special rapporteur decision), the process is more flexible. In that case, stakeholder participation is not limited to those accredited to work within the body (e.g. NGOs with consultative status at the UN). However, the participation of States and other actors in the drafting process as well as the financial resources is not guaranteed. In addition, factors such as the perceived relevance of the topic or the level of States' support often determine their level of engagement. Moreover, the number of consultations is determined by the mandate holder's capacity to mobilize funds or to work within existing resources.

When principles are drafted within an intergovernmental body, the subsequent resolutions of that body reflect the level of support from States. Both the language used (e.g. 'take note' or 'endorse') and the method for the adoption (i.e. if they have been adopted by consensus or by vote) may indicate States' consent to be bound.

The Abidjan Principles have been adopted outside an intergovernmental body, yet this fact is not exceptional and should not be interpreted as limiting their potential impact. Over the years, several principles have been adopted by groups of academics, practitioners, and NGOs. These include some very influential instruments such as the Limburg Principles (1986); the Maastricht Guidelines (1997); the ETO Principles (2011);[24] and the *Additional Principles and State Obligations on the*

[24] See note 18. The ETO Principles were adopted in 2011 by a group of experts in international law and human rights at a gathering convened by Maastricht University and the International Commission of Jurists. Available at http://www.etoconsortium.org/.

Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (The Yogyakarta Principles Plus 10).[25]

The main advantage of these processes is that they 'bypass' the political intricacies of an intergovernmental process. External drafting processes are more flexible and often move faster than those within intergovernmental bodies. In principle, they allow for more active participation by non-State actors (e.g. not being restricted to NGOs with consultative status), a greater 'control' over the participants (e.g. avoiding those actors who would only aim to disrupt the process), and facilitate reaching consensus on a coherent text without politically compromising on critical issues. Processes led by non-governmental actors also include a greater opportunity for experts in the subject to influence the process. This contrasts with their limited influence in intergovernmental processes.

The fact that some principles are developed outside an intergovernmental law-making body does not mean that UN bodies cannot subsequently endorse them. For example, the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (Johannesburg Principles),[26] adopted in 1995 by a group of experts convened by NGOs and academics, were subsequently included as an annex in the report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. The Special Rapporteur subsequently recommended that the former Commission on Human Rights endorse them.[27] In its 1996 resolution on the topic, the Commission 'took note' of the Johannesburg Principles.[28] Since then, the

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[25] Adopted in 2017 to supplement the Yogyakarta Principles (see note 19) by a group of human rights experts from diverse regions and backgrounds, including judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, NGOs and others. See http://yogyakartaprinciples.org.

[26] Adopted in 1995 by a group of experts in international law, national security, and human rights convened by Article 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, which met in South Africa.

[27] E/CN.4/1996/39, 22 March 1996. See para. 154 and Annex 1.

[28] Commission on Human Rights, Resolution 1996/53, 19 April 1996.

Johannesburg Principles have been cited in several annual resolutions on freedom of opinion and expression.[29]

States can also play an instrumental role in ensuring that guiding principles adopted outside an intergovernmental law-making body by NGOs, practitioners and academics acquire a different legal status and are recognized by an intergovernmental process. For example, after the adoption of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*[30] (Siracusa Principles), the Government of the Netherlands requested through a 'note verbale' that the UN Secretary-General[31] circulate the principles as an official UN document. The former Commission on Human Rights complied with the request and published the principles.[32] The Maastricht Guidelines were also subsequently published as a UN document, through a much simpler process. The Committee on Economic Social and Cultural Rights just published them as one of its documents in its 23rd session in the year 2000.[33]

IV. THE LEGITIMACY OF NON-INTERGOVERNMENTAL STANDARD-SETTING PROCESSES

The Abidjan Principles were adopted in a non-intergovernmental process. It is therefore important to examine the factors that will determine their legitimacy. Specifically, why should States and other actors (e.g. UN treaty bodies, specialized agencies) comply with or apply the guiding

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[29] Article 19*, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* [November 1996], London.

[30] Adopted in a conference held in Siracusa, Italy in 1984, organized by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights, and the International Institute of Higher Studies in Criminal Sciences. Available at https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.

[31] Note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva addressed to the Secretary-General.

[32] E/CN.4/1985/4, 28 September 1984.

[33] E/C.12/2000/13, 2 October 2000. The Limburg Principles were also included in this document.

principles, given that they have been developed outside an intergovernmental process? What determines whether they feel pressure to comply with/apply them?

To answer these questions, I will introduce the concept of legitimacy adapted by Franck to the international system. As he defines it:

> Legitimacy is a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believed that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.[34]

This notion of legitimacy suggests that two factors predispose those addressed by the rule toward voluntary obedience: one related to the process of 'rule-making' and the other to the 'rule' itself. In this analysis, the 'rule-making institutions' are those directly involved in the drafting and adoption of the guiding principles (i.e. drafters and signatories/adopting individuals or institutions), whereas the 'rules' are the guiding principles themselves. Finally, those addressed by the rule are primarily the States, but also other actors that are expected to apply the principles in their work.

The extent to which States and other actors perceive human rights principles to be legitimate will determine both how inclined they are to comply with them and the cost of non-compliance (in terms of the 'mobilization of shame'). Thus, when States do not perceive that human rights principles have a high degree of legitimacy, the degree of compliance will be lower, and it will be less costly to ignore them.[35]

Without trying to be exhaustive, I propose the following factors as critical determinants of legitimacy for human rights principles adopted outside an intergovernmental process, as the Abidjan Principles were:

1. independence and expertise of the drafters and signatories;
2. diversity of the drafters and signatories;
3. rigour and persuasiveness of the human rights principles;
4. practicality of the human rights principles; and
5. validation of the human rights principles.[36]

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[34] T.M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990), 24.

[35] Ibid, p.49.

[36] The first two elements refer to those drafting and adopting the guiding principles (i.e. 'the rule-making institution') and the last three elements refer to the text of the guiding principles (i.e. 'the rule').

It is important to note that legitimacy is a matter of degree and that hence the legitimacy of guiding principles depends on the level of fulfilment of these factors.

Independence and Expertise of Drafters/Signatories

The independence and expertise of those involved in the process as drafters and signatories is without doubt one of the central factors determining the legitimacy of guiding principles. If States have little to no confidence that a body of independent experts developed the principles, they and other actors will not feel bound to comply with or apply the principles.

While the early principles tended to include mainly legal experts (i.e. academics) in drafting processes (e.g. Limburg Principles), those involved in these processes have tended to exhibit greater 'diversity of knowledge' over the years. The Abidjan Principles, for example, involved a wide range of expertise among their drafters and through the many consultations.[37]

The expertise needed is a combination of a high level of knowledge about the topic of the principles, the skills to draft this type of document, plus good political judgement to understand the context in which they will be submitted. Particularly relevant is the level of expertise of the conveners, which refers to a small group of people who take responsibility for moving the process forward and undertake the core of the work (often called 'steering committee' or 'secretariat'). Their knowledge of the particular field, openness to understand and incorporate various perspectives, and capacity to identify gaps and legal analysis are essential for the success of the process. This group is often in charge of making initial proposals, synthesizing the feedback from the consultations, and taking final decisions on the text. In addition to technical and legal expertise, this group should be politically savvy. While they must have a deep understanding of why some principles are needed, they should be willing to accommodate some diplomatic and legal parameters within which drafters must work.

Often, the development of principles is supported by additional research commissioned from experts who are requested to draft specific 'background' documents in their field of expertise. The additional

[37] Drafting committee and signatories available at: https://www.abidjanprinciples.org/en/support/drafting-committee.

research may seek to clarify contested or complex topics, identify existing obligations, provide a comparative analysis, and identify good practices or existing case law. Taken as a whole, the core group, the conveners, supporting experts, and drafters/signatories should have considerable expertise in the diverse areas covered by the principles.

Diversity of Drafters/Signatories

Another important determinate of legitimacy is the diversity of those involved in the process. This refers to diversity in terms of gender, geographical representation (people from different countries/continents), different forms of social and legal systems, and different areas of expertise. Diversity is also a matter of degree. For example, a process developed or led only by white academics from the North would certainly lack legitimacy. The legitimacy of the process increases in line with the diversity of those involved in the process.

While the level of diversity was low in previous processes,[38] it is nowadays unacceptable to have a process without gender and geographical balance. Those involved in the development of guiding principles seem to attach a high degree of importance to this factor, as it is often emphasized that those involved in their respective processes are a diverse group of experts.[39] Yet, in several cases, while those involved might be from different nationalities, they are often based in institutions from western Europe and the United States.[40]

The legitimacy of the process can be undermined if beneficiaries, victims, and those who are directly affected by the principles are not represented, particularly when those most affected by violations of the standards at stake have not been adequately consulted or represented in

[38] For example, from the 34 participants in the conference that adopted the Maastricht Guidelines, 30 were from Europe and North America and only nine were women. See, *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Annex 2, 'List of Participants'.

[39] For example, the 'Introduction' to The Yogyakarta Principles and the ETO Principles.

[40] For example, from the 40 signatories to the ETO Principles, 15 were women and, as evident from their positions, the great majority of these experts were based in Europe and North America (their nationalities were not registered in the document).

the process. In the case of the Poverty Guidelines,[41] for example, efforts were taken to ensure the direct participation of people living in poverty.[42]

Rigour and Persuasiveness

The persuasiveness of human rights principles heavily depends on the quality of the research and analysis underpinning their development. Principles should convince readers that they are elucidating existing obligations and that they are based on formal sources of international law.

Thus, their formulation should rely on quality and thorough research, solid legal analysis, careful preparations of the process, and broad consultations. The more progressive the text is or the more it asks in terms of obligations for States and other actors, the more justification is expected, and the higher the threshold for persuasiveness. Hence, more rigorous research is needed when the text expands on the human rights protection currently included in hard law instruments.

To strengthen their persuasiveness after the adoption of some principles, those involved in previous processes have published legal annotations or commentaries expanding on the legal basis of each adopted principle. Such documents seek to provide detailed legal analysis, directly citing specific provisions of binding treaties and domestic and international case law and referencing reports of UN special rapporteurs or treaty bodies as well as academic publications.[43]

Rigorous research requires, at the very minimum, institutional commitments, time, and resources. For example, the *Global Principles on National Security and the Right to Information* (2013), were drafted by 22 organizations and academic centres in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world and in consultation with relevant international and regional human

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[41] *The Guiding Principles on Extreme Poverty and Human Rights* adopted in 2012. UN Doc. A/HRC/21/39 of 18 July 2012.

[42] The participation of people living in poverty was mediated by ATD Fourth World, an organization with vast experience working and developing consultations with people in that situation. Thus, the methodology used was specifically adapted to ensure the effective and meaningful participation.

[43] See, for example, Olivier De Schutter; Asbjørn Eide; Ashfaq Khalfan; Marcos Orellana; Margot Salomon; and Ian Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* (HRQ), 1084–1169.

rights special rapporteurs.[44] The process was facilitated and funded by the Open Society Justice Initiative. Without its support and commitment, the process and resultant principles would have been very difficult to achieve.

Practicality

The legitimacy of the human rights principles also relies on their practicality. The implementation of the required measures should be feasible and should not impose undue burdens on those tasked with implementing them.

Thus, principles should be clearly written with precision and reflecting a good understanding of the particularities and capacities of various States. In this regard, it is crucial for the drafters to be able to differentiate the 'unwillingness' from the 'inability' of States to comply with the obligations identified in the process.[45] To be able to respond effectively to the realities of different countries, the principles must be based on solid country or regional case studies and the identification of best practices. To this end, some processes have not only invited experts to undertake research, but also to complete detailed questionnaires on the law and practice of their countries concerning key issues.[46]

Validation Processes

The legitimacy of human rights principles is enhanced when other experts (beyond the drafters) as well as national and international bodies expressly recognize them. The more human rights principles are referred to by other bodies, the higher their legitimacy.

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[44] See https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf.

[45] As noted in the Maastricht Guidelines No. 13: '[i]n determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations.'

[46] This has been the case, for example, of the process for drafting *Global Principles on National Security and the Right to Information* [2013]. See Sandra Coliver, 'National Security and the Right to Information', presentation delivered in Paris on 11 December 2012. Available at: https://www.opensocietyfoundations.org/sites/default/files/coliver-nsp-pace-20121220.pdf.

Undoubtedly, the endorsement of the UN political organs, such as the Human Rights Council and the UN General Assembly, is important. When these bodies adopt resolutions reaffirming human rights principles originally authored and adopted outside an intergovernmental body, such resolutions undoubtedly increase the legitimacy of the principles.

The legitimacy of human rights principles is also bolstered when different expert bodies (e.g. UN treaty bodies, special procedures mandate-holders, regional human rights bodies or national human rights institutions) refer to them. Within few months after their adoption the Abidjan Principles have been referred to by the UN Special Rapporteur on the Right to Education,[47] the Human Rights Council and the African Commission on Human and Peoples' Rights.[48]

Validation also occurs when principles are referenced in resource materials and textbooks relating to human rights that are used across the world or by a variety of stakeholders, in particular those who are addressed by them. For example, not only have civil society and workers' organizations and national human rights institutions endorsed the Business Principles[49] but governments, business enterprises, business associations and investors have done so as well.[50] The Forced Evictions Principles[51] have been included in a 'judicial implementation protocol' issued by the Mexican Supreme Court in 2014 intended to serve as a reference for judges.[52]

Considering that the final objective is their implementation, the use of principles in court proceedings (e.g. in affidavits or amicus curiae) and their recognition by judicial bodies is a major validation. Despite their formal non-binding nature, it is not uncommon to find that human rights principles have influenced court judgements. For example, the Forced Evictions Principles have led to either a halt to planned evictions or ensured a resettlement programme was consistent with international human rights law.[53] The High Court of India have used them to uphold

47 See note 3.

48 See notes 1 and 2 respectively.

49 See note 16.

50 A/HRC/17/31, 21 March 2011 para. 7.

51 See note 15.

52 See http://equidad.scjn.gob.mx/wp-content/uploads/2014/06/protocolo-final-proyectos-de-desarrollo-e-infraestructura.pdf, Suprema Corte de Justicia de la Nación, Mexico, 2014.

53 Housing and Land Rights Network, *Reaffirming Justiciability: Judgements on the Human Right to Adequate Housing from the Delhi High Court* (India, New Delhi, March 2013).

the rights of slum dwellers and eviction victims.[54] Similarly, the High Court of Kenya have used the Forced Eviction Principles to guide the determination of the resettlement rights of slum residents[55] and have called for a national law on evictions to be modelled on them.[56]

In some exceptional circumstances, high-level national courts have expressly considered human rights principles binding at the domestic level. This was the case, for example, of the Colombian Constitutional Court regarding the IDP Principles.[57]

A strategy commonly used to achieve faster validation of principles developed outside an intergovernmental process is to engage with various human rights expert bodies and judicial authorities very early in the process. A further one is to invite some authorities to participate in their personal capacities as 'signatories' of the principles (i.e. those who publicly appear adopting the principles).[58]

V. CRITICAL DECISIONS ON THE CONTENT OF THE TEXT: STRIKING A BALANCE

Those leading a process of elaborating guiding principles are often confronted with critical decisions that determine the nature of the document. While these decisions are presented here as dichotomies, the challenge is to strike a balance between the options available.

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[54] For example, the case *Sudama Singh and Others v Government of Delhi and Anr* [2010] (W.P. (C) Nos. 8904/2009, 7735/2007, 7317/2009 and 9246/2009, judgement of 13 February 2010) and the case of *P.K. Koul v Estate Officer and Anr. and Ors* [2010] (W. P. (C) No. 15239/2004 and CM No. 11011/2004, judgement of 30 November 2010).

[55] Case of *Kepha Omondi Onjuro & others v Attorney General & 5 others* [2014] High Court of Kenya, Petition No. 239 of 2014. Available at http://kenyalaw.org/caselaw/cases/view/105457/.

[56] Case of *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* [2010] High Court of Kenya, Petition No. 65 of 2010. Available at http://kenyalaw.org/caselaw/cases/view/90359/.

[57] Colombian Constitutional Court, Judgment T-O25 (2004).

[58] For example, the Limburg Principles were adopted by 29 experts; the Maastricht Guidelines were by 34 experts; and the ETO Principles by 40 experts.

Restatement or Progressive Development of the Law?

In line with other human rights principles, such as the IDP Principles,[59] the Yogyakarta Principles,[60] the Business Principles,[61] the Poverty Principles[62] and the ETO Principles[63], the Abidjan Principles claim that they do not create new legal obligations, but merely reflect or make explicit the existing state of international law.

Such statements reflect difficult dilemmas that drafters must address when drawing up the text. Considering that the whole objective of the process is to clarify emerging international legal obligations, drafters may want to develop a progressive set of standards (i.e. expanding human rights protection especially for the most vulnerable). However, if they go too far, their document might be dismissed by States or by key stakeholders as not being sufficiently grounded in international law. On the contrary, if they fall too short, they risk diluting existing obligations and thus undermining human rights protection.

The quest to be consistent with existing law can result in the deliberate omission of elements from the final text that had been considered during the drafting phase, but which the drafters concluded were not yet binding under international law. For example, the Yogyakarta Principles (2006) did not include the right to marry for same-sex couples, despite the fact that its inclusion was repeatedly raised during the process.[64] Yet, the principles expressly noted that regular revisions to international human rights law were necessary 'to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries'.[65] Thus, ten years after the adoption of the principles, the Yogyakarta Principles Plus 10 were adopted to 'supplement'

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[59] See 'Foreword' to the Guiding Principles by Under Secretary General for Humanitarian Affairs, Mr. Sergio Vieira de Mello, and Principle 3.

[60] See 'Introduction to the Yogyakarta Principles' and 'Preamble'.

[61] See 'General Principles'.

[62] See 'Objectives'.

[63] See 'Introduction' and 'Preamble'.

[64] Principle 24 on the right to found a family only speaks of a right to non-discriminatory treatment of same-sex marriage in those States which already recognize it. See Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 2, 207–248.

[65] See the 'Preamble' to the Yogyakarta Principles.

the original 29 Yogyakarta Principles. The Yogyakarta Principles Plus 10 add additional principles and State obligations, 'which have arisen over the past decade.'[66] However, the adoption of subsequent principles is very atypical.

The difficulty of calibrating the text to balance its progressive stance with receiving the support of States and other relevant actors was evident in the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (UN Draft Norms), developed by the former UN Sub-Commission on the Promotion and Protection of Human Rights in 2003.[67] While the Draft Norms were presented as a restatement of the human rights obligations imposed on companies under international law, they were criticized for the ambiguity of their legal foundations and by imposing obligations on business actors that went beyond the existing legal framework.[68] Many governments and the business community also vehemently opposed them, considering that they went too far.[69] The former Commission on Human Rights also rejected the UN Draft Norms.

To overcome the impasse, the Commission on Human Rights requested the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises (SRSG), John Ruggie,[70] in 2005. Turning his back to the UN Draft Norms, the SRSG radically changed the approach taken by the Sub-Commission, as he undertook an inclusive consultation process seeking to build consensus among the various stakeholders.[71] As a result,

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66 Press release: 'Experts Release Much Anticipated Expansion of the Yogyakarta Principles' (27 November 2017). Available at: http://yogyakartaprinciples.org/principles-en/press-release/.

67 Resolution 2003/16, E/CN.4/Sub.2/2003/12/Rev.2 (2003).

68 See Office of the High Commissioner for Human Rights, *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights* (2005) (E/CN.4/2005/91).

69 Remarks by the Special Representative of the Secretary-General, John Ruggie on 28 January 2014. Available at: https://sites.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf.

70 E/CN.4/RES/2005/69, 20 April 2005.

71 Karin Buhmann: 'Navigating from a "train wreck" to being "welcomed": negotiation strategies and argumentative patterns in the development of the UN framework' in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013), 29–57.

he submitted a completely new set of principles to the Human Rights Council in 2011: *The Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework* (Business Principles)[72] which were strongly supported and endorsed by the Human Rights Council.[73]

However, the Business Principles have not been exempted from criticism either. For some States (particularly those from the Global South), academics, and NGOs, the Business Principles contain watered-down obligations cast only in terms of a *responsibility* (rather than an *obligation*) to respect human rights.[74] They also do not include the extraterritorial dimension of the duty to protect human rights in relation to business entities.[75] Some authors have argued that the attempt to take into account and reconcile the views of all parties concerned led to a lack of coherent conceptual foundation.[76]

Thus, drafters should strive to identify the most protective interpretations of international human rights law as well as best practices. They should ensure that the text of the principles is based on existing international law, but at the same time provides wider protection against abuses by applying the general standards to a specific context.

The drafters should be particularly careful in ensuring that the principles do not take a more regressive approach towards the human rights

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72 A/HRC/17/31, 21 March 2011.

73 Human Rights Council Resolution 17/4 of 16 June 2011.

74 See, e.g., Carlos López: 'The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?' and Surya Deva: 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013), 58–77 and 79–104 respectively.

75 Daniel Augenstein and David Kinley, 'When Human Rights "Responsibilities" become "Duties": The Extra-Territorial Obligations of States that Bind Corporations' (September 2012) Sydney Law School Legal Studies Research Paper No. 12/71.

76 See, e.g., López op. cit., note 74, and Tara Melish, 'Putting "Human Rights" Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights' in C. Rodriguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning. Globalization and Human Rights* (Cambridge University Press, 2017), 62–75. See also 'Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights' of January 2011. Available at: https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf.

obligations of States and the responsibilities of non-State actors than authoritative interpretations of international human rights law and current practices.

Legal or Non-legal Language?

The language, format and length of these documents vary enormously. Some documents are written in non-legal language (e.g. the Forced Eviction Principles), some in a more normative language (e.g. the Limburg Principles, the Johannesburg Principles and the ETO Principles) and yet others in a mix of both normative and non-legal language (e.g. the Abidjan Principles).

The language used seems to be largely determined by the process undertaken, the topic under discussion and the aim of the document. When the process is mainly led by legal experts, human rights principles generally use legal terminology that reflects formulations found in international human rights treaties. This is the case, for example, in the ETO Principles adopted by 40 international law experts. The more a process draws on the advice of non-legal practitioners and experts, the less legal the language. Moreover, when the human rights principles are designed to be operationalized, in other words, to be a tool for policymakers and practitioners (e.g. the Forced Eviction Principles and the Poverty Principles), less legal and more technical language is used.

While drafters should avoid legally dry documents and should make guiding principles more accessible to non-legal experts, sometimes relying on well-established legal language has advantages. Using legal terms may assist in restating the authority and status of the principles. Moreover, it could help to avoid definitions or clarifications. For example, various human rights principles, including the Abidjan Principles, use the well-established tripartite typology of respect, protect, and fulfil. This widely accepted typology reflects, in a concise manner, the various levels of obligations, which would otherwise require lengthy explanations.[77]

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[77] For further information about this typology, see Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003).

Detailed or Broad Formulations?

Vagueness can lead States and other actors to dismiss a set of principles. However, broad formulations are sometimes needed to avoid the risk of the principles quickly becoming outdated. Drafters must therefore strike a balance between specific normative guidance and general formulations and leave room for normative improvement or further development of additional standards and norms. They need to identify issues that are likely to evolve in the future and draft the relating principles with this in mind. This does not mean that all the principles should be broad and non-prescriptive but, rather, that broad language should be considered where substantive legal uncertainties remain after the background research and consultations have been done.

While human rights principles need to be mandatory to guide States' behaviours, their support and compliance could be undermined by ignoring the diversity among States or interfering with the legitimate discretion of States to determine the policy measures best suited to their needs. Sometimes, it might be appropriate to draft a principle in a manner that allows States to make choices on implementation within carefully defined limits. The challenge here is to identify the situations in which States should enjoy such discretion. Drafters might question, for example, if specific approaches are appropriate in most, but not all, States due to their specific contexts. Is there any cultural limitation for the implementation of some principles in some countries/regions? These questions should be carefully addressed by the drafters and subject to the widest consultation possible.

To strike a balance, human rights principles should be drafted with a clear sense of the controversies and difficulties surrounding the topic. When it is possible to infer clear obligations without stretching beyond the current stage of international law, the text should attempt to provide detailed guidance in a mandatory manner (e.g. 'States must'). When international law and standards are emerging, not clear, or even contradictory, the drafters should use less mandatory language (e.g. 'States should') or formulations allowing interpretation to evolve over the years providing broader protection for the individuals involved. Decisions about how generally or specifically to articulate a controverted principle should be subject to broad consultation and, when necessary, to additional research.

Targeting only States or also Non-State Actors?

Considering that States are the primary duty bearers in international law, human rights principles are mainly addressed to them. Nonetheless, under international law, States have a duty to protect against non-State abuses. Therefore, even when focusing on States, third parties, including corporations, are indirectly liable for infringements.

Due to the relevance of other actors in the promotion and protection of human rights, some principles have included 'recommendations' directly addressed to non-State actors. This is the case, for example, in the Poverty Principles and the Yogyakarta Principles. While the ETO Principles target States, some may also be applicable to international organizations.[78] Often, when guiding principles make recommendations to non-State actors, the language changes from 'shall' or 'must' (which refers to States' obligations) to a simple 'should'.

The Abidjan Principles refer mainly to States' obligations including their obligations to regulate private actors. While most of the principles have been written in a normative manner ('States must') some of them refer to what States should do to ensure compliance with their obligations. Exceptionally, the Abidjan Principles refer directly to private actors. For example, principle 49 refers to the responsibility of private actors to respect the right to education and other human rights in education. Similarly, principle 77 refers to the responsibility of private actors to refrain from conduct which nullifies or impairs the enjoyment of the right to education.

VI. CONCLUSION

The Abidjan Principles have been adopted with the specific aim of regulating the increased involvement of private actors in education. In light of rapid growth of private involvement in education over the last 20 years, the Abidjan Principles seek to ensure the legal right of all persons to access public education. The drafting process lasted from 2015 to 2019. The process was grounded in extensive research that sought to clarify the

[78] For example, while the ETO Principles deal with the obligations of States, some principles may however also be applicable to International Organizations. See Commentary to Principle 16. See O. de Schutter et al., op. cit., note 43.

existing legal obligations regarding the role of private actors in education.[79] Several consultations with a variety of stakeholders informed the process.[80] Through this widely consultative process, input and expertise were received from communities, parents, children, academic experts, and States. The Secretariat that facilitated the process also actively engaged with human rights treaty monitoring bodies.[81] Through the work of the Secretariat, the UN Special Rapporteur on the Right to Education, Ms Boly Barry, became a champion for the Abidjan Principles. She elaborated on how they can be leveraged for the implementation of Sustainable Development Goal (SDG) 4 on education in her 2019 report to the UN Human Rights Council.[82]

This chapter has elaborated on a series of factors that determine the legitimacy of human rights principles in the eyes of States and other actors: (a) independence and expertise of the drafters and signatories; (b) their diversity; (c) rigour and persuasiveness of the principles; (d) their practicality; and (e) their validation.

At this stage, some months after the adoption of the principles, it is possible to say that the Abidjan Principles are better positioned to garner legitimacy than other principles regarding *diversity* and *independence and expertise* of drafters and signatories. The Abidjan Principles' original signatories came from more than 30 different countries. In a striking contrast with previous principles, the original signatories were 60 per cent women and 60 per cent of the signatories came from the Global South.[83] Legal as well as non-legal experts were also consulted to ensure that the text responds to the reality on the ground and draws from the knowledge of various disciplines.

The quality of the text, the detailed, careful, and complete analysis of the States' obligations regarding the provision of the right to education, and the regulation of the involvement of private actors suggest legal *rigour*. The fact that the text has been endorsed quickly by States

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79 See https://www.abidjanprinciples.org/en/resources/consultation-reports.

80 Ibid.

81 The secretariat was made up of Amnesty International, the Equal Education Law Centre, the Global Initiative for Economic, Social, and Cultural Rights, the Initiative for Social and Economic Rights and the Right to Education Initiative.

82 A/HRC/41/37 of 10 April 2019.

83 See https://static1.squarespace.com/static/5c2d081daf2096648cc801da/t/5d5f200b80e7760001a9143a/1566515220020/Designed_A4_WEB_Abidjan+Principles__august2019.pdf.

members of the Human Rights Council and the African Commission on Human and People's Rights could be considered as an indication of their *persuasiveness.*

The practicability of the principles will need to be demonstrated over time. Still, the fact that they have already influenced the private sector engagement strategy of the GPE seems a step in the right direction.

The development of additional tools to complement the Abidjan Principles, such as a legal commentary and a practitioners' manual, may also help to ensure their implementation. Their validation will also depend on the civil society organizations, which are working collaboratively to put the principles into action, and their capacity to grow the movement of organizations using the Abidjan Principles to advocate for the right to education. These civil organizations should also work to ensure more political partners and allies support the principles, from friendly governments to international organizations.

The coalition of civil society organizations which is leading the implementation of the Abidjan Principles has shown that they are driven by a coherent vision and long-term strategy. The history of guiding principles shows us that, with the right support and a legitimate text, it is possible to find opportunities for their endorsement even in restrictive political contexts.

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3. Is there a right to public education?

Jacqueline Mowbray

I. INTRODUCTION

Recent decades have seen a rapid increase in the involvement of private actors in education. The United Nations (UN) Special Rapporteur on the Right to Education, Kishore Singh, has referred to the 'explosive growth of privatized education, in particular for-profit education, taking advantage of the limitations of government capacities to cope with rising demands on public education'.[1] And the Special Rapporteur and others have raised a number of concerns regarding the effects of this development on human rights.[2] Against this background, it is vital to consider the scope of states' obligations to provide public education, as a matter of international human rights law.

In particular, scholars have begun to ask whether or not there is a human right to public education.[3] This chapter explores this question by drawing out the implications of international human rights law for the involvement of private actors in education. It begins by asking what constitutes public education for the purposes of international human rights law, and then considers whether states have any obligation, under international human rights law, to provide such education. Having concluded that they do, the chapter then considers the scope of this obligation and finds that the right to education, read in light of the requirement of non-discrimination, obliges states to make public education available to all within their jurisdiction. On this basis, it can be concluded that

[1] UN General Assembly, Report of the Special Rapporteur on the Right to Education, Kishore Singh, A/69/402 (24 September 2014), para. 32.

[2] See generally the 2014 report of the Special Rapporteur, above, n 1.

[3] See, e.g., Sylvain Aubry and Delphine Dorsi, 'Towards a Human Rights Framework to Advance the Debate on the Role of Private Actors in Education' (2016) 42 *Oxford Review of Education* 612, 620.

international human rights law contains a right to public education. The final part of this chapter therefore explores the nature of this right and its implications for state and private involvement in the sphere of education.

II. WHAT IS 'PUBLIC EDUCATION'?

In order to determine the extent of states' obligations to provide public education, it is necessary first to establish what we mean by the term 'public education'. The difference between public and private education is not always clear, due to differences in national education systems and understandings of 'private' and 'public', coupled with the fact that there are different elements involved in delivering education services, some of which may be private and some of which may be public.[4] Are religious or community schools public or private, when the facilities belong to the church or community, but the teachers are paid by the state? What about the situation where schools receive full state funding, but are administered by an independent school board?

A review of the relevant jurisprudence and treaty body practice indicates that the relevant international bodies will generally accept a state's categorisation of schools as 'public' or 'private'. In other words, what constitutes public education will, in the first instance, be a matter determined by the state itself. Thus in the *Waldman* case, which raised the issue of whether Roman Catholic schools fully funded by the state were public or private,[5] the Human Rights Committee ultimately defers to Canada's categorisation of these schools as 'a distinct part of the public school system'.[6] This approach is also evident in other decisions, where the Human Rights Committee accepts the particularities of the state system in question and does not look behind the state's categorisation

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[4] See, e.g., Fons Coomans and Antenor Hallo de Wolf, 'Privatization of Education and the Right to Education', in K. de Feyter and F.G. Isa (eds.), *Privatisation and Human Rights in the Age of Globalisation,* 229, 243–250 (Intersentia, 2005). See also Igor Kitaev, *Private Education in Sub-Saharan Africa: A Re-Examination of Theories and Concepts Related to Its Development and Finance* (UNESCO, 1999), 41.

[5] The case raised the question of whether funding Roman Catholic schools and not Jewish schools constituted unlawful discrimination. One basis on which the state sought to justify the difference in funding was by arguing that the Roman Catholic schools were public, whereas the Jewish schools were private.

[6] *Arieh Hollis Waldman v Canada*, Communication No. 694/1996, HRC, CCPR/C/67/D/694/1996 (5 November 1999), para. 10.3.

of schools;[7] and in the practice of the treaty bodies.[8] This reflects the intentions of the drafters of article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which sets out the right to education. The drafters were at pains to emphasise the national peculiarities of their educational systems,[9] and accepted that differences between states, including in relation to understandings of 'private' and 'public' education, would continue.[10] As a result, states have a certain degree of latitude in deciding which schools they will consider to form part of their public education system. Thus, some schools with private elements, such as the Roman Catholic schools in the *Waldman* case[11] that were run by the church but publicly funded and overseen by a public school board, may nonetheless be considered part of the public education system.

However, the state's discretion in this respect is not unlimited, as a matter of international human rights law. While the relevant international instruments and bodies do not define public education, they do establish certain criteria which should generally characterise public education. Thus, the relevant international instruments refer to schools 'established by the public authorities', meaning that public schools should, in general, be established on the initiative of the state and not that

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7 See, e.g., *Blom v Sweden*, *Carl Henrik Blom v Sweden*, Communication No. 191/1985, HRC, U.N. doc CCPR/C/32/D/191/1985 (4 April 1988).

8 See, e.g., CESCR, *Concluding Observations: Pakistan*, paras 81–83, U.N. doc E/C.12/PAK/CO/1 (20 July 2017), where the Committee specifically acknowledges the state's approach in its Basic Community Education Schools program.

9 See, e.g., Official Records of the UN General Assembly (U.N. GAOR), 12th Session, 3rd Committee, Agenda Item 33, 782nd mtg, *Draft International Covenants on Human Rights (Indonesia)*, ¶ 59, U.N. doc A/C.3/SR.782 (16 October 1957); U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, 780th mtg, *Draft International Covenants on Human Rights (India, Japan, Ecuador)*, paras 9, 29, 32, U.N. doc A/C.3/SR.780 (14 October 1957); U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, 785th mtg, *Draft International Covenants on Human Rights (Denmark)*, para. 29, U.N. doc A/C.3/SR.785 (21 October 1957).

10 This reflects the findings of the general literature: see, e.g., Aga Khan Foundation, *Non-State Providers and Public–Private-Community Partnerships in Education,* especially paras 1–6 (UNESCO, 2007), https://unesdoc.unesco.org/ark:/48223/pf0000155538.

11 *Waldman v Canada*, above n. 6.

of private actors.[12] It follows from this that public schools must be funded by the state, although funding alone is not sufficient to make a school 'public' if the other requirements for public education are not met.[13] In particular, comments by the treaty bodies, the Special Rapporteur and others indicate that schools which operate primarily to make a profit for private actors cannot be considered as public.[14]

The relevant treaty provisions also set up a distinction between schools directed or controlled by public authorities and those directed or controlled by private individuals or bodies. Article 13(4) of ICESCR, for example, which protects the right to establish private schools, provides for the liberty of individuals and bodies to 'direct' educational institutions.[15] It follows from these provisions that the state must 'direct' the operation of public schools, but can only intervene in the operation of private schools in limited circumstances. As a result, for a school to be classified as part of the public education system, the state (or local authorities) must have the ability to exercise substantial control over the operation of the school, such that the way in which the school operates is ultimately determined by the state, or by publicly appointed school boards, and not by private actors.

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[12] Art 13(3) ICESCR. *See also, e.g.*, Art 13(4) ICESCR; CRC, Art 29; *and* UNESCO Convention against Discrimination in Education, Art 2(c).

[13] *Blom v Sweden*, above n. 7; *Waldman v Canada*, above n. 6, para. 2.5; U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, 780th mtg, *Draft International Covenants on Human Rights*, (India), U.N. doc A/C.3/SR.780 (14 October 1957), para. 7.

[14] See UN General Assembly, Report of the Special Rapporteur on the Right to Education, Kishore Singh, A/HRC/29/30 (10 June 2015), para. 68; and the 2014 report of the Special Rapporteur, above n. 1, para. 106. Note also that the CESCR, in its Concluding Observations, consistently treats for-profit education providers as private: see, e.g., CESCR, *Concluding Observations: Pakistan*, U.N. doc E/C.12/PAK/CO/1 (20 July 2017), para. 81; CESCR, *Concluding Observations: Philippines*, U.N. doc E/C.12/PHL/CO/5-6 (26 October 2016), para. 55; CESCR, *Concluding Observations: Lebanon*, U.N. doc E/C.12/LBN/CO/2 (26 October 2016), para. 10. The Committee on the Rights of the Child follows a similar approach: see, e.g., Committee on the Rights of the Child, *Concluding Observations: Chile*, U.N. doc CRC/C/CHL/CO/4-5 (30 October 2015), paras 67–68.

[15] Article 29(2) of the CRC is in identical terms. The UNESCO Convention against Discrimination in Education refers to the 'maintenance' of separate educational institutions (art. 2(b)–(c), art. 5(c)) and the right of national minorities to 'carry on' their own educational activities (art. 5(c)).

III. DO STATES HAVE AN OBLIGATION TO PROVIDE PUBLIC EDUCATION?

As a matter of international human rights law, do states have an obligation to provide public education? Or would it be possible for a state to comply with its obligations without providing public education, but simply ensuring that private education met the relevant human rights standards?

The main provisions of international human rights law which protect the right to education are article 13 of the ICESCR and articles 28 and 29 of the Convention on the Rights of the Child (CRC). The structure of both of these instruments is such that they first establish the right to education[16] and lay down general principles regarding the form education should take to fulfil that right (the objectives to which education should be directed, that primary education should be free and compulsory, and so on).[17] They then establish a particular right for individuals to establish and attend schools 'other than those established by the public authorities'.[18] It is clear from the scheme of these treaty provisions that the drafters envisaged that public education provided by states would be the dominant form of education, 'the norm', such that the possibility for education other than that provided by the state needed to be protected as an exception. An analysis of the *travaux préparatoires* of ICESCR confirms that this was indeed the case, and that the drafters viewed private education as additional or supplementary to public education.[19]

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16 Art 13(1) ICESCR; Art 28(1) CRC.

17 Arts 13(1) and (2) ICESCR; Arts 28 and 29(1) CRC.

18 Arts 13(3) and (4) ICESCR; Art 29(2) CRC.

19 See, e.g., the discussion around the obligation to make primary education free, in which states confirmed that this was only the case in respect of public schools, and in doing so, confirmed the central role of public schools: Official Records of the UN General Assembly, Twelfth Session, Third Committee, Agenda Item 33, Draft International Covenants on Human Rights, 786th Meeting, A/C.3/SR.786 (22 October 1957), para. 1 (UNESCO); Official Records of the UN General Assembly, Twelfth Session, Third Committee, Agenda Item 33, Draft International Covenants on Human Rights, 787th Meeting, A/C.3/SR.787 (22 October 1957), paras 46–55. See also, e.g., Official Records of the UN General Assembly, Twelfth Session, Third Committee, Agenda Item 33, Draft International Covenants on Human Rights, 782nd Meeting, A/C.3/SR.782 (16 October 1957), para. 59 (Indonesia); Official Records of the UN General Assembly, Twelfth Session, Third Committee, Agenda Item 33, Draft

However, the view of the Committee on Economic, Social and Cultural Rights (CESCR) is that ICESCR as a whole 'neither requires nor precludes any particular form of government or economic system being used as the vehicle' to deliver the rights contained in the Covenant.[20] Similarly, many of the obligations in the Covenant, including the obligation to fulfil the right to education, are considered 'obligations of result' rather than 'obligations of conduct', meaning that states have a choice as to how they achieve the relevant outcomes.[21] And '[p]rivatization is not per se prohibited by the Covenant, even in areas such as the provision of … education … where the role of the public sector has traditionally been strong'.[22] These ideas have traditionally been understood as supporting the possibility for states to allow their obligations to be fulfilled by private providers, including in relation to the right to education. Thus, Nowak argued in 2001 that '[i]f there are sufficient private facilities, the state may fulfil its obligations even without its own schools'.[23]

However, a close analysis of the relevant legal materials[24] suggests that, under international human rights law today, there *is* an obligation on states to provide public education, regardless of the role of private providers in the field. This follows both from a strictly theoretical legal

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International Covenants on Human Rights, 785th Meeting, A/C.3/SR.785 (21 October 1957), para. 26 (India).

[20] CESCR, General Comment No. 3, The nature of States' parties obligations (Article 2, para. 1, of the Covenant), E/1991/23 (14 December 1990), para. 8 ('General Comment 3').

[21] See Coomans and Hallo de Wolf, above n. 4, 238.

[22] CESCR, General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (10 August 2017) ('General Comment 24'), para. 21. See also *Committee on the Rights of the Child*, General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16 (17 April 2013), para. 33. See also Coomans and Hallo de Wolf, above n. 4, 256.

[23] Manfred Nowak, 'The Right to Education' in A. Eide et al. (eds.), *Economic, Social and Cultural Rights: A Textbook* (2nd ed, Martinus Nijhoff, 2001), 257. Nowak seems to have changed his view on this issue since then, however: see Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (University of Pennsylvania Press, 2017), 57–66.

[24] Including the texts of the relevant international instruments; their *travaux préparatoires*; decisions of international supervisory bodies, such as the CESCR and the Committee on the Rights of the Child, as well as the work of bodies such as the UN Human Rights Council and the UN Special Rapporteurs; and state practice.

analysis of the relevant law, as well as from the practical application of these legal principles in the contemporary education environment.

Legal/Theoretical Analysis

A number of arguments support the position that states are under a legal obligation to provide some sort of public education. First, there is a textual argument that the wording of the relevant legal provisions assumes, and therefore requires, states provide public education. So, for example, article 13(3) ICESCR guarantees the freedom of parents 'to choose for their children schools, other than those established by the public authorities'.[25] The reference to 'choice' in this context makes clear that there must also be public education, that is, 'schools established by the public authorities'. If no such schools existed, then the 'choice' referred to in 13(3) would not, in fact, be a choice, but a necessity. Similarly, the *UNESCO Convention against Discrimination in Education* explicitly states that private educational institutions are permissible 'if the object of the institutions is … to provide educational facilities in addition to those provided by the public authorities'. This suggests that private education may supplement, but not supplant, public education, which must continue to be provided by public authorities.

Second, article 13(2)(e) of ICESCR provides that '[t]he development of a system of schools at all levels shall be actively pursued'. This reference to 'development of a system' strongly suggests public education, given that private institutions, as envisaged under articles 13(3) and (4), necessarily develop on an individual, ad hoc basis. The *travaux* of ICESCR indicate that, although a number of states felt that this provision did not add anything to the other provisions in article 13(2),[26] the

[25] See also UNESCO Convention against Discrimination in Education, Art 5(b).

[26] UN General Assembly, Draft International Covenants on Human Rights: Report of the Third Committee (Rapporteur Mr Carlos Manuel Cox (Peru)), A/3764 (5 December 1957), para. 45. 'Some representatives opposed this amendment as being too detailed and merely repeating what was implicit in the rest of article 14 [ultimately article 13].' See also, e.g., the comments of the Indian representative in Official Records of the UN General Assembly, Twelfth Session, Third Committee, Agenda Item 33, Draft International Covenants on Human Rights, 785th Meeting, A/C.3/SR.785 (21 October 1957), para. 25: 'That sub-paragraph was unnecessary as the same ideas were expressed elsewhere.'

amendment introducing it was nonetheless adopted,[27] suggesting that it draws out an obligation implicit in the rest of article 13(2),[28] for states to develop a public education system. This is certainly how the provision is interpreted by the CESCR in General Comment 13, where the Committee draws from that provision the proposition that 'it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances'.[29] This conclusion, that the development of a system of schools requires a public education system, is supported by evidence from organisations such as UNICEF that, as a practical matter, '[o]nly the State … can pull together all the components [of education] into a coherent but flexible education system'.[30]

Third, under article 13(4) of ICESCR, states cannot interfere in the operation of private schools, except in certain limited respects. This is because article 13(4) specifically protects the 'liberty of individuals and bodies to establish and direct educational institutions'. It is clear from the *travaux* that this provision was designed to protect private institutions from interference by the state and to guarantee their independence, including academic freedom.[31] As McBeth summarises, 'the state must monitor the standards of private education … but it must not interfere in the delivery of education by private entities provided those standards are met'.[32] This means that, in respect of private education providers, the extent to which the state can exercise control over their activities is more limited than with respect to public institutions. Critically, this means that there may be aspects of a state's obligations under article 13(2) of

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[27] UN General Assembly, Draft International Covenants on Human Rights: Report of the Third Committee (Rapporteur Mr Carlos Manuel Cox (Peru)), A/3764 (5 December 1957), para. 48(m).

[28] Ibid, para. 45, which refers both to the obligation being 'implicit' in the rest of the article, and to the fact that '[o]ther representatives maintained that such measures ought to be specifically mentioned'.

[29] CESCR, General Comment No. 13 on the right to education (article 13 of the Covenant), E/C.12/1999/10 (8 December, 1999) ('General Comment 13'), paras 48 and 53.

[30] UNICEF, *The State of the World's Children: Education* (UNICEF, 1999), 63.

[31] See Official Records of the UN General Assembly, Twelfth Session, Third Committee, Agenda Item 33, Draft International Covenants on Human Rights, 779th Meeting, A/C.3/SR.779 (11 October 1957), para. 14 (Ireland).

[32] Adam McBeth, 'Privatising Human Rights: What Happens to the State's Human Rights Duties When Services are Privatised?' (2004) 5 *Melbourne Journal of International Law* 133, 138.

ICESCR which the state cannot force private providers to fulfil. For example, article 13(2) provides that primary education shall be 'available free to all',[33] and secondary and higher education shall be 'accessible to all',[34] that is, affordable to all.[35] However, the state cannot require private schools to be 'free to all' or affordable to all, because, under article 13(4), state intervention in the operation of private schools is limited to ensuring compliance with article 13(1) and ensuring that minimum educational standards are met, and does not include ensuring compliance with article 13(2). As McBeth concludes:

> It is therefore unlikely that a state could discharge its duty to make education accessible by requiring private operators to provide free schooling to those who could not otherwise afford the fees, rather than maintaining a parallel government education system …[36]

Similarly, the state cannot interfere where private providers offer schools to meet the needs of, for example, a particular national or linguistic minority, and therefore accept only, or predominantly, students from that background.[37] Under the *UNESCO Convention against Discrimination in*

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33 Art 13(2)(a).

34 Art 13(2)(b) and (c).

35 General Comment 13, above n. 29, 6(b).

36 McBeth, above n. 32, 138. Even where the state offers private schools financial assistance or subsidies to cover the cost of offering education that is free/affordable to all, the state cannot compel private schools to accept such an offer, as this matter does not concern the school's compliance with article 13(1) or minimum standards for 'the education given in such institutions' (which, it is clear from the *travaux* and General Comment, is intended to cover the delivery of education and issues such as curriculum and academic standards). This conclusion has been upheld, at least in relation to minority schools, by a decision of the Supreme Court of India, applying a provision of the Indian Constitution which reflected article 13(4) and protected the right of minorities to establish and administer private schools. In *Pramati Educational and Cultural Trust & Others v Union of India & Ors*; Writ Petition No. 416 of 2012, the Supreme Court of India found that even private minority schools which were aided by the state could not be compelled to offer free education to children belonging to disadvantaged groups.

37 Art 13(4) ICESCR; UNESCO Convention against Discrimination in Education, Art 2(b). For examples of domestic application of this principle, see, for example, *P.A. Inamdar & Ors v State of Mahrashtra & Ors* (2005) 6 SCC 537, which concerned an equivalent provision of the Indian Constitution. In *Society for Unaided Private Schools of Rajasthan v Union of India & Another*

Education, these selective admission practices do not constitute unlawful discrimination, and are specifically protected.[38] Similarly, the right to freedom of religion,[39] read together with the right to establish private educational institutions, protects the rights of religious groups to establish their own schools and accept only, or predominantly, students who observe that religion. While individually such schools are permissible, an education system made up entirely of such schools would *as a whole* risk being discriminatory, if, for example, this would result in greater educational opportunities for individuals from some backgrounds and not others.[40] Even if the state managed to 'curate' a system where the offerings of different private providers put together ensured that there were equal educational opportunities for all, the state's limited control over the decisions of private providers to establish or to close schools would put this system under constant threat. As a result, the state could only guarantee equal educational opportunities for all by having a public education system available to meet the needs of groups whose needs may not be met by private providers. Once again, 'only the state' can 'pull together' an education system that complies with article 13.[41]

Fourth, this interpretation of the relevant legal provisions (that they require states to develop and maintain a public education system) is supported by recent treaty body practice, as well as practice of other international bodies. So, for example, the CESCR noted in its concluding

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(2012) 6 SCC; Writ Petition (C) No. 95 of 2010, and then *Pramati Educational and Cultural Trust & Others v Union of India & Ors*; Writ Petition No. 416 of 2012, the Supreme Court of India found legislation requiring private, minority schools to reserve 25 per cent of their places for students from disadvantaged backgrounds to be invalid, on the basis that it violated the right of minority groups to establish and administer private schools.

[38] See art. 5(c). See also art. 2(b).

[39] See, e.g., art. 18 ICCPR (International Covenant on Civil and Political Rights).

[40] For an excellent example of where this has occurred, see Alison Mawhinney's description of the situation in Ireland: 'A Discriminating Education System: Religious Admission Policies in Irish Schools and International Human Rights Law' (2012) 20 *International Journal of Children's Rights*, 603–623. Although this article describes schools which are treated as 'public' by the Irish state, they are operated by religious organisations, and thus the study demonstrates the risks which would be arguably even more pronounced in the case of truly private schools.

[41] See UNICEF, *The State of the World's Children: Education* (1999), above n. 30, 63.

observations in relation to Kenya that it was 'concerned that inadequacies in the public schooling system have led to the proliferation of so-called "low cost private schools"'[42] and recommended 'that the State party take all the measures necessary to strengthen its public education sector'.[43] Similarly, the Committee on the Rights of the Child has required states to 'prioritize the provision of quality, free primary education at public schools over the provision of education at private schools'.[44] The obligation of states to provide public education is also reinforced by statements of other international bodies. The Human Rights Council, for example, has in recent years consistently passed resolutions 'recognizing the significant importance of investment in public education, to the maximum of available resources'.[45]

Fifth, state practice suggests that the provision of public education may be regarded as an obligation of states under international law. All states provide some degree of public education. Further, substantial state practice, in the form of constitutional provisions, legislation and judicial decisions, demonstrates acceptance of a legal obligation to provide public education. More than 80 per cent of national constitutions guarantee the right to education,[46] and two-thirds of these guarantee the right to

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[42] CESCR, Concluding Observations: Kenya, E/C.12/KEN/CO/2-5 (5 April 2016), para. 57.

[43] Ibid, para. 58. Similarly, in relation to Morocco, the Committee 'recommends that the State party take urgent measures to address the problems of poor-quality public education … [and] develop an appropriate educational system and programme': CESCR, Concluding Observations: Morocco, E/C.12/MAR/CO/4 (21 October 2015), para. 48. See also CRC, Concluding Observations: Kenya, CRC/C/KEN/CO/3-5 (21 March 2016), para. 58(b); CRC, Concluding Observations: Brazil, CRC/C/BRA/CO/2-4 (29 October 2015), para. 74(c), para. 76(b); CRC, Concluding Observations: Chile, CRC/C/CHL/CO/4-5, para. 68(b).

[44] CRC, Concluding Observations: Kenya, CRC/C/KEN/CO/3-5 (21 March 2016), para. 58(b).

[45] See UN General Assembly, *Human Rights Council*, Resolution on the Right to Education, A/HRC/32/L.33 (29 June 2016), para. 3; UN General Assembly, Human Rights Council, Resolution on the Right to Education, A/HRC/35/L.2 (16 June 2017), para. 3. See also comments by the Special Rapporteur, Kishore Singh, for example, UN General Assembly, Report of the Special Rapporteur on the Right to Education, Kishore Singh, A/70/342 (26 August 2015), para. 122; 2014 report of the Special Rapporteur, above n. 1, para. 96.

[46] 81 per cent in 2011, according to Jody Heyman et al., 'Constitutional Rights to Education and Their Relationship to National Policy and School

free education, at least at primary level.[47] In light of the discussion above regarding constraints on the ability of the state to require private providers to offer free education, this suggests a legal obligation on the state to provide public education. No states currently fulfil their constitutional obligation to provide free education through the exclusive use of private providers, although some jurisdictions (Liberia and New Orleans, for example) have moved in this direction. More significantly, many constitutions explicitly impose obligations on states to provide public education.[48] The Library of Congress's review of the right to education in 20 states revealed that in 13 of the 20 the right to public education was protected[49] in constitutions or in other fundamental legislation, and a further three constitutions did not specifically mention public education but did guarantee free education.[50] The state constitutions of all 50 states of the United States explicitly mandate the creation of a public education system.[51]

National legislation and judicial decisions also impose obligations on states to provide public education. So, for example, in Mexico, the *General Education Law* provides that the government must allocate no

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Enrolment' (2014) 39 *International Journal of Educational Development* 131, 135; 82 per cent in 2014, according to: 'Accountability from a Human Rights Perspective: The Incorporation and Enforcement of the Right to Education in the Domestic Legal Order' (2017), paper commissioned for the 2017/8 *Global Education Monitoring Report*, Accountability In Education: Meeting Our Commitments, available at: http://www.right-to-e ducation.org/sites/right-to-education.org/files/resource-attachments/RTE_Accountability_from_a_human_rights_perspective_2017_en.pdf, 32–34.

47 Heyman et al., above n. 46, 135.

48 So, for example, art. 14 of the Constitution of the Philippines provides: 'The State shall establish and maintain a system of free public education in the elementary and high school levels …': Heyman et al., above n. 46, 135. For further examples, including Argentina and France, see The Law Library of Congress, 'Constitutional Right to an Education in Selected Countries', Report of May 2016, available at: https://www.loc.gov/law/help/constitutional-right-to-an-education/constitutional-right-to-education.pdf.

49 Either explicitly or implicitly (through, for example, provisions requiring free education in public schools).

50 The Law Library of Congress report, above n. 48.

51 See the excellent study of these constitutional provisions prepared for the Education Commission of the States: Emily Parker, '50-State Review: Constitutional Obligations for Public Education' (Education Commission of the States, 2016), available at: https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf accessed 30 March 2020.

less than 8 per cent of the country's GDP to public education.[52] In South Africa, the South African Schools Act 1996 provides that the state 'must fund public schools from public revenue'.[53] More generally, as the UN Special Rapporteur on the Right to Education, Kishore Singh, has noted, in a number of countries, such as Finland, '[n]ational legislation and policies … give paramount importance to education as a public function of the State and as a public good'.[54] This reflects comments in national judicial decisions, such as the historic case of *Brown v Board of Education*, where the US Supreme Court found that public education 'is perhaps the most important function of state and local governments',[55] and *Wisconsin v Yoder*, where the Supreme Court noted that '[p]roviding public schools ranks at the very apex of the function of a State'.[56]

Overall, then, analysis of the relevant provisions of international human rights law, read in light of the *travaux* of the relevant instruments, the practice of international bodies, and state practice, strongly suggests that states are obliged to provide public education, regardless of the extent to which education is also offered by private providers. Does an analysis of how these legal principles apply *in practice* support such a conclusion?

Practical Application of the Legal Principles

As provided in Guideline 8 of the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, understandings of the 'scope, nature and limitation of economic, social and cultural rights' develop through 'application of legal norms to concrete cases and situations'. And the content of the rights protected under international human rights instruments can change over time, in response to changes in the social and economic context within which these rights take effect.[57] For these reasons, to determine whether states have an obligation to provide public

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[52] Art 25. See The Law Library of Congress report, above n. 48, 30.

[53] Para. 34(1). See The Law Library of Congress report, above n. 48, 40.

[54] June 2015 report of the Special Rapporteur, above n. 14, para. 78.

[55] *Brown v Board of Education of Topeka* (1954) 347 US 483 at 493.

[56] *Wisconsin v Yoder* (1972) 406 US 205 at 213. See 2014 report of the Special Rapporteur, above n. 1, 72.

[57] Thus, human rights treaties are often referred to as 'living instruments', the interpretation of which will change over time. See, e.g., *Tyrer v UK* (App. No. 5856/72), ECHR Judgment of 25 April 1978, Series A, No 26, para. 31.

education, it is necessary to consider not only the legal principles, but also their practical application in the contemporary environment. Such an analysis supports the conclusion that states are under an obligation to provide public education, because as a practical matter it would be very difficult, if not impossible, for states to comply with international human rights law without providing a degree of public education.

Equality and non-discrimination

International human rights law requires that the right to education is guaranteed on the basis of equality. Discrimination with respect to the enjoyment of rights under ICESCR, including the right to education, is expressly prohibited by article 2(2). Similarly, article 2(1) of the CRC prohibits discrimination with respect to the right of the child to education in the CRC; and the *UNESCO Convention against Discrimination in Education* specifically requires states to eliminate and prevent discrimination with respect to education.[58]

However, significant evidence shows that private education increases inequality and discrimination, as discussed in the education-focused chapters of this volume. The Special Rapporteur on the Right to Education, Kishore Singh, has found that the increased use of private providers in education 'cripples the universality of the right to education as well as the fundamental principles of human rights law by aggravating marginalization and exclusion in education and creating inequities in society'.[59] It does so in different ways, depending on the type of private education in question and the broader educational and social context of the state within which it is offered.

Elite private schools, which charge significant fees and offer high-quality education, are accessible only to those who have the capacity to pay.[60] The existence of such schools therefore raises concerns from the perspective of equality of educational opportunity absent a robust, high-quality public education alternative. So, for example, in its concluding observations on Pakistan in 2017, the CESCR expressed concern about the 'reinforcement of social segregation in education caused by the

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[58] See arts 3 and 4. See also the 2017 report of the Special Rapporteur on the Right to Education on equity and inclusion in education: UN General Assembly, Report of the Special Rapporteur on the Right to Education, Koumbou Boly Barry, A/72/496 (29 September 2017).

[59] 2014 report of the Special Rapporteur, above n. 1, para. 41.

[60] Ibid, paras 44–46.

privatization of education, as high-income families send their children to high-quality private schools while low-income families have to send their children to underfunded public primary schools'.[61] This is clearly contrary to international human rights law, as the CESCR notes in its General Comment 24:

> The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, which would create new forms of socioeconomic segregation. The privatization of education illustrates such a risk, where private educational institutions lead to high-quality education being made a privilege affordable only to the wealthiest segments of society …[62]

So-called 'low cost private schools' also raise concerns regarding economic accessibility and discrimination on the basis of socioeconomic status. These schools are often introduced in communities which lack public education facilities.[63] They therefore tend to function as substitutes for free public education, and their introduction can hinder state progress towards providing free, quality public education for all. These schools effectively supplant free public education for particular communities with for-fee education. This means that individuals in these communities can only access education by paying fees, with the resulting potential for discrimination on the basis of socioeconomic status. Thus, in relation to Kenya, the CESCR has expressed concern that the 'proliferation of so-called "low cost private schools"' has 'led to segregation or discriminatory access to education, particularly for disadvantaged and marginalized children'.[64]

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[61] CESCR, Concluding Observations: Pakistan, E/C.12/PAK/CO/1 (20 July 2017), para. 81; CESCR, Concluding Observations: Morocco, E/C.12/MAR/CO/3 (4 September 2006), para. 30; CESCR, Concluding Observations: Morocco (21 October 2015), para. 47; CESCR, Concluding Observations: Lebanon, E/C.12/LBN/CO/2 (23 October 2016), para. 60; CESCR, Concluding Observations: Australia, E/C.12/AUS/CO/5 (11 July 2017), para. 53.

[62] CESCR, General Comment 24, above n. 22, para. 22.

[63] In relation to the Philippines, for example, the CESCR notes that these schools have proliferated 'owing to inadequacies in the public school system'. See CESCR, Concluding Observations: The Philippines, E/C12/PHL/CO/5-6 (25 October 2016), para. 55(b).

[64] CESCR, Concluding Observations: Kenya, E/C.12/KEN/CO/2-5 (5 April 2016), para. 57. See also CESCR, Concluding Observations: UK,

The involvement of private providers in the delivery of education can also exacerbate discrimination against women and girls in relation to access to education because 'families prioritize the education of boys over girls'.[65] Thus in its concluding observations on Uganda in 2015, the CESCR expressed concern about the increasing 'gap in access to quality education resulting from the increase in the provision of private education, disproportionately affecting girls'.[66]

Therefore, substantial evidence indicates that increased provision of education by private providers exacerbates inequality and discrimination on the basis of socioeconomic status, sex, and social group. As a result, scaled increases which resulted in a *purely* private state education system would, according to the evidence, violate rights to equality and non-discrimination.[67] In light of the aforementioned limits of public oversight of private institutions, states must therefore retain a robust, high-quality public education system to ensure equality of access to educational opportunity.

Free education

The right to education requires that primary education be available 'free to all',[68] and that free education be progressively introduced at other levels of education.[69] In the case of an education system which consisted solely of private schools, guaranteeing this element of the right would require the state to fund private providers to provide free education. As noted above, article 13(4) of ICESCR may limit the extent to which this can, in fact, be done in compliance with international human rights law. Further, since the state cannot discriminate between private providers in terms of funding,[70] this would mean that the state would be required to fund *all* providers, including private schools not previously subsidised by the state. As Nowak suggests, it is difficult to see how this could be done

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E/C.12/GBR/CO/6 (13 July 2016), para. 14; CRC, Concluding Observations: Kenya, CRC/C/KEN/CO/3-5 (21 March 2016), para. 58(b); CRC, Concluding Observations: Peru, CRC/C/PER/CO/4-5 (1 March 2016), para. 61(c).

65 2014 report of the Special Rapporteur, above n. 1, para. 47.

66 CESCR, Concluding Observations: Uganda, E/C.12/UGA/CO/1 (7 July 2015), para. 36(c).

67 See CESCR, General Comment 24, above n. 22, para. 22.

68 Art 13(2)(a) ICESCR.

69 Art 13(2)(b) and (c).

70 *Waldman v Canada*, above n. 6.

in a way which makes economic sense for the state.[71] As a result, complying with the legal requirement to provide education free to all is likely to be difficult in the absence of a public education system. Certainly, this is the view of commentators such as Hodgson, who conclude that '[t]he obligation to supply free education to children implies that each nation must establish a free public education system in order to place a basic education within the reach of the great majority of children'.[72]

The '4A scheme'

Education at all levels is required to exhibit four 'interrelated and essential features', namely availability, accessibility, acceptability and adaptability.[73] Evidence shows that, if education were *exclusively* provided by private schools, this would pose problems in respect of a number of elements of this '4A scheme'. While private providers may increase the availability of schools, they raise a number of concerns from the perspective of accessibility. As noted above and elsewhere in this volume, significant evidence reveals that increasing the number of private providers of education leads to increased discrimination in terms of access to education, and has particular implications for economic accessibility.[74] There is also evidence that physical accessibility of education is adversely affected by an increase in private schools, because for-profit schools are more likely to be established in major urban areas, where services can be most easily and cheaply provided and where large numbers of students provide maximum profit. Most private providers are unlikely to establish schools in remote or difficult to access areas, which require increased costs to provide education to fewer students. Thus, in its concluding observations on Kenya, for example, the CESCR noted the negative impact of the proliferation of 'low cost private schools' on access to education for children living in 'arid and semi-arid areas'.[75]

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71 Nowak, *Human Rights or Global Capitalism*, above n. 23, 64.

72 Douglas Hodgson, 'Education, Right to, International Protection', *Max Planck Encyclopedia of International Law*, available at: http:www.mpepil.com, para. 7.

73 General Comment 13, above n. 29, para. 6.

74 Except, of course, where the state funds these schools so that they are free, but, as discussed above, this may create both practical difficulties for the state and the potential for other forms of discrimination.

75 CESCR, Concluding Observations: Kenya, E/C.12/KEN/CO/2-5 (5 April 2016), para. 57. See Chapter 9 by Linda Oduor-Noah for a more extensive analysis of this issue in the East African context.

Acceptability of education requires that 'the form and substance of education, including curricula and teaching methods, have to be acceptable (eg relevant, culturally appropriate and of good quality) to students'.[76] However, one of the major concerns surrounding the role of private actors in education has been the way in which low-fee private schools, in particular, have affected quality in education, as private providers, driven to make profits, seek to provide education for the lowest cost. The Special Rapporteur on the Right to Education, Kishore Singh, has cited numerous examples of low-fee private schools which do not comply with government guidelines or follow the national curriculum, and which employ unqualified instructors.[77] The CESCR has expressed similar concerns in its concluding observations.[78]

Private schools may also pose problems from the perspective of adaptability of education. Adaptability means that 'education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings'.[79] The concern here is that private providers who operate on a for-profit basis have an incentive to roll out the same educational programme across a number of different schools, and even across different states, without taking account of local needs. Acknowledging this concern, the Committee on the Rights of the Child recommended in its concluding observations on Brazil that the state 'stop the purchase of standardized teaching and school management systems by municipalities from private companies', which 'include teaching and teacher training materials and school management packages that may not be adequately customized for effective use'.[80]

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[76] General Comment 13, above n. 29, para. 6(c).

[77] June 2015 report of the Special Rapporteur, above n. 14, paras 45, 70–71.

[78] CESCR, Concluding Observations: Pakistan, E/C.12/PAK/CO/1 (20 July 2017), para. 81(c); CESCR, Concluding Observations: The Philippines, E/C12/PHL/CO/5-6 (25 October 2016), para. 55(c).

[79] General Comment 13, above n. 29, 6(d).

[80] CRC, Concluding Observations: Brazil, CRC/C/BRA/CO/2-4 (29 October 2015), paras 75 and 76.

Conclusion on Practical Application

The above analysis demonstrates that a system of education provided purely by private providers would, in practice, likely be inconsistent with a number of states' obligations with respect to the right to education. The significance of this potential impact, as a matter of human rights law, is heightened by the fact that states have obligations not to take retrogressive steps with respect to enjoyment of the right to education. While the right may be subject to 'progressive realisation', states cannot take backward steps, such that the right to education is realised to a lesser extent than it was before.[81] Given that all states had at least some system of public education in place at the time that they ratified the Covenant, and given the risks associated with a wholly private education system, there is a strong argument that introducing such a system would constitute a retrogressive step, and would thus be impermissible.[82] It therefore seems that all states are under an obligation to provide at least some level of public education.

The next part of this chapter turns to consider exactly how much public education states must provide, as a matter of human rights law. In particular, it asks whether states are obliged to provide public education for all.

IV. ARE STATES OBLIGED TO PROVIDE PUBLIC EDUCATION FOR ALL?

Having established that states are under an obligation to provide some degree of public education, the next question is: how much? Must states provide public education to everyone within their jurisdiction, or is it sufficient if only some public education is provided, as long as private providers 'fill the gap' and ensure that everyone receives an education in accordance with article 13 and other relevant provisions?

The discussion above outlines a number of practical concerns regarding the ability of private providers to deliver, on a non-discriminatory basis, education that complies with article 13 and related provisions. Therefore, states must provide sufficient public education, equally acces-

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81 See General Comment 13, above n. 29, para. 45.

82 This conclusion follows the general argument made in Nowak, *Human Rights or Global Capitalism*, above n. 23, 62, 64–65.

sible to all, to counter any discrimination on the basis of socioeconomic status, sex, social group, or place of residence, which might emerge as a result of the operation of private schools.

More generally, however, there is an argument that the requirements of equality and non-discrimination demand that if the state provides public education (as it is obliged to do under international human rights law), then such education must be accessible equally to all, in accordance with, for example, the requirements of article 2(2) ICESCR. The state is therefore obliged to make public education available to all individuals within its jurisdiction, without discrimination on any of the prohibited bases,[83] including place of residence, socioeconomic status, sex and race. This would mean that states need to provide a system of public schools throughout their territory, because if public schools are available in some areas but not others, this disparate provision is likely to amount to discrimination on the basis of place of residence and/or socioeconomic status.

To make this argument, it is first necessary to show that there is a 'difference in treatment' between individuals who are able to access public education and those who are not. This is because unlawful discrimination occurs only where there is a 'difference in treatment' for which there is no 'reasonable and objective' justification.[84]

Is there a relevant difference in treatment where one individual has access to public education, and another only has access to private education, even where the private education is of equivalent quality and meets the requirements of, for example, article 13 ICESCR?

There is a good argument that this is a relevant difference in treatment. Public and private education have substantial differences in terms of objectives, structure, control, and funding.[85] This is reflected in article 13,

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[83] International law explicitly prohibits discrimination on grounds of: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 'Other status' on which discrimination is prohibited has been found to include attributes such as disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation. See CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights* (art. 2, para. 2 of the ICESCR), paras 18–35, U.N. doc E/C.12/GC/20 (July 2, 2009) ('General Comment 20').

[84] Ibid, paras 13–14.

[85] See the discussion in Section II above. See also, e.g., the UNESCO definitions of 'public educational institution' and 'private educational institu-

which treats private education separately in articles 13(3) and (4). Public and private education are, in fundamental ways, different, such that, as a matter of first principles, there is a difference in treatment.

Further, as outlined above, it is highly unlikely that private education systems will comply with all the requirements of international human rights law. As noted above, these systems raise particular concerns from the perspectives of accessibility, acceptability and adaptability. As a result, private education is likely to involve lesser enjoyment of the rights concerned, or at least a risk of lesser enjoyment of those rights. This is particularly problematic in light of the fact that the state has less control over private educational institutions than public ones. This means that individuals whose education is provided by such institutions do not enjoy the same public law avenues for challenging decisions made by these providers which affect their rights as would be the case in the context of public education. While it is not impossible that states could develop robust legal frameworks to hold private providers accountable in this context, the availability of different remedies (under public law and private law) would likely constitute a 'difference in treatment' for the purposes of international human rights law, particularly because public law remedies are more enduring, less open to change, and usually more substantial than frameworks developed to apply to private providers.

If this is indeed a difference in treatment, the question is then whether this difference in treatment is based on a prohibited ground, and, if so, whether there is a reasonable or objective basis for providing public education to some individuals and not to others. The most likely scenario is where public schools are available in some areas but not others. This would amount to differential treatment on the basis of place of residence, which would constitute unlawful discrimination unless there was a 'reasonable and objective' justification for this difference in treatment. A reasonable and objective justification exists if the difference in treatment pursues a legitimate aim and is proportionate to achieving that aim.[86] It is difficult to see what 'legitimate aim' could be pursued by offering public education in some areas and not others. The state may argue that it is too difficult or costly to provide public education to, for example, those living in remote areas. However, this is really a question of financial

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tion': UNESCO Institute for Statistics, *Glossary*, http://uis.unesco.org/node/334761.

[86] General Comment 20, above n. 83, para. 13.

resources and the impact this has on states' obligations of progressive realisation, as discussed further below. It does not, of itself, render the difference in treatment lawful.

Another possible scenario is where public schools are available in all areas, but schools lack sufficient places to meet demand. In such a case, schools must decide which students they will offer places to and on what basis they will make such decisions. There would seem to be a substantial risk that such decisions could involve direct or indirect discrimination on prohibited grounds, including place of residence, social group or socioeconomic status. Even decision-making on the basis of apparently 'neutral' criteria, such as order of receipt of application to attend the school, may constitute indirect discrimination against those who live further away from the school or are of lower socioeconomic status. This is because these factors may affect the extent to which individuals are aware of the need to apply for admission, and to do so as early as possible, and the ease with which they can apply for admission. If there is indirect discrimination on this basis, there is unlikely to be any reasonable or objective justification for it, as it is difficult to see what legitimate aim could be pursued by these measures. Overall, the selection of some students and not others to attend public school carries with it a grave risk of unlawful discrimination.

It follows from the above analysis that the right to education, read together with the prohibition on discrimination, requires states to provide public education to all students who wish to pursue it. Of course, students and their parents remain free to choose private educational institutions, as provided for in article 13(3). However, the state must make some form of public education reasonably available to all.

V. A RIGHT TO PUBLIC EDUCATION?

If states are obliged, under international human rights law, to make public education reasonably available to all, it follows that there is a corresponding right to public education. The following considers the nature of this right and its implications for state action in relation to education.

What is 'Public Education'?

The right to public education can be understood as a right of access to educational institutions meeting the international human rights law requirements for public education, as set out in Section II above. Thus,

it is not open to states to 'rebrand' private schools as 'part of the public education system' in order to satisfy their international human rights obligations. In determining which schools form part of the public education system, international bodies will look at which schools the state has traditionally considered 'public'. For other schools to be included as part of this system, they must (like the Roman Catholic schools in *Waldman*) have substantially the same characteristics, in terms of state funding, control and so on, as existing public schools. It is also important to note that what constitutes 'public education' cannot, without reasonable justification, vary throughout the state, as this would amount to discrimination on the basis of place of residence.

How Much Public Education Must the State Provide?

The number and size of public schools which the state must provide to satisfy its international human rights obligations will, of course, depend on context. However, all students must have some form of public education reasonably available to them. For students in remote areas, this may mean having the option to travel to a public school further away, or to board at such a school. However, in all cases, individuals are entitled to public education that meets the 4A requirements of availability, accessibility, acceptability and adaptability; is free for primary and progressively free for secondary school; and is directed towards the ends set out in article 13(1) of ICESCR.

Resource Implications

What about states which lack the financial capacity to provide public education for all? Such states cannot, of course, be expected immediately to provide public education for all. The state obligation, in respect of the right to education, is to 'take steps … to the maximum of its available resources, with a view to achieving progressively the full realisation' of the right.[87] An individual's right to public education will not be violated as long as the state can demonstrate that it is 'taking steps … to the maximum of its available resources' to provide public education to all.

Much excellent work has been done on the nature of the state's obligation to 'progressively realise' economic, social and cultural rights 'to the

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87 Art 2(1) ICESCR.

maximum of its available resources'.[88] A number of conclusions can be drawn from this work regarding the scope of state obligations to provide public education (and the corresponding scope of the right to public education). The first is that states are obliged to use the maximum of their available resources (and to consider maximising these resources through, for example, appropriate taxation policies)[89] in order to progressively make public education available to all. This requirement is consistent with the concluding observations of the treaty bodies, discussed above, which require states to 'prioritize the provision of quality, free primary education at public schools over the provision of education at private schools',[90] and, in particular, to prioritise the allocation of resources to public schools.[91]

Second, states cannot take retrogressive steps, or steps which decrease the availability of public education, except in exceptional circumstances. As the CESCR has stated:

> There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[92]

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[88] See, e.g., Aoife Nolan, 'Budget Analysis and Economic and Social Rights' in Eibe Riedel et al (eds.), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP, 2014), 369; Rory O'Connell et al., *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014); Diane Elson et al., 'Public Finance, Maximum Available Resources and Human Rights' in Aoife Nolan et al. (eds.), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart, 2013) 13; Sigrun Skogly, 'The Requirement of Using the "Maximum of Available Resources" for Human Rights Realisation: A Question of Quality As Well As Quantity?' (2012) 12 *Human Rights Law Review* 393, 420.

[89] See, e.g., Elson et al, above n. 88.

[90] CRC, Concluding Observations: Kenya, CRC/C/KEN/CO/3-5 (21 March 2016), para. 58(b).

[91] See, e.g., CRC, Concluding Observations: Brazil, CRC/C/BRA/CO/2-4 (29 October 2015), para. 74(c); CRC, Concluding Observations: Chile, CRC/C/CHL/CO/4-5, para. 68(b); CRC, Concluding Observations: UK, CRC/C/GBR/CO/5 (12 July 2016), para. 18.

[92] General Comment 13, above n. 29, para. 45.

Third, even when the state is still working towards making public education available to all, there can be no discrimination in terms of access to public education. This potentially creates problems for states without a fully functioning public education system in all areas, as this could constitute discrimination on the basis of place of residence, which would need to be justified on the grounds that there is a reasonable and objective basis (that is, a legitimate aim) for treating individuals in different areas differently. It is possible that this could be justified on the basis that the state may choose to concentrate its resources on, for example, urban areas, where the number of students who would gain access to public education would be higher. However, this justification would be subject to strict scrutiny and would apply only as long as necessary in light of the state's resources, with the state required to move towards making public education available in all areas as expeditiously as possible.

VI. CONCLUSION

International human rights law requires all states to develop and maintain public education systems. And it is clear that private educational institutions raise a number of concerns from the perspective of international human rights. As a result, states are obliged, as a matter of international human rights law, to provide access to public education on a non-discriminatory basis, and therefore to ensure that everyone has access to a school which is part of the public education system. While states maintain a certain discretion in terms of which schools they characterise as 'part of the public education system', this discretion is both limited and amenable to review by relevant international human rights bodies. Similarly, while the obligation to provide public education for all is subject to progressive realisation, international human rights bodies must determine whether states are complying with this obligation by taking steps 'to the maximum of available resources' to provide public education for all.

Ultimately, then, international human rights law does give rise to a right to public education. How this right applies in practice will depend on context and individual circumstances. Nonetheless, it is a critical starting point for addressing concerns regarding the role of private actors in education.

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4. Parental rights in education under international law: nature and scope

Roman Zinigrad

INTRODUCTION

The parental right to influence or control their children's instruction is guaranteed by all major human rights instruments that address education (the parental right in international law is, henceforth, the Parental Right, or Right). This guarantee reflects the essential role that parental involvement in education plays in the development and formation of children, in the thriving of their community and their state, and in the parents' own self-fulfillment. Interpreting the Parental Right – i.e., the nature of the obligations it confers on the state, as well as in relation to the right of the child to receive education – is therefore, understandably, a matter of vigorous disputes given the acute ideological disagreement over the best educational means, conditions, and ends.

The stakes in the recognition of the Parental Right are high. Many issues crucially depend on the parental share in designing the curriculum and the learning environment for the state's children today (and constituency tomorrow), including: the strength of a state's democratic institutions, its respect of freedom of thought and other human rights, its degree of tolerance and social cohesion, its economic policies, or its cultural and/or religious minorities' abilities to preserve their identity and defend their interests.

What renders the interpretation of the Right even more challenging are several factors related to the historical transformations in the perception of education, and the special characters of the Parental Right and of the child's right to education. These include: the growing recognition of the child as the main beneficiary of educational rights; the paradigm shift in the conceptualization of parental authority over children; the Right's exceptionality in granting one individual significance over the future of

another (under established international law children do not have agency to independently determine their education).

In the face of these challenges, this chapter contributes to the understanding of the Parental Right and of the international law framework in which it operates. It describes the debates and predominant interpretations of the nature and of the scope of the Parental Right. Section I discusses the nature of the Parental Right, examining its possible interpretations as a negative or a partially positive; Section II addresses the Parental Right's scope in public and private educational institutions.

I. THE NATURE OF THE PARENTAL RIGHT

This section considers whether the Right involves positive obligations on the part of the state. An individual right may be envisioned as one of three options – either entailing material state support to ensure its realization (positive claim), as only requiring the state to guarantee its exercise without interference (negative claim), or as merely allowing the individual to act upon it unless restricted by the state (privilege).[1] The currently predominant view adopts the second option and considers the state to have a duty to guarantee non-interference in the parental educational choices. While not stated explicitly, this view draws mainly on the unusual language used in some provisions that establish the Right in human rights instruments. It is rooted in the liberal tradition of envisioning rights as ensuring protection from the state rather than assistance, and reflects fears of parental choices that would be detrimental to the child's education and of diverting state resources to private educational institutions at the expense of the public system of education.

But this approach is not without contestation. Supporters of expanded parental choice argue that, without a state obligation to provide financial support to private institutions, the Parental Right is effectively meaningless due to the tremendously burdensome costs of private education.

[1] The discussion of the third option is beyond the scope of this chapter. For accounts claiming the parental educational prerogative is a mere privilege see e.g. James G. Dwyer, *Religious Schools v. Children's Rights* (Cornell University Press 1998) 46–47; Meira Levinson, *The Demands of Liberal Education* (Oxford University Press 2002) 50–51.

A. The Parental Right as a Negative Claim

Under the currently prevalent interpretation, the Parental Right established in international law should be considered as a *negative claim* across all international documents and in all instances.[2] According to this view, states may, but are in no circumstances obligated, to realize the parental educational choices – neither by providing financial support to private education nor even by adding educational elements desired by parents to the public-school curriculum.[3] For instance, if parents consider that the curriculum is disparaging their culture or not adapted to their religious beliefs, the Parental Right would not be sufficient for parents to demand the change of the state policy.

Indeed, the drafting history of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[4] – one of the international law instruments framing the Parental Right as a 'liberty' – reveals that the choice of this term in the context of the Parental Right was made with the explicit intention of clarifying that states only have an obligation of non-interference in the parental choice and are not under a duty to support it financially in case parents opt for education in a private school or at home. In the same manner, the European Court of Human Rights (ECtHR or Strasbourg Court) and the European Commission have consistently declared that article 2 of the First Protocol of the European Convention of Human Rights (ECHR art P1-2),[5] obliging states to guarantee 'the right of parents', does not impose any positive financial obligations on the state, including neither of establishing public nor of subsidizing private education.[6] Commentaries of other international bodies as well as

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[2] Under the tripartite classification of state obligations to 'respect, protect, and fulfill' international human rights, negative claims to education constitute the obligation to 'respect'. See, Matthew C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Oxford University Press 1998) 110.

[3] See e.g. Klaus Dieter Beiter, *The Protection of the Right to Education by International Law* (Martinus Nijhoff 2006) 543.

[4] (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[5] Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[6] See e.g. *Belgian Linguistic case (No 2)* (1968) 1 EHRR 252 [31]; *Kjeldsen v Denmark* App No 5095/71 (Commission (Plenary) Decision, 7 December 1976) [152].

academic literature mostly share the same understanding, at least in cases when the parents are not members of protected minority groups. While alternately invoking the International Parental Right as either 'right' or 'liberty', they consistently assign them with one and the same meaning of no more, no less than a right of non-interference.[7] Accordingly, provisions that refer to state obligations in this context are also interpreted as ensuring that parents can make the educational choice but not as assisting them to actually realize that education.[8] Parents may therefore, at their own expenses, pay for a private education that would conform to their choices. The states' obligation to 'respect' the Parental Right, as framed in ICESCR, the International Covenant on Civil and Political Rights (ICCPR),[9] the Convention on the Rights of the Child (CRC),[10] ECHR,[11] or in the UNESCO Convention against Discrimination in Education (CADE),[12] is understood as a duty to 'to avoid measures that hinder or prevent the enjoyment of the right'.[13] These prohibited measures include

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[7] On the general Parental Right in art 18(4) ICCPR, see e.g. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 433–34; *Blom v Sweden* Communication No 191/1985, UN Doc CCPR/C/OP/2 [10.3]; Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999) 521; Luzius Wildhaber, 'Right to Education and Parental Rights' in Ronald St. J. MacDonald et al. (eds.), *The European System for the Protection of Human Rights* (Kluwer Law International 1993) 533. But see the exception of positive Parental Rights in art 26 ICCPR, below.

[8] The distinction between negative and positive state protection is arbitrary as even ensuring interference requires allocation of resources, and the case of education is no exception to this observation. See e.g. Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1993) 181–2.

[9] (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[10] (Adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[11] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

[12] (Adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93.

[13] CESCR 'General Comment 13: The Right to Education (art 13)' (8 December 1999) UN Doc E/C.12/1999/10 [47]. See also, Fons Coomans, 'Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realization' in Yvonne Donders and Vladimir Volodin (eds.), *Human Rights in Education, Science, and Culture: Legal Developments and Challenges* (Ashgate 2007) 187, 189.

such actions as the prohibition of private religious education, the refusal to adapt the public-school curriculum to parental religious or moral convictions, or a refusal to exempt children from specific curricular contents.[14]

The theoretical grounds for this reading of the Parental Right are found in the liberal tradition that perceives rights as checks on government power that guarantee protection from incursion upon personal freedoms, rather than material support in the rights' realization. In this reading, the Right is therefore perceived as what is sometimes (misleadingly) labeled a 'first generation' right. The pragmatic rationale for supporting this negative interpretation is mainly twofold. First, it is the presumption that the Parental Right is dangerously prone to compromising the child's right to education due to the risk that parents will choose educational institutions or contents of inferior quality to that chosen by the public system. Given this characterization, the denial of public funds (or of introduction of parental choices into the public-school curriculum) functions as a strong disincentive for parents to disagree with the state's educational ideology.[15] Second, the apprehension that investment in private educational institutions will drain the resources essential for the public system creates a presumption against material support of parental choices.[16]

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[14] See e.g. *Kjeldsen* (n 6) [153], [158]; *Campbell v. UK* (1982) 4 EHRR 293 [37]; Coomans (n 13) 189–90.

[15] See e.g. Stephen G. Gilles, 'On Educating Children: A Parentalist Manifesto' (1996) 63 *U Chi L Rev* 937, 942 ('Selective funding [where only public schools receive government funding] exerts powerful – and highly questionable – financial pressure on dissenting parents to conform their educational choices to the majority's values by enrolling their children in public schools to avoid the heavy burden of private school tuition'); Moshe Cohen-Eliya and Yoav Hammer, 'An Argument from Democracy against School Choice: A Critique of Zelman v. Simmons-Harris' (2003) 49 *Loy L Rev* 859, 902 ('A lack of funding for private schools increases the relative cost of education in such schools compared with the cost of public school education. As a result, the number of pupils attending private schools – some of which, as aforesaid, do not teach democratic values – should decrease. In this manner it would be possible to ensure that most students are taught democratic values within public schools'). See also Harry Judge, 'Faith-Based Schools and State Funding: A Partial Argument' (2001) 27 *Oxf Rev Educ* 463, 469–70.

[16] See e.g. Jerry Paquette, 'Public Funding for "Private" Education: The Equity Challenge of Enhanced Choice' (2005) 111 *Am J Educ* 568, 582 ('In the current conjuncture of globalization, restraint, and retrenchment, the proposition that public funding for private schools will have a negative impact on funding for public schools seems difficult to refute. At the very least, all other things being

The interpretation of the Parental Right as a negative claim is, however, subjected to criticism on both fronts, as being either too narrow or too broad. The following subsection discusses the first alternative of reading the Right as a partially positive claim.

B. The Parental Right as a Limited Positive Claim

International law has a long tradition of requiring positive support from the state for minority education. The Treaty Between the Principal Allied and Associated Powers and Poland, 1919 is arguably the first international document to write educational rights into international law. The treaty established that minorities constituting a considerable proportion of a Polish town or district 'shall be assured an equitable share in […] the sums which may be provided out of public funds under the State […] for educational […] purposes,' thus explicitly defining the minorities' right to choose education as a *positive* claim, albeit under a regime predating the United Nations.

Today, the strongest backing for defining the Parental Right as requiring the state to *provide* their children the education of their choice arises for parents belonging to protected minority groups, and especially so to indigenous peoples. But support in international law is found also for a general state obligation to fund private education as long as it is subject to a list of rigorous regulations. Positive readings of the Parental Right as an instrument that guarantees equality in education to minorities appear in ICCPR, ICESCR, and CADE, with the most explicit assertion being stated in the International Labour Organization (ILO Convention) 169.[17]

Article 27(3) of the Convention, which recognizes the right of indigenous and tribal peoples to 'establish their own educational institutions and facilities, provided that such institutions meet minimum stand-

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equal (notably revenues and political will to spend), such funding adds a new spending focus to already thinly stretched state or provincial budgets with the result that the political valence of an average budget line must increase to maintain the current funding level for it. Given this addition, all other things being equal, the public education envelope could be expected either to lose funding or, in the best-case scenario, to have its current rate of increase reduced. In short, the often repeated claim that public funding for private schools 'is from a different pot' and does not negatively impact educational funding is disingenuous').

[17] Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989) (ILO Convention No. 169) (adopted 27 June 1989, entered into force 5 September 1991) 328 UNTS 247.

ards established by the competent authority in consultation with these peoples', also requires the state to ensure that '[a]ppropriate resources shall be provided for this purpose'. This Article explicitly entitles the peoples protected by the Convention to claim material support from the state in establishing autonomous, non-state educational institutions, in contrast to the remarkable absence in many other analyses and debates on the international obligations of states regarding private education. While not directly referencing the Parental Right, this provision clearly concerns parents who choose to send their children to the school managed by their own communities.[18]

Another normative source that assigns the Parental Right positive features is article 27 ICCPR, which states 'persons belonging to [ethnic, religious or linguistic] minorities shall not be denied the right […] to enjoy their own culture, to profess and practise their own religion, or to use their own language'. Article 27 does not explicitly mention the Parental Right but that article's provision has been consistently interpreted to include the right of parents to pass their identity on to their children through education. And while article 27 has been initially formulated as to constitute only a duty of non-interference – hence the text's negative formulation that the right 'shall not be denied' – several sources suggest that the Parental Right in article 27 should be interpreted as a positive claim.

Principal among these sources is General Comment 23 of the Human Rights Committee (HRC), stating that the enjoyment of all rights guaranteed under article 27 depends on the ability of the protected minority groups to maintain their way of life, and that to this end 'positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion'.[19] The HRC's assertion implies that at least in those cases where education proves to be an essential tool for the preservation of a minority's identity, the state should be obligated to provide the necessary means that will guarantee the according education of minority children.

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[18] See also, International Labour Standards Department, *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (2009) 131.

[19] UNCHR 'General Comment 23: Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5 [6.2].

This issue was addressed in the *Waldman* case, which concerned the funding of denominational schools in the Canadian province of Ontario, where some religious schools were granted partial, indirect financial support from the state, but other schools via a special legal status had direct, full public funding.[20] The HRC decision found such differential treatment to violate article 26 ICCPR, which prohibits discrimination on the grounds of religion. However, Martin Scheinin, a member of the HRC, concurred adding a separate analysis of how article 27 impacted the case. In Scheinin's view, where a 'sufficient number' of minority parents considers secular public schools to be incompatible with their views and demands to provide their children with religious (or linguistic) instruction, the state can choose to either establish a public school that would answer their expectations or allocate equal resources to a private school, but doing neither would amount to discrimination. Both choices in any event require positive financial assistance to minority groups and are requisite because 'Article 27 imposes positive obligations for States to promote religious instruction in minority religions'.[21] And while the application of Scheinin's criterion must face the challenge of estimating how many parents are required to constitute this state obligation, his opinion is important for the very recognition of the possibility to do so.

Read together, General Comment 23 and Scheinin's view provide that the Parental Right in article 27 guarantees children belonging to protected minority groups an education that is state-funded and adapted to the way of life and wishes of their parents, at least when essential for preserving the minority's identity and with enough children to justify opening a separate school for this purpose.

The view that the Parental Right of members of minority groups can constitute a positive state duty was similarly adopted in the application of ICESCR. In 2001, the Committee on Economic, Social and Cultural Rights (CESCR) expressed concern about the inability of minorities in Japan[22] to receive education in their language and about their culture within the public system, and the tension it created with the principle of non-discrimination in article 2(2) ICESCR. To address this tension, the Committee recommended that the state recognize the private minority

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20 *Waldman v. Canada* (1999) 7 IHRR 368.

21 Ibid, Scheinin M (concurring) [5].

22 This refers to Buraku and Okinawa communities, the indigenous Ainu people, and people of Korean descent.

schools and make funding available.[23] Unlike *Waldman*, which involved selective funding of private schools, this matter involved the overall lack of funding of special minority education. This was deemed a form of discrimination in comparison with the Japanese majority in the state. This decision indicates that the Parental Right to choose education other than the default provided by the state is in fact a positive claim if only for members of minority groups.[24]

Furthermore, the interpretation of the Parental Right in article 13(3) in conjunction with article 2(2) ICESCR as casting positive obligations on the state is appropriate despite it being defined as 'liberty', which implies only negative duties. First, the Covenant is rooted in a welfare conception of human rights and was explicitly conceived to guarantee 'second generation' rights through positive state obligations. This background coalesces with the rationale of ensuring the education of minority groups in ICCPR and so reinforces the view of the Right as a positive claim at least under the strict conditions of article 27 ICCPR, delineated above.

The same conclusion follows if one applies a contextual (or systematic) method of interpretation to article 13(3),[25] and that due to the fact that the Parental Right appears in both ICESCR and ICCPR and is formulated in both Covenants in identical language (in articles 13(3) and 18(4), respectively).[26] A plausible explanation to resolve this apparent redundancy would be to accredit ICCPR, which protects 'first generation' rights, with

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[23] CESCR 'Concluding Observations: Japan' (24 September 2001) UN Doc E/C.12/1/Add.67 [60].

[24] In its decision, CESCR refers to art 13(2) ICESCR, without explicitly mentioning art 13(3) on the parental liberty. However, since the parental will is the only reason to send children of minority groups in Japan to schools that preserve their identity, the Committee's recommendation clearly requires to interpret the Parental Right – and not only the right of the minority children to receive education – as a positive claim.

[25] Contextual interpretation 'is concerned with the innate connexion in which all the institutions and rules of law are bound up into a great unity'. It clarifies 'in what relation [a single legal provision] stands to the entire system of law and it is practically to enter into the system', Friedrich Karl von Savigny, *System of the Modern Roman Law* (William Holloway tr, 1867). And see Nowak (n 7) XXVI ('Systematic interpretation [of the ICCPR] may also be aided by a comparative analysis of similar human rights conventions, such as the Social Covenant').

[26] The contextual approach is the main method of interpretation in international law. See Vienna Convention on the Law of Treaties (adopted May 23, 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31.

the guarantee of the negative aspect of the Parental Right, and ICESCR, its positive aspect.[27]

Beiter and others also support the joint reading of articles 13(3) and 2(2) ICESCR as generating a positive Parental Right. Their reasoning is that the heavy financial burdens imposed on parents whose convictions do not allow for sending their children to public schools that lack compatible religious or moral education puts them at an unfair disadvantage.[28] And it has been furthermore suggested that the parental 'liberty'-right in article 13(3) should be interpreted as obligating the state to financially support parental choices not only when parents have ideological disagreements with the public curriculum, but as well in cases of gifted or disabled children, if parents wish to provide them with education that will better meet their needs.[29]

II. THE SCOPE OF THE PARENTAL RIGHT

A. Introduction

Having analyzed the nature of the obligations the Parental Right casts on the state, the following subsection addresses the circumstances to which it applies, the extent of the parental discretion in education, and the external constraints on this discretion. These elements define the scope of the parental prerogative to decide what and how their child should learn and determine what level of control parents have over the contents, methods, and organization of her education.

The first principle to be deduced from the definition of the Right in international law is that it concerns children's education, and so its scope includes, by definition, only those parental demands that concern a choice of education. Parents therefore cannot choose to deny the child education altogether. The scope of the Parental Right can be defined either by referring to the substance of the child's education, or, indirectly, by reference to the types of educational institutions that can be chosen by her parents. Indeed, international instruments employ both of these options and prescribe the Right's scope in both substantive and institutional terms. Submitting to the same structure, the chapter makes a distinction between

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27 See Beiter (n 3) 559–60.
28 Ibid 559–60 and references there.
29 Ibid 560, 566, and references there.

these two sub-categories of the Parental Right. Importantly, the scope of the substantive element of the Parental Right applies to both public and private educational institutions.

B. Public Education (Substantive Parental Right)

As opposed to the 'institutional' provisions granting parents the right to choose a non-public school for their child (discussed below), the substantive provisions that address the contents of education are not limited to specific schools. They are equally valid for all institutions – private and public, including institutions run by the state.[30]

Most international and regional instruments, such as ICESCR, ICCPR, the African Charter on the Rights and Welfare of the Child (ACRWC), the American Convention on Human Rights (ACHR), and CADE, limit the scope of the Parental Right to a specific type of instruction, stipulating that parents can only determine the 'religious and moral' education of their children.[31] Elsewhere provisions use different variations of 'religious and philosophical',[32] or yet again, 'religious and philosophical and pedagogical'[33] convictions. Some documents grant parents a general right to choose without qualifying its nature. These latter exceptions may be understood as to refer to education in its broad sense, as encompassing not only religion and morals, but 'the entire process of social life by means of which individuals and social groups learn to develop consciously […] the whole of their personal capacities, attitudes, aptitudes and knowledge',[34] and including the transmission of knowledge and the nurturing of intellectual development.[35] As a rule, the terms 'religious', 'moral', 'philosophical', and 'pedagogical' are interpreted broadly and inclusively.

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30 See e.g. ibid 540–59.

31 ICESCR art 13(3); ICCPR art 18(4); African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990) art 11(4); American Convention on Human Rights (21 November 1969) 1144 UNTS 143 art 12(4); CADE art 5(1)(b).

32 ECHR art P1-2.

33 CFR art 14(3).

34 UNESCO 'Recommendation Concerning Education for International Understanding, Co-Operation and Peace and Education Relating to Human Rights and Fundamental Freedoms' (19 November 1974) s I.1(a).

35 *Campbell* (n 14) [33].

The term 'religion' remains undefined in international and regional human rights instruments.[36] HRC's General Comment 22 (GC22) holds that 'religion' should be 'broadly construed' and apply not only to traditional and institutionalized forms of worship but also to 'newly established' ones.[37] Narrower definitions of 'religion' – as founded upon a belief in a higher force or only encompassing 'known religions'[38] – have also been suggested in the literature, and the legal definition of religion has proven to be a contentious concept in domestic caselaw as well.[39] Notwithstanding the different interpretations of 'religious', the relevant educational provisions always refer to 'religious' only together with 'moral' or 'philosophical' values and so anyway clearly encompassing beliefs that are not validated by a 'Supreme Being', by an already established religious community, or for that matter, any religious authority at all, whatever religion is taken to mean.

The term 'moral' in international instruments, while lacking a clear autonomous definition, is understood to bear the same meaning as the term 'philosophical' in article P1-2, ECHR,[40] as fleshed out by the ECtHR and the (now obsolete) European Commission on Human Rights. According to the Commission's view in the *Campbell* case,

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[36] T. Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law Conference: Religion, Democracy, & Human Rights' (2003) 16 *Harv Hum Rts* J 189, 189–90.

[37] UNCHR, 'General Comment 22: Article 18 ICCPR' (30 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4 [2] (note that CESCR's General Comment 13 does not mention the same broad interpretation for ICESCR). Some further suggest the term should include atheistic values, mirroring whatever definition of 'religious' values is accepted, Beiter (n 3) 542 and references there.

[38] On the former, Beiter (n 3) 541; on the latter, Ben Saul et al., *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1152–53. The limitation to 'known' religions seems, however, misguided. Saul and others base their view on ECHR's decision in *Valsamis v Greece* (1996) 24 EHRR 294 [26], but the Court draws the 'known religion' term from the Greek Constitution and does not use it as a definition of 'religion' in general.

[39] See e.g. the changes in the definition of 'religion' in the caselaw of the US Supreme Court, in Samuel J. Levine, 'A Critique of Hobby Lobby and the Supreme Court's Hands-off Approach to Religion Essays' (2015) 91 *Notre Dame L Rev Online* 26, 34, fn 28.

[40] 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

'philosophical' beliefs consist of 'ideas based on human knowledge and reasoning concerning the world, life, society, etc., which a person adopts and professes according to the dictates of his or her conscience' and can be summarized as 'a person's outlook on life'.[41] Formulating its view as a middle-ground interpretation, the Strasbourg Court added in a like manner that the adjective 'philosophical' in Article 2 is not limited to fully-fledged systems of thought but does exclude 'views on more or less trivial matters'.

The most generous interpretation so far of what constitutes 'philosophical' beliefs was set by the Strasbourg Court concerning the choice of language in which education is provided. Initially, the Court held in the 1968 *Belgian Linguistic* case that the term 'religious and philosophical convictions' does not cover the parents' linguistic preferences,[42] but this interpretation was subsequently rejected. In the 2012 *Catan* case the Court established that *philosophical* convictions in article P1-2 ECHR do include choice of language if it is one of the state's national languages, and ruled that parents have the right to ensure that the *private* education of their child is provided in that national language.[43] Additionally, as shown below, although the circumstances of the case concerned only private schools, the said provision applies also to public education.[44] And finally, since the limitation of parental convictions to 'parental and philosophical' appears only in article P1-2 ECHR, the recognition of linguistic choices as part of the Parental Right is even more natural and evident for provisions like article 13(3) ICESCR, whose phrasing can better accommodate linguistic convictions.[45] Furthermore, due to this

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41 *Campbell and Cosans v United Kingdom* Series B no 42 (Commission Opinion, 16 May 1980) 37.

42 *Belgian Linguistic case* (n 6) [6].

43 *Catan v Moldova and Russia* (2013) 57 EHRR 4 [137], [143]. See also *Cyprus v Turkey* (2002) 35 EHRR 30 [278], [280], where the Court ruled that the Turkish–Cypriot authorities violated ECHR art P1-2 by abolishing secondary Greek-language schools in northern Cyprus and consequently leaving Greek–Cypriot children who have already pursued primary education in Greek without appropriate secondary-school facilities (but note that the infringement of educational rights in this case was rooted in the difficulty to switch the language of learning rather than the right to be educated according to the parents' convictions). For a comprehensive analysis of the language aspect of the right to education see Jacqueline Mowbray, *Linguistic Justice: International Law and Language Policy* (Oxford University Press 2012) 28–50.

44 *Catan* (n 43) para 139; *Kjeldsen* (n 6) [50].

45 See in the same spirit, Saul and others (n 38) 1137–38.

general phrasing, article 13(3) ICESCR can be interpreted as including even linguistic preferences of languages other than national.

Article 14(3) of the Charter of Fundamental Rights of the European Union (CFR) adds 'pedagogical' convictions to that which must be considered. The CFR explanatory notes provide only that article 14(3) was based on article P1-2 ECHR,[46] leading some to suggest that the scope of the Parental Right under both articles is identical.[47] Following this narrative the addition of the 'pedagogical' element may be possibly interpreted as the codification of previous rulings of the ECtHR, such as that the scope of the Right includes opposition to corporal punishment in schools.[48] A less 'originalist' reading of article 14(3) should, however, lead to the conclusion that the new addition represents a distinct category of convictions parents can consider in ensuring the education of their children. I suggest that one option to differentiate pedagogical convictions from religious and philosophical ones is to consider that parents can oppose public school policies based on pedagogical methods or recent research findings in this field yet to be adopted by the state educational system.

As to the meaning of 'convictions' (outlined below) based on which parents are authorized to control the education of their child, the ECtHR held that it is 'not synonymous with the words "opinions" and "ideas" […] and denotes views that attain a certain level of cogency, seriousness, cohesion and importance'.[49] Thus, for instance, opposition to administering corporal punishment on children was classified by the ECtHR in the *Campbell* case as a 'conviction' because it was based upon views relating to 'a weighty and substantial aspect of human life and behavior, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails'.[50]

The Substantive Parental Right applies not only to the contents of a child's education but also to the educational methods and means the school employs, as well as the school's general organization. In public

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46 Draft Charter of Fundamental Rights of the European Union − Text of the Explanations Relating to the Complete Text of the Charter as Set out in Charte 4487/00 Convent 50.

47 Beiter (n 3) 196–97.

48 *Campbell* (n 14). And see below.

49 Ibid [36].

50 Ibid.

schools, therefore, the state is to account for the parental convictions in decisions regarding such topics as: the use of disciplinary means, like corporal punishment;[51] the display of religious symbols, like crucifixes, in classrooms;[52] or the organization of school parades commemorating wars.[53] The relatively broad interpretation of the above provisions is, however, limited by the following substantive and technical restrictions.

The first substantive limitation on the Right deriving from the above provisions is set in light of the fundamental values of the international and regional instruments that protect it. Interpreting the ECHR, the Strasbourg Court has held that 'philosophical convictions' encompass nothing but beliefs that are 'worthy of respect in a 'democratic society'[, …] not incompatible with human dignity [and not conflicting] with the fundamental right of the child to education'.[54] This constraint is valid also for the term 'moral' in article 13(3) ICESCR and other similar provisions, in virtue of the analogy between them and ECHR article P1-2. Indeed, the *travaux préparatoires* of ICESCR reflect the same restrictions on the meaning of 'moral' beliefs. Drafts of article 13(3) ICESCR initially referred to 'philosophical', instead of 'moral' education with the use of the latter eventually prevailing only to emphasize that the parental right does not extend to extreme views that might undermine the state's role in protecting the interests of the child in education.[55]

Second, if the public-school education provided to children seeks to expose children to new information and ways of thinking rather than aiming to subvert the parental values, it is not considered to infringe upon the Parental Right. Thus, according to the ECtHR, public schools can directly or indirectly expose children to religious and moral values even if they contradict the convictions of their parents, as long as the school does not seek to indoctrinate the child into these values and remains impartial as to their validity.[56] Similarly, GC22 allows for 'neutral and

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51 *Campbell* (n 14).

52 *Lautsi v Italy* (2011) 54 EHRR 3 [63]. The Court, however, ended up not prohibiting this practice in Italian schools citing the doctrine of the margin of appreciation.

53 *Valsamis v Greece* (1996) 24 EHRR 294 [27]; *Efstratiou v Greece* App No 24095/94 (ECtHR, 18 December 1996) [28]. In these cases too, however, the Court found the particular school policy not to violate the Parental Right.

54 *Campbell* (n 14) [36].

55 See Beiter (n 3) and references there.

56 See e.g. *Kjeldsen* (n 6) [53]; *Appel-Irrgang v Germany* App No 45216/07 (ECtHR, 6 October 2009).

objective' education,[57] and GC13 asserts that article 13(3) ICESCR permits 'public school instruction […] if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression'.[58] In this spirit, the HRC found that the Parental Right of atheist parents in Finland, whose children were required by their public school to attend classes in the history of religion and ethics, was not violated by this requirement because they were taught 'in a neutral and objective way'.[59] And the ECtHR established that sexual education in Danish public schools does not violate the Parental Right when taught in 'an objective, critical and pluralistic manner'.[60]

In light of the above, the mandate of public schools should be interpreted broadly as including the option of exposing children not only to neutral or objective facts but also to moral and religious values concerning those facts or other perceptions, even if they stand in direct contradiction with the parental convictions, as long as these are not presented as the *only* conceivable beliefs children can adopt. That interpretation is also best aligned with the prohibition on the state to pursue an aim of indoctrination that clashes with the parental convictions.[61]

International and regional documents set a list of basic educational goals to which both public and private educational systems must conform. Parents cannot oppose educational contents and activities that pursue these goals within the public-school system, on any grounds, even if they find them objectionable on religious grounds or otherwise biased.[62]

If certain educational elements imposed by a public school are indeed found to violate the Substantive Parental Right under the above provisions, international law entitles the parent to relieve her child from the part of her public-school curriculum that conflicts with her convictions. The Substantive Parental Right does not, however, amount to introducing

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57 GC22 (n 37) [6].

58 GC13 (n 13) [28].

59 *Erkki Hartikainen v Finland* Communication No 40/1978, UN Doc CCPR/C/12/D/40/1978 [para 10.4].

60 *Kjeldsen* (n 6) [53]. See similar ruling in *Dojan v Germany* App no 319/08 (ECtHR, 13 September 2011).

61 But see the separate opinion of Judge Verdross in *Kjeldsen* (n 6).

62 For the provisions and interpretation of the core goals, see below, the analysis of the Institutional Parental Right.

the educational contents preferred by the parent into the public-school curriculum.

In the public system, the Right amounts, at the very least, to exempting the child from some or all of the classes conflicting with the parent's convictions. Thus, non-Christian parents in Norway were found to have the right to fully exempt their children from compulsory class studies in Christianity, religion, and philosophy, because the class curriculum was found to not be conveyed in an 'objective, critical, and pluralistic manner'.[63] The ECtHR also decided that a father associating himself with the Alevi religious tradition had the right to exempt his daughter from classes on religious culture and ethics in a state school in Turkey, because the classes were shown to provide extensive teaching of Islam but no teaching at all on the Alevi faith, and thus did not meet the criteria of 'objectivity and pluralism'.[64] Finally, the Parental Right of parents in Scotland was sufficient to demand their children are not subjected to corporal punishment by the authorities in the state schools they attended.[65]

The provisions guaranteeing the Substantive Parental Right do not, however, under the current, prevalent interpretation, include the right to include the religious or moral education that accords with the parental convictions within the public-school system. These provisions only create a negative state duty to refrain from instruction that interferes with parental beliefs but do not pose an obligation to integrate those beliefs in the instruction.[66]

Finally, as mentioned, the provisions ensuring the Substantive Parental Right apply not only to public but to private education, where they guarantee state non-interference in the choice of the private school, and state protection against interference on behalf of third parties. For instance, forced closure of private schools that provide education in one of the state's national languages, as well as harassment and intimidation of those interested to attend them, amounts to a violation of the Substantive Parental Right in ECHR article P1-2,[67] and in similar provisions.

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63 *Folgerø and Others v Norway* (2008) 46 EHRR 47 [102].

64 *Zengin v Turkey* App No 1448/04 (ECtHR, 9 October 2007) [63]–[65].

65 *Campbell* (n 14) [37]–[38].

66 On the potential positive attributes of the Substantive Parental Right, see above.

67 *Catan* (n 43) [143].

C. Private Education (Institutional Parental Right)

In addition to the Substantive Parental Right, international law grants parents the prerogative to opt out from the system of public education and choose to send their children to a private educational institution not managed by the state. This Institutional Parental Right is guaranteed explicitly by instruments such as ICESCR and ACRWC and is tacitly inferred also from general provisions in other international and regional instruments concerning the Parental Right. Thus, the *travaux préparatoires* of article 26(3) UDHR,[68] which provides generally for a (prior) parental right 'to choose the kind of education that shall be given' to the child, indicate that the provision was intended to include the right to choose not only the contents of education but also in which school they are to be provided.[69] Even more importantly, the ECHR, which mentions in article P1-2 only the 'right of parents to ensure […] education and teaching in conformity with their own religions and philosophical convictions' and lacks the element of school choice that appears in ICESCR, is nevertheless interpreted by the Strasbourg Court as including both the Substantive and the Institutional Parental Rights.[70]

The distinction made in international instruments between the right to choose a private school and a right to ensure the child's education in accordance with the parent's convictions implies that the scope of the institutional aspect of the Parental Right is – while not unlimited – considerably more extensive than its substantive element, in terms of parental discretion. Had the goal been to allow parents the same degree of control in both public and private institutions, the educational provisions could suffice with introducing the Substantive Parental Right that would apply to all types of educational institutions. The Right to opt for private education entails therefore the prerogative to choose educational contents

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[68] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

[69] See e.g. UN Doc E/CN.4/SR.68 in William A Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (CUP 2013) 1849, 1851–52. See also Beiter (n 3) 93. For similarly worded provisions, see e.g. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69 (1988) art 13(4).

[70] See e.g. *Kjeldsen* (n 6) [50]; *Folgerø* (n 62) [84(b)].

and methods that 'differ substantially' from the public-school curriculum.[71] The parental choice may therefore regard religious schools as well as secular alternatives to public education such as anthroposophic, democratic, or Montessori schools.

The scope of the Parental Right – and the consequent freedom of private educational institutions – is, however, not unlimited only in virtue of their separation from the public system. International law curbs the scope of the Institutional Parental Right by two types of 'external' constraints – ad international law and ad domestic state law. Both types concern the minimal requirements even private schools must pursue, in virtue of those interests of children and the state that conflict with the Parental Right.

The first 'external' limitation on the Institutional Parental Right is embodied by the goals of education, enshrined in international and regional documents as an essential component, 'a most basic form,'[72] of the child's right to education. The educational goals apply to all types and levels of education and so (directly or indirectly) bind all actors in the realm of education, including the parents, the state, and individuals or entities managing private educational institutions. Ensuring that education conforms to these goals is also considered to be part of what has been characterized as the 'minimum core obligations' the state is obligated to fulfill irrespective of the availability of its resources or other difficulties.[73] The list of these core educational goals appears with

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71 Beiter (n 3) 539.

72 GC13 (n 13) [57].

73 CESCR 'General Comment 3: The Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23 [10]; GC13 (n 13) [57]; 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Hum Rights Q* 691, 695; Coomans (n 13) 207.

some variations in the UDHR,[74] ICESCR,[75] CRC,[76] the Protocol of San Salvador,[77] the ACRWC,[78] and other instruments.[79]

As to normative hierarchy between the obligation to implement the core educational goals and the Institutional Parental Right, in case of a clash between the two the former prevails over the latter.[80] This hierarchy seems, however, to be valid only if the clash is clear and cannot be avoided by means of interpretation. The nature of the educational goals as framed in international instruments, particularly in ICESCR, as well as the autonomous status of the Parental Right, suggests that the goals should be interpreted to align as much as possible with the parental educational preferences. Considering the absence of detailed guidelines or unison as to the meaning of some of the educational goals, the relatively mild ratification of the goals in international instruments, and the status of the Parental Right as an autonomous human right, the 'specific formal endorsement' of the goals should accommodate the parental choices of private education.

The second 'external' limitation imposed on the scope of the Institutional Parental Right addresses the role and interests of the state in education, thus balancing the counter-state motivations that give rise to the abovementioned core goals of education. It is manifested in international and regional instruments by further restricting the parental choice of private schools solely to institutions that conform to educational standards set by the state. To disperse any doubts, some documents even

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74 Art 26(2) ('Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace').

75 Art 13(1).

76 Art 29(1).

77 (N 68) art 13(2).

78 Art 11(2).

79 See e.g. WCEFA, *World Declaration on Education for All: Meeting basic learning needs* (1990) art I; *Vienna Declaration and Programme of Action*, UN World Conference on Human Rights (25 June 1993) UN Doc A/CONF.157/23 [I.33], [II.80]; *Plan of Action for the United Nations Decade for Human Rights Education, 1995–2004* (12 December 1996) UN Doc A/51/506/Add.1 pt II.

80 See e.g. GC13 (n 13) [6(c)].

reiterate this precondition as an additional and separate restriction on the right to establish private educational institutions.[81]

The enactment by the state of educational standards in relation to private education is framed in some international provisions as a discretionary power but has been interpreted even in those provisions as a duty that the state cannot forbear. Thus, the provision of article 13(4) ICESCR that 'education given in [non-state] institutions shall conform to such minimum standards as *may* be laid down by the State',[82] is understood in GC13 to mean that the state is '*obliged* to establish "minimum educational standards"', and furthermore, that it '*must* also maintain a transparent and effective system to monitor such standards'.[83]

The state's control over private education does have limits. First, since the state itself is subjected to the international law requirements concerning the goals of education discussed above, the educational standards it lays down for private institutions must be in compliance with these goals and cannot require private schools to violate them. The core goals of education, such as enabling 'all persons to participate effectively in a free society', and promoting 'understanding, tolerance and friendship', also include the civic values essential for the state to preserve its stability and perpetuate the successful functioning of its institutions that must therefore be introduced to children even against parental disagreement.

Second, as seen above, according to article 13(3) ICESCR and other instruments, the power to circumscribe the parental choice applies only to the setting of 'minimum educational standards'. This clearly implies that the regulation of private education must be lower than the requirements made by the state for the system of public education. The rationale of this provision further supports considerable circumscription of the state's power. This limitation rests upon the presumption that equalizing the demands from private education to those in public schools would render the Institutional Parental Right meaningless and grant the state excessive control over education leaving the parents without a viable alternative to the state's educational narrative and agenda. Accordingly, the literature suggests the extent of the said minimum standards must be severely restricted.

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[81] See e.g. ICESCR art 13(4); ACRWC art 11(7).

[82] Emphasis added. For more examples of same formulation see e.g. CRC art 29(2); ACRWC art 11(7).

[83] GC13 (n 13) [54] (emphasis added).

Thus, Beiter claims private education to be 'broadly equivalent' to the public curriculum, 'but must leave the determination of content and methods largely to private schools themselves'; Coomans sees it to be 'evident that such standards may not frustrate' the freedom to establish and direct non-state educational institutions; and Nowak asserts that within the goals of education already set in international law, private schools are free to develop 'their own curricula, to apply specific admissibility criteria (even if these would be considered discriminatory in public schools), and teaching methods'.[84] These views, particularly the latter, essentially mean that the power to impose 'minimum standards' is limited to the educational goals of international law and does not allow the state to dictate any additional criteria. Now, while this approach is certainly warranted given the above considerations, it suffers from an interpretive difficulty. Since private schools are anyway obligated to follow the educational goals set in international law, the provision regarding 'minimum educational standards' becomes redundant.

In order to settle this issue without collapsing the Institutional Parental Right into its substantive counterpart, the 'minimum educational standards' requirement may be interpreted as allowing the state to impose on private schools not only the international goals of education – which, as mentioned, coincide to an extent with the state's interest in nurturing in children such civic virtues as effective participation in society or tolerance – but also regulatory requirements, concerning school registration, safety, health, teachers' qualifications, maximum number of students, student–teacher ratio, and other like *technical* standards. These standards can be characterized as providing the minimum necessary conditions for *any* school environment or curriculum and thus would not frustrate the Parental Right even in the context of private education.

D. Conclusion

The scope of the Parental Right encompasses education in public schools, in private institutions, and at home. The Right therefore is implemented to varying degrees in accordance with the type of education parents have chosen for the child, but all its aspects nevertheless share several robust

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[84] Beiter (n 3) 562–63; Coomans (n 13) 190; Manfred Nowak, 'The Right to Education' in Asbjorn Eide et al. (eds.), *Economic Social and Cultural Rights: A Textbook* (2nd rev edn, Martinus Nijhoff 2001) 264.

standards. Beyond the basic principle that the Parental Right does not extend to completely denying the child's education, it is always subject to the premises that education must be directed to accomplish the core aims of education and fulfill the minimal educational standards set by the state.

The article has set forth that the Parental Right always requires a narrow interpretation of the first two limitations so as to maximally accommodate potential parental views. Thus, if a core educational aim suffers two or more meanings, one of which can accommodate the parents' views, then following the principle of 'consistent interpretation', this meaning should be chosen over others. On the other hand, if the aim clearly contradicts the parental preferences – for example if parents oppose the promotion of tolerance, respect of rights, or basic civic virtue – it must prevail and limit the scope of the Right. Similarly, the state power to dictate minimal standards in all types of education is limited to the administrative regulation of educational conditions – like safety or hygiene – and does not include the imposition of substantive norms beyond the core educational aims.

Furthermore, the scope of the Parental Right always allows parents to have partial control over the fundamental values taught to their children. The Substantive Parental Right – which, as the article argues, extends to public, private and home education, and which authorizes parents to ensure that the basic values constituting their child's education accord with their own convictions – is being interpreted increasingly broadly as relevant to practically all aspects of education that conflict with deeply held parental beliefs. It applies not only to matters of religion or morals, but also to linguistic preferences; it concerns contents that have only incidental disagreement with the parental views; and includes not only the contents and methods of education but also the school organization.

The actual implementation of the Substantive Parental Right, however, reveals the main differences between the scope of parental prerogatives in public and private education. In the public-school system, the Right is abrogated if the educational contents to which the parents are opposed are taught in a neutral and non-indoctrinating manner. And even if the parental convictions are found to be unlawfully disregarded in the public school, the Substantive Parental Right, save for extreme circumstances, entitles parents only to exclude their child from being exposed to the problematic contents, but not to include contents based on their convictions in the school curriculum (given the Parental Right is not a positive claim, see above, Section I).

These constraints do not apply in the alternatives to state education, as they are annulled by the institutional aspects of the Parental Right. These additional aspects grant parents the prerogative to bias their children in favor of their own religious and moral beliefs without having to expose them to the views promoted by the state or other entities, as long as this narrow education does not violate the abovementioned human rights norms. The parents – and in case the child attends a private school, also the school officials – are, however, subjected to supervision by the state, which is obligated to ensure they pursue the core aims of education and fulfill the state's own educational standards.

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5. State funding of private education: the role of human rights

Sandra Fredman

INTRODUCTION

The rapid spread of low-cost for-profit schools in many countries raises many questions for human rights compliance. The recognition of the responsibility of the State to provide education for every child was one of the most important forces for progress in the twentieth century. This process has culminated in the establishment of the fundamental right of every child to receive free and compulsory primary education, with progressive realization of free secondary education. Free and compulsory education serves many purposes, such as combating child labour and facilitating the enjoyment of other rights. But can the State discharge its obligation to provide free and compulsory education by funding private actors to do so, and if so, under what conditions? This is the central question in this chapter.

The chapter will show that, although the State is required to *permit* private education, it is not necessarily obliged to *fund* such education. On the other hand, the State is not *prohibited* from funding private education; indeed, it might have this duty if doing otherwise would be discriminatory. International human rights instruments consistently reiterate that the obligation to respect, protect, and fulfil the right to education remains on the State, regardless of whether it has permitted or funded private providers.[1] The real question therefore concerns the *conditions* under which State funding of private education should be permitted. The liberty of individuals and bodies to establish and direct educational institutions is subject to compliance with minimum standards laid down by the State

[1] ICESCR Art 2(1), 13(3) and (4); CRC Art 3, 29(2).

and to the core values of the right to education. The chapter elaborates on the duties of the State when it permits private education, and how these duties manifest when the State provides funding for such education. The chapter pays specific attention to the duty not to discriminate.

Section I of the chapter considers whether funding of private providers breaches human rights. This section first establishes that there is a duty to permit private schools; second, that there is generally no State duty to fund private schools; and, third, that nevertheless there is no absolute prohibition on State funding for private schools. Section II considers the conditions under which such funding should be provided to ensure compliance with human rights.

Numerous different ways exist in which the State funds private sector involvement in education provision. They range from contracting out the provision of materials such as textbooks and digital technology; to construction of buildings; to subsidies of individual pupils in private schools; to partnerships with private providers over the management of schools; to simply subsidizing private education providers, including religious, linguistic, or other minority schools. Funding mechanisms can include giving charitable status to private schools, thereby allowing them to pay less tax; or favourable contract terms. This chapter does not aim to analyse each of these, but instead to set out the main principles as expounded by international, regional, and selected domestic human rights instruments. The specific type of funding in individual cases needs to be assessed in these terms.

It should be acknowledged at the outset that there is very little express material in the legal sources investigated in this chapter as to the conditions under which public funding of private schools is permissible. There are clear principles which identify the continuing State responsibility in relation to private provision, but these principles apply whether or not the State is providing funding. This chapter therefore aims to extrapolate from the general principles applicable to State responsibilities for the right to education in order to answer this question. To do so, the chapter draws on a number of different sources at international, regional, and municipal level. Each of these sources is based on a different textual mandate and might have varying degrees of legal authority. The aim is therefore not to produce a definitive legal analysis, but to develop a set of principles, and show how they relate to existing legal sources.

I. IS PUBLIC FUNDING OF PRIVATE PROVIDERS COMPLIANT WITH HUMAN RIGHTS LAW?

i. Is There a Duty to *Permit* Private Education?

All the major international human rights instruments include provision for private education. There is no independent right to education in the International Covenant on Civil and Political Rights (ICCPR). Nevertheless, Article 18 (freedom of conscience, thought, and religion) includes a provision requiring States to 'have respect for the liberty of parents and … legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.[2] The International Covenant on Economic, Social and Cultural Rights (ICESCR) is somewhat broader: Article 13 on the right to education includes an express provision requiring respect for the 'liberty of individuals and bodies to establish and direct educational institutions', subject to the values stated in the Covenant and to minimum standards.[3] The UN's Convention on the Rights of the Child (CRC) has a very similar provision. Similarly, the European Convention on Human Rights (ECHR), which states that no one should be denied the right to education, goes on to provide that the State must 'respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.[4]

The Hague Recommendations on the education rights of national minorities take this somewhat further. They declare that States should not impose unduly onerous legal and administrative regulatory requirements which might hinder the enjoyment of the right to found private schools.[5] The right to establish private educational establishments is also protected in domestic constitutions. For example, the South African Constitution provides for the right to establish independent private educational institu-

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[2] ICCPR 1966, Article 18(4).

[3] ICESCR, 1976 Article 13(4); see also CRC, Art 29(2).

[4] ECHR Protocol 1 Article 2; contrast the absence of such a provision in the African Charter on Human and People's Rights (1981).

[5] The Hague Recommendations regarding the education rights of national minorities (October 1996), Recommendations 8, 9 and 10 and explanatory notes to Recommendations 8–10. See https://www.osce.org/hcnm/32180 (accessed 13 April 2018).

tions.[6] Similarly, under the Constitution of India, religious and linguistic minorities have the right to establish and administer educational institutions of their choice.[7]

These provisions can be regarded as fulfilling the freedom dimension of the right to education. The freedom dimension of the right is crucial to protect parental rights to opt out of State education, particularly where there is a risk that the State might use the education system as propaganda or to suppress minority religions. This means that the State is under an obligation, at the very least, to permit private provision of education. However, the freedom aspect should not obscure the social and equality dimensions of the right to education. Education as a social right, which is enshrined in the ICESCR, goes beyond protection against State interference in the content or provision of education, and establishes a positive right to free and compulsory education, particularly at the primary level.[8] Education as an *equality right* means that States should guarantee that the right to education can be exercised without discrimination on grounds such as race, religion, gender or disability.[9] The question of whether the State is either required or entitled to fund private schools must also account for the maximization of these aspects.

ii. Is There a Duty to Fund Private Education?

The freedom aspect of the right to education means that the State must permit private education. It does not, however, necessarily mean that the State must fund private education.[10] In the *Belgian Linguistics* case, the European Court of Human Rights (ECtHR) refused to hold that there was any requirement for the State to establish at their own expense or to subsidize education of any particular type or at any particular level.[11] The Human Rights Committee (HRC) has similarly held that a State party is under no obligation under the ICCPR to provide public subsidies for

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6 South African Constitution, 1996, s 29(3).

7 Constitution of India, 1949, Article 30.

8 ICESCR, Article 13.

9 ICESCR, Article 2(2); CRPD Article 5.

10 It was noted above that there are myriad ways in which the State can fund private education. This subsection sets out the main principles, which might need to be applied in specific form to different types of funding.

11 *Belgian Linguistic Case (No 2)* (1979–80) 1 EHRR 252 (European Court of Human Rights) para [3].

private education where it has a comprehensive public school system in place.[12] In two communications against Sweden, the Committee rejected the claim that Sweden's refusal to provide financial assistance towards the cost of private schooling constituted discrimination in breach of the ICCPR.

In the first case, *Lindgren v Sweden*,[13] the applicants argued that because of the compulsory nature of school attendance, the State should offset the cost of textbooks and school meals at private schools. They also claimed that the State discriminated between their children and pupils of public schools contrary to Article 26 ICCPR, which establishes equality before the law and the right not to be discriminated against on specific grounds. The Committee rejected their claim as the parents were free to take advantage of public sector schooling. Since the State made public schooling available to all children, including a variety of ancillary benefits, such as free transport by bus, free textbooks, and school meals, the State party was not under an obligation to provide the same benefits to private schools. The decision to use private education was a free choice recognized by the State party. But such free choice understandably brought with it consequences, namely payment of tuition, transport, textbooks, and school meals. The Committee concluded that a State party could not be deemed to discriminate against parents who freely choose not to avail themselves of benefits open to all. Therefore, the State had not violated Article 26 by failing to provide the same benefits to private school pupils as to those at public schools.

In the second case, *Carl Henrik Blom v Sweden*, the author challenged his government's refusal to provide financial aid for him to attend a private Rudolf Steiner School. He claimed that this constituted discrimination against pupils in private schools in violation of the equality guarantee in Article 26 ICCPR. At that time, Swedish law provided that the State was not obliged to provide public funding to private schools and that funding could only be provided to schools subject to State supervision. The school in question had not yet been placed under such supervision. The HRC decided that the State party could not be deemed to act in a discriminatory manner if it did not provide the same level of

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[12] *Lindgren v Sweden*, Communication No 299/1988; UN Doc. CCPR/C/40/D/298-299/1988 (1990); *Carl Henrik Blom v Sweden*, Communication No. 191/1985, UN Doc CCOR/OP/2 at 216 (1990).

[13] *Lindgren v Sweden*, Communication No 299/1988; UN Doc. CCPR/C/40/D/298-299/1988 (1990).

subsidy to private and public education when the private system is not subject to State supervision. It therefore rejected the claim.[14] As summarized by the concurring opinion in the later case of *Waldman*, while the Committee in these cases 'left open the question of whether the Covenant entails, in certain situations, an obligation to provide some public funding for private schools, it concluded that the fact that private schools, freely chosen by the parents and their children, do not receive the *same level* of funding as public schools does not amount to discrimination.'[15]

A similar principle was established in South Africa, although using very different reasoning processes. In a case in 2013, private schools contested the withdrawal of State subsidy of private schools as a breach of contract and of the right to education. The South African Constitutional Court held that no binding contractual right to such subsidies existed. Provided the State provided reasonable notice and fulfilled existing obligations, it was entitled to withdraw such funding.[16] Similarly, the Hague Recommendations on the education rights of national minorities, while declaring that private schools should not be prevented from seeking resources from all domestic and international sources, nevertheless find no formal obligation to fund such schools.[17]

Although the State has no obligation to fund private schools, if it does choose to do so, it cannot discriminate on the basis of a prohibited grounds such as race, religion, or gender. In its General Comment on Education, the Committee on Economic, Social and Cultural Rights (CESCR) asserts that a State party has no obligation to fund educational institutions established under Article 13(4) of the Covenant. However, if it does make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds,

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[14] *Carl Henrik Blom v Sweden*, Communication No. 191/1985, UN Doc CCOR/OP/2 at 216 (1990).

[15] *Arieh Hollis Waldman v Canada HRC*, Communication No. 694/1996 (5 November 1999, UN Doc CCPR/C/67/D/694/1996) concurring opinion para 3; at the European level, see also *Jordebo v Sweden*, upholding the State's right to refuse to recognize a private school for the purposes of fulfilling the duty to provide private education: Application No. 11533/85 (admissibility decision).

[16] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education* [2013] ZACC 10 (South African Constitutional Court).

[17] The Hague Recommendations regarding the education rights of national minorities (October 1996), Recommendations 8, 9 and 10 and explanatory notes to Recommendations 8–10. See https://www.osce.org/hcnm/32180 (accessed 13 April 2018).

namely race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.[18] Similar legal authority exists at domestic level. Thus, the Constitution of India prohibits the State from discriminating when granting aid to an educational institution on the grounds that it is under the management of a religious or linguistic minority.[19] A similar conclusion was reached by the US Supreme Court in a recent case. Giving the opinion of the Court, Chief Justice Roberts held: 'A state need not subsidize private education. But once a state decides to do so, it cannot disqualify some private schools solely because they are religious.'[20]

The HRC has echoed this approach, holding that, under the ICCPR, if the State chooses to fund some religious schools, it must make this funding available without discrimination to all religious groups. Thus, in its decision in *Waldman*, the HRC found a violation of Canada's duty not to discriminate, since Roman Catholic schools were given full and direct public funding, whereas other religious schools were not. The Committee therefore upheld a complaint of discrimination by a member of the Jewish faith who enrolled his children in a private Jewish school in Ontario. According to the Committee: 'The Covenant does not oblige State parties to fund schools which are established on a religious basis. But if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination.'[21] It therefore found a violation of the author's rights under Article 26 of the Covenant to equal and effective protection against discrimination.

This also raised the question of whether the State is required to establish a public minority school, or can discharge its duty not to discriminate by providing comparable public funding to a private minority school. In his concurring opinion, Martin Scheinin stated that one legitimate criterion would be whether there were sufficient minority children to make a public minority school a viable part in the overall system of education. In this case, since there were sufficient Jewish children, it was discriminatory to provide only indirect funding for the Jewish school as compared to full direct funding provided to public Roman Catholic schools

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[18] ICESCR Gen Comment 13 on the Right to Education (1999), para 54.

[19] Constitution of India, 1949, Article 30.

[20] *Espinoza v Montana* No.18-1195 (Decided June 30, 2020). See https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf (15 July 2020).

[21] *Arieh Hollis Waldman v Canada*, HRC Communication No. 694/1996 (5 November 1999, UN Doc CCPR/C/67/D/694/1996) Para 10.6.

in Ontario. This can be contrasted with the earlier case of *Tadman*, in which parents of children from a variety of non-Catholic faiths claimed that either funding should be provided for all other religious schools, or no funding should be provided for Roman Catholic schools. The HRC found that the claim was inadmissible. Because the parents were asking for funding to be withdrawn from Catholic schools, they had lost nothing and therefore could not be regarded as victims.[22]

On the basis of the concurring decision in *Waldman*, Beiter argues that State parties have an obligation either to provide for religious education of minority religious groups in public schools or alternatively to grant State funding to private schools operated by such groups if a sufficient number of children would attend such a school.[23] He further supports this by reference to Article 27 ICCPR which gives persons belonging to ethnic, religious, or linguistic minorities the right to enjoy their own culture, practise their own religion, and use their own language.[24] However, this principle has not been clearly established by the HRC.[25]

iii. Is the State Prohibited from Funding Private Education?

This raises the key question of whether the State is prohibited from funding private providers. At domestic level, this depends on the wording of the national constitutional right to education. Some human rights instruments specifically permit the State to fund private providers. The South African Constitution expressly entitles the State to provide State subsidies for independent educational institutions.[26] In India, the *Right to Education* legislation enacted under the recently amended Article 21A of the Indian Constitution includes as a central feature the duty of private unaided institutions to make 25 per cent of the places available to children from disadvantaged sectors of society. The State pays the

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22 *Tadman and Ors v Canada*, Admissibility, Communication No 816/1998, UN Doc CCPR/C/67/D/816/1998, IHRL 3616 (UNHRC 1999), 29th October 1999. For an interesting contrast in Canada, see the Good Spirit case (2017 SKQB 109). Meghan Campbell, "A New Ground Of Discrimination: Rural Remoteness?" (OxHRH Blog, 5 June 2017). See http://ohrh.law.ox.ac.uk/a-new-ground-of-discrimination-rural-remoteness (accessed 15 July 2020).

23 K. Beiter, *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers, 2006), 452.

24 Ibid, 453.

25 Human Rights Committee Communication No. 1155/2003 (Norway).

26 South African Constitution, S29(4).

private school the same amount per capita as it would spend on educating the child in the public sector. The private school is expected to subsidize the remainder, and to give each child equal access to all the facilities at the school. The statute was challenged by private proprietors as a breach of their freedom of occupation. The Supreme Court upheld the statute, except in relation to minority schools, which it held had the right to retain their minority character. There was, however, no challenge to the use of public funds for children in the private sector.[27]

By contrast, in several US States, State courts have held that the State Constitution bars the use of money intended for public schooling to be used on a voucher system to send individual learners to private schools. The Constitution of Louisiana states: 'The legislature shall provide for the education of the people of the State and shall establish and maintain a public educational system.'[28] It requires the legislature to 'fully fund the current cost to the state' of 'a minimum foundation program of education in all public elementary and secondary schools', and the 'funds appropriated shall be equitably allocated to parish and city school systems'.[29] The Supreme Court of Louisiana held that this meant that funds approved for the minimum foundation programme could not be diverted to non-public schools or other non-public course providers. On the other hand, the Constitution specifically permits the funding of textbooks for students attending non-public schools.[30]

A similar and even more emphatic conclusion was reached in relation to the Florida Constitution, which provides that 'It is … a paramount duty of the state to make adequate provision for the education of all children residing within its borders.' It goes on to state: 'Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high-quality system of free public schools.'[31] In *Bush v Holmes*, the Supreme Court of Florida struck down the statutory provision of school vouchers, which used public funds to allow students to obtain a private school education from kindergarten to grade 12 as an alternative to public school edu-

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27 *Society for Un-aided Private Schools of Rajasthan v. Union of India* (2012) 6 SCC 1 (Indian Supreme Court). The responsibility for determining schools with minority status lies at the level of individual Indian states.

28 La. Const. art. VIII, § 1.

29 Constitution of Louisiana, Article VIII, § 13(B).

30 *Louisiana Federation of Teachers v State of Louisiana* 118 So.3d 1033 (2013) (Supreme Court of Louisiana).

31 Florida Constitution Article IX, section 1(a).

cation.[32] The Court held that the programme diverted public funds into private systems in competition with free public schools, which were the sole means set out in the Constitution to provide for education of children in the State. The diversion 'not only reduces money available to the free schools, but also funds private schools that are not "uniform" when compared with each other or the public system. Many standards imposed by law on the public schools are inapplicable to the private schools receiving public monies.'[33] The Court emphasized that this did not diminish the basic right of parents to educate their children as they saw fit. Only when the private school option depended on public funding was the choice limited.[34]

It should be noted that these principles are not necessarily replicated at Federal level in the US. The US Supreme Court has held that education is not a fundamental right, and refused to find that funding arrangements based on local taxes were in breach of the right to equality under the Fourteenth Amendment, even though they clearly discriminated against poorer residents.[35] Moreover, the Court seems to be moving away from the strict principle that religious institutions should be excluded from government grant programmes. Indeed, a case in 2017 required the State of Missouri to include a preschool and day-care centre run by Trinity Lutheran Church in its programme to provide grants to schools for playground surfaces made from recycled tyres. The exclusion it was held, 'expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.'[36]

At international level, it is difficult to find a definitive statement on the permissibility of public funding for private providers. However, there are some clear indications that State funding of private providers is not prohibited. As we have seen, the CESCR has stated that a State party has no duty to fund private educational institutions. But if it does elect to

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32 *Bush v Holmes* 919 So.2d 392 (2006) (Supreme Court of Florida).

33 Ibid, 398.

34 Ibid.

35 *San Antonio Independent School District v. Rodriguez* 411 U.S. 959 (1973) (U.S. Supreme Court).

36 *Trinity Lutheran Church v Comer* 137 S. Ct. 2012; Espinoza v Montana No.18-1195 (Decided June 30, 2020). See https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf (accessed 15 July 2020).

make a financial contribution, it should do so without discrimination.[37] This strongly suggests that funding of private institutions is not prohibited. Similarly, the more recent CESCR General Comment on State obligations in the context of business activities states that privatization is not in itself prohibited, but expresses concern that private education is not affordable to many individuals.[38] The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) General Recommendation on education similarly makes no clear statement suggesting that the funding of private providers is prohibited. Thus, the key issue is not whether State funding of private providers is prohibited, but what conditions should be attached to such funding. It is this question to which we now turn.

II. UNDER WHAT CONDITIONS IS PRIVATE FUNDING PERMISSIBLE?

Little definitive material exists in the legal sources investigated in this chapter about the conditions under which private funding of education is permissible. There are clear principles articulating State responsibility in relation to private provision, but these principles apply whether or not the State is providing funding. This section therefore aims to extrapolate from the general principles applicable to State responsibility for the right to education to answer this question. In order to do so, the chapter draws on a number of different sources at international, regional, and municipal levels. As mentioned above, each of these sources is based on a different textual mandate and might have varying degrees of legal authority. The aim is therefore not to produce a definitive legal analysis, but to develop a set of principles, and show how they relate to existing legal sources.

The central principle is that the State remains responsible for the provision of education. This continues to be the case even if parents exercise their choice to find alternative education for their children or individuals choose to establish their own institutions. Whether it funds private providers or not, the State retains its responsibility to ensure that all providers conform to educational standards set for schools, and

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[37] CESCR General Comment 13 (1999), para 54.

[38] General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para 21.

fulfil the primary values informing the right to education, as set out, for example in ICESCR.[39] This is clearly established under both the CESCR and the CRC. Article 13(3) ICESCR states that parents' liberty to choose schools must be respected provided they conform to 'such minimum educational standards as may be laid down or approved by the State.'[40] Under Article 13(4), the right to establish and direct educational institutions is additionally subject to the requirement to respect the principles in Article 13(1),[41] namely that education should 'be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms'. In addition, education should:

> enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.[42]

The CRC takes a similar approach. Thus, the liberty of individuals and bodies to establish and direct educational institutions should always be subject to minimum standards laid down by the State and the general principles applicable to all institutions. The CRC expands the principles in the ICESCR to include the development of respect for the 'child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own'.[43] In addition, education should be directed to 'the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin'; and to 'the development of respect for the natural environment'.[44]

The duty to monitor private institutions and insist on minimum standards applies to States regardless of whether public funding for pupils attending these institutions is provided. Given that the State is permitted

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39 See the values set out in ICESCR Article 13(1).
40 ICESCR Art 13(3).
41 ICESCR Art 13(4).
42 ICESCR Art 13(1).
43 CRC Art 29(1)(c).
44 CRC Article 29(1)(d) and (e).

to provide funding if it so chooses, the question arises of whether the State accrues *extra* obligations when it does provide public funding. The State's continuing obligations are best analysed under the three-fold duty to respect, protect, and fulfil the right to education. Under each heading, it will be asked whether the State has additional or different duties when it provides funding for private education.

i. Duty to Respect

The State's duty to respect entails a duty not to obstruct the enjoyment of the right to education. It is most usually manifested as a prohibition on indoctrination and a duty to permit parents and individuals to establish schools to educate their children according to their convictions, as we have seen. State funding to private providers arguably creates further obligations. In particular, the duty not to obstruct education means that public funding to private providers should not undermine the State's own provision for education through public funding. As highlighted in the Louisiana and Florida cases (as well as the Abidjan Principles), the use of public funds for private education must not divert public funds away from public education which would otherwise undermine the State's primary responsibility to provide free and compulsory quality education to all children.

The CESCR has highlighted this issue in its Concluding Observations on several countries in recent years. In its Concluding Observations in respect to Kenya in 2016, the CESCR expressly linked lack of investment in public schooling to the proliferation of low-cost private schools.[45] As discussed in Chapter 9 of this volume, the spread of such schools has in turn led to segregation and discriminatory access to education, particularly for disadvantaged and marginalized children, such as those living in informal settlements and semi-arid areas.[46] The Committee made it clear that the State has primary responsibility for the right to education. It called on the State to take all measures necessary to strengthen its public education sector, including increasing the budget allocated to primary legislation, and improving access to and quality of primary education for all without hidden costs.[47]

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45 CESCR Kenya Concluding Observations (2016).
46 CESCR Kenya Concluding Observations (2016).
47 CESCR Kenya Concluding Observations (2016), paras 57–58.

In relation to Uganda, in its Concluding Observations in 2015, the CESCR similarly expressed its concern at the deteriorating quality of education in public schools. This included hidden costs in public schools on the one hand, and the widening of the gap in access to quality education resulting from the increase in the provision of private education, disproportionately affecting girls and children from poor families, on the other.[48] Again stressing that the State retains primary responsibility to provide quality education to all children, it recommended that the State party should allocate sufficient resources to the education sector at the same time as strengthening regulations and expanding monitoring and oversight mechanisms over private schools.[49]

This also manifests in relation to international cooperation, where the donor State has a duty not to obstruct the right to free and compulsory education in recipient States. Both the CESCR and the Committee on the Rights of the Child have identified that financial support for private actors for low-cost and private educational projects in developing countries contributes to undermining the quality of free public education and creates segregation and discrimination.[50] Thus, in its Concluding Observations in relation to Ireland in 2016, the CESCR expressed its concern that some of the official development assistance provided by Ireland was reportedly used for activities in contravention of the social, economic, and cultural rights in the receiving countries. It expressed its particular concern at:

> the financial support provided by the State party to private actors for low-cost and private education projects in developing countries, which may have contributed to undermining the quality of free public education and created segregation and discrimination among pupils and students

in contravention of Articles 2, 13, and 14 on the right to education.[51]

Similarly, in its Concluding Observations in relation to the UK in 2016, the Committee on the Rights of the Child expressed its concern at the UK's funding of low-fee, private and informal schools run by for-profit

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48 CESCR Uganda Concluding Observations (2015), para 36.

49 Ibid.

50 CESCR Concluding Observations Ireland (2016 E/C.12/GBR/CO/6) para 14; CRC Concluding Observations UK (2016).

51 CESCR Concluding Observations Ireland (2016 E/C.12/GBR/CO/6) para 14.

business enterprises in recipient States. It recommended that the State party should ensure that its international development cooperation:

> supports the recipient States in guaranteeing the right to free compulsory primary education for all, by prioritizing free and quality primary education in public schools, refraining from funding for-profit private schools, and facilitating registration and regulation of private schools.[52]

When a particularly close relationship between the State and the private provider emerges, the private provider might be perceived as carrying out a public function, and therefore subject to the same duties to respect human rights as the State itself. In its recent General Comment on State obligations under the ICESCR in the context of business activities, the CESCR noted that, in accordance with international law:

> States parties may be held directly responsible for the action or inaction of business entities: (a) if the entity concerned is in fact acting on that State party's instructions or is under its control or direction in carrying out the particular conduct at issue, as may be the case in the context of public contracts; (b) when a business entity is empowered under the State party's legislation to exercise elements of governmental authority or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities; or (c) if and to the extent that the State party acknowledges and adopts the conduct as its own.[53]

This effect would depend on the nature of the funding and the subsequent relationship between the State and the private provider.

In recognition of the fact that governments are increasingly using private bodies to carry out functions traditionally carried out by the State, some jurisdictions have developed principles to determine when private bodies can be regarded as carrying out public functions. In some circumstances, this entails holding the State responsible for the private bodies' actions, as above. In others, the body itself is considered to be bound by human rights obligations when carrying out that function. The tests for when a body is carrying out a public function are complex and variable, and cannot be elaborated on here.

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[52] CRC Concluding Observations UK (2016).

[53] CESCR General Comment No. 24 (2017) on State obligations under the *International Covenant on Economic*, Social and Cultural Rights in the context of business activities, para 11.

ii. Duty to Protect

The duty to protect requires the State to protect individuals from violations of their rights by third parties. In the context of education, it requires the State to ensure that private providers adhere to the standards required of all schools as well as furthering the principles and values which inform the right to education. A key example concerns discipline in schools. In its General Comment on the Right to Education, the CESCR states that a State party must ensure that discipline which is inconsistent with the Covenant does not occur in either public or private educational institutions.[54] Similarly, the ECtHR has consistently held the State cannot absolve itself of responsibility to secure the right to education of every child by delegating its obligations to private bodies or individuals. Nor is the responsibility of the State limited to the mere establishment of schools; it includes duties in relation to the provision of education within the school and, most specifically, the school's disciplinary system. Thus, when a head-teacher in an independent school administers corporal punishment, this activity would engage the responsibility of the State.[55]

This obligation was further underlined by the ECtHR in the important case of *O'Keefe v Ireland*, which concerned persistent incidents of sexual abuse by teachers in Church owned and managed schools in Ireland.[56] The Court found that governments have an inherent positive obligation to protect children from ill treatment, an obligation of acute importance in a primary school context. The obligation was not fulfilled when the Irish State, which was aware of the sexual abuse of children by adults, 'nevertheless continued to entrust the management of the primary education of the vast majority of young Irish children to non-state actors … without putting in place any mechanism of effective state control against the risks of such abuse occurring'.[57] The State was held to have failed to fulfil its positive obligation to protect the applicant from the sexual abuse to which she was subjected to while at school.

What extra is required if public funding is involved? There is very little direct authority on this issue. Some possibilities, however, can be derived from basic principles. The UN High Commissioner for Human Rights

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54 CESCR General Comment No. 13 para 41.

55 *Costello-Roberts v UK* (1995) 19 E.H.R.R. 112 (European Court of Human Rights).

56 *O'Keeffe v Ireland* (2014) 59 EHRR 15 (ECtHR).

57 Ibid, para 168.

and the CESCR clearly state that the State should take legislative and other positive measures to discharge its duty to protect.[58] In the context of public funding of private schools, one highly effective positive measure is through attaching conditions to the provision of funding. A key aspect of the State's positive duty not to be complicit in human rights violations and its duty to protect is to ensure that funding, whether supplied through a contract or other measure, would be conditional on the private provider meeting human rights standards. It is crucial, however, that funding is withdrawn if such conditions are not met, which raises an additional issue about the sustainability of private education and the fate of the students should the State have to rescind funding.[59] Properly enforced, contract compliance measures are a very effective regulatory tool.[60]

In its General Comment on the Right to Inclusive Education, the Convention on the Rights of People with Disabilities (CRPD) Committee makes the most explicit recommendation on the use of public procurement[61] to achieve equality for disabled persons in several contexts. First, it states that, given the widespread lack of textbooks and learning materials in accessible formats such as Braille or digital formats, States should consider developing guidelines for the conversion of printed material into accessible formats, and make accessibility a central aspect

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[58] Report of the United Nations High Commissioner for Human Rights (E/2015/59, 19 May 2015), paras 17–19; Committee on Economic, Social and Cultural Rights, general comment No. 15 (2003) on the right to water (arts. 11 and 12 of the Covenant), para. 21; general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 33; and general comment No. 12 (1999) on the right to adequate food, para. 15.

[59] The situation of a publicly funded private school closing in the middle of the year is discussed in Björn Åstrand, 'From Citizens into Consumers: The Transformation of Democratic Ideals into School Markets in Sweden' in Frank Adamson, Björn Åstrand and Linda Darling-Hammond (eds.), *Global Education Reform: How Privatization and Public Investment Influence Education Outcomes* (Routledge, 2016), 73–109; see also *Juma Musjid v Essay* (2011) ZACC 13 (South African Constitutional Court).

[60] Christopher McCrudden, *Buying Social Justice* (Oxford University Press, 2007).

[61] Public procurement refers to the purchase by governments and state-owned enterprises of goods, services and works: Organisation for Economic Co-operation and Development (OECD) Directorate for Public Governance, https://www.oecd.org/gov/public-procurement/ (accessed 15 July 2020).

of education-related procurement.[62] Second, public procurement should be used to implement the requirement that all new schools be designed and built following accessibility standards, and existing schools should be adapted within a reasonable time frame.[63] Third, State parties should use mechanisms available under public procurement processes and partnerships with the private sector to allocate budgets to ensure inclusive education for all. Such allocations should prioritize ensuring adequate resources to render education settings accessible, to invest in inclusive teacher education, to provide accessible transport to school, to make appropriate learning materials available, to provide assistive technologies and sign language. and to implement awareness raising strategies to address stigma and discrimination and to reduce bullying.[64]

The UN *Guiding Principles on Business and Human Rights* give further guidance on the ways in which the State should discharge its duty to protect when it contracts with or legislates for business enterprises to provide services impacting on the enjoyment of human rights. Although these are not specific to the education sphere, they are clearly applicable to the public funding of private education providers. Several principles are relevant in this context. As a start, States should exercise adequate oversight to ensure they meet their international human rights obligations. This entails, as a necessary step, that relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. In addition, they should ensure that they can effectively oversee the enterprises' activities, including through adequate independent monitoring and accountability mechanisms.[65]

The Principles also require States to promote awareness of and respect for human rights by business enterprises with which they conduct commercial transactions, including through terms of contracts.[66] Where business enterprises are owned or controlled by the State, the latter should

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[62] CRPD General Comment No. 4 The Right to Inclusive Education para 24.

[63] CRPD General Comment No. 4 The Right to Inclusive Education para 63.

[64] CRPD General Comment No. 4 The Right to Inclusive Education para 69.

[65] United Nations Human Rights Office of the High Commissioner *Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy Framework'* (New York, US and Geneva, 2011), Principle 5.

[66] Ibid, Principle 6.

take additional steps to protect against human rights abuses. The more the business enterprise relies on taxpayer support, the stronger the State's duty to ensure the enterprise respects human rights.[67] This is also the case where business enterprises receive substantial support and services from State agencies. The latter might include development agencies and development finance agencies. In these circumstances, States should require due diligence by the agencies themselves and by business enterprises or projects receiving their support, especially where the nature of the business poses a significant risk to human rights.

Thus, the Guiding Principles affirm that the State's duty to protect extends to all situations in which a commercial nexus exists between the State and businesses, including contracting out, privatization, and the purchase of goods and services through public procurement. A recent survey of 20 jurisdictions found that central governments and other public bodies were not fulfilling this duty. In the few jurisdictions that did address human rights, their scope was limited to specific human rights, such as modern slavery, or human rights instruments, such as International Labour Organization (ILO) conventions.[68] The survey makes no mention of education provision.

A particularly important aspect of the duty to protect in the context of providing public financing is the duty of States as members of multilateral institutions that deal with business related issues, such as international trade and financial obligations. In participating in such institutions, States retain their human rights law obligations.[69] In General Comment 13, the CESCR emphasizes that international financial institutions, especially the World Bank and International Monetary Fund (IMF):

> should pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis … The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to education.[70]

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67 *Guiding Principles on Business and Human Rights*, Principle 4.

68 International Learning Laboratory, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions* (July 2016), http://www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions/ (accessed 20 April 2018).

69 *Guiding Principles on Business and Human Rights*, para 10.

70 CESCR General Comment 13, para 61.

Given that these bodies get their mandates through the participation of individual States, it is crucial that States fulfil their duty to protect in relation to education by ensuring that international financial institutions take these obligations seriously.

iii. Duty to Fulfil

According to the CESCR General Comment on Article 13, the State has the duty to fulfil the availability of education 'by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries'.[71] There is little direct reference by the Committee to the implications for the duty to fulfil of the public funding of private education providers. In this subsection, as in the previous one, an attempt is made to extrapolate from the basic principles, and from examples at international, regional, and domestic level, to flesh out such implications.

a. Duty of non-discrimination

The main area in which the duty to fulfil has traction in relation to public financing of private providers relates to equality and non-discrimination. The background principle is that the duty to fulfil the right to education includes the duty to ensure that the right to education is enjoyed equally and without discrimination on any of the prohibited grounds. In all human rights instruments, the duty not to discriminate is an immediate duty, not subject to progressive realization or maximum available resources. Thus when considering public financing of private providers, these transactions must take care not to discriminate, either directly or indirectly.

The CEDAW Committee has given detailed attention to this duty in the context of gender. In its 2017 *General Recommendation on the Right to Education*, it notes that in times of economic crises, many State parties make cuts to social services and outsource education to private entities, including religious or community groups or non-governmental organizations (NGOs). The Committee emphasizes that 'privatization has specific negative consequences for girls and women, and in particular girls from

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[71] CESCR General Comment 13 on the Right to Education, para 50.

poorer families, namely, their exclusion from education'.[72] It therefore recommends both that the State provide universal free and compulsory education, regardless of socio-economic status, and that the State ensure that private actors respect the non-discrimination standards required in public institutions, as a condition of their running private institutions.[73]

In its provision of public financing, the State is also under duty to prevent discrimination on grounds of disability. Both the CESCR and the CRPD have elaborated this duty. In its General Comment on Persons with Disabilities, the CESCR emphasizes that, when public services provision is increasingly privatized, private providers must be subject to both non-discrimination and equality laws in relation to persons with disabilities.[74] While the Committee accepts that it may be appropriate for governments to rely on private groups to assist persons with disabilities in various ways, this can never absolve governments of their duty to ensure full compliance with ICESCR rights.[75]

Likewise, the CRPD General Comment on Inclusive Education, noting the growth of private sector education, emphasizes that the right to inclusive education extends to the provision of all education, not just that provided by public authorities. State parties must ensure that persons with disabilities can access education in both public and private academic institutions on an equal basis with others.[76] This means that States must put in place legislative and other measures for the regulation, monitoring, oversight, enforcement, and the adoption of policies as a framework for ensuring that private providers do not infringe the rights of persons with disabilities. Private educational institutions and enterprises should not be permitted to charge additional fees for accessibility and reasonable accommodation and must be prevented from refusing to enrol persons with disabilities on the basis of their impairment.[77]

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[72] CEDAW General Recommendation No. 36 (2017) on the right of girls and women to education (2017), paras 38–39.

[73] CEDAW General Recommendation No. 36 (2017) on the right of girls and women to education (2017), paras 38–39.

[74] CESCR General Comment No. 5 Persons with Disabilities (1994), para 11.

[75] CESCR General Comment No. 5 Persons with Disabilities (1994), para 12.

[76] CRPD Committee General Comment No. 4 (Right to Inclusive Education) (2016), para 24.

[77] CRPD Committee General Comment No. 4 (Right to Inclusive Education) (2016), paras 39 and 76.

Perhaps the most pervasive form of discrimination resulting from privatization of education relates to people living in poverty. Discrimination on grounds of socio-economic status is not expressly mentioned in the relevant treaties. In their General Comments, several of the Committees nevertheless address the issue of discrimination against poorer learners, especially in relation to public funding decisions. In its General Comment on Education, the CESCR stresses that if sharp disparities in spending policies result in differing qualities of education for persons in different geographical locations, this situation might constitute discrimination under the Covenant.[78] Thus, if public funding of private bodies is provided, it cannot be done in a way which would cause or increase disparities in quality of education for different regions. Given that regional differences are often a proxy for economic disparities, this stipulation is one way of shaping the duty to fulfil so that it does not decrease access to education based on poverty.

The CEDAW Committee addresses poverty as an intersectional issue. The Committee is clear that, at the intersection of poverty and gender, girls and women are most affected by the costs of education. It thus states that State parties should take:

> all measures to ensure that user fees and hidden costs do not have a negative impact on girls' and women's access to education. These include the introduction of measures to ensure that girls and women from lower socio-economic strata are not denied access to any level of education because they cannot pay user fees or meet hidden costs.[79]

This means that if the State claims that it is discharging its duty to fulfil the right to education by providing public funding to private providers, it needs to be sure that such funding is provided in a manner which is not discriminatory.

Discrimination in this context is not just about differential quality of schooling. It also requires the State to prevent stigma and stereotyping and to ensure meaningful participation. This stance is made more explicit by the CESRC. In its General Comment on non-discrimination in social and economic rights, it recognizes that a person's social and economic situation may result in pervasive discrimination, stigmatization, and

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78 CESCR General Comment No.13, para 35.

79 CEDAW General Recommendation No. 36 (2017) on the right of girls and women to education, para 39.

negative stereotyping. This can lead to unequal access to the same quality of education as others. It therefore states that individuals and groups of individuals should not be arbitrarily treated on account of belonging to a particular economic or social group within society.[80] This is a positive duty: the State should not just refrain from discriminating in its own right, it should take concrete, deliberate, and targeted measures to ensure that discrimination in the exercise of Covenant rights is prohibited.[81] Both public and private institutions should be required to develop plans of action to address discrimination.[82]

b. Transparency, accountability, and efficiency

A second major aspect of the duty in relation to funding of private providers concerns proper accountability, transparency, and efficiency. These have been recently made explicit in CESCR General Comment No. 24 (2017) on State obligations under the ICESCR in the context of business activities. In this General Comment, the Committee expresses its concern that private education institutions may be insufficiently regulated, 'providing a form of education that does not meet minimum educational standards while giving a convenient excuse for States parties not to discharge their own duties towards the fulfilment of the right to education'.[83] It therefore stresses that States always retain the duty to regulate private actors to ensure that services are regularly assessed, adequate, and accessible to all. One important way of ensuring accountability is through participation. This is made clear by the 2017 General Comment, where the CESCR states:

> Since privatization of the delivery of goods or services essential to the enjoyment of Covenant rights may result in a lack of accountability, measures should be adopted to ensure the right of individuals to participate in assessing the adequacy of the provision of such goods and services.[84]

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[80] CESCR General Comment No. 20 Non-discrimination in economic, social and cultural rights (2009) para 35.

[81] CESCR General Comment No. 20 Non-discrimination in economic, social and cultural rights (2009) para 36.

[82] CESCR General Comment No. 20 Non-discrimination in economic, social and cultural rights (2009) para 38.

[83] General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities para 22.

[84] Ibid, para 22.

The need for accountability and transparency is particularly clear in relation to tendering to private providers for the provision of materials such as school textbooks, desks and chairs, or buildings. Tender processes are vulnerable to corruption and inefficiency, with the result that learners might be unable to access key materials such as textbooks, which are part of the State's ongoing duty to fulfil the right to education. The duty to fulfil in such cases requires that the State provide alternatives if its contracting partners are not fulfilling their duties.

For example, in a recent series of cases in South Africa, the responsible education authority had contracted out its obligation to provide textbooks to a company which failed at scale to put in place an appropriate system to deliver the textbooks while also pocketing some of the discounts available to the State.[85] The South African courts held that the State had breached its duty to fulfil the right to education as well as its duty not to discriminate against the learners who had not received their textbooks.[86]

This is also true when the private provider no longer wishes to continue its role as a partner in the provision of education. In such circumstances, the State would be in breach of its duty to fulfil the right to education if it does not take immediate steps to provide alternative free schooling for the affected learners. An example is the South African Constitutional Court case of *Juma Musjid*, which concerned a faith-based Trust which had allowed a State funded school to operate on its property.[87] After several years, the Trust decided that it no longer wished to host the school and applied for an eviction order. The South African Constitutional Court held that the public authority responsible for schooling in this context had breached its duties to make alternative arrangements for the affected learners.[88]

It is also important to stress that the correlative of the right to establish private educational institutions in order to permit parents to educate their children according to their own convictions must be a duty to provide alternatives to private education where the latter conflicts with parental convictions. If the only schools available are those with a particular religious ethos, or a wider ideology, the State is required to provide accessible and affordable alternatives.

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85 *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198 (South African Supreme Court of Appeal).

86 Ibid.

87 *Juma Musjid v Essay*.

88 Ibid.

The above principles strongly suggest that funding for some types of privatization is less likely to fulfil human rights principles than others. This can be illustrated by applying Rizvi's three-fold categorization of privatization as delegation, divestment, and displacement. Delegation refers to situations in which the State continues to remain entirely responsible for a function but delegates the production to the private sector. Privatization through divestment occurs when government sheds its responsibility for an enterprise, function, or asset by transferring it to a private agency. This can be through a sale, or even the free transfer of assets to a nominated class of people. Displacement is a passive or indirect process, which occurs when the private sector more or less gradually displaces the government. A major impetus for displacement is through deregulation, where the State abandons its role as guarantor of the right to education on the assumption that market competition will lead to the most efficient provision of services.[89] All of these approaches are driven, to a greater or lesser extent, by a belief in the market as the optimal way of meeting people's needs.

It is possible for funding through delegation to comply with human rights commitments, provided the funding is conditional on adherence to these commitments. Delegation will generally take place through contracts. This makes it possible to enforce human rights commitments as contractually binding requirements, which, if breached, could lead to repudiation of the contract. As mentioned above, properly enforced, contract compliance mechanisms can be highly effective.[90] At the same time, where such conditions are not effective, or difficult to enforce, the duty to protect would require the State not just to withdraw the funding under this contract, but potentially desist from the kind of funding in question.

On the other hand, divestment, which occurs when government transfers its responsibilities to a private agency, is unlikely to fulfil the State's human rights commitments unless it is accompanied by a strict regulatory environment, which is properly enforced. Unlike delegation, where the State retains control over continuing funding, divestment is by definition a one-off transaction. For example, the sale of property to a private corporation to build a school, possibly at a discounted rate, gives no contin-

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89 F. Rizvi. *Privatization in Education: Trends and Consequences* (UNESCO Education Research and Foresight Working Papers, October 2016), 5–6.

90 C. McCrudden, *Buying Social Justice Equality, Government Procurement, & Legal Change* (Oxford University Press, 2007).

uing leverage to the State in relation to the subsidy provided. Particularly difficult to constrain is funding which has a displacement effect, that is, where government is displaced more or less gradually by the private sector, usually as a result of deregulation.[91] Therefore, where public funding of private providers diverts funding from public schools, thereby making quality education less accessible for some children, this would directly infringe the State's duty not to obstruct the right to education of all the children in its jurisdiction. Where funding has a displacement effect of this kind, it is very likely to infringe the State's duties to respect, protect, and fulfil the right to education.

CONCLUSION

International human rights law clearly establishes that the State must permit educational institutions outside the State system. This preserves individual freedom of opinion, religion, and political conviction against the risk that the State will use the educational system to enforce its own values, religion, or other ideology on individuals. It is also relatively clear that the State generally has no obligation to fund private educational establishments. The chief exception to this occurs under the non-discrimination principle: if the State funds some religious establishments, it might be required to fund others. This also suggests that the State is not wholly prohibited from funding private schooling. In some States, such funding is expressly permitted, although, in others, clear provisions prevent public funding of private schooling.

The question therefore becomes *under what conditions* public funding of private providers of education would comply with human rights standards. Human rights law establishes that the State retains its responsibility to respect, protect, and fulfil the right to education in relation to private provision, whether or not it provides public funding. However, as the chapter has shown, little direct authority addresses what extra requirements flow from the provision of public funding for such private provision. Nevertheless, the chapter was able to derive several central principles from existing legal materials, usefully considered under the headings of the duty to respect, protect, and fulfil the right to education.

The duty to respect means that public funding to private providers should not undermine or obstruct the right to education of every individ-

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91 F. Rizvi, *Privatization in Education*, 5–6.

ual, whether in the State itself, or in a recipient of aid. The duty to protect requires the State to make such funding conditional on observance of human rights standards. The duty to fulfil entails that the State should not discriminate in the provision of funding, nor allow funding to lead to further discrimination. This includes discrimination on grounds of socio-economic status. The duty to fulfil also requires the transparency and accountability in the award of funding. More work, however, is necessary to flesh out these principles in relation to the wide range of practical examples of public funding of private education providers.

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PART II

What education research reveals

6. Evidence on school choice and the human right to education

Joanna Härmä

1. INTRODUCTION

"An uneducated person is no different from a beast", or such was the opinion of a father of a primary school child in a rural village in Uttar Pradesh over a decade ago.[1] This father was intent on claiming the right to an education for his child but felt unable to rely on the free government school system. Rather, he was pressed by circumstances (government teachers who simply did no teaching) to "choose" a private school instead. This situation is lauded by some, such as James Tooley (2009) as positive school choice, but actually, like many of his peers, the father wished for a well-functioning government school instead that would obviate the need for any "choice" at all (Härmä, 2008). Education is virtually universally considered a fundamental human right due to its intrinsic and instrumental value. It is crucially important to all aspects of life, including defending one's own human rights. Education can empower and formal schooling, where children from various backgrounds come together to learn, can help to forge social cohesion, can build positive group identities, and can increase awareness of and respect for diversity within society.

However, at the same time, education can be misused as an instrument of suppression of weaker groups, minorities, and the socially and economically disadvantaged. Because of this, international human rights law recognizes the liberty of parents to choose schools other than mainstream government ones for their children, in particular to conform with their religious and philosophical convictions, as well as different

[1] Focus group respondent during data collection for my doctoral study in 2008.

linguistic needs (Zinigrad, Chapter 4, this volume). At the same time, the neoliberal movement equates choice with liberty and freedom, in a sense echoing rights-based arguments. Milton Friedman's seminal *Capitalism and Freedom* (1962) outlines the reasons why full parental school choice is required in a free, capitalist society.

Many parts of the world have experienced considerable growth in the private school sector (Akaguri, 2014; Day Ashley et al., 2014; Härmä, 2008, 2013; Tooley & Dixon, 2006; Tooley, 2009). Fully private schools that run entirely on user fees have been "mushrooming" in poorer parts of the world where government schools are not serving people well. In other instances, middle classes and elites use high-fee private schools, seeking to preserve and pass on their privilege to the next generation. In more economically developed countries with established welfare states or a commitment to government-funded education provision for all, a different wave of "school choice" is swelling. Here, taxpayer funds are directed towards charter schools, academies, and other types of public–private partnership schools, with varying results as described by Verger et al. in Chapter 7 of this volume.

In these differing contexts with different types of school choice mechanisms, two key aspects of human rights appear to be clashing – the liberty of a parent to choose their child's education on the one hand, and the right of a student to access free, quality education without discrimination or systemic barriers, on the other.

This chapter will explore the notion of school choice from a human rights law perspective, and with a practical, rather than a theoretical, approach, reviewing published evidence about countries' experiences with school choice in its various forms. In Section 2, the chapter begins by outlining the international law provisions on the right to education. Section 3 explores school choice as a concept and an issue. The extent of *real choice* in schooling is discussed, using cases of school choice as it has developed in various countries. Section 4 explores contexts injecting choice into a system by design, while Section 5 examines the more spontaneous, unplanned development of "choice". An analysis of contexts with little or no school choice and where serious and concerted public policy and investment have obviated the need for it offers a counterpoint to the supposed need for choice (Section 6). Discussion of the evidence, its ramifications, and conclusions comprise the final section (7). The chapter draws on secondary research available at the time of writing, from more developed countries and from others researching the Global South, and also draws heavily on the primary research of the author.

2. SCHOOL CHOICE AND THE INTERNATIONAL HUMAN RIGHT TO EDUCATION

A considerable body of human rights law has built up over seven decades proclaiming, reinforcing, and embedding the notion that education is a human right, as presented in the Abidjan Principles. The starting point was the immediate post-war period, with the establishment of the United Nations and the adoption of the *Universal Declaration of Human Rights* in 1948. This declaration did not have the binding nature of a treaty or convention. However, in 1966, two key pieces of human rights law emerged: *The International Covenant on Civil and Political Rights* and *The International Covenant on Economic, Social and Cultural Rights.* These treaties elucidated the states' obligations to respect, protect, and fulfill the right to free, universal access to primary education as binding law. This was reaffirmed in the near universally-ratified human rights treaty, *The 1989 Convention on the Rights of the Child*. The 1960 *UNESCO Convention Against Discrimination in Education* fleshes out the right to education by stating that schooling must be non-discriminatory.

Governments have continued to reaffirm the commitment to education through major education gatherings that have proposed the achievement of Education for All at the end of a specified period of time: first in Jomtien in 1990 (*The World Declaration on Education for All*); next in Dakar in 2000 (*The Dakar Framework for Action*), and most recently in Incheon in 2015 (*The Incheon Declaration and Framework for Action*). All of these various efforts have continually reaffirmed that all children have the right to participate in education, irrespective of their personal or social circumstances.

The focus has traditionally been on governments acting as duty-bearers of the right to education by acting in the multiple roles of rights guarantor, funder, provider, and regulator. Yet government need not fulfill all of these roles. Government could fund provision of and access to schools supplied by non-government bodies. They could also fund an external organization that inspects and regulates schools, rather than acting as regulator. Alternatively, they could act to establish their own schools which they manage and fund. The key is simply that no child should be excluded for social, economic, or geographical reasons, or any other reason; treaties and frameworks for action have neither precluded nor promoted a key role for the private sector in any of these roles. With

regard to "choice" specifically, the liberty to choose was envisaged as protection for people who might find themselves living under authoritarian rule, under a government that might use their own school system for purposes of coercion (Mowbray, Chapter 3, this volume; Zinigrad, Chapter 4, this volume). At the time they were developed these treaty provisions were not designed to support the types of market-driven school choice currently on offer.

School choice can be incompatible with the right to education when the choice of some parents leads to access to or quality in education being decreased for other children. This appears to be happening in the United States where charter schools[2] have been promoted, ostensibly to provide better quality options for families whose children are attending local government schools that are labeled as failing, according to standardized test scores (Berliner & Biddle, 1995). With funding following former government school pupils to new charter schools, the most disadvantaged and those that fail to gain access to a new school are left behind[3] in schools that must struggle to meet the more challenging, and often more expensive, needs of the poorest and most marginalized students. Evidence on the socioeconomic background of government and charter school students shows that English language learners, low socioeconomic status students, and those with special needs attend public schools in much larger proportions than charter schools. However, as a direct result of school choice being exercised by some parents, these more challenging and demanding pupils must be taught with less funding and resources, and with less positive peer effects, than during previous eras (Abrams, 2016; Adamson and Darling-Hammond, 2016; Ravitch, 2013).

Currently, some governments are not providing education for all students, for example in urban informal settlements in the Global South where governments have shown reluctance to set up sufficient numbers of schools.[4] In locations with both government and private schools, those

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[2] Charter schools are schools in the United States (called Academies in the United Kingdom) that are owned and run by non-government entities sometimes for profit and sometimes not for profit (always not-for-profit in the United Kingdom), but are funded by the government and do not charge user fees.

[3] The opening of some charter schools has been significantly hyped, leading to them being over-subscribed. In such cases, lotteries are commonly used to determine who is admitted. Those "left behind" are the children whose parents are not able or motivated enough to seek admission to the school, or those who do not win a place through the lottery system.

[4] See discussion below.

who can pay school fees are abandoning government provision and foregoing government funding entirely by paying to send their children to private schools. This practice has been widespread amongst the middle and upper classes for a long time in many countries, but it has become increasingly common amongst the less well-off. The phenomenon of families who are not wealthy, paying for "no frills" private schooling already exists in richer countries, largely at religious schools (Walford, 2011), and appears to be growing. For instance, James Tooley is establishing low-fee private schools in north-east England (Economist, 2018; Turner, 2017), while Bob Luddy, a libertarian businessman, is establishing a similar chain in his home state of North Carolina in the United States (Epstein, 2017). In these situations, if all those who can pay end up attending private schools, the pressing need to find solutions for families "left behind" in under-resourced government schools receives less attention. In effect, school choice exercised by some parents negatively impinges on the right to a free, quality education for the poorest and most marginalized students by further stratifying educational provision.

Proponents of consumer choice within a market propose certain ways of averting inequity. First, targeted vouchers can support the poorest in making a specific school choice, although, to be meaningful, the voucher must cover enough, all, or sometimes more than the school costs. Charter schools (United States), academies (United Kingdom), or Free Schools (Sweden), funded by government directly rather than through an actual "voucher", also provide options for those who cannot pay. Despite the varying extents of government funding under various scenarios, evidence from developed and developing countries shows that "choice" usually bypasses the poorest as its exercise requires levels of awareness, time, organization, transportation, and motivation that financially-struggling parents often do not have (Burch, 2009; Carr-Hill & Murtaza, 2010; Ravitch, 2013).

The liberty of people to set up schools, the liberty of parents to choose, and how these situations are (at times, and in certain conditions) unfortunately but unavoidably at odds with the wider right to good quality education for all, are all discussed at depth by Aubry and Dorsi (2016). While the original framers of the liberties in and to non-state education did not have the marketization of education in mind, a case can be made for the extension of this liberty to choose schools in the interests of children caught in difficult circumstances. However, this section of the chapter has mentioned "school choice" with a foregone conclusion that *real, free school choices* exist. The next section examines the concept of school

choice, what it really means in practice, and whether or not parents are able to exercise real choice in education.

3. SCHOOL CHOICE IN PRACTICE: WHAT DOES IT REALLY MEAN?

This section discusses the basic elements of markets that need to be present for choice and competition to yield the purported benefits. It then discusses examples of locations where choice has developed as a result of policy and where it has developed in a more spontaneous, unplanned manner. It finishes by discussing the limits of school choice in light of the well-acknowledged inefficiencies of markets and governments.

3.1 The Theory of School Choice

Milton Friedman is the most famous and influential proponent of school choice and essentially the father of the neoliberal pro-market agenda that took root in the 1950s. In *Capitalism and Freedom* (1962), he set out proposals for full school choice, arguing that the government has no role to play in the *provision* of education. However, he posited that the imposition of a required minimum level of education as well as public funding to support this endeavor is justified by the positive "neighborhood effects" of schooling for the wider society. Friedman accepted the "public good" nature of education, through which the wider society benefits from all people being literate and educated to an (unspecified) extent.

Because poor parents would be unlikely to be able to pay the amounts required for the socially optimal minimum level of education for their children, Friedman suggested the provision of government funding through vouchers given to families. Parents would choose a school from a pool of government-approved institutions (strangely, indicating a regulatory role for government as well as the role of funder). Parents would be free to add to the voucher provided by government by "topping up" with their own income in order to access a perceived better quality of school.

School choice is suggested as a means of achieving ever greater quality and variety of education through a range of different providers, all serving various segments of a market in which providers compete for clients (parents and children). Competitive pressures are purported to lead to lower costs and therefore greater efficiency system wide. More recent decades have seen claims of markets fostering innovation in schools – implying innovation *in the classroom*, leading to higher learn-

ing levels for students. The client, or the child and parents, can choose the option that suits them best, according to the aspects of education that they prioritize. Once in a school, families can continue to engage with school choice, changing schools when dissatisfied.

For these claimed benefits of the market to materialize, certain conditions need to be present:

- a *range of interchangeable options* from which clients can realistically choose (there must be no monopolistic provider or cartels);
- *clear and objective information* available to help parents to make informed decisions;
- parents should be able to make their choice freely with *no onerous transaction costs*.

Competition to achieve higher profits, or at least survival in the market would purportedly lead to higher quality education for children. In addition, neoliberal or neoconservative market proponents ascribe value to the very notion of *the freedom to choose*, in and of itself (Friedman, 1962). Sending a child to a neighborhood school is considered restrictive, even in cases where such schools are highly effective, as in Finland, and as they were in Sweden before school choice was introduced (Abrams, 2016).

"Pure" markets in the education sector do not exist in any country at the present time. All markets are subject to distortions and failures, and education markets are typical of this. The key distortion in education "pseudo-markets" is the existence of government-funded schools. These schools are usually not subject to market forces for their continued existence and operate under circumstances of limited or indirect/long route accountability. Yet this "distortion" is a consequence of the key market "failure", the inability of most people to pay the price of private education.

A yet more intractable failure is that of sparse and remote populations living in rural areas of many countries, and in areas with challenging terrain. These areas frequently have too few children to support competition between a range of providers; there may barely be enough children to support one school in a village. Friedman's response to this issue was that transportation is improving and fewer and fewer people are living in rural areas (Friedman, 1962). However, small communities still exist in all global contexts whose children need and deserve good schooling. Only schools existing entirely outside market logic (government schools

and sometimes community schools) are financially able to serve poor and remote communities.

Government schooling systems also experience failures. State provision is meant to be of good quality, available to all residents, tuition fee-free (depending on the level, but almost certainly fee-free for "basic education", however defined in the context). However, in reality, schools in poorer countries are often under-funded, and so impose some level of fees (whether official or not – usually in poorer countries) which has the effect of excluding the very poorest. They also lack direct accountability to the families that they serve, with staff hired and paid through civil service staff structures (creating only indirect accountability). School leadership is often weak both in terms of management skills and the authority needed to run a school. These weaknesses lead to the predictable and well-documented results of teacher absenteeism, poor-quality instruction, and over-crowded and under-resourced classrooms – all of which have provided the push for many families to seek an alternative.

A crucial factor in the education space is that parents lack objective, reliable information on school quality in all types of schools. Parents often do what they can to assess the quality of the options available to them, often through discussions with other parents in the community (Srivastava, 2006), meaning that their conclusions are necessarily impressionistic or based on anecdote. Even in richer countries, obtaining real information on the quality of education is difficult. In many countries, information on schools' examination results are published, but with the stakes attached to these examinations growing, instances of cheating and teaching to the test have been documented, meaning that the examination results likely provide a poor reflection of actual teaching quality (Abrams, 2016; O'Neil, 2016; Ravitch, 2013). Furthermore, the focus on choice turns parents into consumers looking for the best deal for their children, rather than citizens interested in shared educational goals (Ravitch, 2013).

While the above discussion has set out the reasons why some degree of choice cannot quite qualify as true and free choice, the rest of this chapter will use the term "choice" to refer to situations where some degree of choice is available. The next sub-sections look at where choice has developed as the result of purposeful policy and then where it has developed by default, in an unplanned way.

3.2 School Choice as Policy

Governments have instituted school choice policies, hoping to improve the quality of all schools through competition as a primary rationale. Richer countries such as the United States, Sweden, and Canada have willingly adopted school choice policies for a variety of reasons, while other countries have policies of privatization and choice essentially pushed on them – sometimes with the complicity of pro-market local partners. Examples of the latter include the voucher system in Chile, and, more recently, the possibility of complete system privatization in Liberia. School choice can be promoted in various ways, starting with allowing students to choose between government schools, instead of being automatically enrolled at their neighborhood school. But some choice proponents prefer the more direct means of providing schools with a per-pupil funding amount that follows the pupil to the school of the parents' choosing. This voucher-type approach can occur with various degrees of government regulation. For instance, disallowing all "top-up" payments or the charging of any other fees means that the different schools are truly available to all families (not taking into account issues of physical distance), irrespective of socioeconomic backgrounds. Governments can further stipulate that participating schools must take children on a first-come, first-served basis or through a lottery, in order to be as equitable as possible.

Another alternative to inject choice is through charter schools – privately owned and run schools that receive government funding, based on the numbers of pupils who enroll. In a funding sense, they are government schools, and have in many places replaced conventional government schools. In other places, they directly compete with government schools. For-profit corporations may or may not be allowed to operate schools and test-based accountability has often accompanied choice reforms as a means of judging the success or otherwise of the system (Burch, 2009). Both voucher and charter school cases have broadly not resulted in allowing the poorest to access private schools, with the poorest continuing to attend increasingly ghettoized government schools (Abrams 2016; Berliner and Biddle, 1995).

3.3 Unplanned School Choice

Where fee-paying private schools have appeared, often in ever-increasing numbers, "school choice" is said to have developed (Tooley, 2013).

Private schools have existed for decades and centuries, often serving the middle and upper classes, but recent developments have seen private schools targeting the relatively poor springing up in great numbers in parts of India, Pakistan, Nigeria, Ghana, Kenya, Uganda, and Peru, amongst other countries. In Lagos, for example, the numbers of schools have grown at a fast pace, from a known 12,098 in 2011, to an estimated 18,000 – a growth of nearly 50 percent in three years (Härmä, 2011a; Rosales-Rogge et al., 2014). On the surface, considerable choice in private schools exists serving all socioeconomic levels of society. In 2015, 62 percent of primary school-going children were in private schools in Lagos (Nigeria National Population Commission and RTI International, 2015), meaning that only 38 percent are going to government schools. In Kampala, I estimated that 84 percent of all school-going children attend private schools (Härmä, 2016b, p. 4). However, to access these schools, parents must be able to pay termly fees, as well as registration and examination fees, and buy books and stationery, uniforms, and sometimes other costs that often make up around half of all education annual expenditures (Härmä & Siddhu, 2017). In most places where these private schools have developed outside government planning or regulation, governments provide no support, financial or other, to families – they must find their own way in assessing (with no public information available), choosing and, crucially, paying for a private education.

3.4 Limits to School Choice

> School choice will only generate the anticipated benefits when the choice is real, relevant and meaningful, i.e. when parents can choose an important aspect of their child's education, such as the pedagogical approaches used to teach them. If schools are not allowed to respond to diverse student populations, and to distinguish themselves from each other, choice is meaningless. (OECD, 2017, p.3)

The Organisation for Economic Co-operation and Development's (OECD) outlook on school choice shows that surface appearances of choice and competition are not enough; rather, certain elements need to be present before choice yields the anticipated benefits. This sub-section discusses the limits of school choice.

First, family choices are necessarily geographically bounded: most people do not want their children, especially very young children, traveling long distances to go to school, and many cannot afford the time or the cost involved in transporting their children to schools far from

home. Even in large, densely-populated cities with many schools, choice is often geographically bounded because of distance or travel time. In remote, rural locations, choice is often confined to one's local village as children would have to travel long distances to the next location with a school. In rural Uttar Pradesh, India, with approximately 820 people per square kilometer, choice exists even in rural villages; however, in Kwara State in Nigeria, with just 80 people per square kilometer, there is virtually no school choice (Härmä, 2016a).

Education is also an ongoing "transaction" between the family and the school and it is difficult for parents to judge the quality of a school at the start. Rarely is there good, objective information on school quality, with test scores not providing a complete picture of school performance, being open to manipulation and cheating (Abrams, 2016; O'Neil, 2016; Ravitch, 2013). It also does not lend itself to frequent changing in the hopes of finding a better option; education is an area where, generally speaking, fewer changes proves better to avoid disruption to the child's education. In addition, depending on the nature of the local education "market", it might be the case that "choice" becomes "flipped" with popular schools being over-subscribed and therefore able to select the most able students. In addition, certain schools may seek to recruit higher achieving students from other schools in a bid to raise their own test scores, something that has happened in certain charter school-fueled choice environments in the United States, for example (Adamson & Darling-Hammond, 2016). Alternatively, due to the costs (registration fee, new uniform, and textbooks), as well as concerns regarding continuity for the child, parents can feel "locked in" to their initial school choice (Härmä & Siddhu, 2017).

Meaningful school choice only really exists where parents could, without detriment to their children, keep using the default school which in most systems should be the neighborhood government school. Diane Ravitch (2013) explores the notion of education as one of the few "commons" left in American society, and the notion is applicable to other countries also; a shared educational experience is widely seen to have benefits for nation building and social cohesion. For this reason, many argue that social benefits arise from children growing up and sharing a common schooling experience.

Yet there are instances where all children attending a common school may not be practical or desirable. Parents might choose not to use a school because they want a particular religious grounding for their child, or they may want a different type of pedagogy or philosophy, as

with Steiner or Montessori schools. It is inevitable that not all families will live close enough to different types of schools to enable them to have such wide options. The limitations on choice are nearly inevitable; a truly dynamic market of choices for all is essentially unattainable. Even when choice does exist, competition does not automatically mean better quality education. The OECD has found that there is no country-level relationship between the quality of learning outcomes (as measured by 15-year-olds' scores on the science examination as part of PISA [Programme for International Student Assessment] 2015) and the share of students enrolled in private schools. Among OECD countries, the correlation is almost zero, indicating that school choice does not necessarily lead to better quality education (OECD, 2017, p. 8).

4. CONTEXTS WHERE CHOICE BECAME OFFICIAL POLICY

This section looks at countries where official policies to create school choice were instituted. In Chile, a universal voucher scheme was instituted without the necessary safeguards to ensure that it would benefit disadvantaged families. In the Nordic countries, Sweden stands out with its universal school choice program, but this entailed safeguards to ensure no selective admissions policies and no additional fees could be charged to families.

4.1 Chile

Perhaps the most famous and one of the longest-term neoliberal experiments with school choice (as part of wider market reforms) has taken place in Chile since 1973 (Verger et al., 2016). Augusto Pinochet instituted a universal voucher system to allow full school choice, with most schools opting to participate in the voucher program and only the more selective schools opting to remain fully private. A 1993 addition to the scheme allowed schools to charge "top-up" fees, so that vouchers could be used in combination with family income to access more expensive schools. As a result, parents used the vouchers to move their children from government schools to private schools, while better-off families used the voucher to access even more expensive schools than they could afford previously. In addition, schools were allowed to be selective in their admissions while taking public money. By 2012, half of all school enrolments were in the private subsidized sector; 45 percent were in gov-

ernment schools, while the remaining 5 percent were attending private, independent schools (Castro-Hidalgo & Gomez-Alvarez, 2016).

At the same time teacher training was downgraded and salaries reduced (Verger et al., 2016). A nation-wide assessment system, known as SIMCE, was also instituted, further disincentivizing schools from accepting lower scoring pupils. Schools selected students because of the reputational damage that could ensue from the inclusion of poorly performing students whose examination results would appear as a reflection of school quality (Castro-Hidalgo & Gomez-Alvarez, 2016).

With the poorest students left behind in government schools, coupled with a new teacher evaluation policy whose results were tied to those of the SIMCE, the message emerged that poor results in government schools were the result of ineffective teachers. However, the loss of all better-off peers to the private, subsidized sector meant that results were almost certain to be worse in government schools. Yet the reality is that government schools have proven more effective over a longer term at improving student learning than private independent or private, subsidized schools. This is particularly striking in light of the fact that private schools have been educating higher scoring pupils and those with greater social capital (Castro-Hidalgo & Gomez-Alvarez, 2016).

The results of this more than four-decade experiment in school choice are much lower than average scores on international assessments and enormous socioeconomic stratification. The rich attend private independent schools, the middle and middle-to-high income pupils attend private, subsidized schools, while the low and low-to-middle income students attend government schools (OECD, 2012a). Chile's example underscores that public funding to private schools that does not specifically target disadvantaged students only leads to increasing stratification (OECD, 2012b), with the country having one of the most unequal education systems in the world.

4.2 Sweden

In 1991, Sweden got its first Conservative government for many years, and in 1992 it introduced a universal voucher system. The many new voucher-funded schools are known as Free Schools (Wiborg, 2013). This reform represented a radical departure from the welfare state approach to education that had been built up between 1945 and 1975, founded in the belief that equal educational opportunities were crucial in creating a fair and equal society (Wiborg, 2010; Åstrand, 2016). Sweden's com-

prehensive schools had served all children from all types of families, with positive implications for social cohesion (Wiborg, 2010). Despite a return to power of the Social Democrats in 1994, the new system continued, and Sweden became "one of the world's most liberal public education systems" (Blomqvist, 2004, as cited in Wiborg, 2010, p. 10). There is no prohibition on for-profit providers and chains: Swedish private schools can be owned by stock companies, private companies, cooperatives, faith-based organizations, foundations, or almost any other type of organization (Åstrand, 2016). Key restrictions, however, include the prohibitions on charging any fees whatsoever, and on using selective admissions policies.

Although schools must teach the knowledge and skills outlined in the national curriculum and comply with the general objectives and values of the national system, they are granted a relatively high degree of freedom. The vision for the "market" was that a wide range of schools would develop, leading to more specialization in individual schools and overall greater variety as well as increased flexibility in school programs (Åstrand, 2016). Yet the reforms have not turned out as expected or predicted, with the majority of schools adopting a generalist, traditional approach, and mostly being operated by for-profit corporations. It was expected that parental cooperatives would spring up to establish schools (Wiborg, 2010), but this did not happen, seemingly indicating less interest in school choice on the part of parents than had been anticipated.

Most "innovation" is seen in school management and marketing, rather than in the classroom, with operators openly running their schools under McDonald's-style franchising arrangements and using marketing strategies that include attracting new pupils through offers of free computers and other gimmicks. The school chain Kunskapsskolan mimics the Ikea concept in providing the least possible support to its customers, in order to maximize profit. One school company owner in Sweden claims that "to run a school and to sell refrigerators are one and the same. It's about having your ear to the market and to understand where the needs are for our customers, the pupils" (Åstrand, 2016, p.73).

Sweden's private schools have experienced an unsurprising rise in investor interest. One case is illustrative of the pitfalls of such a liberal approach: one school company, Fourfront, grew at a fast pace in the early 2000s, and was then sold to JB Education, a company owned by the Danish venture capital firm Axcel. JB Education had experienced a high growth rate up to 2013, but then abruptly collapsed in bankruptcy, resulting in the schools being sold or closed (Åstrand, 2016, p. 85). This

bankruptcy threw the educational continuity of 10,000 pupils into jeopardy (Orange, 2013).

It can be no great surprise that, with 70 percent of private schools run for-profit, the drive for lower costs and greater "efficiency" has led to private schools employing lower-qualified teachers, with lower proportions of teachers specifically qualified to teach the subjects that they teach. Teachers now do more non-teaching work, including marketing of the school to attract new clients. With much greater pressure on teachers, who feel less and less satisfied and valued in their work, has come grade inflation in schools, whereby teachers award students higher and higher grades in order to provide an image of student success (Abrams, 2016). Grade inflation has developed at the same time as Sweden's aforementioned declining results on international assessments and has been directly linked to the increase in market competition (Abrams, 2016). In addition, there has been an explosion in media and arts courses (Orange, 2011), while employers' organizations complain that secondary schools are not producing the types of graduates needed; students attend programs that are perhaps fun, but with less labor market relevance (Demsteader, 2013). Along with declining learning for pupils and declining working conditions for teachers has come greater inequity and stratification through school choice, with the better-off tending to gravitate towards certain schools (Abrams, 2016; Economist, 2013). The latest PISA round has found an ever-widening learning gap between low and high achievers (OECD, 2016).

5. CONTEXTS WITH SCHOOL CHOICE EMERGING BY DEFAULT

In many low and lower-middle income countries, a market in "low-fee private schools" has developed from the grassroots. Individuals set up small private schools as a result of perceived poor quality of education at government schools, or, in the case of many densely-populated urban informal settlements, no access to government schools at all. Low-fee private schools are now common in Lagos, Nairobi, Accra, Kampala, Lusaka, Delhi, Hyderabad, Lahore, and many other African and South Asian cities, but they are increasingly gaining a foothold in some rural areas as well, such as in Uttar Pradesh and several other Indian states. This "organic" development is lauded as the poor devising their own strategies to meet their own needs (Tooley, 2009). However, in reality, many parents' choices are severely curtailed through distance and

affordability factors; lacking objective information on which to make quality assessments; taking place in an effectively unregulated context (despite regulations existing on paper); and essentially coerced due to the untenable state of affairs in the government system.

While parents believe they are buying a better quality education for their children, there is no clear evidence that private schools invariably do better than government schools (see Day Ashley et al., 2014, for an assessment of the available evidence regarding the quality of low-fee private schools which finds no clear verdict on this issue). However, even if no clear quality advantage could be proven, parents are nevertheless eager to pay for schools that are very often closer to home, with smaller class sizes, meaning that teachers know their children as individuals and keep tabs on them.

5.1 The Rise of Low-fee Private Schooling in Sub-Saharan Africa and South Asia

Governments in many cases have failed to keep pace with need, particularly in slums, where extending government services would be seen as extending legitimacy to what are deemed illegal settlements. In Lagos, authorities have no incentive to provide schools in areas that they wish to clear to make way for up-market development. Also, as all relatively affluent people and virtually all civil servants have abandoned the government school system, government schools receive reduced scrutiny on issues of quality and access. In Abuja, Nigeria's still relatively new capital, the Abuja Master Plan has been ignored in many cases, with plots of land specifically designated for government being granted to private schools and individuals for their own use instead (Härmä, 2019). In both Lagos and Abuja, along with many other similar contexts, government school capacity is vastly over-stretched. Additionally, they are too far from home for many families to access. In such circumstances, it is certainly the case that the option of a low-fee private school is wanted; however, it must be viewed for what it is, essentially school choice out of desperation – a coerced choice, rather than the positive exercise of a human right.

5.2 The Problem of Affordability

Despite the appearance in many contexts of many choices for families, real choice is limited by several factors, the biggest being the ability

of families to pay school fees and other attendant costs. In rural Uttar Pradesh, it was found that 94 percent of parents interviewed preferred private schools, but only just over 40 percent of children were actually attending these schools. Those who preferred private schools but were not using them said their would-be choices were unobtainable due to inability to pay with their only actual options being government school or no school at all (Härmä, 2011b, p. 356). This finding is echoed in Lagos (Härmä & Siddhu, 2017) and Kwara State, Nigeria (Härmä 2016a); as well as in Kampala (Härmä, 2016b).[5] The costs of starting at a private school (registration fees as well as new books and uniforms, which come on top of the recurrent costs of tuition fees, examination fees, and others) curtail school choice and school switching.

6. ACHIEVING GOOD QUALITY EDUCATION WITHOUT CHOICE (NOT A FOREGONE CONCLUSION)

6.1 Finland

In the 1970s and 1980s, Finland was only an average achiever on the International Association for the Evaluation of Educational Outcomes' assessments of mathematics and science (Sahlberg, 2016); at the same time Finland was embedding and strengthening a fairly radical education reform that actually followed the lead of the Swedish system: from 1970 to 1979 the Finnish *peruskoulu*, or comprehensive school was launched and rolled out.

The reforms initiated the high-achieving Finnish school system that exists today, comprising three particular and significant characteristics. First, the equal opportunities principle insists that all students be offered the same education, which has required an emphasis on early identification of children with special needs and providing them with the necessary support. A second aspect of the new system has been to provide career guidance and counseling as part of the curriculum – ensuring emphasis on the connection between schooling and eventual working life. Third, a whole new philosophy of inclusive education had to be adopted, as this reform was not just a reorganization but an entirely new way of working,

[5] For a wider range of contexts and researchers, see Day Ashley et al., 2014.

bringing together all types of children in the same classroom. This new philosophy recognized that all children can learn, given the right type of support, and that "schools should function as small-scale democracies, just as John Dewey had insisted decades before" (Sahlberg, 2015, p.30).

These greater demands on teachers and the education system led to the 1979 law on teacher education "emphasizing professional development and focusing on research-based teacher education" (Sahlberg, 2015, p.30), requiring that all teachers teaching primary school and above have a master's degree, and requiring that pre-primary teachers have a bachelor's degree. A spirit of collaboration pervades the teaching profession, with weekly full-afternoon meetings to jointly plan and develop curriculum. Schools within a municipality are encouraged to share materials and work together, and time within each teacher's working schedule is allocated for professional development (Sahlberg, 2016). Teachers are ever-developing and are supported to keep improving, in the spirit of a national joint venture. Instead of test-based accountability, Finland nurtures a trust-based responsibility that relies on teachers' and principals' professionalism and judgement; instead of school choice and competition, Finland focuses on equity of outcomes – and

> because school learning is strongly influenced by children's family background and associated factors, equity of outcomes requires that schools are funded according to their real needs to cope with these inequalities. School choice often leads to segregation that increases inequity of outcomes. (Sahlberg, 2016, p.120)

Few Finnish parents feel that their neighborhood school is not the best school for their child, and the country continues to regulate private schools strictly. The establishment of private schools requires a decision of the Council of State, and the few private schools allowed are fully funded by the state and barred from charging any fees to parents. Around 75 private schools offer various religious approaches, languages of instruction, and particular pedagogical philosophies, such as the network of Steiner Schools. No school is allowed to use selective admission practices; private schools must admit pupils on the exact same basis as municipal schools (Sahlberg, 2015). It is safe to say that Finland is an environment of essentially no school choice, which has reaped benefits for social cohesion, equity in education outcomes, and keeping gaps between rich and poor at an absolute minimum. Finnish schools are a result of and reflect back the egalitarian ethos within the wider society.

6.2 Ontario, Canada

Another example of an education system that has turned away from pro-market reforms is the province of Ontario. Canada has a federal governance system in which each province is separately responsible for its education system. Fullan and Rincon-Gallardo (2016) describe Ontario's recent education policy history as follows:

> During the past two decades, Ontario has undergone an important transition from an aggressive neoliberal agenda … to a more collaborative orientation based on financial stewardship, partnerships among stakeholders, and shared accountability for student success. The outcomes of these two approaches have been remarkably different: from stagnant performance, labour disruption, and public dissatisfaction with Ontario's public education system in the former approach, to improved performance, mostly vanished labour disruption, and improved morale and confidence in public education in the later approach. (p. 175)

In 1995, a Conservative was elected premier of the province on a platform of aggressive deficit reduction that led to severe cuts to the education budget, punitive policies regarding teachers, and encouragement of private school growth. What resulted was a decade of low morale and a worsening image of the public education system. This set the stage for the Liberal Party's victory in 2003, based on a platform that put renewal of the public education system near the top of the list of priorities. This proved an extremely popular move, and the party remained in power until June 2018.

Ontario provides another example of where a clear policy pursued relentlessly can build the strength of a system and lead to real and sustained improvement. The new approach to education repealed some of the support to private schools and adopted a focus on capacity building at all levels and instructional practices linked to good results; a spirit of partnership and learning from implementation both across and between schools and districts; and a spirit of high trust and partnership between school districts and unions. Research on the approach and dissemination of lessons as the reforms have progressed have been central to learning, adapting and improving, and imbedding better practices. Unlike the systemwide approach in Finland, Ontario chose to focus on a small number of ambitious goals such as improving literacy and numeracy; increasing high school graduation rates; closing achievement gaps; and increasing public confidence in education (Fullan & Rincon-Gallardo, 2016).

A key example of what the new approach meant in practice was that the Conservative government's program of teacher testing and recertification were cancelled in favor of a new teacher induction program aimed at supporting teachers to develop their skills. For elementary education, the efforts include "coaching, collaborative inquiry, online video and other supports related to instructional practices, networking schools and districts around effective practices, targeted interventions and *various forms of collaborative professionalism*" (Fullan & Rincon-Gallardo, 2016, p. 181; emphasis added). "The provincial government developed a whole system improvement strategy based on partnership, capacity building, focus on results, and a relentless commitment to keep going deeper and deeper" (Fullan and Rincon-Gallardo, 2016, p. 180). Systems were built that allow for the identification of struggling schools and the implementation of the Ontario Focused Intervention Partnership, which uses non-punitive means to build capacity for improvement, rather than placing blame and eliminating staff.

The reforms have led to "a shared sense of purpose, capacity, clarity, and commitment among system leaders, and correspondingly among vast numbers of participants at all levels of the system" (Fullan & Rincon-Gallardo, pp. 189–90). As a result, Ontario's student achievement has risen steadily since 2003, as have high school graduation rates. Perhaps most crucially for society as a whole, gaps in student achievement have reduced; for example, the differences between French or English learners and the rest of the student population have reduced by 83 percent; the gap for those with special needs has reduced by 8 percentage points. Along with this, the number of poorly performing schools has also decreased. As a result, public attitudes towards the education system, as measured through a dedicated survey, have improved from 43 percent affirming they are satisfied or very satisfied in 2002, to 65 percent in 2012 (Fullan & Rincon-Gallardo, 2016).

7. DISCUSSION AND CONCLUSIONS

Ontario and Finland have pursued education improvement strategies that run almost entirely contrary to those promoted through the global education reform movement, or GERM, as described by Sahlberg (2016). The results have been overwhelmingly positive, famously-so in Finland; it should be noted that this took place as the result of committed policy and implementation work, not simply due to contextual factors. It is often argued that Finland is a small and ethnically quite homogenous country

with a high income. However, Ontario is extremely diverse (including Toronto) and has a much larger population; Finland is equal in population size to several US states, and so could serve as a fitting model for state administrations. Indeed, several US states are following an approach closer to that of the northern neighbor, Ontario, than to other US states (Adamson & Darling-Hammond, 2016, p. 159).

The discussion of school choice situations in poorer countries has shown that parents are often pushed into choosing a private option out of desperation and wanting the best for their children. But this is not a desirable situation and is only eroding the system overall: the poorest are left behind in over-crowded and increasingly ghettoized government schools. This type of unplanned school choice may be construed as benefiting government education systems by lessening the burden on them and leaving more resources for the poor, left behind. However, when all those with social capital and therefore "voice" abandon the system, the result appears to be ghettoization and lack of care or intimate knowledge on the part of the authorities, whose children also attend private schools.

The promotion of choice does not lead to the consistent upward pressure on quality anticipated, and often comes with negative unintended consequences, often to do with test-based accountability and other types of accountability measures. In the richer country cases, some charter/voucher schools are performing well, but many are not, and the same is also true of low-fee private schools in poorer countries. These results are discussed in depth in the subsequent education-focused chapters (7–9) of this volume. What does appear to show through is that a strong emphasis on choice helps to turn citizens into consumers shopping for the best "deal" for their child, rather than community members supporting a school that belongs to the whole community. The notion that school choice is a freedom in and of itself worth valuing is, arguably, only true in a limited number of cases where wider liberties or rights for minorities are limited or threatened. If school choice is considered a human right, then it is, perversely, a right whose exercise often materially diminishes the rights and outcomes for less-fortunate children. Systems based on school choice such as Sweden and Chile have seen highly stratified and disappointing learning outcomes, along with increasing segregation. While the more motivated and able may reap benefits from school choice, this is the case only in a narrow sense, ignoring the "externalities" of having to live in an increasingly unequal society.

The original intention of the framers of the freedom of school choice and the liberty of individuals to establish private schools was to allow

parents to stop their children from being conditioned by a tyrannical state and to allow parents with strong beliefs or linguistic needs to educate their children accordingly. This provision has been re-interpreted and co-opted by an entirely different cause, primarily in the last four decades: the promotion of marketization and the roll-back of the state which is a neoliberal project. The right to choose a school is equated with freedom itself – and by implication with fundamental human rights (Åstrand, 2016).

The example of Finland leads the way in showing how a system can provide true learning and support the human rights of children overall: a system that respects its teaching staff, relying on their professionalism and judgement; that provides more funding to reach the most difficult to educate; and that ensures that all children have an equal chance. In places where teachers do not have this level of skill and professional judgement, teachers' skills and knowledge need to be scaffolded in the short-term. Teachers should be educated, supported, and given proper induction in order to teach well. They also need to be responsible and accountable for the work that they do. School choice and related accountability mechanisms are not enough to bring about quality improvement, and increasing choice appears to be highly correlated with increasing segregation and stratification of school systems. Of note, this negative outcome seems to be common across richer and poorer countries; those with stronger and weaker regulatory systems; and contexts where choice was injected by design, and where it developed spontaneously, in a *de facto* manner. This indicates that the right of parents to choose requires careful balancing with the rights and interests of those who are not in a position to choose, and governments and societies need to consider the elements of society that they value most.

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7. How and why policy design matters: understanding the diverging effects of public–private partnerships in education[1]

Antoni Verger, Mauro C. Moschetti, and Clara Fontdevila

INTRODUCTION

In different policy circles, Public–Private Partnerships (PPPs) are increasingly perceived as an innovative policy approach to promote better quality education and provide disadvantaged populations with new educational opportunities. Many governments, international organizations and other key educational stakeholders expect PPPs to bring together the best of the private and public worlds, namely the equity orientation of the public sector and the efficiency and innovation of the private sphere (see Osborne and Gaebler, 1992). In education, PPPs can be broadly defined as legal arrangements through which the public sector contracts the private sector for the delivery of educational services for a certain period of time. These contracts should specify performance criteria and goals, and identify whether the public and the private sectors share the financial risks entailed in the delivery of the service (Patrinos et al., 2009). Nonetheless, beyond this broad and legalistic definition, PPP arrangements might follow very diverse rationales and crystallize

[1] An extended version of this chapter can be found in: Verger et al. (2020). Its content is based on the background paper that the same authors elaborated to inform the deliberations that preceded the adoption of the Abidjan Principles on the Right to Education.

in very different policy modalities, which places PPPs in an ambiguous policy category.

The most relevant PPP modalities in educational delivery are vouchers, charter schools and supply-side subsidies for private schools. Although there might be important differences as we shall see, overall, *voucher programmes* represent a significant departure from traditional and bureaucratic forms of educational funding and involve competitive funding formulas that allot public funds to families for use in private or public schools of their choice. *Charter schools* are relatively autonomous schools that are publicly funded but privately managed and exempt from following certain public regulations. *Supply-side subsidies* for private schools generally involve the provision of public funds to existing privately owned schools to cover part of (or all) their operating costs, via lump sums or the direct payment of specific inputs, such as teacher salaries or educational resources (Boeskens, 2016; Patrinos et al., 2009).

PPPs' growing popularity for educational delivery contrasts with insufficient supporting evidence. In fact, existing research on the outcomes of PPPs often yields contradictory results across multiple impact dimensions, including expanding access, improving educational results, and distributing educational opportunities or promoting educational innovations (Aslam et al., 2017; Day Ashley et al., 2014; Languille, 2016; Verger et al., 2019; Waslander et al., 2010). Diverging effects can be partially explained by the fact that policy-design variables and context specificities strategically mediate the enactment and impact of PPPs. However, within some policy and academic circles—such as international development and comparative education—the PPP debate is often too generic and fails to adequately differentiate the extent to which PPP modalities work, for whom, and in which sense.

This chapter aims to understand how and why policy design operates in order to analyse the differential impact of PPPs on education. Specifically, the chapter addresses the question of how policy options mediates the effects of PPPs in education in several dimensions (with a focus on learning outcomes and equity). The study also aims to contribute to the advance of a more nuanced and evidence-informed discussion on the potential benefits, challenges and disadvantages of PPPs in educational delivery.

The chapter is organized as follows: The first section builds a conceptual and analytical framework to classify different PPP modalities according to a series of policy-design variables. The second section presents the methodology and scope of the study. The third section

discusses the main findings of our research for this chapter, including an overview of the impact of each PPP model, both in aggregate terms and according to specific policy-design variables. We conclude by discussing the main findings of the study and distilling its main research and policy implications.

POLICY MATTERS: A CONCEPTUALIZATION OF DIFFERENT PPP MODELS AND RELATED POLICY OPTIONS

According to the World Bank's seminal report *The Role and Impact of Public–Private Partnerships in Education* (Patrinos et al., 2009), PPPs cover a continuum of policy arrangements with different levels of engagement between the public and the private sectors (see Figure 7.1). This continuum ranges from a nascent stage—in which private schools exist independently of the state—to an integral stage—in which education is entirely provided by the private sector under a voucher scheme (Patrinos et al., 2009). This classification spectrum can be read as a sequence of educational governance models that transition from a bureaucratic and centralized governance model through to a fragmented and postbureaucratic governance approach in which unleashed market forces dominate.

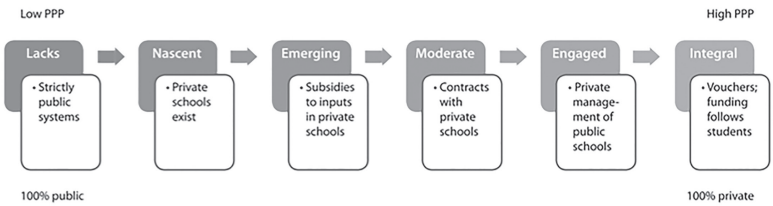

Figure 7.1 The World Bank PPP continuum concept

This categorization has widely influenced the fields of comparative and international education due to its comprehensive nature. The categories assume that PPP models intrinsically calibrate market dynamics, with vouchers schemes being the market driver par excellence (in the sense that these schemes' main objectives are to expand families' choice opportunities and thus promote competition between schools). Nonetheless, in so doing, this categorization neglects the significant differences that

might exist within each PPP model. For instance, voucher schemes are more or less likely to trigger market competition, depending on whether they are targeted or universal, whether they provide partial or complete funding, and whether their territorial scope is local, regional or national (Levin, 2002; Moe, 2008). The market dynamics that charter schools programmes generate can also differ significantly, according to the degree of school autonomy, the diversification of their educational offerings, or the freedom of choice for families they pursue (Bulkley, 2005). As we argue in this chapter, these and other policy-design variables are crucial for understanding the heterogeneous nature of PPPs and their diverging outcomes.

Policy-Design Variables in Educational PPPs

Policy design is a key phase in policy formulation in which policy interventions are operationalized in concrete sets of tools and regulations. Despite often being conceived as technocratic, policy-design decisions tend to respond to political agendas and ideological preferences (Jordan & Turnpenny, 2015). This is especially so if we consider ambiguous policy programmes, such as PPPs, which can be guided by very contrasting values (such as academic excellence, educational equity, or freedom of school choice). Indeed, the final tools in which programmes crystallize can incline the intentions and logics underpinning the policy in rather different directions. For this very reason, specific policy-design decisions might explain the divergent outcomes of apparently similar policy interventions.

In this section, we unpack and present the main policy-design variables that contribute to the programmatic configuration of PPPs. We first reflect on those policy variables and options that are common to most PPP modalities before turning to those variables that are specific to each PPP modality.

Profit-making

PPP programmes can provide access to for-profit organizations or exclude them as eligible providers. When PPPs provide access to for-profit institutions, they intend to foster competition on a bigger scale and are expected to expose public schools to more intensive private competition (Hoxby, 1994). Many market policy advocates see profit-making as the strongest means available for incentivizing schools to meet consumer demand efficiently, as well as for facilitating the rapid expansion

of private provision and—above all—for unleashing the market's full potential (see Robertson, 2015). However, in basic education, for-profit operators are allowed to operate only in a few educational systems, given the concerns over the risk of corruption, or of profit being made at the expenses of quality or of public funding contributing to private gains.

Students' selection

Regulations over student admissions also vary across and within different PPP modalities. Some proponents of a free-market system argue that, for high-quality schools to participate in PPP programmes and turn the educational system into one that confers real choice, regulations regarding admissions should be kept to a minimum (Parry, 1996). Also, in contexts where PPPs have been adopted to ensure the economic viability of religious schools, or to preserve school diversity (as with most subsidy programmes), schools are more likely to enjoy greater discretion over student admission procedures. However, PPP arrangements that follow an equal opportunity rationale frequently prohibit the possibility of schools selecting students.

Tuition add-ons

Some PPP programmes encourage—or at least permit—families to add to the value of the voucher or subsidy and therefore allow schools to charge extra fees accordingly. Allowing parent add-ons incurs the risk of generating social segmentation in schools, yet can also be an effective way of encouraging private schools to participate in PPP programmes, thus maximizing the allegedly virtuous effects of competition (Moe, 2008). In some instances, permitting tuition fee add-ons may be justified on the grounds of cost-efficiency and quality. They are also expected to promote equity, since add-ons generate additional resources in the educational system that can be invested in the most socially disadvantaged schools or families (Narodowski et al., 2016; Van Der Berg et al., 2017). There are also those that argue that fixed-amount vouchers might lead to underfunding, thus restraining potential pedagogic innovation and improvement (see Bellei & Vanni, 2015).

Voucher programmes' specificities

Voucher schemes vary substantially, depending on their underlying 'structure of choice' and the social values they pursue (Levin, 2002; Moe, 2008). Policymakers can calibrate the degree of choice and/or

educational opportunity they wish to promote via vouchers by deciding between the following options.

Universal or targeted vouchers
Vouchers can be made available to every family with school-age children or exclusively to a specific group. A universal voucher programme would, theoretically, extend greater freedom of choice to families and generate higher levels of competition between schools (Moe, 2008). In contrast, targeted vouchers tend to follow an affirmative action rationale by granting vulnerable groups (including socioeconomically disadvantaged families and children with special educational needs) a wider choice of schools (Morgan et al., 2013; Ben-Porath, 2009).

Same-amount voucher or scaled voucher
Voucher systems may provide either the same, or a different, scaled amount of money per child, based on a series of pre-defined criteria, usually of a socioeconomic nature.[2] While giving all vouchers the same amount is often seen as the most straightforward market solution, scaled vouchers are more likely to be adopted if the programme is expected to serve an equity agenda. This is because scaled vouchers offer the chance to compensate for socioeconomic differences between families, in addition to expanding their capacity to choose (Levin & Belfield, 2003). Furthermore, it is also because they are expected to compensate for the (assumedly) greater costs of educating disadvantaged students and to incentivize schools to serve low-income populations (Moe, 2008).

Charter schools: the mediating role of management organizations
Despite some common attributes, differences between charter school regulations abound. An important design variable in charter school programmes concerns the *nature* and *scale* of the private operators. Charter schools might be managed by independent operators or by big charter management organizations (CMOs), frequently organized in the form of school chains. The former option is indeed more closely aligned to the original conception of the charter schools, as these were primarily envisioned as locally managed and highly autonomous educational establishments that were presumed more likely to incentivize innovative

[2] Although behavioural problems, learning disabilities or other educational difficulties might be considered as well (Levin, 2002).

and context-relevant education (Scott & DiMartino, 2009). However, some charter school advocates defend the presence of CMOs, claiming they can generate economies of scale and encourage dynamics of mutual support and pedagogic exchange within the school chain.

METHODS AND SCOPE

This research analyses the impact of PPPs on education according to a series of programme design features. To this end, we rely on a *scoping review* of the literature, informed by 199 impact studies on different modalities of PPPs published between 1992 and 2018.[3] The papers reviewed were identified with a keyword-based search on *Scopus*. The selection process relied on successive screening sequences based on a protocol that restricted the scope of the review to studies that are empirically driven, focus on the effects of specific PPP modalities, are explicit on the main design characteristics of the studied PPP programmes and focus on primary and/or secondary education. The corpus of papers included in the review was analysed and synthesized following a charting approach so that, for each primary document, key items of information were collected and sorted for a selection of main attributes.

Besides some basic descriptors, (i.e. year of publication, methodological approach, field, etc.), two main groups of attributes were contemplated—namely, policy-design variables and assessed impact dimensions. *Policy-design variables* comprised the range of policy options discussed in the previous section—including those variables common to all PPP varieties, as well as those specific to certain modalities, whereas *impact dimensions* referred to a selection of frequently discussed policy effects organized around common themes. We focused mainly on two dimensions that are more present in the literature—namely, *learning outcomes* (e.g. any measure related to academic achievement and student performance) and *equity* (e.g. any measure of the effect of PPP programmes over learning inequalities, school segregation and the inclusion of students with special needs).

For each of the policy dimensions analysed by a given paper, four possible *directions of impact* were considered—namely, positive, negative,

[3] Further detail regarding the search selection procedures used in this review, as well the list of the references constituting the final corpus of the study, can be found in an extended version of this chapter (see Verger et al., 2020).

neutral or mixed. When the codes assigned to the multiple dimensions addressed by the article differed, the *global impact* of the policy was determined mixed, and the article was coded as such.

The information collected in the coding process was organized and summarized in a database that allowed us to calculate the frequency of the coded effect, as well as to identify recurrent patterns of effects in relation to particular policy designs. Results are presented in a quantitative format for the sake of clarity and conciseness. However, it should be noted that our study is not conceived as a probabilistic undertaking, but rather as a mapping exercise. In this sense, figures are only oriented at capturing the state of the literature; they are not meant to be extrapolated in order to determine broader trends.

Table 7.1 provides an overview of the corpus of studies covered. As observed, the reviewed studies are unevenly distributed in terms of country focus, methodology, year of publication and impact dimension.

Table 7.1 Distribution of primary documents according to selected dimensions

Impact dimension		*Policy addressed*	
Learning outcomes	84	Voucher programmes	84
Equity-related categories	98	Charter school programmes	100
Teacher-related categories	15	Subsidies programmes	15
Family-related categories	9		
Innovation	8		
Curriculum breadth	8		
Student behaviour	2		
Grade inflation	2		
Country		*Methodological approach*	
USA	118	Quantitative approach	151
Chile	35	Qualitative approach	32
UK	8	Mixed methods	9
Other OECD*	21	Literature review/other	7
Other non-OECD	13		
Comparative studies	4		

* Organisation for Economic Co-operation and Development.

Our results should be read without losing sight of such imbalances—which reflect essentially the priorities and prime concerns that have guided research on PPPs during the last decades.

Finally, it is important to bear in mind that a focus on policy-design variables, as established in regulatory frameworks, necessarily entails certain limitations given the fact that real practices do not always adhere strictly to the regulations in place. For instance, even in those systems where student selection or tuition add-ons are forbidden, schools might adopt a number of informal strategies to try to screen students and/or charge fees to families. A more accurate understanding of the relationship between policy design and policy outcomes would require exploration beyond formal arrangements and paying greater attention to enactment dynamics, as well as to the effects of weak legislation or potential regulatory gaps.

UNPACKING PPP EFFECTS: MAIN FINDINGS OF THE REVIEW

In this section, we first provide an overview of the impact of each PPP modality in aggregated terms. Second, we break down our results according to the most relevant policy-design variables for each case.

Impact Overview

Altogether, publications reporting negative effects of PPPs are manifestly more common than studies reporting positive effects—although studies finding neutral and mixed results also abound (Figure 7.2). In the reviewed literature, charter schools and subsidy programmes are reported to generate negative effects more frequently than voucher schemes. As shown in Figure 7.3, voucher schemes offer a slightly more mixed picture in terms of aggregated impact. Studies reporting positive and mixed effects appear to be slightly more frequent for voucher schemes than for charters and subsidies.

However, this aggregated approach offers only limited insight. When we disaggregate the data according to different impact dimensions, the effects of PPPs differ notably. Indeed, as Figures 7.4 and 7.5 show, some remarkable differences between PPP modalities can be found in relation to the most often studied impact dimensions (learning outcomes and equity-related outcomes). When it comes to learning outcomes (Figure 7.4), studies focusing on voucher programmes report positive effects

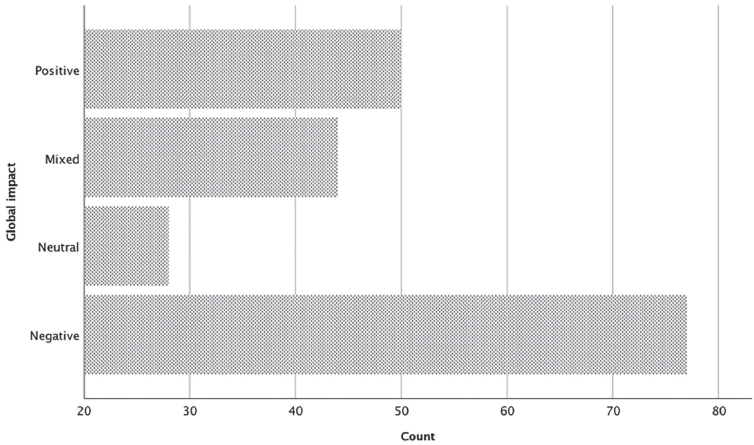

Figure 7.2 Global impact of education PPPs (n = 199)

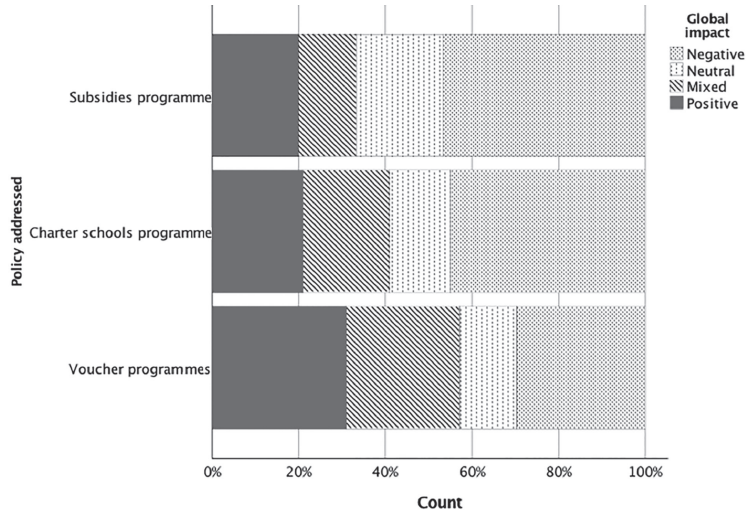

Figure 7.3 Global impact according to policy approach (n = 199)

more frequently (and negative effects less frequently) than studies on subsidies and charters. Mixed results on learning outcomes are significant in all cases and neutral results are comparatively over-represented for subsidy programmes. Conversely, the three different PPP modalities

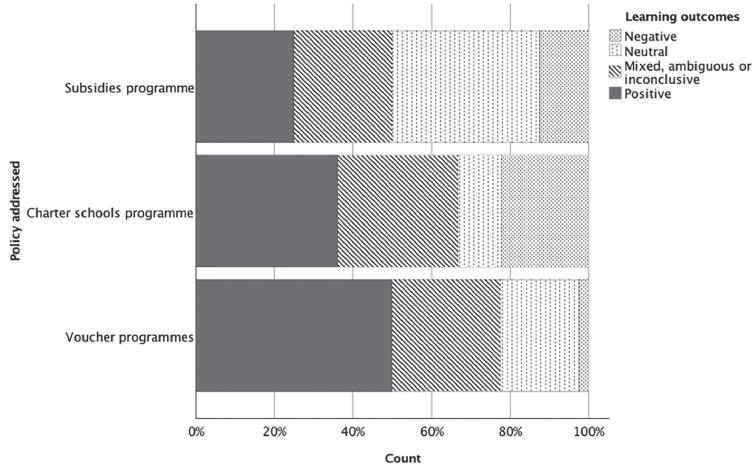

Figure 7.4 *Impact on learning outcomes according to PPP programme (n = 84)*

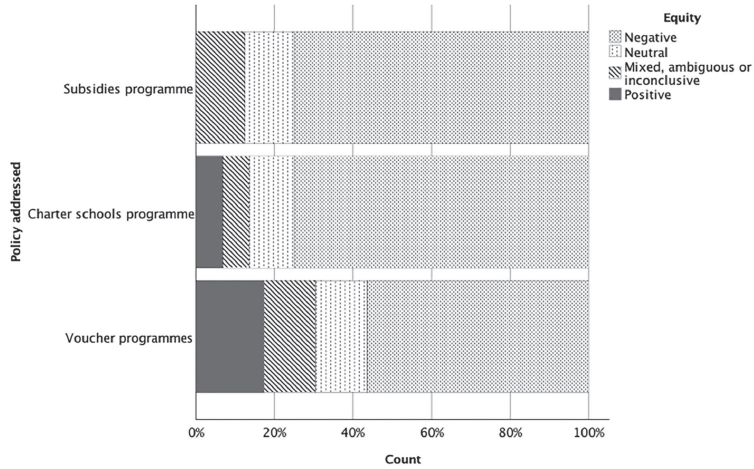

Figure 7.5 *Impact on equity according to policy approach (n = 98)*

appear to have a more similar pattern of results in relation to equity-related dimensions (Figure 7.5). In these cases, the reported effects of PPPs, independently of their modality, are predominantly negative.

Ultimately, the apparently contradictory and inconsistent nature of the results sketched above are indicative of the limitations of adopting a bird's eye perspective to assess the impact of PPPs. A design-sensitive approach—which we argue for in this chapter and develop below—is better equipped to advance a more fine-grained understanding of the effects of PPP interventions on education.

Voucher Programmes

Universal vs. targeted vouchers

This research suggests that targeted vouchers perform significantly better than universal vouchers. As shown in Table 7.2, positive effects are reported in about half of the studies on targeted voucher programmes, whereas studies on universal vouchers only report positive effects in about 20% of the cases.

Table 7.2 Voucher programmes' impact according to scale—paper count and row percentage

	Negative		Neutral		Mixed, ambiguous or inconclusive		Positive	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Targeted	3	12.5	4	16.7	5	20.8	12	50.0
Universal	22	37.9	7	12.1	16	27.6	13	22.4
				Learning outcomes				
Targeted	0	0.0	1	10.0	0	0.0	9	90.0
Universal	1	3.4	7	24.1	10	34.5	11	37.9
				Equity-related dimensions				
Targeted	2	15.4	3	23.1	4	30.8	4	30.8
Universal	24	75.0	3	9.4	2	6.3	3	9.4

A disaggregated analysis shows that universal vouchers are unlikely to yield any gains in terms of equity, whereas targeted vouchers perform

much better from this perspective. The differences in academic performance between universal and targeted vouchers are also important. Targeted vouchers are reported to yield overall positive results on learning outcomes, whereas research on universal vouchers finds mixed or neutral effects much more frequently.

These findings could be explained by the fact that universal vouchers, by placing emphasis on school competition, tend to exacerbate school segregation. Research observes that the overtly competitive environments created by universal voucher schemes tend to benefit middle-class and upper-class families with greater ability to navigate the system and effectively exercise choice (Alves et al., 2015; Gewirtz et al., 1995; Olmedo, 2008). Universal vouchers also seem to generate more incentives for schools to try to recruit the best students and those perceived as less costly to educate, and to discriminate against less academically skilled students or against those with special educational needs (Carrasco et al., 2017; Hsieh, & Urquiola, 2006).

For-profit vs. not-for-profit participant schools

As captured by Table 7.3, voucher schemes in which participation is limited to non-profit providers are more frequently found to deliver positive results than schemes that do not restrict profit-making. The very limited evidence in this area suggests the need for caution in the interpretation of the results—and does not allow for their disaggregation by dimension of impact. However, these findings are ultimately consistent with the arguments made by a number of scholars who have problematized the fact that there is no guarantee that for-profit schools will re-invest earnings to improve educational quality, or who have argued that public funding does not necessarily end up following demand, but rather corporate income (Bellei & Vanni, 2015).

Tuition add-ons

The reviewed evidence suggests that negative results are more frequently reported for voucher programmes that allow parental co-funding (Table 7.4), especially in relation to equity. Such findings are consistent with recent studies highlighting how add-ons build market hierarchies and create sorting dynamics that lead to socioeconomic stratification and undermine equity in education. As documented in Chile, the voucher value becomes a formal ‘suggested retail price’, whereas actual tuition prices ultimately display great variability according to the amount of the add-on tuition charged by private voucher schools (Mizala & Torche,

Table 7.3 Voucher programmes' impact according to profit restrictions—paper count and row percentage

	Negative		Neutral		Mixed, ambiguous or inconclusive		Positive	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Profit not allowed	1	16.7	0	0.0	1	16.7	4	66.7
Profit allowed	24	31.6	11	14.5	20	26.3	21	27.6
				Learning outcomes				
Profit not allowed	1	16.7	0	0.0	0	0.0	5	83.3
Profit allowed	0	0.0	8	25.0	10	31.3	14	43.8
				Equity-related dimensions				
Profit not allowed	1	100.0	0	0.0	0	0.0	0	0.0
Profit allowed	24	54.5	6	13.6	6	13.6	8	18.2

Table 7.4 Voucher programmes' impact according to add-ons restrictions—paper count and row percentage

	Negative		Neutral		Mixed, ambiguous or inconclusive		Positive	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Not allowed	5	17.9	6	21.4	8	28.6	9	32.1
Allowed	18	40.9	4	9.1	7	15.9	15	34.1
				Learning outcomes				
Not allowed	0	0.0	3	23.1	3	23.1	7	53.8
Allowed	1	4.5	5	22.7	3	13.6	13	59.1
				Equity-related dimensions				
Not allowed	4	28.6	3	21.4	3	21.4	4	28.6
Allowed	18	75.0	2	8.3	2	8.3	2	8.3

2012). The result is usually a highly segmented educational marketplace that reflects the differential purchasing power of households.

Same-amount vouchers vs. scaled vouchers

Since scaled vouchers aim to balance the field for disadvantaged families, this type of voucher should perform better than same-amount vouchers in terms of equity. However, existing research reports practically the same positive results for same-amount vouchers as for scaled vouchers and—paradoxically—more negative results for scaled vouchers than for same-amount voucher programmes (see Table 7.5). These results counter the equity expectations informing the theory of change that underpins most scaled voucher programmes. Given the limited literature on the matter, further research is needed to gain a better understanding of the social mechanisms that are more likely to explain such patterns. Future research could focus on examining whether the differences in value scales are sufficient to counteract schools' incentives for selecting students, or whether scaled vouchers might aggravate student selection by 'signalling' a particular type of student.

Table 7.5 *Voucher programmes' impact according to amount—paper count and row percentage*

	Negative		**Neutral**		**Mixed, ambiguous or inconclusive**		**Positive**	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Differential	15	53.6	1	3.6	3	10.7	9	32.1
Uniform	9	18.8	9	18.8	15	31.3	15	31.3
				Learning outcomes				
Differential	0	0.0	3	27.3	1	9.1	7	63.6
Uniform	1	3.7	5	18.5	8	29.6	13	48.1
				Equity-related dimensions				
Differential	13	72.2	1	5.6	1	5.6	3	16.7
Uniform	11	47.8	4	17.4	4	17.4	4	17.4

Student selection

Voucher schemes that allow student selection yield slightly more positive results than non-selective schemes, especially when looking at learning outcomes (Table 7.6). This might be due to the fact that studies on vouchers tend to report results of private voucher schools as compared to conventional public schools' students, and do not necessarily conduct a system-level analysis. As Hsieh and Urquiola (2006) show, the main effect of the Chilean universal voucher programme has been to facilitate the exodus of the middle-class from non-selective public schools to selective private schools. While learning outcomes in the latter have improved, the authors find no evidence that the school choice dynamics triggered by the voucher system have improved aggregate academic outcomes in the country.

Table 7.6 *Voucher programmes' impact according to student selection restrictions—paper count and row percentage*

	Negative		Neutral		Mixed, ambiguous or inconclusive		Positive	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Not allowed	16	37.2	8	18.6	7	16.3	12	27.9
Allowed	7	22.6	2	6.5	10	32.3	12	38.7
				Learning outcomes				
Not allowed	0	0.0	5	31.3	2	12.5	9	56.3
Allowed	1	4.5	3	13.6	7	31.8	11	50.0
				Equity-related dimensions				
Not allowed	13	54.2	3	12.5	4	16.7	4	16.7
Allowed	10	71.4	2	14.3	0	0.0	2	14.3

Most studies on the effects of voucher schemes tend to focus on learning outcomes as the main dependent variable. However, the existing studies focusing on the impact of vouchers on equity dimensions tend to report negative results more frequently. As suggested by Table 7.6, when selection practices are allowed, vouchers have predominantly negative consequences for equity. This pattern is likely to be the consequence of

the increase in social and school segregation entailed by student selection practices. Numerous scholars have noted that, when schools face market pressure, they are more likely to compete for students perceived as easier to educate—usually, those from wealthier backgrounds, or that are part of certain ethnic, social, or religious groups regarded as desirable (see, for instance, Jennings, 2010; Van Zanten 2009).

Charter Schools

For-profit vs. not-for-profit participant schools

While evidence regarding the mediating role of the for-profit variable is limited, our review suggests that profit-making restrictions do not alter the direction of the educational effects of charter school programmes substantially. Nonetheless, the results are slightly more positive for charter programmes that do not allow operators with profit motives, or when comparing not-for-profit charter schools to for-profit charter schools. (Table 7.7).

Table 7.7 *Charter programmes' impact according to profit restrictions—paper count and row percentage*

	Negative		**Neutral**		**Mixed, ambiguous or inconclusive**		**Positive**	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Not-for-profit	10	41.7	4	16.7	2	8.3	8	33.3
For-profit	17	54.8	2	6.5	5	16.1	7	22.6
				Learning outcomes				
Not-for-profit	1	10.0	3	30.0	0	0.0	6	60.0
For-profit	4	36.4	1	9.1	2	18.2	4	36.4
				Equity-related dimensions				
Not-for-profit	7	58.3	4	33.3	0	0.0	1	8.3
For-profit	8	88.9	0	0.0	1	11.1	0	0.0

As shown by Table 7.7, when we disaggregate the results in terms of impact on learning outcomes and equity, a similar pattern can be identified, with for-profit motives being more associated with worse effects

regarding equity and—to a lesser extent—learning outcomes. The findings on equity are usually attributed to the fact that for-profit operators have more market oriented ethos and have greater economic incentives to select the most able students, or to avoid special needs or disadvantaged students (Lacireno-Paquet et al., 2002).

CMOs vs. independent charter schools

As Table 7.8 shows, charter schools operated by independent providers are reported to obtain better results than charter schools operated by CMOs. However, the number of studies that place emphasis on the scale of the school operator is relatively low, which means that this comparison needs to be approached with caution.

Table 7.8 Charter programmes' impact according to management—paper count and row percentage

	Negative		Neutral		Mixed, ambiguous or inconclusive		Positive	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Independent	1	20.0	0	0.0	1	20.0	3	60.0
CMO	8	47.1	1	5.9	3	17.6	5	29.4
				Learning outcomes				
Independent	0	0.0	0	0.0	0	0.0	1	100.0
CMO	1	20.0	0	0.0	1	20.0	3	60.0
				Equity-related dimensions				
Independent	2	66.7	0	0.0	0	0.0	1	33.3
CMO	4	80.0	0	0.0	1	20.0	0	0.0

CMOs' results, in terms of learning outcomes, are more frequently reported to be positive than negative. This might be explained by the economies of scale and the support structures that these chains generate for their school members. However, in terms of equity, CMOs' effects are more negative than those generated by more independent providers. This might be the result of the fact that independent schools tend to be more mission-oriented and more socially motivated than CMOs, which

makes the former more likely to generate more positive equity outcomes (Burch and Bulkley, 2011; Hernández, 2016; Roch and Sai, 2015).[4]

Student selection

The restriction of selection practices contributes to charter schools producing better results from the perspective of learning outcomes and—especially—educational equity (Table 7.9). As we saw in respect of vouchers, a regulatory framework that tolerates student selection is conducive to schools discriminating against certain types of students as a way to reduce costs and improve their overall institutional performance. These practices might benefit some schools, but can potentially harm the quality and equity of the educational system for at least two reasons. First, student selection might incentivize schools to compete on the basis of intake exclusiveness rather than on the basis of improving their performance or instructional strategy (Lubienski 2006). Second, student selection dynamics generally translate into greater school and social segregation, which results in a decrease in equity.

However, student selection is a subtle phenomenon that might happen in school settings that are not apparently conducive to this practice, or even in contexts where selective admissions are explicitly prohibited. Hidden selection practices by charter schools include requiring very high levels of parental commitment, implementing complicated applications procedures that only certain families can navigate, discouraging certain families from applying to the school during interviews, or operating exclusively in relatively well-accommodated neighbourhoods (Jabbar, 2016; Jennings, 2010; Robertson, 2015; Weiler and Vogel, 2015). Presumably as a consequence of these practices, existing research reports negative results of charter schools in terms of inclusion or equity much more often than positive, neutral and mixed results.

Subsidies

Conducting a similar analysis for subsidy programmes is more challenging, given the limited availability of studies focusing on the effects of these programmes, as well as the fact that subsidy arrangements consti-

[4] That said, CMO size might be an endogenous variable to the profit motive, since large CMOs tend to operate with for-profit objectives more often than independent schools and, in recent years, numerous CMOs have continued scaling up their activity driven by profit.

Table 7.9 Charter programmes' impact according to student selection restrictions—paper count and row percentage

	Negative		Neutral		Mixed, ambiguous or inconclusive		Positive	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Not allowed	29	39.2	10	13.5	18	24.3	17	23.0
Allowed	6	54.5	3	27.3	0	0.0	2	18.2
				Learning outcomes				
Not allowed	7	23.3	2	6.7	10	33.3	11	36.7
Allowed	0	0.0	2	66.7	0	0.0	1	33.3
				Equity-related dimensions				
Not allowed	24	80.0	2	6.7	1	3.3	3	10.0
Allowed	4	57.1	3	42.9	0	0.0	0	0.0

tute a particularly heterogeneous policy category and frequently rely on a rather undefined structure of incentives.

Allowing or prohibiting tuition add-ons

In subsidy programmes, add-on tuition fees might be allowed to ensure schools enjoy the necessary financial autonomy to experiment with innovative projects, or are equipped with the appropriate material conditions to increase the quality of their services. However, add-ons are frequently regarded as problematic in terms of equity, in that they are likely to trigger a *de facto* selection mechanism (OECD, 2012).

Results from a disaggregated analysis by impact dimension are in line with these premises. As shown in Table 7.10, when it comes to learning outcomes, allowing schools to charge tuition fees appears to be a relatively effective option. Here, studies showing positive effects are equalled by those identifying mixed results but outnumber those showing negative and neutral effects. Nonetheless, the opposite is true in relation to equity, since programmes allowing tuition add-ons show mixed and neutral effects at best and—in the great majority of cases—produce negative effects. The interpretation of such patterns, however, remains particularly challenging given the limited evidence on programmes discouraging tuition. In any case, the clear prevalence of studies finding

negative effects suggests that the equity damage caused by the imposition of school fees is particularly difficult to alleviate through the introduction of compensatory measures, such as sliding scales. While progressive scales can ensure a certain degree of resource equality, they cannot prevent or neutralize the segregation dynamics engendered by price-discriminating schools.

Table 7.10 *Subsidy programmes' impact according to add-on restrictions—paper count and row percentage*

	Negative		**Neutral**		**Mixed, ambiguous or inconclusive**		**Positive**	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Not allowed	2	50.0	2	50.0	0	0.0	0	0.0
Allowed	5	45.5	1	9.1	2	18.2	3	27.3
				Learning outcomes				
Not allowed	0	0.0	2	100.0	0	0.0	0	0.0
Allowed	1	16.7	1	16.7	2	33.3	2	33.3
				Equity-related dimensions				
Not allowed	1	100.0	0	0.0	0	0.0	0	0.0
Allowed	5	71.4	1	14.3	1	14.3	0	0.0

Allowing or prohibiting selective admissions

Similar dynamics to those just described might be at play with the regulation of student admission procedures. In terms of aggregate effects, as shown by Table 7.11, research on systems allowing for student selection reports a relatively balanced combination of effects—although evaluations finding negative effects outnumber studies finding a positive impact. Studies on subsidy programmes that restrict student selection report only negative or neutral effects.

In terms of learning outcomes, the fact that positive effects on learning are only found in systems allowing student selection (Table 7.11) suggests that gains in achievement might be the result of changes in student composition and are not necessarily the result of an improvement in

Table 7.11 Subsidy programmes' impact according to student selection restrictions—paper count and row percentage

	Negative		Neutral		Mixed, ambiguous or inconclusive		Positive	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Not allowed	2	50.0	2	50.0	0	0.0	0	0.0
Allowed	5	50.0	1	10.0	1	10.0	3	30.0
				Learning outcomes				
Not allowed	0	0.0	2	100.0	0	0.0	0	0.0
Allowed	1	20.0	1	20.0	1	20.0	2	40.0
				Equity-related dimensions				
Not allowed	1	100.0	0	0.0	0	0.0	0	0.0
Allowed	5	71.4	1	14.3	1	14.3	0	0.0

school effectiveness or the instructional or organizational advantage of the private sector. Table 7.11 also shows the overly negative effect of subsidy programmes allowing for selective schools in terms of equity. None of the studies reviewed report positive effects, and the number of studies finding negative effects is greater than the number of studies finding neutral or mixed effects. Again, such results are indicative of the sorting dynamics and practices usually triggered by different modalities of PPPs in education. When given the opportunity, schools are likely to exclude socially disadvantaged or less academically able students as a means of increasing the average achievement and/or the 'attractiveness' of the student body and hence enhancing their institutional reputation.

For-profit schools: allowed vs. not allowed

Finally, provisions regarding the participation of for-profit schools also shape the effects of subsidy programmes. As shown by Table 7.12, only subsidy programmes allowing for-profit schools to receive public funds are reported to yield positive effects in aggregate terms, while negative effects are over-represented when contrasted with programmes not accepting for-profit schools. Conversely, most of the studies on systems prohibiting government-supported schools to operate for profit

find neutral or inconclusive effects. The over-representation of negative effects in programmes accepting for-profit schools is explained by the generally negative impact of these programmes on equity. As captured by Table 7.12, this modality of subsidy programme is likely to yield negative results for this specific impact dimension. At the same time, however, it should be noted that positive effects on student achievement are only identified for subsidy programmes accepting for-profit providers.

Table 7.12 Subsidy programmes' impact according to profit restrictions—paper count and row percentage

	Negative		Neutral		Mixed, ambiguous or inconclusive		Positive	
	Count	%	Count	%	Count	%	Count	%
				Global impact				
Not-for-profit	1	25.0	2	50.0	1	25.0	0	0.0
For-profit	6	60.0	1	10.0	0	0.0	3	30.0
				Learning outcomes				
Not-for-profit	0	0.0	2	66.7	1	33.3	0	0.0
For-profit	1	25.0	1	25.0	0	0.0	2	50.0
				Equity-related dimensions				
Not-for-profit	1	50.0	0	0.0	1	50.0	0	0.0
For-profit	5	83.3	1	16.7	0	0.0	0	0.0

It is unclear which are the mechanisms that explain these contradictory effects. The association between the presence of subsidized for-profit schools and improved levels of academic achievement remains particularly difficult to interpret, especially given that the potential of commercial providers is expected to result from school competition dynamics—something most subsidy programmes do not promote explicitly, but might activate nonetheless (Moschetti, 2018).

DISCUSSION

The main goal of this chapter is to map existing research on PPPs' effects on education and to identify different patterns of effects according to

policy-design variables. In this section, we discuss our results by focusing on the two impact dimensions we have explored—namely, equity and learning outcomes.

Equity Effects of PPPs: Conducive to School Segmentation and Segregation

Different PPP modalities appear to yield similar results regarding equity-related dimensions and—especially—school segregation. The majority of research on PPPs, no matter their modality, reports negative effects on equity matters. This is, to a great extent, because most PPP policy programmes in education tend to replicate long-established privatization, pro-competition and quasi-market interventions, which have proven especially problematic in relation to equity and inclusion in education (Waslander et al., 2010; Languille, 2016; Verger et al., 2019; World Bank, 2018). Nonetheless, not all the policy-design variables bear the same responsibility in the production of these results.

Allowing for-profit providers to participate in PPP schemes is one of the policy choices that tends to further aggravate inequalities. Research shows that, overall, PPP interventions that limit participation to non-profit providers appear to deliver better results than partnerships that permit profit-making. The very nature of the internal incentives of profit-making institutions—and arguably their commercial ethos (Linder & Rosenau, 2000)—tends to increase the probability of these schools engaging in student selection practices guided by cost-efficiency criteria: students' characteristics (such as attitudes towards learning or academic skills), then, become a key factor in these schools' profit-maximizing function, providing incentives for them to deploy selective strategies (Elacqua, 2012; Robertson, 2010).

Tuition add-ons are another variable that appears to be significantly problematic from the equity perspective across different PPP modalities. This is due to the fact that, when subsidized schools can top up public funds with parental contributions, equity suffers as a consequence of add-ons generating typical market price-based hierarchies and sorting dynamics that lead to socioeconomic stratification. This stratification is particularly difficult to alleviate, even with compensatory measures or maximum-price regulations (Narodowski, 2002; Krüger, 2014).

Student selection is a third cross-cutting phenomenon affecting all PPP models, with negative implications for equity in education. The pervasiveness of student selection practices is a result of schools' perfor-

mance being primarily determined by the nature of their student intake (Van Zanten, 2009). When student selection takes place, research tends to show positive results on learning outcomes for selective schools in comparison to non-selective schools, but also negative effects on equity and inclusion (Hsieh & Urquiola, 2006). Nonetheless, numerous studies report that, even when student selection is not allowed, covert selective practices happen in the context of voucher schemes (Carrasco et al., 2017; Zancajo, 2018), charter schools programmes (Jennings, 2010; West et al., 2006) and public subsidies programmes (Gottau & Moschetti, 2016; Rambla, 2003). Thus, research based on formal regulations does not capture the dimension of the selection effect because it tends to be administratively difficult for governments to control whether the private schools involved in PPP frameworks fully comply with public regulations on students' admissions.

PPPs' Effect on Learning Outcomes: Not a Win-Win for All

According to the reviewed literature, the different modalities of PPPs yield mostly positive results in relation to learning outcomes, usually measured in terms of student performance on standardized tests. The causal theory connecting PPPs and improved student achievement relies, on the one hand, on the school effectiveness dynamics that increased choice and competition trigger; on the other, on the fact that private school providers are more autonomous and are, accordingly, more likely to innovate and promote more socially relevant education (Chubb & Moe, 1990). Notwithstanding, empirical research shows that pedagogic innovation is not necessarily the main driver of PPP effectiveness. PPP schools, instead, tend to strengthen their effectiveness by adopting organizational strategies, such as introducing longer school days, as well as instructional practices more oriented toward discipline, ability grouping and external tests preparation (Lubienski, 2003; Termes et al., 2017; Preston et al., 2012). These types of strategies have proven to be particularly effective in schools serving vulnerable populations (Angrist et al., 2013).

In PPP frameworks, the improvement of learning outcomes is also connected to the changing student intake in more competitive schools. Numerous studies show that schools react to market pressures by adjusting their relationship to the environment, and that those schools that are better positioned in the educational market are able to exert a degree of control over student composition (Waslander et al., 2010; Van Zanten,

2009; Lacireno-Paquet et al., 2002). Other authors note that, in a context of choice and diversity, self-selection dynamics are likely to be at play (see Chen and Pereyra, 2019). Accordingly, the diverging schooling preferences and expectations of families, given their socially constructed nature, affect substantially the social composition of private, charter or subsidized schools (Solmon & Goldschmidt, 2004). Therefore, beyond instructional and organizational strategies, the explanation for the connection between PPPs and improved levels of educational achievement would also lie in the specific student composition of certain schools.

Our review seems to support this line of reasoning, in that PPP arrangements allowing for student selection practices and tuition add-ons yield slightly more positive results in terms of learning outcomes. As we have seen, those PPP designs that are more frequently found to produce substantive achievement gains are precisely those that provide schools with more leeway for adjusting their student intake—whether through explicitly selective admissions or by charging tuition fees. However, to confirm this hypothesis, it would be necessary to unpack our *learning outcomes* category in order to understand at which levels such performance gains occur.[5] This is so as, if the improvement in learning outcomes is the result of changes in the student composition, performance gains are unlikely to be found at the system level. In more segregated educational systems, peer-effect losses undermine the overall effectiveness of the educational system, something that especially penalizes disadvantaged students (Levin, 2002). The differential effects of universal and targeted vouchers would corroborate the pertinence of this line of reasoning. Thus, the superiority of targeted over universal vouchers might be explained by the fact that the former enables disadvantaged students to benefit from being schooled alongside their better-off peers. In contrast, when universal voucher systems allow the free circulation of any pupil within the system, ensuing segregation dynamics are likely to inhibit positive peer effects, so that the aggregate level of educational achievement is more likely to stagnate, or worsen, as a consequence of enhanced stratification.

[5] The fact that our analysis merges system-level, school-level and student-level gains in learning achievement into a single category does not allow us to perform a more fine-grained analysis.

CONCLUSIONS

This chapter highlights the importance of policy-design variables when making sense of the diverging impact of PPPs in education. Specifically, the chapter shows that policy decisions on profit-making, add-ons and student selection can potentially work as either catalysts or inhibitors of market dynamics in education and—in so doing—play a significant role in mediating the performance and outcomes of PPP programmes. These dynamics are especially visible in relation to equity issues. Our results demonstrate that those PPP designs more inclined toward the promotion of market competition between providers, or which encourage market interactions between schools and families (via add-ons or school choice), are also those that pose greater risk to educational equity. When market dynamics are encouraged within PPP frameworks, schools tend to address competitive pressures by investing more resources into student screening and selection, whereas the effects on educational innovation and instructional improvement are barely documented. This is consistent with existing studies pointing to the fact that PPP schools generate more innovations at the organizational level than at the pedagogic and/or instructional levels (Lubienski, 2003; Lake, 2008).

Our results suggest that, if the aim of educational policy is to promote inclusion and equity, the implementation of most of the PPP programmes analysed in this chapter would not be advisable. Even if educational quality is the goal, most PPP programmes, by undermining equity, do a disservice to the aggregated effectiveness of the educational system. Teacher training and professional development, school cooperation networks or distributed leadership are all policy programmes that contain greater potential for school improvement—and are less challenging from the public accountability perspective—than partnering with the private sector.

Besides these general trends, however, our review does not allow for the identification of robust causality patterns for most of our variables of interest. In summary, such results suggest that existing knowledge about the effects of the different PPP policies is still limited. This is not so much the consequence of insufficient evidence, but rather of the fact that the effect of particular policy-design variables is rarely analysed in isolation and therefore evidence on specific policy arrangements remains fragmentary and unsystematized. Our research has identified a number of research gaps for which further research is warranted. Within the reviewed PPP

modalities, public subsidies to the private sector is the modality most clearly under-researched. Studies exploring PPPs' impact in dimensions other than learning outcomes and equity (including pedagogic innovation, educational differentiation and economic efficiency) are equally insufficient. In terms of policy-design variables, future research could focus on the role of accountability systems, school admission procedures and school choice regulations in mediating PPP outcomes. In territorial terms, more research on PPPs should be conducted in the so-called Global South, where studies on this phenomenon are emerging, but are still marginal.

It should finally be noted that policy design is not the only factor of significance in understanding PPP effects. Beyond policy-design factors, the divergent and inconclusive result of research on PPPs is the consequence of different institutional and socioeconomic contexts where research is conducted, and can also be attributed to the adoption of varying methodological approaches. As discussed by Jabbar et al. (2019) in relation to school choice policies, the effect of these policies depends greatly on the context of implementation and the socioeconomic status of the population benefitting from such policies. PPP reforms are complex and multifaceted: their outcomes are conditioned by how these reforms interact with other educational policies in place, local realities, administrative capacities and the political reception of these reforms. Thus, to strengthen its explanatory power, future research should attempt to identify the context-mechanism configurations (cf. Pawson, 2006) that influence different patterns of PPP outcomes.

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8. The growth of private actors in education in East Africa

Linda Oduor-Noah

INTRODUCTION

East African countries have thus far committed to achieving Education for All (EFA) through the signing of various treaties and conventions,[1] each one pronouncing the State as the sole custodian and entity obligated to deliver on the right to education (Oketch et al., 2010b). More recently, these commitments have been given further onus through the Sustainable Development Goals, which commit countries to achieving inclusive and equitable quality for all. Despite these commitments, only 68 per cent of school-age children in sub-Saharan Africa attend school (Abuya et al., 2014; Phillips, 2013). Furthermore, the declining quality of education despite current investments remains a serious concern (Languille, 2014; Wilson-Strydoma & Okkolin, 2016; Zuze & Leibbrandt, 2011). Private actors are now increasingly put forward as the solution to this crisis, based on a rationale of competitive markets producing a higher quality offering (Bellei & Orellana, 2014). However, this chapter will show that any benefits conferred by the current mix of education provision vary in scope, value, and impact.

Given that human rights law allows for the ownership and operation of schools by private entities, the State remains obligated to ensure that all actors within the education sector observe human rights principles (the 2019 Abidjan Principles). This chapter consolidates literature that

[1] Including the *Universal Declaration of Human Rights* (1948 Article 26); *International Covenant on Economic, Social and Cultural Rights* (1966); *International Convention on the Rights of the Child* (1989), and agreements made at various fora such as the Jomtien Education for All (1990) and the Dakar Framework for Action (2000).

examines trends in the growth of private actors, factors influencing this growth, and the impact of this growth on primary and secondary education in East Africa over a seven-year period. The chapter will also explore the extent to which East African governments are meeting this obligation. Examples from countries in the region – Kenya, Uganda, Tanzania, Ethiopia, Rwanda and South Sudan – illustrate each of these issues.

1. CONTEXT

This section presents a broad overview of the education landscape in the East African region providing a historical description of the social, political and economic contexts leading to national commitments to free basic education as well as those that had a significant bearing on the evolution of private education. This analysis begins during the colonial era.

1.1 Education Agendas from the Colonial Period to Post-Independence

While various forms of education existed prior to colonisation, education in the colonial era took an exclusive form characterised by racial segregation and barriers to progression for indigenes (Somerset, 2007; Weaver, 2011). For instance in Kenya, colonial education was concentrated in urban areas neglecting semi-arid areas, while in Uganda, education was provided at a fee as far back as the pre-colonial period. Ethiopia, however, had universal education provision as early as 1908 with further developments driven by Theodore Shultz inspired schools of thought in the 1950s, which called for higher public spending on education. Subsequently, universal education became a core component of the post-colonial project proposed by newly elected presidents throughout the region. For them, education would provide long-denied opportunities, reaffirm national identity, and increase the capacity of the economy to cater to the needs of the newly independent State. Each country approached the task with its own political philosophy: Tanzania and Uganda were described as having socialist leanings, while Kenya was described as being more capitalist in orientation (Lelei & Weidman, 2012; Mtonga, 1993; Oketch & Rolleston, 2007; Wiegratz, 2019). Provision increased first, followed by a wave of fee abolitions in the 1960s and 1970s. This led to surging enrolments (Anangisye, 2010; MOEC, 2000; Mtahabwaa & Rao, 2010; Oketch & Rolleston, 2007; Vavrus, 2002; Wambayi, 2004). High enrolment further illustrated the

extent to which school fees had acted as a barrier to accessing education at the time.

In the 1980s, Structural Adjustment Policies (SAPs) took hold in Uganda and Kenya, with States instructed to make changes to their macro-economic environment. Governments were expected to reduce inflation, "liberalize, privatize [and] deregulate" (Vavrus & Moshi, 2009, p. 32; see also Phillips, 2013; Wedin, 2004). This re-introduced user fees across public services and set in motion a decline in education expenditure. For instance, in Uganda, education expenditure declined from 5.1 per cent to 2.5 per cent between the years 1988 and 2000 (Penny et al., 2008; Riep & Machacek, 2016). Unlike its neighbours, Tanzania resisted these prescriptions resulting in rising tensions between international and bilateral donors and the president. This led to a decline in development support exacerbating the economic crisis in Tanzania overall (Lofchie, 2014; Nyerere, 1967). The tensions only began to ease when President Nyerere's successor came into power in 1985 and accepted the World Bank and International Monetary Fund's loan terms and conditions. Tanzania became a prime example in the region of how donor pressure could shift national economic policy (Anangisye, 2010; Lofchie, 2014; MOEC, 2000; Mtahabwaa & Rao, 2010; Oketch & Rolleston, 2007; Phillips, 2013; Vavrus & Moshi, 2009, p. 32).

The social and economic impact of SAPs in the late 1980s–1990s is well documented and each East African country subsequently experienced heightened poverty, a decline in school quality and school enrolments, low completion and retention and increases in the number of out-of-school children (Phillips, 2013; Oketch & Rolleston, 2007; Vavrus, 2002; Woods, 2009). Some countries, however, experienced an expansion of private sector activity as well, such as in Tanzania, where the government would vacillate between registering private secondary schools when overrun by demand and strictly prohibiting registration of private schools due to equity concerns (Lassibille et al., 2000).

1.2 A Second Wave of Universal Primary Education

A second wave of Universal Primary Education (UPE) initiatives arose in the late 1990s and early 2000s, mainly driven by political expediency but also in response to the global call for UPE and EFA commitments. In Ethiopia, transitions in government in the 1990s came with the adoption of a new constitution and Free Primary Education (FPE) in 1994 (Bines & Woods, 2007; Mekuria, 2009; Negash, 2006). Similarly in Uganda,

preparation for the transition to UPE began in earnest in 1993 with subsidised (but not free) education for children to attend either public or private schools. This opened opportunities to less well-off students and sharply increased the gross enrolment rate to 58 per cent in the first year and 75 per cent in subsequent years (Altinyelken, 2010; Lincove, 2012; Nishimura et al., 2008; Oketch & Rolleston, 2007; Zuze & Leibbrandt, 2011). All official fees were then abolished in 2003, which further increased enrolments (Lincove, 2012; Moshman, 2015). Rwanda, however, underwent severe shocks during this period culminating in the post-genocide reconstruction period (1994–present) (Kabayiza, 2011; Moshman, 2015; Obura, 2003; Obura & Bird, 2009). To increase participation, the government embarked on an ambitious reform agenda, making education free and compulsory in 2003. Rwanda's basket of reforms over this period to 2011 generated a significant increase in enrolment and completion rates and led to significant improvements in public school infrastructure, textbook distribution and class sizes (Abbot et al., 2015; ICAI, 2012; JICA, 2012; MINEDUC, 2013; Nkurunziza et al., 2012; Obura & Bird, 2009; Schweisfurth, 2006; Upper Quartile & IPAR – RWANDA, 2014; IBRD & World Bank, 2011).

Similarly, Kenya and Tanzania underwent processes of expansion in the early 2000s. While most reforms in these two cases resulted in positive change, they were, however, introduced into contexts structurally ill-prepared to accommodate them. In many instances, UPE interventions led to congested classrooms, insufficient learning materials, inadequate teacher training, irrelevant curricula, and overstretched teachers and staff, all of which contributed to an overall decline in education quality (Abuya et al., 2015; Alcott & Rose, 2016; Anangisye, 2010; Barrera-Osorio & Zable, 2009; Baum & Cilliers, 2018; Edwards et al., 2015; Nishimura & Yamano, 2008; Ohba, 2013; Oketch & Rolleston, 2007; Oketch et al., 2012a; Phillips, 2013). As a result, learning outcomes in subsequent years in these two countries plummeted, resulting in what is now commonly termed "the learning crisis" (Srivastava, 2017; World Bank, 2018b). Additionally, in Uganda, Kenya and Tanzania, there was later a push to expand access to secondary education, though with varying levels of success due to the continuing barriers to access (Ohba, 2011; Oketch et al., 2012b; UNESCO, 2012).

2. THE EXPANSION OF PRIVATE EDUCATION MECHANISMS IN EAST AFRICA

Non-State actors have played a significant role in education provision in East Africa since the colonial period and as the following sections will show, their expansion may be indicative that growing education privatisation is likely underway. There are various forms of privatisation as outlined by Tooley & Dixon (2006): open or demand-side privatisation involves the provision of State incentives such as tax credits, grants, subsidies, vouchers or other financial resources to private education providers. These subsidies are often attached to conditions such as quotas for marginalised groups or the meeting of learning targets at the school level. Supply side privatisation on the other hand, is the State intentionally instituting reforms to incorporate private actors in the provision of education services. These two forms are often viewed as being "acceptable", especially when situated within strong regulatory environments. Conversely, de facto privatisation occurs in the context of a State that has abdicated its obligation to provide quality, free education to its children. Some, however, argue that de facto privatisation has played an essential role in meeting UPE in the region and that it can be adapted to benefit all students. Additional arguments state that the model proves useful for targeting marginalised populations and providing additional revenue to the State, which could then be directed to expanding education supply (Bellei & Orellana, 2014; Oketch, et al., 2010a; Tooley & Dixon, 2006). However, evidence also shows that this approach favours the privileged and leads to widening inequality (Srivastava, 2010).

Given the paucity of evidence, this review does not make any conclusive determination as to which form of privatisation may be unfolding. Instead it will explore emerging trends and discuss the concurrent rise of private education provision in the region. More specifically, the review focuses on two key mechanisms: low-fee private schools (LFPS),[2] including their commercial formulations, and education public–private partnerships (PPPs). For this review "private schools" will denote "formal schools that are not public, and [that] may be founded, owned, managed and financed by actors other than the State, even in cases when the State provides most of the funding and has considerable control over

[2] Also referred to as low cost private schools (LCPS) or private schools for the poor.

Table 8.1 Types of private education mechanisms in East African countries

Form	Ethiopia	Kenya	Rwanda	Tanzania	Uganda	South Sudan
Elite private schools (for-profit)	✓	✓	✓	✓	✓	✓
Commercial LFPS	X	✓	X	?	✓	✓
Non-profit LFPS	✓	✓	X	✓	✓	?
PPP schools[a]	X	?	?	X	✓	?
Sponsored/Government-aided schools	?	✓	✓	✓	✓	X
Vouchers	X	✓	?	✓	✓	?
Non-profit/Philanthropic (Non-governmental organisations/Faith-based Organisations)	✓	✓	✓	✓	✓	✓
Community Schools[b]	✓	✓	?	✓	✓	X

[a] Modelled after the Charter Schools model. [b] Community schools were not considered independently as the majority of these schools could still be categorised as LFPs.
Key: ✓ = Present X = Absent/no available documentation ?= Unclear.

these schools' teachers, curriculum, and accreditation" (Lewin & Sayed, 2005, p. 11) An overview of the most common private delivery types is presented in Table 8.1.

2.1 Low-fee Private Schools

LFPS are "independently funded through comparatively lower tuition fees (relative to elite or higher-fee private schools), financially sustained through direct payments from poorer or relatively disadvantaged households (though not necessarily the poorest or most disadvantaged), and independently managed and owned by a single owner or team" (Srivastava, 2013b, pp. 11–12 in Edwards et al., 2015, p. 6). LFPS can take a variety of forms, and may be operated by individuals, community and self-help groups or large commercial enterprises (Barrera-Osorio & Zable, 2009; Srivastava & Read, 2019).

LFPS in East Africa tend to be deeply embedded in low-income communities, providing education in constrained environments characterised by unique challenges such as: pervasive poverty; food insecurity;

physical insecurity; high population density; muddled land use and land tenure insecurity; pollution; inadequate water supply and sanitation; a high concentration of needy or orphaned children; and insufficient social amenities and public facilities. The LFPS are therefore often small in size, housed in rented, semi-permanent buildings and rely on parental contributions or the owner's private finances. Tuition fees at these establishments typically cost between $3 and $6 per month, though other school-related expenditures may raise the total cost to over $30 in some cases. These schools therefore serve children from somewhat poor (but not the poorest) households in informal settlements (Allavida Kenya, 2012; Edwards et al., 2015; Ohba, 2013).

Kenya presents perhaps a more evolved case of the presence of LPFS in the education space. In Kenya, basic education institutions are divided into two distinct categories according to the *Basic Education Act 9 (2013): public and private schools* (Government of Kenya, 2013). LFPS were initially considered to be "non-formal schools" which provided formal education services to out-of-school children, youth and adults. After several attempts to integrate non-formal schools into the formal education system, a further category of school was introduced (though not grafted into the Act) in 2009 (MoE, 2009; Urban Primary Education Advocacy Initiative, 2007). Most registered LFPS are now commonly referred to as "APBET schools" in reference to The Alternative Provision of Basic Education and Training (APBET) (2009) policy, which defines them as "institutions that resemble formal schools in that they aim at transmitting a formalized curriculum leading to formal school examinations. They however differ in school practices, management, financing, staffing conditions, registration, operating environment and school structures" (MoE, 2009, p. 8). The policy's rationale was that APBET schools could not meet standard registration criteria in the short term, given their constrained environment (informal settlements in designated urban areas or in arid and semi-arid areas) and the target populations they serve. Thus standards would be relaxed to accommodate them.

The APBET policy and guidelines were essentially an acknowledgement of the role that LFPS had played in accommodating children the public education system could not. In theory, APBET schools would be a stop-gap measure. However, on the ground sentiment differs and is more aligned to the view that these institutions are here to stay given the continued insufficient and ineffective investment in public education. LFPS in Kenya are now increasingly recognised as legitimate service providers of education, despite over 60 per cent of them remaining unreg-

istered and unregulated (Allavida Kenya, 2012; Urban Primary Education Advocacy Initiative, 2007). In Kenya, the government not only registers these schools but also advanced them instructional materials and other grants between 2004 and 2017 (Edwards et al., 2015). Some studies also show that parents in informal settlements are increasingly opting to enrol their children in these institutions given growing negative perceptions of public schools. Between this, excess demand and public school constraints, evidence shows that over 50 per cent of children attend LFPS in low-income settlements (Oketch et al., 2012a; Zuilkowski et al., 2018).

Capitalising on parental desire for private schooling, corporate chains of schools have emerged in Uganda, Tanzania and Kenya. The largest and most well-known of these is Bridge International Academies (BIA), which started in Kenya before expanding to Uganda and West Africa (Rangan & Lee, 2010). Various civil society actors have, however, raised serious concerns around the operation of this particular chain (Civil Society, 2017; EACHRights, 2018). Save for BIA, these large chains of schools remain rare throughout the region. For instance, in Uganda, 91 per cent of all LFPS were found to be either sole proprietorships or partnerships and that approximately only 15 per cent of LFPS operated as chains, the majority of which consisted of not more than two schools (CapPlus, 2017b).

2.2 Public–Private Partnerships

There appears to be a growing acceptance of PPPs within the region, with Kenya, Uganda Tanzania and Rwanda having put in place regulations or guidelines concerning the provision of public services via PPPs (Ndandiko & Ibanda, 2010; United Republic of Tanzania, 2009). Ethiopia's Education Development Roadmap for 2018–2030, for instance, states that it will be setting out to increase education PPPs (ePPPs) and will provide incentives such as tax exemption, subsidies and land to private actors (MoE, 2018). The most prevalent form of ePPPs within the region, are "vouchers, subsidies, private management/contract schools and private finance initiatives" (Aslam et al., 2017, p. vi) and sponsored or government-aided schools in Kenya, Uganda and Rwanda.

In regard to school vouchers, Kenya announced plans for a voucher programme in its National Vision 2030 plan (Republic of Kenya, 2007; Vision 2030 Delivery Secretariat, 2018). Similar programmes are found in Tanzania through the National Education Trust Fund (Nafula et al., 2007). However, there is limited documentation about the implemen-

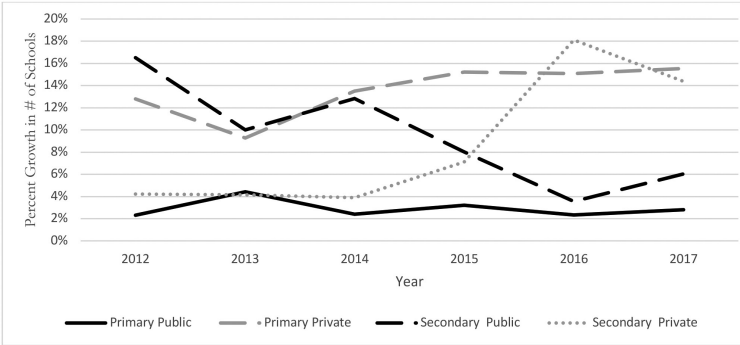
tation or impact of these programmes in either case. Overall, countries do not appear to have significantly adopted ePPP arrangements save for Uganda, where interventions are more advanced; Uganda's school voucher programme was established in 2007 as part of its Universal Secondary Education initiative given the high demand for secondary education (Bous, 2019; ISER, 2016). While, some positive effects were found, these were not broadly shared across all PPP schools: for the majority of schools the impact of the model on learning outcomes remained inconclusive (Aslam et al., 2017; Barrera-Osorio et al., 2015; Baum, 2018; Brans, 2011; ISER 2016; Romero et al., 2017). Concerns were also raised over the State's limited capacity to monitor and regulate the situation, as well as the unequal or differential access to education for children from vulnerable groups and the poorest households caused by the intervention (Arinaitwe et al., 2019; ISER, 2016; Verger, 2012).

2.3 The Growth of Private Schools

While various actors exist within the education ecosystem, it is also important to assess their growth and spread. Evidence from Kenya, Tanzania and Uganda shows a greater increase in private schools relative to their public counterparts. According to one report, in Kenya "54 per cent of the growth in enrolment between 2003 and 2007 was attributable to private schooling" (NAO, 2010, p. 19). The substantial increase in the number of unregistered LFPS, particularly in informal settlements, is furthermore largely unaccounted for (Barrera-Osorio & Zable, 2009; GI-ESCR & Hakijamii, 2015; KNBS, 2019; Nishimura & Yamano, 2008; Oketch et al., 2012a; Oketch, et al., 2010a). Figure 8.1 shows the annual percentage increase by public and registered private schools for both primary and secondary levels, highlighting the increasing trend.

Over a six-year period, the number of public primary and secondary schools increased 19 per cent and 72 per cent, respectively, while the number of private schools increased by 114 per cent in primary and 63 per cent in secondary. Private primary schools have shown a larger overall growth rate, while growth in public secondary schools has slowed as private secondary school growth has increased (KNBS, 2019).

Similarly, between 1990 and 2007, Uganda increased the privatisation of social services including creating an increasing role for the private sector at all education levels (Uwezo, 2015). Until recently, government primary schools in Uganda remained the most highly utilised. However, by 2013, 1.4 million primary school students were reported to be enrolled

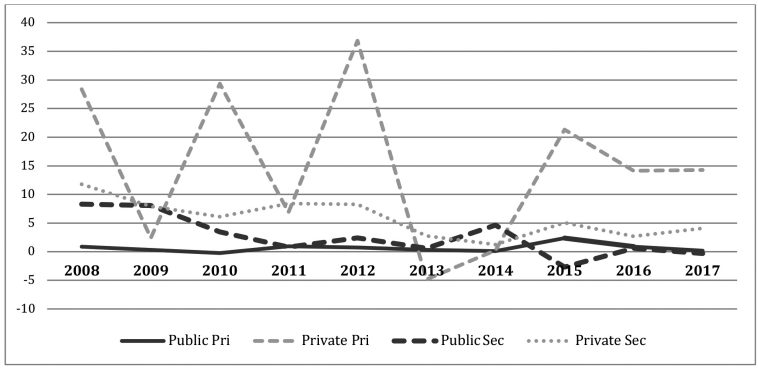


Source: Developed based on data from KNBS (2016) and KNBS (2018).

Figure 8.1 *Percentage increase in private school growth in Kenya, by year (compared to previous year)*

in private schools (Lincove, 2012; Riep & Machacek, 2016; UBOS, 2014). Other reports refer to the intensification of private provision between 2005–2009, describing the private sector as constituting 59 per cent of all schools more so in urban areas (UBOS, 2014, 2019; World Bank, 2018a). In Kampala for instance, 84 per cent of school-going children receive a private education (CapPlus, 2017b).

Comparatively, Tanzania experienced a surge in both public and private schools over the last two decades: for primary schools, a surge in private providers followed the lifting of the ban on private primary schools in 1995 (CapPlus, 2017a). Between 1997 and 1999, private secondary schools enrolled slightly over half of the total secondary school student population at the time (Lassibille et al., 2000; Baum & Cilliers, 2018). Recent figures indicate that over a ten-year period (2007–2017), there was an approximate 7 per cent increase in the number of public primary schools compared to a 275 per cent increase in private primary institutions (Baum & Cilliers, 2018; Ministry of Finance and Planning, 2018; National Bureau of Statistics, 2016; PPMORAL, 2014). Despite this steep increase, the majority of enrolments remain in public sector schools (Baum & Cilliers, 2018; CapPlus, 2017a; Bosu et al., 2011). However, should private sector growth continue, then this may indicate a departure from historical trends of public sector dominance (Figure 8.2).



Sources: Developed based on data from Ministry of Finance and Planning (2018), National Bureau of Statistics (2016) and Baum & Cilliers (2018).

Figure 8.2 Percentage increase in private school growth in Tanzania, by year (compared to previous year)

Developments in Ethiopia and Rwanda differ with the State remaining the largest provider of education services in both cases. Thus they were not explored any further.

3. FACTORS DRIVING THE GROWTH OF PRIVATE EDUCATION

Wilson-Strydoma and Okkolin (2016) have noted with concern the tendency to outline barriers to access and quality in education without having an accompanying discussion around what drives these trends in developing country contexts. In Kenya for instance, private school expansion was observed in four distinct periods, triggered by: population growth in the 1990s; the introduction of cost-sharing policies; the introduction of FPE in 2003 and its resultant access shocks; and a subsequent increase between 2006 and 2010 in response to the growing demand for alternatives to public education (Allavida Kenya, 2012; Bold et al., 2013; Edwards et al., 2015; GI-ESCR & Hakijamii, 2015; Oketch et al., 2012a). This section provides further insights into the factors driving private sector expansion in the East Africa region.

3.1 Barriers to Accessing Public Institutions

A key factor that contributes to the increase in private schools is the scarcity of government schools. In Kenya, this, coupled with public schools situated at the periphery of low-income settlements, limits accessibility especially for younger children (GI-ESCR & Hakijamii, 2015; KNHCR, n.d.; Ohba, 2013; Oketch & Rolleston, 2007). Conversely, LFPS and APBET schools are situated much closer to the children's home. As another example, Tanzania currently requires that all children receive a minimum of one year of pre-primary education to gain admission into public primary schools. The State does not provide early childhood education and therefore this policy has been accompanied by a proliferation of private pre-primary schools (CapPlus, 2017a). Access to public education programmes is further hampered by additional school-related costs or illegal levies charged at public schools. In many instances these payments are mandatory, leading to children being excluded from school for failing to pay (Areba et al., 2013; KNHCR, n.d.; Njihia et al., 2014; Vavrus & Moshi, 2009). Modes of payment in public schools are also considered less flexible compared to LFPS/APBET schools in Kenya. As such, parents from low-income areas who prefer paying in instalments opt out of the public schools (Kaffenberger et al., 2018: Zollmann & Wanjala, 2016; Zuilkowski et al., 2018).

3.2 Declining Quality

It is popularly suggested that the actual and perceived decline in the quality of public education is the main driver of the growth of private schools within the region. Following the implementation of FPE, various studies in Kenya, Uganda, Tanzania and Rwanda noted that, while access had expanded, learning outcomes were dropping in parallel, despite significant investments in expansion (DPG, 2009; Grogan, 2006; ICAI, 2012; ITAD, 2013; Njihia et al., 2014; Upper Quartile & IPAR – Rwanda, 2014; Uwezo, 2015; Zuilkowski et al., 2018). Various reasons for this have been put forward: Across the region, FPE was often introduced on a political platform, with swift implementation and little corresponding institutional strengthening or planned capacity expansion (Abuya et al., 2015; Oketch & Rolleston, 2007; Zuze & Leibbrandt, 2011). For example, in Kenya, the introduction of FPE was announced just one month before the start of the new school term, with limited or no teacher orientation or infrastructure in place (Abuya et al., 2015; Nishimura

& Yamano, 2008; Oketch & Rolleston, 2007). Similarly, in Tanzania the State issued directives in 2006 that required each ward to construct a lower secondary school to expand access. No funding accompanied this directive and, as such, ward officials adapted by imposing a contribution of $24 on each community member for public school construction. Ward officials also converted primary schools into secondary schools and created unaccredited training programmes to increase the number of secondary school teachers, evidence of a clear disconnect between political expectations and the capacity to deliver on these demands (Languille, 2014; Phillips, 2013; Sumra & Rajani, 2006; Zuze & Leibbrandt, 2011).

In Uganda, enrolments increased to 171 per cent against a 41 per cent concomitant increase in both schools and teachers between 2000 and 2007 (Chapman et al., 2010). Government schools had a higher pupil–teacher ratio, reaching 72:1 compared to an average of 33:1 in private primary schools (Uwezo, 2015). Rural areas also suffered an acute shortage of qualified teachers, with existing teachers expressing a lack of "confidence" in their knowledge and capacity to implement policy directives (Chapman et al., 2010; Oketch & Rolleston, 2007; UBOS, 2013; Wane & Martin, 2013; Zuze & Leibbrandt, 2011). At the same time, the Ugandan government embarked on a series of reforms, including decentralisation, implementation of a local language policy and other curriculum reforms, that led to implementation difficulties at the school level (Altinyelken, 2010; Altinyelken et al., 2014; Lincove, 2012; Nishimura et al., 2008; Oketch & Rolleston, 2007; Penny et al., 2008; UBOS, 2013; Uwezo, 2015). The resulting decline in quality, both real and perceived, meant more parents abandoning the government sector.

Declining foreign budget support, increasing debt and austerity, and corruption further constrain education budgets, which impacts education quality (Altinyelken, 2010; Bines &Woods, 2007; Lassibille et al., 2000; MOEC, 2000; Nishimura et al., 2008; Obura & Bird, 2009; Oketch & Rolleston, 2007; Srivastava, 2010; TI – Kenya, 2010; Uwezo, 2015; Vavrus & Moshi, 2009; Weaver, 2011; Williams et al., 2015).

3.3 Policy Orientation

Policy orientation also plays a critical role in catalysing the growth of private actors: All countries in the East African region exhibit an openness to greater private investment in education. Ethiopia exhibits a pre-disposition for PPPs in their Education Development Roadmap (2018–2030) (MoE, 2018). In Uganda, development plans such as

the Education Sector Strategic Plans (ESSP) and Education Strategic Investment Plans orient towards partnering with the private sector (Härmä & Pikholz. 2017; ISER, 2016; Penny et al., 2008; Republic of Uganda, 2014; Riep & Machacek, 2016). The vision of the Private Schools and Institutions department within Uganda's Ministry of Education and Sports (MoES) is to "foster Public Private Partnership[s] in the provision of quality education and sports" (MoES, 2020). In Rwanda policy objectives include providing an economic environment that attracts investment (Abbot et al., 2015; ICAI, 2012; Kabayiza, 2011; MoE, 2007). Rwanda's ESSP (2006–2010), outlines increased non-governmental involvement in the sector as a crucial strategy for expanding access to education, (MINEDUC, 2006, 2008).[3] Furthermore, both Rwanda's first and second Economic Development and Poverty Reduction Strategies (EDPRS) create a platform for increased engagement of the private sector in education, with commitments to provide incentives (e.g. tax incentives) to non-governmental actors (IPAR, 2012; MINECOFIN, 2013; MINEDUC, 2006, 2008, 2013; IBRD & World Bank, 2011).

The same approach appears in Tanzania's Educational Sector Development Programmes (ESDP) (1997, 2001, 2008–2017), which invite the private sector to enter partnership with the government in the construction and management of education institutions. Previously, the Education and Training Policy (1995) also considered enhanced involvement of the private sector in education as part of "broadening" the financial base for education (Vavrus, 2002). The State also provided various incentives to this effect, including "tax rebate, priority land allocation, and duty free import of school materials" (MOEC, 2000, p. 32). Similarly in Kenya, the Education Sector Support Programme (2005–2010) viewed collaboration with the private sector as a key strategy for enhancing the affordability and accessibility of education (MoEST, 2005). Positive indicators of performance in this regard were an increase in the number of private schools, the increase in enrolment of students in private secondary schools, or an increase in incentives to private actors (MoEST, 2005).

[3] The document also states that an evaluation of the possible impact of non-governmental provision on equity, inclusivity and the cost of education should be carried out prior to further engagement.

3.4 Weak Regulations and Weak Enforcement

Where private education is regulated (Table 8.2), it is scarcely enforced due to lack of capacity, corruption or general inefficiency (Edwards et al., 2015; Härmä & Pikholz, 2017). In Kenya, the closure of non-compliant LFPS is rare (Wambayi, 2004) and appears to have only intensified in the latter half of 2019 when several children lost their lives in the collapse of a school building (Daily Nation, 2019; Omar, 2019; Saturday Standard Team, 2019). Similarly, in Uganda, numerous LFPs continue to operate despite failing to meet minimum standards. There have also been challenges with enforcement due to lack of State capacity (Härmä & Pikholz, 2017; Uwezo, 2015). Stronger calls for compliance have recently been made accompanied by threats of closure should non-compliance persist. It is unclear, however, whether the government has taken concrete action in this regard (Edwards, 2018; Museveni, 2018).

In Kenya and Uganda, weak regulations and enforcement have created opportunities for the exploitation of poor parents and teachers, with low-cost commercial private proprietors occupying regulatory gaps and loopholes in order to strengthen their market position (Bellei & Orellana, 2014; EACHRights, 2018; EI & KNUT, 2016). For example in Uganda, registration is a two-step process that allows proprietors to operate with a licence prior to meeting the necessary requirements. Full compliance rarely follows (CapPlus, 2017b; Härmä & Pikholz. 2017). Additionally, weaknesses in Uganda's *PPP Act* (2015) include the lack of a contracting authority, lack of social impact assessments and the fact that parliament fails to play a role in the "development, approval, coordinating, monitoring, or audit process" (ISER, 2016, p. 14; Republic of Uganda, 2014).

3.5 Donor Influence

Donors have also contributed significantly to the growth of private actors in Africa. For instance. the UK's Department for International Development (DFID) set up the Developing Effective Private Education Nigeria (DEEPEN) project in Nigeria. In East Africa, the International Finance Corporation (IFC) plays a significant role in encouraging private participation by financing private actors and addressing the regulatory environment, with PPPs regularly included in their recommended policy package (Hall, 2015; Mundy & Menashy, 2012). The IFC have also financed commercial chains of low-cost private schools in Kenya, such as the BIA (Baker & Smith, 2017). The Africa Schools Program, estab-

Table 8.2 Policies and regulations concerning private actors

Ethiopia	The Ministry of Education and Fine Arts provides guidelines on the regulation and operation of non-State schools.These guidelines have been updated in the *Licensing and Supervision of Private Educational Institutions* guidelines (Seboka, 2003:12).
Kenya	– *Basic Education Act (2013)*: The Act provides for the recognition of both formal and non-formal institutions. In section 49, it further stipulates minimum requirements for the establishment of private schools in regard to registration and minimum standards. – *Alternative Provision of Basic Education and Training (APBET) Policy (2009)*: In order to address gaps in State provision, the government allowed community or non-governmental organisation (NGO) led, not-for-profit, non-formal institutions to formally register as education institutions. The policy is operationalised through the APBET Guidelines (2016) which cover the basic education registration requirements and procedure for registration of APBET schools.
Tanzania	*National Education Act No. 25, 1978*: The Act outlines the procedures required for the registration and licensing of teachers and private schools.
Uganda	– *Education (Pre-Primary, Primary and Post-Primary) Act (2008)*: Section 31 outlines requirements for private school registration and licensing and minimum standards for all private providers. – *Guidelines For Establishing, Licensing, Registering and Classification of Private Schools/Institutions in Uganda (2013)*: The guidelines describe private actors as partners in national development and provide an overview of roles and responsibilities, punishable offences, "procedures, requirements, standards, classification and regulation for establishing and running private schools/institutions" (MoES, 2013, p. 4). The guidelines also allow for the creation of a private school register and the capturing of school data by the Ministry (MoES, 2013). – *Draft Guidelines for Universal Post Primary Education and Training and Universal Post O-level Education and Training or PPP Schools*: These non-binding guidelines focus on selection criteria, implementation modalities, funding conditions, and grant management (ISER, 2016).

lished in 2007, saw the IFC invest upwards of US$50 million in credit guarantees that would facilitate local financing and provide advisory services to at least 500 private schools across Africa (IFC, 2007). Based on the supposed successes of pilots in Kenya and Ghana, the programme was subsequently rolled out across the region. Various other investors, private sector investment arms such as Novastar Ventures, and international financial institutions continue to focus their efforts on private sector expansion in the region (GI-ESCR, n.d; Global Justice Now & NEU, 2019).

4. IMPLICATIONS OF PRIVATE SECTOR GROWTH

Evidence is growing around the impact of the growth of private actors on equity, access, quality, transparency and participation (Aubry & Dorsi, 2016). In the region, impact on the first three dimensions is more evident with a few key examples provided below.

4.1 Quality

As private schools, and in particular LFPS increase, we should consider that LFPS are often limited in the quality of their offering given their modest resources (Allavida Kenya, 2012; Edwards et al., 2015; EI & KNUT, 2016). Income from tuition fees in LFPS is regularly insufficient for meeting expenses or needs, as a substantial number of parents are unable to consistently pay fees (Edwards et al., 2015). High mobility and teacher attrition are also common, which is understandable given that teachers working in LFPS often earn only 20–30 per cent of what government staff earn, or less (Barrera-Osorio & Zable, 2009; Ohba, 2013; Tooley & Dixon, 2006). Urwick and Kisa (2014) also report an increase of teacher mobility in Uganda, with increased competition for teachers between private schools and increased moonlighting behaviour by teachers in order to enhance their pay. All these factors have significant implications for the quality of education offered. Despite this, parents from low-income communities are still "opting" to take their children to private over public schools in both Kenya and Uganda, which means more and more children exposed to sub-standard education (Oketch et al., 2010a; UBOS, 2014; Zuilkowski et al., 2018).

Second, research shows that commercial education targeting low-income communities also has limits to the quality of education that is offered due in part to the primary focus being on exploiting market opportunity. For instance, evidence shows that commercial chains use cost-cutting strategies such as: employing untrained and unqualified teachers; paying low teacher salaries; remaining unregistered; providing sub-standard facilities; ineffective teaching methods; expulsion of poorer children; selecting out poor performers; and in some cases curtailing parental participation (Edwards et al., 2015; EI & KNUT, 2016; Oketch et al., 2012a; Riep & Machacek, 2016; Romero & Sandefur, 2019; Romero et al., 2017).

4.2 Learning Outcomes

There has been significant debate in the past over which type of school is able to deliver the desired learning outcomes. This discussion has centred mainly on academic outcomes, for which the evidence remains inconclusive at best, especially when confounding factors are taken into account (Edwards et al., 2015; Ohba, 2013). For example, some assessments suggest that public education is poor and that private schools outperform public schools (Anangisye, 2010; Languille, 2014; Uwezo, 2015; Woods, 2009) while others show that public schools may perform better and provide greater value than private schools (Alcott & Rose, 2016; Grogan, 2006; Lassibille et al., 2000; MOEC, 2000). Thus, as private education expands, the value for money question still remains.

4.3 Widening Stratification and Inequality

While the increase in LFPS is recognised for expanding the availability of schools, they are usually out of reach of the poorest children (Edwards et al., 2015; Oketch, et al., 2010a;). Fees in LFPS can cost between 4.7–8.1 per cent of a household's income per month, per child, which is not feasible for families with more than one child and who regularly experience negative budgets. The financial burden increases when families take out loans and digital credit to finance their child's education (Donovan & Park, 2019; Kaffenberger et al., 2018; EI & KNUT, 2016; Mutisya, 2018; Zollmann & Wanjala, 2016). In Kenya and Uganda, parental inability to consistently pay fees has led to pupils in LFPS being implicitly categorised according to a "differentiated scale of payment" such as "those who pay in full, those who do not pay at all and those who pay partial fees" (Edwards et al., 2015: 25; Mbole & Kimathi, 2019). This introduces "micro-segregation" even amongst the poor, further exacerbating inequalities (Allavida Kenya, 2012; Barrera-Osorio & Zable, 2009; Riep & Machacek, 2016; Vavrus, 2000; Zuze & Leibbrandt, 2011, pp. 170–171).

Alcott and Rose (2016) also demonstrate that private schools do very little to narrow inequalities in learning, especially for the most disadvantaged in Kenya and in Tanzania. Inequity is further reinforced by narrow selection criteria that place education out of the reach of children who are considered more expensive to educate, such as children with disabilities or those who may have low academic potential (Allavida Kenya, 2012; Edwards et al., 2015; GI-ESCR & Hakijamii, 2015; Lassibille et al., 2000; Oketch, et al., 2010a). In countries like Kenya, the APBET policy

has created a parallel, lower quality tier of education without any clear resolution to fix underlying problems. This is likely to generate further inequalities in the long term, especially given that the necessary checks and balances are lacking (Alcott & Rose, 2016; Edwards et al., 2015). Inequalities in education have been known to reproduce economic, social and political and knowledge inequalities (ISSC, IDS, & UNESCO, 2016). Therefore the expansion of private actors or latent privatisation may work to make children within East Africa's low-income settlements even more vulnerable to suffering these effects.

5. CONCLUSION

While various achievements have been made across the region, public education systems are beset by a range of systemic challenges. As such, East African countries continue to struggle to deliver on the right to education for all citizens. The increase in private actors in education is symptomatic of this struggle. The impact of this increase is, however, not extensively documented, though a nascent body of working is now emerging. What we can however conclude is that effects of privatisation observed in other parts of the world, as outlined in Adamson et al. (2016), are now part of the East African experience. The increase in private actors and its resultant impact is, however, largely absent from policy discourse despite the growing evidence. East African States remain fairly receptive to private participation in the education sector. This chapter will therefore hopefully encourage East African governments and education stakeholders to further interrogate the evidence and to invest in the systematic production of valid, reliable, objective and up-to-date evidence in this regard. The data vacuum must be addressed across the region, especially where non-formal and low-cost private schools are concerned. Better monitoring of the state, scale, scope, and impact of the private sector would go a long way to enhancing State and private actor accountability.

Lastly, this chapter has demonstrated how growth in private provision is largely driven by challenges in the public sector. There is, however, a cyclical nature to the policy mistakes that have been made, especially in the haphazard rolling out of education reforms, which has affected the quality of education and learning outcomes. It is therefore hoped that, as governments across the region set into motion their respective curriculum reform programmes, they will be able to reflect and grow from past missteps.

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9. The evolution and forms of education privatisation within francophone countries

Marie-France Lange

1. INTRODUCTION

This chapter provides a brief overview of the current educational landscape in Haiti and most of the francophone (French-speaking) countries in sub-Saharan Africa, with the purpose of highlighting how their social, political and economic contexts relate to the right to education and the growth of private education. Specifically, it examines countries mainly using the French language as the primary means of instruction in primary and secondary education, including 17 countries in French-speaking sub-Saharan Africa[1] and Haiti, for a total of 18 countries. As the chapter focuses primarily on national systems, it does not include a simultaneous full analysis of international donor relationships with these countries. Instead, it focuses on trends in the growth of private actors and the various forms of private education most prevalent in primary and secondary education, as well as those factors that stimulate this growth of private actors.

The linguistic aspect is important in research on the growth of private education, since the language choice of private schools can sometimes help promote their growth. For example, some private institutions in

[1] Countries included are Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Côte d'Ivoire, the Democratic Republic of Congo (DRC – Congo Kinshasa), Gabon, Guinea, Madagascar, Mali, Niger, the Republic of Congo (Congo – Brazzaville), Senegal, the Union of Comoros and Togo. We did not select former French-speaking Rwanda, as schools now teach in English having adopted English-language curriculum and programmes since the 2008 education reform.

French-speaking sub-Saharan Africa have become popular because they do not teach in African languages, whereas countries might require indigenous language instruction in public schools. Similarly, private Arab-Islamic schools, numerous in some countries, including those of the Sahel, favour Arabic. Even if some countries analysed in this chapter have a close common colonial history, they can have significant disparities in their use of French, often used as the language of instruction, administration, and for the media, but rarely as the *lingua franca*. Instead, African languages usually play this role. In all cases, French is never the mother tongue of the populations of francophone countries of the Global South.

1.2 Issues and Methodology

Educational research is under-developed in francophone countries in sub-Saharan Africa, as noted by Nathalie Bonini and Marie-France Lange (2016) in their summary report analysing 40 years of educational research in anthropology, sociology and comparative education in Africa.[2] It is even less developed in Haiti, for which very few endogenous academic texts exist. Thus, the sharp increase in the presence and roles of commercial actors has so far received relatively little attention by researchers. More recent research[3] has focused on Arab-Islamic education (Brenner & Sanankoua, 1991; Gandolfi, 2003; Charlier, 2004; Sy, 2012; Hugon, 2016; Dia et al., 2016), while other research has concentrated more specifically on Catholic education (Compaoré, 2003; Lanoue, 2002, 2003a, 2004). Only rare cases analyse the question concerning the growth of private education institutions (Compaoré & Pilon, 2017).

This analysis includes both diachronic (How can this change be quantified, and what are the reasons behind its rapid growth?) and synchronic questions (What form does this privatisation take, and what are the consequences in terms of reducing, reproducing, or accentuating educational inequalities and/or in terms of the right to education?). However, data for

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[2] This study only includes publications of articles and scientific works in English and French (and not those in Spanish and Portuguese) released over the last 40 years. It highlights the low representation of African studies on education, in particular French-speaking research, and the over-representation of some English-speaking African countries in scientific literature.

[3] For an overview of educational research topics developed in French- and English-speaking Africa, see Lange, 2003a and Bonini & Lange, 2016.

the included countries is scarce and not reliable. Haiti, for example, did not carry out a school census or produce directories between 2002–2003 and 2010–2011. Other States that do not recognise private schools do not include them in the national school statistics. Therefore, this chapter also takes research into account that does not directly relate to the organisation and development of the private sector, including additional scientific literature, some information from the French press, and analysis of school-level statistical data from different countries. To understand public education policies and their positioning vis-à-vis the privatisation of education, we also examined educational strategy documents and national education plans.

2. THE EDUCATIONAL LANDSCAPE OF FRANCOPHONE COUNTRIES (SUB-SAHARAN AFRICA AND HAITI)

2.1 Francophone Education Systems in Sub-Saharan Africa

While these countries all have different post-independence trajectories, their education systems have, for the most part, retained the structure inherited from colonial systems. Pre-school education is poorly developed, and is, for the most part, found in the private sector. It is mainly available for the advantaged urban social classes, even if some rural community cases have emerged. The primary education cycle is usually made up of six classes, or years, (sometimes five) and ends with the primary school leaving certificate exam. Secondary education, divided into two cycles, is made up of six or seven classes and ends with a final exam, often still called the "*baccalauréat*", as in France, Benin, Côte d'Ivoire, Senegal and Togo, or known as the "State Examination" in the DRC or the "State Diploma" in Burundi. This exam allows access to higher education with equivalence in all French-speaking countries in sub-Saharan Africa and former metropolitan countries (Belgium and France).

2.2 The Education System in Haiti

The Haitian education system is divided into four levels. Pre-school education (not compulsory) comprises three years as in France. Basic education spans nine years and has three cycles with three classes in

each.[4] The first two cycles form the "primary school" education (compulsory and free, according to the Haitian constitution, laws of 19 October 1901 and 3 September 1912). The third and fourth levels complete the secondary education (four years of study) and higher education. As a fragile State facing many challenges (discussed below), more than 80 per cent of primary school students are educated in the private sector (MENFP, 2011).

2.3 Social, Economic and Political Contexts

As a reminder, the United Nations (UN) classifies most francophone countries in this study as among the world's Least Developed Countries (LDCs) (14 out of 18).[5] Nevertheless, a broad spectrum of economic and political contexts partially explains the diverse development of education systems in francophone countries and the growth of the private sector in particular. Three types of political contexts emerge: politically stable countries or those emerging from crisis; countries in conflict or in a so-called "fragile" State; and Haiti's own unique situation, a country that could be classified in the second category, but whose particular political history suggests separate study.

2.3.1 Countries with economic growth and political stability or emerging from crisis

This classification includes countries such as Senegal, with a stable political regime since its independence, and Côte d'Ivoire, still emerging from crisis (Triplet, 2015) following two civil wars (2002–2007 and 2010–2011). The Senegalese education system has had a stable economic and political context without major crisis since independence. Other countries, such as Benin and Mali, experienced revolts in the early 1990s, which led to National Conferences and made it possible to establish a multiparty system and free elections. In Mali, at the beginning of the 1990s, political democratisation triggered a strong social demand for

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[4] Haitian basic education roughly corresponds to that of primary and lower secondary education in francophone countries in Africa.

[5] Cameroon, Congo, Côte d'Ivoire and Gabon are the four countries that do not fall into the LDC group: they also have the highest gross domestic product (GDP) per capita, ranking higher on the Human Development Index (HDI) than the other countries, with the exception of Côte d'Ivoire, whose HDI ranking is considerably low compared to its economic situation.

education, diversification of the educational field, and the rapid growth of the provision of education and, in particular, private education (Lange & Diarra, 1999). Burkina Faso experienced a period without civil war between October 1987 (the date of Blaise Compaoré's coup d'état) and November 2014 (the date when he was overthrown). The fall of this authoritarian regime occurred much later than in Mali or Benin and, although a more democratic political system emerged, the country has not yet stabilised.

Gabon, currently the richest francophone country in Africa, is a special case which has experienced continuous development in both its economy and its education system but lacks political democratisation. Paradoxically, even with improving educational indicators such as high enrolment rates, the actual system management appears to mirror that of a country at war such as the Central African Republic, rather than a relatively rich and peaceful country. Indeed, Gabon has not produced school statistics for several years, does not produce a ten-year education plan or any education policies, and relies on support from international organisations to carry out the basic management operations of its education system.[6] The case of Gabon shows that economic wealth and political stability (due to an authoritarian regime) do not ensure effective education system management.

Furthermore, even relatively politically stable countries, as mentioned above, have experienced periods of crisis in their education systems, which have led to long strikes, either of pupils and students, or of teachers, or both. Most French-speaking African countries have lost one or several years (*une année blanche*, in French) in the past three decades.[7] This has contributed to the rapid development of private schools (in which teachers do not strike) in many cases (Gabon, Mali, Senegal, etc.), a phenomenon also observed in countries in conflict situations or in so-called "fragile" States.

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[6] UNESCO, UNESCO Office, Libreville, 2017, http://www.unesco.org/new/fr/bureau-de-lunesco-a-libreville/about-this-office/single-view/news/unesco_encourages_gabon_to_draw_up_a_sectoral_plan_for_educa/.

[7] An "*année blanche*" or a "lost year" is defined in francophone Africa as an invalidated school year that all students must repeat due to strikes. Such years do not count as repetition in student academic records, but as an "*année blanche*". However, States have validated certain strike years, despite only a few lessons actually occurring, by changing the school calendar (Lange, 1998: 243; Lange et al., 2006).

2.3.2 Countries in conflict or so-called "fragile" States

A large number of African countries have recently faced or still have situations of war or conflict. As an example, the population of sub-Saharan Africa represented approximately 14 per cent of the world's population in 2019; however, the proportion of African refugees or displaced people assisted by the United Nations High Commission for Refugees (UNHCR) stood at more than 26 per cent. The consequences of this violence on the development of education systems, their organisation, and the growth of private, for-profit or non-profit, schools is significant. The Comoros, for example, have an unstable political situation and an undemocratic political regime and have also experienced numerous teachers' strikes, prompting some parents to turn to private education (Lacoste & Leignel, 2016).

Education in conflict situations in francophone Africa has benefited from recent research that helps understand the effects of wars on the functioning of education systems (Guth, 2003; Lanoue, 2003b; Azoh et al., 2009; Triplet, 2015; Murseli, 2019). These studies focus on the consequences of wars and on the adaptation of education systems and families in the face of often failing States. Some describe the emergence of new types of schools (Murseli, 2019) of uncertain status: being neither entirely public nor private, sometimes not State-recognised, and financed by international aid.

In conclusion, the political situation, the State's influence, and its role in the management of the education system are decisive in the development of private education, either because of a public policy of voluntary (instead of mandatory) education, or because of the inability of States to ensure access to quality schooling for as many as possible under safe conditions. When States fail, education systems change considerably, either for reasons of conflict or because the States themselves are corrupt. The role of private education (for-profit or non-profit), its foundations and its organisation is closely dependent on the political systems in place.

2.3.3 Haiti's unique situation

Haiti's educational background is unique and linked to the country's history. It was economically fragile from independence in 1804, due to the huge debt (reimbursement of expelled French settlers) that the Haiti had to pay to France. This weak economic status was compounded by military instability (fear of seeing France try to regain the territory, war with Spain, and the occupation of the United States between 1915 and 1934), ongoing political unrest due to social conflicts between mulattoes

and blacks,[8] and corruption that legitimises the political establishment. Furthermore, natural disasters have added to these unfavourable economic, social and political conditions. More recently, Haiti experienced a succession of hurricanes in 2008, an earthquake in January 2010, followed by a cholera epidemic. Then, in October 2016, Hurricane Matthew particularly affected the department of Grand'Anse,[9] destroying roads and buildings in its wake and impacting 2.1 million people (UN Office for the Coordination of Humanitarian Affairs, 2016).

Most recently, the political crises in 2019 showed the extent of the economic and political difficulties, which hampered the establishment of a stable democratic system and made it difficult to establish an effective public education system. In fact, despite the Haitian State promoting many laws favouring Education for All (EFA) for centuries, economic and political insecurity have led to insufficient financial and institutional means, with the growth of primary and secondary education still relying, for the most part, on the private sector.

3. CHARACTERISTICS OF PRIVATE EDUCATION, GROWTH OF THE SECTOR, AND THE ROLE OF THE VARIOUS ACTORS

3.1 A Brief History

At independence, in countries of the Sahel (Burkina Faso, Chad, Mali, Niger, etc.), the primary education enrolment rate was often less than 10 per cent in 1960 and secondary education was almost non-existent. The same is true of some countries in Central Africa such as the Central African Republic. Private education was also highly under-developed, except in two mandated countries, Togo and Cameroon.[10] This dates

[8] With regard to the conflicts between the Blacks and mulattoes, see the article by David Nicholls (1978) https://www.persee.fr/doc/outre_1631–0438_2003_num_90_340_4045 or Micheline Labelle's publication (1987) https://pdfs.semanticscholar.org/24fc/2614ca8bb4a753c6dccc55d46b78d44a8e47.pdf.

[9] Haiti has ten departments that are divided into *arrondissements* or districts, and these districts are further divided into communes (42 *arrondissements* and 145 communes for the whole country).

[10] As a reminder, these two countries are former German colonies conquered during the First World War by the French and the English and first placed under the supervision of the League of Nations, and later the UN. Their League

to the French concept of a centralised education system, as opposed to former Belgian colonies, such as the DRC, where "the definition of education as a public good, governed exclusively under the State, […] is foreign to the origin of Congolese schools" (André and Poncelet, 2013: 272).

In former French colonies, the separation of Church and State also contributed to the development of public education (Guth, 1990), while in the former Belgian colonies, the Holy See signed agreements (André & Poncelet, 2013: 276). The presence of Christian and Muslim religions meant that the private sector development varied and led to the coexistence of many different types of private schools (private Christian schools under contract with the State, unrecognised Koranic schools, madrasas, or Franco-Arabic public or private schools, recognised or not). Even today, the roles of private education, its different forms, and its relationship with the State have their origins, in part, in colonial history.

During the first two decades after independence (1960–1980), African States invested highly in both enabling as many children as possible to go to school and training the elites to replace colonial cadres. Policies to nationalise private schools were put in place in Congo (Makonda, 1988), Zaire (André and Poncelet, 2013), Benin, or Guinea (Lange, 2001). Other countries, such as Côte d'Ivoire, integrated private Catholic schools into the public sector (Lanoue, 2003a). Later, in 1969, Burkina Faso gradually nationalised Catholic schools and in 1970 enrolments in the private sector represented only 2.8 per cent of primary school students.

Some governments eventually allowed the development of private education, but in the early 1990s, the proportion of the private sector involved in primary education was still very low (less than 5 per cent) as in Benin, Burundi, Guinea, Mali and Niger (see Table 9.1). However, as has already been mentioned, school statistics only take into account those private schools recognised by the State. One of the difficulties of measuring the development of the private sector is also due to the fact that any census of private schools has varied widely over the years.

On the one hand, this variation appears when Ministries of Education have sometimes refused to recognise certain schools and therefore not listed them (see the case of "clandestine schools" in Togo and "parent

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of Nations and UN status allowed for greater investment in education and a larger number of private schools (Lange, 1998). Ruanda–Urundi (1916–1960) was a Belgian protectorate until the independence of Rwanda and Burundi in 1962 but did not have the same outcomes in terms of education development.

Table 9.1 Proportion of private sector providers in primary education in francophone countries (1990–1992)

Country	1990	1991	1992
Benin	–	3.4	3.8
Burkina Faso	9.1	8.6	8.0
Burundi	0.9	0.8	0.7
Cameroon	27.2	25.2	24.9
Central African Republic	–	–	–
Chad	5.4	6.0	5.5
Comoros	–	–	1.0
Congo	–	–	0.4
Côte d'Ivoire	11.3	10.4	9.6
DRC	–	–	–
Gabon	–	–	31.0
Guinea	2.9	2.4	4.6
Haiti	–	–	67.0
Madagascar	16.7	17.8	21.8
Mali	3.6	3.3	16.0
Niger	2.8	2.8	2.8
Senegal	8.9	9.2	9.6
Togo	23.8	24.9	24.6

Source: Table compiled from data from the UNESCO Institute for Statistics (UIS.Stat) (http://data.uis.unesco.org/?lang=en).

schools" in Chad). In several African countries such as Mali, Koranic or Arab-Islamic schools did not fall under the authority of the Ministry of Education, but under the Ministry of the Interior (Religious Affairs) and were only integrated into the Ministry of Education at a later date. This could explain the data showing that the number of Arab-Islamic schools was suddenly rapidly expanding, while in fact the statistical increase was due to an improved census database. The same phenomenon occurred with community schools.

3.2 Recent Trends in the Growth of Private Education

The background information above illustrates how measuring the growth of the private sector is difficult due to low availability of statistical data and a lack of consistency in terms of its collection. As shown in Table

Table 9.2 *Growth of enrolments in private education, francophone countries in 2000, 2011, and 2017, by level**

	2000			2011		2017		
Country	PE	LSE	USE	LSE	USE	PE	LSE	USE
Benin	10.1	13.5	27.4	15.9	26.5	23.2	–	–
Burkina Faso	11.4	33.8	36	39.6	48.6	20.1	39.2	48.6
Burundi	–	–	–	8.2	12.7	1.9	3	14.3
Cameroun	27.3	–	–	23	31.6	–	–	–
Central African Republic	–	–	–	–	–	–	24.7	19.6
Chad	–	15.2	14.2	14.4	17.1	–	–	–
Comoros	10.7	40.3	–	47.2	–	18.8	46.7	63.5
Congo	15.2	15.2	–	–	–	–	–	–
Côte d'Ivoire	11.6	–	–	–	–	13.9	47.5	59.6
DRC	–	–	–	–	–	–	–	–
Gabon	–	–	–	–	–	–	–	–
Guinea	16.1	8.2	–	23.9	31.7	–	–	–
Haiti	–	–	–	–	–	–	–	–
Madagascar	22.6	–	–	32.9	48.4	–	40.1	49.2
Mali	–	13.9	–	18.3	63.1	42.7	29.2	–
Niger	4.3	–	–	–	–	3.6	12.7	24.3
Senegal	10.6	28.8	18.9	–	–	16.3	17.3	32.7
Togo	36.9	–	–	21	29.4	30.2	25.8	30.7

* PE – primary education; LSE – lower secondary education; USE – upper secondary education
Source: Table compiled from data from the UNESCO Institute for Statistics (UIS.Stat) (http://data.uis.unesco.org/?lang=en).

9.2, while all 18 French-speaking countries were studied, some of them had no data available. Table 9.2 reveals that growth in private primary education varies from country to country. One group of countries (Benin, Burkina Faso, Comoros, Congo, Guinea) experienced a significant increase in the number of enrolments in the private sector, while a second group (Côte d'Ivoire, Niger) saw no growth at all, and a third group saw a slight decrease in numbers (Togo, Cameroon). Countries experiencing the greatest growth in the private sector also had a very low representation of the private sector in 1990 (see Table 9.1).

For lower secondary education (Table 9.2), growth in the private sector appears relatively stable between 2000 and 2017. Some countries experienced a slight increase in the number of enrolments in private schools such as Burkina Faso, Comoros, and particularly Guinea and Mali, in contrast to Senegal, whose numbers dropped significantly. However, a decrease in private education enrolment does not necessarily mean that the number of students enrolled in the private sector has dropped; it may indicate that the number of students enrolled in the public sector grew more rapidly due to State investments.

Likewise, for upper secondary education, growth in the private sector appeared mixed (Table 9.2). Several countries experienced a rapid increase in enrolments in the private sector, such as Burkina Faso, the Comoros, Côte d'Ivoire, Guinea and Mali. For upper secondary education, significant increases in the enrolment in private education correspond to those countries (Burkina Faso, Mali, Senegal), which gave priority to primary education and invested little in upper secondary schools.

Despite differences between countries, the general trend is towards an increase in enrolments in private education in the upper secondary level. In some countries, the private sector is becoming as or more important than the public sector (Burkina Faso, Comoros, Côte d'Ivoire, Madagascar, Mali), which indicates that States have withdrawn from investing in secondary education and, more specifically, in upper secondary schooling. In Burkina Faso or Mali, following national education policies implemented in Africa since the Jomtien Conference (1990) and the Dakar Forum (2000), governments have received increased international aid (De Grauwe, 2016), which gave priority to comprehensive primary education and hindered investments in secondary education, which is not considered a priority. An increase in the number of pupils in private education does not always mean that schooling falls under the sole responsibility of the parents. Indeed, private education can benefit from State aid or funding. However, private schools tend to settle in areas where the demand for education is good (with the exception of community schools), which increases social inequalities in terms of access to education.

3.3 Diversification of the Scope of Education in Francophone Countries

As previously mentioned, private education was under-developed at the time of independence and some African countries had even nationalised their entire education system. The processes of privatising education mainly began following major international conferences on education, and commitments made to ensure the development of EFA. These processes have led to the emergence of new types of schools alongside public institutions (especially in primary education, at the beginning). The rapid growth of these new types of schools in sub-Saharan Africa is thought to be a process of "diversifying the scope of education" (Lange & Diarra, 1999; Lange, 2003b), which has enabled an increase in private institutions whether for profit or not. Diversification of the field of education and the process of privatising education have been defined as corresponding:

> to a process of State withdrawal, as can be noted by the appearance [of private institutions], or their rapid development alongside public schools (often in the majority, or even exclusive in the early 1990s, depending on the country), of new types of school (secular or religious private schools, local or community schools …) and the legal recognition of these new schools. (Lange, 2003b: 150).

The diversification of education has taken extreme forms in Africa, as seen in Mali, where up to eight types of formal schools and two types of non-formal schools for primary education operate (Lange & Diarra, 1999: 172). This broad diversity of private schools, their modus operandi, and funding mechanisms have received little research attention in francophone Africa (Kitaev, 1999), although some researchers have addressed the process of privatising education (Kitaev, 1999; Lewandowski, 2007; Wodon, 2014). To overcome the poor quality of information afforded by education statistics in Africa, some authors such as Quentin Wodon (2014) use data from household surveys and do not rely solely on those from the Ministries of Education; however, such data do not provide information on financing methods or the actual organisation of private institutions. Lastly, it should be noted that Haiti's particularity is due to the long-time prominence of private education. Haiti has never known a highly centralised, dominant public education system like most francophone African countries.

The diversity of the educational scope can be seen from the forms taken by privatisation – from the many different types of schools that are created, transformed, or disappear. Tables showing the wide range of schools only reflect the situation of a country at a particular time. Indeed, these new schools often emerge in an unstable or difficult social, institutional, or financial state, driven by the actions of various actors (international and State, parents of students, local communities, etc.) who approve or oppose choices related to the different types of schools, operating methods and funding.

3.4. Forms of Educational Privatisation

An important difference in the forms of privatisation is between private for-profit and private non-profit, which respond to very different social demands. In the first case (private for-profit), schools are created either by religious communities or by small private entrepreneurs. In the second case (private non-profit), community schools are created, financed and managed by the parents. In both cases, schools charge tuition fees and parents are usually responsible for financing their children's schooling.

In francophone Africa, the location of these schools differs greatly according to the urban or rural environment. In urban areas, mainly secular, private, for-profit schools have opened. These differ greatly depending on whether or not they meet a social demand from wealthy parents who wish to move away from public school due to reforms imposed by the State. For example, the imposition of double shifts[11] in an urban environment encouraged the creation of private schools that committed to offering students single shifts. Additionally, due to numerous upheavals in public education, some parents preferred to turn to private schools less affected by strikes. Indeed, African education systems were shaken by teachers' strikes following the imposition of a change in their status, among other things (previously civil servants, the majority of

[11] Double shift (or double session) refers to the schooling of two groups of students by one teacher in the same classroom; one group of students has lessons in the morning, the other in the afternoon. Not only are the class times reduced, but teachers no longer have time to correct as many exercises, since the number of students per teacher is doubled. This double-shift system concerns the majority of French-speaking African countries (Benin, Burkina Faso, Burundi, the Central African Republic, Chad, Côte d'Ivoire, DRC, Guinea, Mali, Niger and Senegal) and it also exists in Haiti.

teachers in francophone Africa are now contract or community workers). Other reforms, such as the imposition of national African languages in public schools or curriculum changes, have also prompted some parents to "flee" public schools.

In general, the deterioration of learning conditions has favoured the growth of private schools in urban areas, with these schools now intended for the middle or upper social classes. However, the most disadvantaged urban populations also find themselves turning to private schools. This occurs primarily for populations living in disadvantaged, peripheral or informal neighbourhoods of capitals or big cities and who benefit very little from State investments. Whether these schools are recognised by the State or not has little influence over enrolment, because, in certain disadvantaged areas of large African cities, parents have no choice. The provision of education is limited to schools that are not recognised[12] and offer variable levels education. The same phenomenon is observed with Haiti's "Borlette schools", often described as very low-quality schools, for the poorest families.

The opening of private for-profit schools depends, therefore, on the social demand for education. Some are very expensive for the privileged classes (such as international schools), while others are more affordable and geared towards the middle classes. So-called "low cost schools" are intended for more disadvantaged populations. Other religious schools are created to meet a social demand, which favours religious education (Christian or Muslim). These private schools can have a wide variety of forms, be recognised or not, and can target the poorest children or those of the privileged classes.

In rural Africa, the very low presence of private, for-profit schools[13] is offset by the presence of community schools (set up by the parents of students), which respond to a lack of State or private education facilities. The phenomenon of schools created by parents is not new; during the time of French colonisation, parents used to set up schools considered as underground or illegal schools. Likewise, Christian missions opened

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[12] This is the case, for example, in certain districts of Ouagadougou. Every year, at the start of the new school year, the Ministry of Education publishes a list of authorised schools, and some districts only have unofficial schools; even though parents are informed of a school's illegality', they have no other option to enrol their children in school.

[13] With the exception of rich rural regions producing coffee and cocoa in Côte d'Ivoire, Cameroon or Togo for example.

schools that colonial authorities sometimes closed (Lange, 1998). At the end of the 1980s, school authorities started to recognise parent-led schools, due to both strong social demand and the financial incapacity of States subjected to the structural adjustment plans (Grégoire and Lange, 2018) to respond to this social demand for education, as well as the influence of international non-governmental organisations (NGOs) or UN organisations. Moreover, these schools changed their names, as in Togo where "clandestine schools" became "local initiative schools" (EDIL) recognised by the State or in Chad, where "spontaneous schools" became "community schools" (Lange, 1998; Marchand, 2000).

UN organisations may have assisted or supported these schools, such as UNICEF, which helped "village schools" in Mali (Lange & Diara, 1999), or international NGOs, which helped "clandestine schools" in Togo. International NGOs, alongside UN institutions, used their influence to get such schools recognised. Thereafter, States provide these schools with a legal framework[14] and a large number of countries now have community schools (Central African Republic, Chad, Haiti, Madagascar, Mali, Niger, Senegal, Togo, etc.). Even if the phenomenon of community schools may be negligible in some countries such as Niger, in others, such as Mali or Chad for example, they account for a significant percentage of primary school children. In Chad, around 20 per cent of primary school pupils are enrolled in community-based education.

Community schools exist predominantly for primary education – very few exist for lower secondary and almost none for upper secondary education. While the presence of community schools is still important today, their numbers are trending downward in many countries. The excessive financial burden borne by parents (who, more often than not, are poor) is encouraging States to transform these schools into public schools. Additionally, due to decentralisation processes implemented in African countries since the 1990s, some community schools became communal schools and were thereafter registered as public schools. Lastly, some entrepreneurs have created community schools, which turned out to be for-profit schools (for example, in Mali, conflicts in the management of community schools in 2016 halted authorisations for these schools).

[14] In Mali, it was Decree no. 94–448/PRM in 1994 that legalised community schools and Circular no. 1703 MEN/SG 29 December 2016 that imposed the provisional ban on the opening of community schools.

This educational landscape littered with, in some countries, a large number of very different types of schools (as in Haiti, see Table 9.3), is constantly being reconfigured due to social dynamics and public education policies. Additionally, school classification is not always uniform even within the same country. For this study, the classification of education statistics enables the measurement of the respective share of each type and its growth. However, this classification does not always reveal who is funding education. Some institutions, such as Catholic or private schools, are often funded by the State as in Burkina Faso, Mali or Senegal, whereas parents can sometimes end up paying for teachers in public schools. For example, in Chad, in 2016, 64 per cent of primary school teachers were community teachers. The same is true in the Central African Republic, where approximately half of primary school teachers are community teachers and therefore funded by the parents of students. A school registered as public does not mean that the State will automatically provide premises, furniture, educational material or trained teachers.[15] Students' parents are sometimes responsible for building public schools, making the furniture and paying teachers.

3.5 The Role of International Actors and the States

The role of international actors has been instrumental in the growth of private education in francophone Africa. Funding plans for the education sector for African countries have all been influenced by international agendas. These externally funded education policies are aimed at educating the greatest number of children at the lowest cost. In doing so, the quality of education in public schools[16] has decreased and promoted a loss of credibility in public schools.

The development of national education policies has thus depended on imposed reforms. For example, the double-shift system was imposed and

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[15] Education authorities define a school as "public": this is recognised by the State and parents, even if the State has little intervention. Education statistics take into account the school and the number of pupils, but do not include teachers paid by the parents.

[16] Various reforms have contributed to lowering the quality of education: double shifts, an increase in the student/teacher ratio, and a drop in the level of teacher training. In French-speaking Africa, during the Structural Adjustment Policies (SAPs), teacher training colleges were closed to save money and teachers were recruited without any or very limited training of only a few weeks or months. This was notably the case in Burkina Faso and Mali.

Table 9.3 Examples of recognised schools in francophone countries (primary education, formal schools)

Gabon	Niger	Central African Republic	Haiti
Public	Public	Public	Secular
Catholic	Private	Communal	Congregational
Protestant	Community	Private Catholic	Communal
Christian Alliance		Private secular	Community
Islamic		Private protestant	Presbyter
Accredited		Franco-Arabic	Episcopal
Private secular			Protestant (mission)
			Protestant (independent)
			Other

Sources:
1. For Gabon, school year 2013–2014 (Directorate of Primary Education (DEP) and school districts). Approved schools (or écoles publiques conventionnées (EPC) in French) are public schools in Gabon, which adhere to Gabonese regulations and fall under the administrative and pedagogical supervision of the Ministry of Education. These government-run public schools are structured according to an agreement between the Gabonese Republic and the French Republic. Education is based on both French and Gabonese programmes (according to Article 4 of the 2015 Agreement). Students work towards the Gabonese Certificate of Primary Education (https://www.mlfmonde.org/etablissements/ecole-publique-conventionnee-gros-bouquet-1/).
2. For the Central African Republic, school year 2016–2017 (Central African Republic, MEPSTA, DGESP, 2017). Community schools no longer officially exist in the Central African Republic; however, teachers paid by parents are often considered "community teachers".
3. For Niger, school year 2015–2016 (Republic of Niger, MEP/A/PLN/EC, 2016). The directory identifies 75 community schools in 2012 compared to only seven in 2016 and indicates that: "According to their statute, the majority of these community schools have been turned over to the State, and thus transformed into public schools" (2016: 12).
4. For Haiti, 2010–2011 school year (MENFP, 2011). It should be noted that "Borlette schools" are not listed, as they are not officially recognised.

financed by the World Bank. International aid has also funded priorities given to primary education, rural areas, and policies promoting girls' education (Lange, 2003b: 157) and some donor-driven reforms therefore stop when funding is cut. This was the case, for example, of community schools in the Central African Republic, created in 1994 with funding from UNICEF and shut down in 2000 when funding ceased (Murseli, 2018: 97–98).

The actual role of the aid-dependent State is reduced due to loan and grant conditions. The international agenda (Millennium Development Goals (MDGs), then Sustainable Development Goals (SDGs)) also

sometimes requires parallel planning between national plans and external demands (Grégoire and Lange, 2018). Thus, African countries, who depend on international aid to partially finance their education systems, have moved away from their "educational projects" policy tool to that of the "ten-year education plan", based on programmes organised and funded by donors. All of these plans include proposals for the development of private education.

These countries have thus experienced many original styles of privatising education, including attempts to delegate the management of public schools to private entrepreneurs. Most of the time, however, these experiments have failed, as in Mali, where school promoters received loans from the World Bank for school construction, leading to schools eventually closing or being handed over to the State because they could never repay the debts incurred (Grégoire and Lange, 2018). In Burkina Faso, the practice of leasing educational establishments to private companies or delegating their management to NGOs faced the same issue, namely a difficulty to find enough solvent families to cover the costs.

On the whole, while private, for-profit education has developed in French-speaking sub-Saharan Africa, certain forms of privatisation and commodification have not been able to stay the course. The first obstacle to a more rapid expansion of privatisation seems to be the insolvency of families, especially in rural areas and city outskirts. Furthermore, in urban areas, the wealthiest social classes use international schools, such as French schools and lycées or other international schools opened locally by private entrepreneurs. The advantages of French schools and lycées are manifold: they are partly funded by France, they issue French or dual diplomas, they allow enrolment in French university, and the cost remains affordable because of the co-financing. However, private international companies such as Enko Education[17] have very recently arrived in several French-speaking African countries, such as in Douala in Cameroon and Abidjan in Côte d'Ivoire (2016), in Dakar in Senegal (2017) and in Burkina Faso and Mali (2018). To operate in these countries, these companies often partner with or purchase local private schools according to the relevant legal requirements (Lange and Henaff,

[17] Enko Education was founded by Cyrille Nkontchou from Cameroon (who created the investment fund Enko Capital in Johannesburg in 2007) and Eric Pignot.

2015). It is still unclear whether this new type of private international school will find its public.[18]

3.6 The Role of Social Demand

Regarding the social demand for education, two types of strategies can be identified. The first corresponds to restricted choice, the case for the populations living on the outskirts of large African cities since the time of the SAPs (between 1980 and 1995, depending on the country). This period saw little to no investment in education in the suburbs by the States, mainly due to financial issues related to the SAPs. Thereafter, the Heavily Indebted Poor Country Initiative (HIPC) programmes enabled significant public investment, but only in primary education and primarily for disadvantaged rural areas. As a result, private schools (with the exception of community schools) mainly developed in urban areas (Compaoré & Pilon, 2017; Assane Igodoe, 2018).

Families in lower-income neighbourhoods are unable to send their children to public schools, as they are more or less non-existent (Burkina Faso, Haiti). This lack of public schools is also observed in certain rural areas and obliges local populations to create their own community schools. Additionally, when States fail (due to political crises or armed conflicts), the populations are also forced to organise themselves to create and manage schools (as in the case of the first "spontaneous school" in Chad). This situation mainly concerns primary education, because parents often do not have the financial resources to ensure the functioning of secondary schools. Due to this lack of public schools, the local populations organise themselves to create these community schools.

The middle and upper classes adopt a different strategy. Choice is driven by a search for higher quality education. These families also choose to avoid public schools as a means to refuse specific reforms, as mentioned above, or simply to avoid public schools altogether, as the quality has deteriorated considerably. In Dakar, for example, "the strengthening of a multi-tiered school system" (Lewandowski, 2011: 44) has occurred due to the poor quality of public schools and therefore their

[18] Enko Education schools are intended for the wealthy social classes; the tuition fees are high (approx. US$4,000 per year), but slightly lower than those of the French schools. Their curriculum leads the International Baccalaureate (French–English bilingual education), which allows students to enrol in English- or French-speaking universities.

low success rates in exams. In these cases, the provision of education is not only expanding, but becoming more hierarchical. The avoidance of public schools by the wealthier social classes in cities further reinforces the privatisation of education, as these social classes no longer use their influence to defend the public schools they do not use. Thus, the process of diversification and privatisation of education is accentuated by the educational strategies of families.

4. CONCLUSION

From a research perspective, studying the evolution of the privatisation of education in the chosen francophone countries is complicated because of the lack of research and the absence of statistics or the irregularity of their release. The failure to identify a significant portion of new private schools also accentuates the difficulties in capturing the extent of the phenomenon. However, the analysis of the 18 French-speaking countries included in the sample provides some information regarding trends in the growth and specificities of private education. Unlike Haiti, which never really built a public education service, most African countries opted for a unified and centralised public system at the time of independence (especially in the former French colonies). The 1990s then saw this pattern deeply upset both by the financial crises that imposed structural adjustment plans and the democratisation of the political systems of certain African countries following the National Conferences (Robinson, 1994), which allowed the expression of the social demand for education.[19] These two phenomena led to the creation of private, for-profit and non-profit schools.

As already mentioned, the privatisation of education is first observed in the cities, where populations have the financial means to pay school fees, but also occurs in rural areas through private, non-profit schools (community schools). The main challenges to the growth of private education arise in terms of the right to education and the reproduction of educational inequalities. The right to education is called into question

[19] The social demand for education concerns both individual, family and collective education strategies within a given social space (Lange, 2003b; Lange et al., 2006), which means that social actors carry out their educational choices and adjust their strategies according to the positions of other actors in the educational field, and also other fields (political, economic, cultural) (Lange and Yaro, 2003).

by the absence of public schools, accessible to all, both from a physical and financial point of view, or by the excessive cost of private schools. In terms of consequences on educational inequalities these are related to inequalities of access, the transmission of knowledge and, ultimately, academic success.

The privatisation of education has a significant influence on an individual's educational path and is determined by the quality of education according to the type of school: school hierarchy increases due to the fact that the provision of private education is based on family financial solvency. Private schools thus target different audiences: the very privileged social classes benefit from quality private international or national institutions, the middle classes attend less successful schools with more affordable prices, and the most disadvantaged social classes only have access to schools that do not enable knowledge transfer or the passing of exams. The privatisation of education can also increase gender inequalities in terms of schooling, with parents making choices in favour of boys if school fees are too high.

The rapid growth of the private sector has been accompanied by a lack of awareness of the phenomenon. States are often unable to identify all private schools. Furthermore, *ex post* control remains inadequate. Governments have not monitored this rapid growth of private education well and the means of regulation are either non-existent or ineffective. While many African countries publish a list of authorised private schools at the start of each new school year (Burkina Faso, Senegal, etc.), in capitals such as Ouagadougou or Dakar, parents have no other choice than to send their children to unrecognised private schools due to a lack of recognised schools. The subject of education privatisation provokes an analysis of the public education policies implemented both in terms of the right to education and the fight against educational inequalities, since the rapid growth of private schools in the 18 French-speaking countries studied highlights shortcomings of the States in ensuring quality education for all children.

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10. Strengthening the implementation of the Abidjan Principles

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"Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development."
Kofi Annan, 2016

INTRODUCTION

In this epigraph, Kofi Annan reminds us of the transformative capacity of education and its importance for individual and collective wellbeing. Unfortunately, the opportunity for free quality public education remains unavailable to many students globally. Over the past half-century, States have ratified treaties committing to the human right of education (outlined by Carmona in Chapter 2 and Härmä in Chapter 6). The Abidjan Principles aggregate this treaty language on the right to education, providing a new resource and an important step towards realizing Annan's vision. Meanwhile, States and international organizations have created systems that do not deliver on these guarantees. Instead, many policymakers have recently turned to market-based models and private actors instead of investing in public education systems. In this chapter, we present different avenues for the implementation of the Abidjan Principles to address the legal right to education and results of the empirical evidence on private actors in education, which show their limited effectiveness.

Understanding how the Abidjan Principles can advance the realization of the right to education for all requires some context regarding the historical trajectory leading up to the Principles. In the aftermath of the Second World War, the United Nations (UN) itself began as an international response to global social fracture. Countries then adopted

and ratified multiple UN treaties legally recognizing different types of human rights, including the right to education intrinsic to every human being. However, other multilateral institutions begun in that era, such as the World Bank, the International Monetary Fund (IMF), and the International Finance Corporation (IFC), have a checkered history in building State capacity to realize the human right to education. World Bank and IMF lending programs have restricted government education expenditures. Furthermore, the lending model itself – controlled by countries benefiting from centuries of colonial extraction of labor and resources – has created debt servitude among many countries in the Global South that impinges on their capacity to provide free, high-quality public education.

Instead of helping the public systems charged with this mandate, many multilateral and bilateral aid agencies now champion market-based approaches instead of investing in the States to help them deliver on the right to education. For instance, the IFC pursues this agenda by hosting biannual global conferences on the privatization of education. This perspective of changing education from a public service to a commodity has led to the saturation of public agencies, both national and international, by actors promoting private interests and education as an individual good. Unfortunately, as the empirical chapters of this volume show, that approach is associated with increased inequality and segregation, thus creating possible human rights violations. Also, multinational and bilateral institutions pursuing or enforcing these strategies despite these results are thus preventing States from realizing the right to education by creating the conditions for, and potentially committing, human rights violations themselves.

On the seventy-fifth anniversary of the genesis of the UN, a half-century after the adoption of the International Covenant on Economic, Social, and Cultural Rights, and three decades after the adoption of the Convention on the Rights of the Child, the human right to education remains systematically denied to millions of students. We use the word systematically because the global system has had the intervening time between these treaties and the current moment to deliver on its treaty obligations. While some progress has been made, annual reports from multiple international agencies document the overall failure of States to provide free quality public education for all (UNESCO, 2020; World Bank, 2018). It remains difficult to disentangle the responsibility for this inadequacy – international institutions blame States and vice versa. But the failure and responsibility lie across governance institutions, which is why civil

society members decided to engage in the long and intense process of drafting the Abidjan Principles in the first place.

The Abidjan Principles were created as an essential tool providing an authoritative account of existing human rights obligations, or exactly what States have committed to regarding the human right to education. But, given the gap between commitment and reality, the principles remain insufficient. More than simply words on the page, ameliorative action on the part of all stakeholders – governments, civil society, international donors, and impacted communities, to name a few – must occur in order for the right to education to manifest as reality. This chapter articulates some of the processes for continuing the realization of these rights, especially for those whose right to education is currently violated. In particular, it articulates several related pathways for the application and implementation of the Abidjan Principles for different stakeholders in the progressive realization of the global education vision that the international community has already promised to future generations.

IMPLEMENTING THE ABIDJAN PRINCIPLES

The individual enjoyment of the right to education, based on the rights to equality and non-discrimination, is essential for both the full development of the human personality and for the expansion of fair and inclusive societies. In an ideal world, States would have the will and capacity to implement the right to education for all. However, as described above, full realization remains far from reality and faces challenges such as persistent inequality and the transformation of education from a human right into a commodity. At a fundamental level, achieving the right to education requires a political shift in state education provision. However, because States do not operate in isolation, changes also need to occur at multiple levels, with different actors considering and responding to the commitments made under human rights law.

The Abidjan Principles provide guidance on the necessary changes in law, policy, and practice for the protection and realization of the right to education for all. This includes both the provision of free quality public education and the regulation of private actor involvement in education. The processes for the actual implementation of the Abidjan Principles include different avenues, such as broad awareness of the human right to education, State capacity building to meet this obligation, and social, political and legal accountability mechanisms if States or multilateral organizations prevent or fail to realize the right. In the following sections,

we highlight these different steps that collectively aim towards creating better education systems that benefit everyone and the society as a whole.

We have organized the steps according to their relative level of contention, from the straightforward first steps of recognition and awareness raising about the principles and the right to education to the final step of expensive and time-consuming litigation. Unfortunately, recent history reveals that despite treaty promises made, the latter endeavors of civil society mobilization and legal action are required for some States to realize the right to education. We hope that the Abidjan Principles contribute to a world with a diminishing need for resources devoted to receiving something that has already been promised, so that our global resources can instead be deployed in service of the hard, yet fruitful, work of providing the highest quality education possible to our children. Before that moment arises, the steps for realizing the Abidjan Principles include:

- increasing institutional recognition of the Abidjan Principles;
- expanding public and stakeholder awareness;
- building capacity and providing technical assistance to support States;
- conducting research on issues raised in the Abidjan Principles;
- promoting social accountability initiatives: monitoring, reporting, and advocacy;
- pursuing formal accountability mechanisms and litigation; and
- collaborating with other actors and movements.

Increasing Institutional Recognition of the Abidjan Principles

In the first year after adoption in February 2019, key actors in the education and human rights field have rapidly and widely recognized the Abidjan Principles and started to implement them in various ways that illustrate their usefulness. This recognition not only solidifies their legitimacy as an authoritative legal interpretation of the right to education under international law but also reflects how this legal tool can help address current education challenges. They have been mentioned or used as a reference text at national, regional, and international fora by various types of actors, with some key acknowledgments outlined below.

The first mention of the Abidjan Principles occurred at regional level in a resolution of the African Commission on Human and Peoples' Rights that addresses the role of private actors in health and education, adopted in May 2019 (ACHPR 2019; RTE 2019a). This is particularly symbol-

ically relevant because the growing development of private actors over the past decades has raised particular concerns on the African continent (as discussed in Chapters 8 and 9). In another resolution adopted in 2020, the African Commission cites the principles as a reference to guide the development of norms on States' obligations to regulate private actors' involvement in the provision of social services (ACHPR 2020; RTE 2020d). At regional level on other continents, the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA & IACHR 2019; Right to Education Initiative 2020a) of the Inter-American Commission on Human Rights (IACHR), and the European Committee of Social Rights (ECSR 2020; RTE 2020f) have recognized the Abidjan Principles.

At the international level, the UN Special Rapporteur on the Right to Education, Dr. Boly Barry, presented a report to the UN Human Rights Council on the implementation of the right to education and Sustainable Development Goal 4 in the context of the growth of private actors in education in July 2019 (Boly Barry 2019), providing an analysis incorporating the Abidjan Principles. She recommended that all States should develop and implement adequate regulations for the involvement of private actors in education, as articulated under Guiding Principle 55. During the dialogue, States overwhelmingly expressed support for the Abidjan Principles and largely committed to provide quality public education and regulate private involvement in education in accordance with them (Boly Barry 2019; RTE 2019b). In the Resolution on the Right to Education adopted during the same session, the UN Human Rights Council also recognized the Abidjan Principles (UNHRC 2019a; RTE 2019c).

In October 2019, at the UN Human Right Council Social Forum on the right to development Ms. Michelle Bachelet, UN High Commissioner on Human Rights, in a panel on "Transformative Power of Education", discussed the principles in her speech (UN Web TV 2019). Then, in early 2020, the UN Independent Expert on the effect of foreign debt, Juan Pablo Bohoslavsky, mentioned the principles in his report on private debt and human rights reminding stakeholders that "States must take steps to ensure that no individual is excluded from any public educational institution on the basis of the inability to pay and must take all effective measures to prevent the risk of overindebtedness for learners and their families" (Bohoslavsky 2020; RTE 2020b). At UNESCO, a document presented to the Executive Board in Fall 2019 mentioned that UNESCO will explore how to promote the Abidjan Principles within its mandate

(UNESCO 2019). In addition, the new Global Partnership for Education private sector engagement strategy, adopted in June 2019, recognized the Principles (GPE 2019). And, in November 2019, the Paris Peace Forum selected the Abidjan Principles as one of the most promising governance projects (RTE 2019e).

Importantly, within the legal domain, a judgement of the High Court of Uganda directed the government to regulate private actor involvement in education, quoting the Abidjan Principles (High Court of Uganda, Civil Division 2019; RTE 2019d). Furthermore, the Abidjan Principles were published in the June 2019, Volume 8 – Issue 1 of the *International Human Rights Law Review*, one of the most reputable peer-reviewed journals on international human rights law (International Human Rights Law Review 2019). This further affirms the value accorded to the Abidjan Principles by the legal community and establishes their status as an essential legal tool on the right to education. However, beyond this significant recognition, the Abidjan Principles will only be meaningful if implemented through the adoption of law, policies, and practices that address the current education challenges and lead to tangible positive impacts on the enjoyment of the right to education by everyone, particularly the millions currently left behind.

Expanding Public and Stakeholder Awareness

For the Abidjan Principles to be implemented, a first essential step is their circulation among all actors involved in education, including States, civil society organizations, and private actors. The duty-bearers need to better understand their obligations regarding the right to education and how they must deliver them in the current context. The right-holders, and the ones who act on their behalf, need to understand the scope of the right to education and States' obligations in order to claim their right if they cannot enjoy it. To facilitate this process, a website (www.abidjanprinciples.org) provides, in four languages: the text of the Abidjan Principles, the list of signatories, background information, and updates about their implementation and resources. The Abidjan Principles themselves have been already translated in Arabic, French, Spanish (to be published) and Russian (to be published). In addition, an infographic provides summary information and videos provide additional commentary.

In addition to these direct resources, Table 10.1 presents the different types of events in which different stakeholders increase their awareness and understanding of the principles. These include international

meetings, regional workshops, academic conferences, and State-level capacity building training. For instance, in October 2019, the UN Special Rapporteur on the Right to Education, Dr. Boly Barry, presented the principles at the World Bank Annual Meeting, calling on the World Bank to use them in their assessment of education project funding (GI-ESCR 2019f). At the UN Annual Parliamentary Hearing on SDG 4 in February 2020, stakeholders discussed how the principles can help assess private sector engagement, especially regarding the strengthening and financing of public systems (UN Web TV 2020).

Building Capacity and Providing Technical Assistance to Support States

States have the obligation and the power to ensure the realization of the right to education for everyone. Therefore, they are the first entities needing to understand the Abidjan Principles in order to apply them accordingly. Building the capacity of States – including for legislators, ministries of education, judges and other decision-makers at the national level – and providing technical assistance are key vehicles to supporting States' compliance with the Abidjan Principles. To help build this capacity, the Institute of International Education Planning (UNESCO-IIEP) is developing an analytical table to review national education strategic plans, together with States, in light of the Abidjan Principles. In addition, the International Commission of Jurists is organizing training workshops for judges in several African countries to explain the Abidjan Principles.

Capacity building processes have already begun within certain countries. In Uganda, in June 2019, the Initiative for Social and Economic Rights (ISER) provided a workshop on the Abidjan Principles to a Ministry of Education directorate, focusing on how to use the principles in education sector reviews and planning, public–private partnership policy, regulations of private actors, and policy on financing of education. In Nepal, the National Campaign for Education Nepal (NCE-Nepal) engaged with local governments as they planned for delivering the right to education and regulating private education institutions. NCE-Nepal advocated for the application of the Abidjan Principles to local education policies, resulting in some guiding principles included in the draft policies. Finally, in Saudi Arabia, the Office of the United Nations High Commissioner for Human Rights Technical Cooperation Project and the Saudi Human Rights Commission brought together officials from the Ministry of Education and the National Center for Privatization to discuss

Table 10.1 Events increasing awareness of the Abidjan Principles

Event type	Event topic	Location and time
International meetings	Panel session: *Private Provision of Education through PPPs: rights, equality and the role of the World Bank and GPE* (GI-ESCR 2019c)	World Bank, Washington DC, April, 2019
	Meeting with World Bank senior staff, including Jaime Saavedra, Global Director for Education	World Bank, Washington DC, April, 2019
	UN Human Rights Council side event: *Implementing SDG 4 in accordance with the right to education and the Abidjan Principles* (GI-ESCR 2019e)	Geneva, June 2019
	Panel session: *Emerging challenges to the right to education, alternative solutions and the role of World Bank with the UN Special Rapporteur on the Right to Education and CSO experts from Ghana and Sierra Leone* (GI-ESCR 2019f)	World Bank Civil Society Policy Forum, Washington DC, October, 2019
	IIEP UNESCO strategic debate: *How to take the right to education seriously* (IIEP UNESCO 2019)	Paris, October 2019
	Paris Peace Forum: *Shine Bright: a better future with innovation in education* (Paris Peace Forum 2019; GI-ESCR 2019h)	Paris, November 2019
	Education as a key to peace and sustainable development: toward the implementation of SDG 4 – 2020 Annual Parliamentary Hearing at the UN (UN Web TV 2020)	New York, February 2020
	RTE Forum's National Council (RTE Forum India 2019)	India, July 2019
Workshops	*Regional Consultation on Building National Capacity on the Right to Education and the Abidjan Principle* (ASPBAE 2019)	Bangkok/ Thailand, October 2019
	National workshop on right to education and Abidjan Principles dissemination (GI-ESCR 2019g)	Nepal, October 2019
	GNECC Sensitization workshop for its members and stakeholders in Takoradi on the "Abidjan Principles" (Ghana News Agency 2020)	Ghana, March 2020
	The Abidjan Principles – Regulating private involvement in education (GI-ESCR 2019a)	Colombia University Teachers College, New York, April 2019

Event type	Event topic	Location and time
Academic Meetings	CIES 2019: *Designing and implementing the human rights guiding principles on obligations of States regarding private actors in education* (GI-ESCR 2019b)	San Francisco, April 2019
	Round table discussion on the implementation of the Abidjan Principles on State in obligations regarding private actors in education (University of Ottawa 2019; GI-ESCR 2019d)	University of Ottawa, Canada, May 2019
	The 2019 Guiding Principles on the Right to Education: The drafters' perspective (Oxford Human Rights Hub 2019)	University of Oxford Faculty of Law, UK, August 2019
	2019 HDCA: *Private education, inequalities and human rights guiding principles on States' obligations regarding private actors' involvement in education* (HDCA 2019)	London, September 2019
	UKFIET 2019: *The effects of privatisation on the right to education. A multi-country study using the Abidjan Principles on States' obligations regarding private actors' involvement in education* (UKFIET 2019)	Oxford, UK, September 2019
	Breakfast meeting celebrating the first anniversary of the Abidjan Principles (ActionAid 2020)	UCL Centre for Education and International Development, London, February 2020
	Privatisation, education and human rights (University of Nottingham 2020)	University of Nottingham, February 2020
	CIES 2020: *The Abidjan Principles on the right to education: A practical tool to address global challenges to the provision of quality education for all to ensure future peaceful societies and life on earth* (RTE 2020e)	Online CIES, April 2020

the impacts of privatization on the right to education and the relevant human rights standards, including the Abidjan Principles (GI-ESCR 2020). These workshops and tools, either proposed by civil society organizations or inter-governmental agencies, or initiated by States themselves, are essential for the ongoing implementation of the Abidjan Principles.

Conducting Research on Issues Raised in the Abidjan Principles

Academics play a key role in ensuring the implementation of the Abidjan Principles by delivering evidence-based and solution-oriented research to the public, decision-makers, and other stakeholders. Such publications increase in usefulness by including proposals for solutions and drawing recommendations that decision-makers and stakeholders can address. ActionAid International first used the Abidjan Principles for research in two reports in 2020: *Multi-country research on private education compliance with the right to education, a study of Ghana, Kenya and Uganda* (ActionAid 2019); and *Private education and compliance with the Abidjan Principles, a study of Malawi, Mozambique, Tanzania and Nigeria* (ActionAid & Norad 2020). The success of this research initiative led additional anglophone and francophone researchers to further consider how to apply the Abidjan Principles to their research, including reflecting on how to apply a legal framework in non-legal disciplines (ReFPE 2020; Unterhlter et al. 2020). This intersectional consideration represents a unique contribution of the Abidjan Principles in bringing together legal and non-legal experts (including in this volume) to ensure that the principles remain rooted in educational realities.

Academics can also contribute to the debates regarding future education policies by highlighting how the right to education, as defined under international human rights law, applies to key educational decisions. For example, Ann Skelton, chair of the Abidjan Principles' drafting committee, contributed to a UNESCO publication on the humanistic futures of learning, making the argument that innovation can be incorporated into public education without having to commercialize it (Skelton 2020). Looking ahead, the next challenge is continuing data collection, research, and analysis to expand the evidence base on the impact of the private providers of education and the delivery of high-quality public education within and across contexts. A related challenge includes cultivating the nexus between research and advocacy to create better applied research that informs policymaking.

Promoting Social Accountability Initiatives: Monitoring, Reporting, and Advocacy

When States fail to ensure the full implementation of the right to education, citizens can play a key role in mobilizing and advocating for legal, political, and practical changes by identifying issues and making

recommendations based on their everyday realities. Using human rights frameworks, including the Abidjan Principles, supports and strengthens their advocacy in holding States accountable for their committed obligations. A wide variety of such initiatives includes tracking surveys, social audits, citizen report cards, and participatory budgeting. Social accountability strategies can have a powerful impact and the potential to empower vulnerable and disadvantaged people in claiming their rights.

An effective way for citizens to support and push for the implementation of the Abidjan Principles and the right to education occurs through monitoring and reporting at the UN level. When human rights treaty bodies examine State reports on the implementation of human rights, civil society organizations can submit alternative reports that share their own information and perspective. Both the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights have raised particular concerns regarding the growing involvement of private actors in education and its impact on the right to education (GI-ESCR 2017). Furthermore, in the review, UN treaty bodies can assess whether States are complying with their obligations underpinning the Abidjan Principles.

Since their adoption, several civil society organizations have submitted reports to UN treaty bodies that cite the Abidjan Principles, with observations and recommendations pending. In 2020, for instance, 13 organizations submitted a report to the Committee on Economic, Social and Cultural Rights (CESCR) on France's investment in Bridge International Academies using the Abidjan Principles (RTE 2020c). The *Mouvement L'école* ensemble in Canada also submitted a report to the CESCR using the Abidjan Principles to analyze data in the province of Québec (Mouvement l'école ensemble 2020). As a result, the Committee issued serious questions about the issues of a two-tiered education system and the need to organize a strong public system for all in Québec, requiring a government response in writing. Finally, in 2020, in preparation for Kenya's peer-reviewed Universal Periodic Review (UPR), the East African Centre on Human Rights (EACHRights) presented an alternative report on the challenges presented by the growth of private actors in education and advised the Government of Kenya to utilize the Abidjan Principles in their recommendations. In their review, several States recommended that Kenya strengthen efforts to ensure that all Kenyans enjoy access to education without discrimination, including its efforts to improve public services such as education (UNHRC 2019b).

Pursuing Formal Accountability Mechanisms and Strategic Litigation

When violations of the right to education persist past the point of social accountability, litigation can become the only way to hold States accountable (RTE 2017). Potentially long and costly for everyone involved, litigation should be a last resort avenue; however, it can have positive impacts. Indeed, according to a Right to Education Initiative report, "courts can play an important function in giving persons belonging to marginalized groups, particularly those living in poverty, a 'voice' in democratic systems that may otherwise neglect their interests" (RTE 2017). The report continues to note that "litigation – even just the threat of it – can also offer an important avenue to publicise human rights violations and attract media attention, which may lead to accountability and change in the future" (RTE 2017).

At the national level, several lawsuits already cite the Abidjan Principles. For instance, the Equal Education and Equal Education Law Center referenced them in a submission made to the South African Constitutional Court in a matter involving the lawfulness of an independent school's decision to terminate its contract with the parents of two of its learners and to prevent the learners from continuing to attend the school. The submission referred explicitly to Guiding Principle 55, stating:

> the recently developed Abidjan Principles include a very expansive list of issues that States must address when dealing with minimum standards. This expansive list includes the governance of private educational institutions which includes requirement for the full and effective participation of children and learners amongst other stakeholders; protection of the rights of learners to freedom of association and speech, suspension and expulsion of learners requiring "due process and that any such suspension or expulsion be reasonable and proportionate." (Equal Education 2019)

In its judgment given on June 17, 2020, the Constitutional Court ruled that independent (private) schools must hear parents' and learners' voices regarding decisions to terminate a contract with the school and whether it serves the best interests of the children concerned. The Constitutional Court also ruled that independent schools do provide basic education and have an obligation not to impair this right. Moreover, independent schools assume a positive obligation to maintain standards not inferior to that of public schools (Equal Education Law Center 2020). While not an

optimal use of scarce educational resources, the outcome in this and other cases has led to increased adherence by States to the right to education.

CONCLUSION

As the world faces multiple crises, from pandemics to climate chaos, the commodification of education and culture, and global protests about social and racial inequality, we must remember why the UN and other international institutions were created and the original reasons for naming education as a human right. The fracturing of society in the Second World War gave rise to institutions designed to quell any recurrences, but only the realization of the human rights guaranteed by States through the UN bodies and treaties will prevent a repeat performance. Put simply, in order for all of these issues to be addressed, everyone needs high-quality education, and the Abidjan Principles provide the guidelines needed to ensure this provision.

Any institutions at the international, national, or subnational level that impinge on the realization of the right to education should be investigated for possible human rights violations. This possibility represents a very serious implication of the Abidjan Principles with potentially dramatic repercussions for the accused parties. However, we are at a time in which responsible decisions must be taken for the future of education and of humanity. The Abidjan Principles provide necessary guidance and solutions to address these current challenges, but it is up to all global stakeholders to realize the human right to education collectively.

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Annex: the Abidjan Principles Process and the ten Overarching Principles

The Abidjan Principles consist of 97 Guiding Principles across six sections. These 97 principles are grouped within ten Overarching Principles within six Sections, which provide an overview and summary of the text. The six Sections and ten Overarching Principles are presented below. The Abidjan Principles are available in full in the adoption languages of English and French at: www.abidjanprinciples.org/en/principles/.

ADOPTION

The Abidjan Principles were adopted on 13 February 2019 in Abidjan, Côte d'Ivoire by a panel of 20 experts from 14 countries worldwide. This adoption conference also included 68 observers from over 40 countries. The Principles were signed by each expert at a ceremony presided by the Minister of Education in Côte D'Ivoire. The United Nations Special Rapporteur on the Right to Education, Dr Kombou Boly Barry, attended the conference as an expert and participated in the signing ceremony.

THE ABIDJAN PRINCIPLES: SECTIONS AND OVERARCHING PRINCIPLES

Section I. General Provisions

(*Note:* This introductory section contains no Overarching Principles.)

Section II. Obligation to Respect, Protect and Fulfil the Right to Education to the Maximum of Available Resources

Overarching Principle 1
States must respect, protect and fulfil the right to education of everyone within their jurisdiction in accordance with the rights to equality and non-discrimination.

Overarching Principle 2
States must provide free, public education of the highest attainable quality to everyone within their jurisdiction as effectively and expeditiously as possible, to the maximum of their available resources.

Section III. Obligation to Respect, Protect and Fulfil the Right to Education in the Context of Private Involvement

Overarching Principle 3
States must respect the liberty of parents or legal guardians to choose for their children an educational institution other than a public educational institution, and the liberty of individuals and bodies to establish and direct private educational institutions, subject always to the requirement that such private educational institutions conform to standards established by the State in accordance with its obligations under international human rights law.

Overarching Principle 4
States must take all effective measures, including particularly the adoption and enforcement of effective regulatory measures, to ensure the realisation of the right to education where private actors are involved in the provision of education.

Section IV. Financial Provisions

Overarching Principle 5
States must prioritise the funding and provision of free, quality, public education, and may only fund eligible private instructional educational institutions, whether directly or indirectly, including through tax deductions, of land concessions, international assistance and cooperation, or other forms of indirect support, if they comply with applicable human rights law and standards and strictly observe all substantive, procedural, and operational requirements.

Overarching Principle 6
International assistance and cooperation, where provided, must reinforce the building of free, quality, public education systems, and refrain from supporting, directly or indirectly, private educational institutions in a manner that is inconsistent with human rights.

Section V. Accountability and Monitoring

Overarching Principle 7
States must put in place adequate mechanisms to ensure they are accountable for their obligations to respect, protect, and fulfil the right to education, including their obligations in the context of the involvement of private actors in education.

Overarching Principle 8
States must regularly monitor compliance of public and private institutions with the right to education and ensure all public policies and practices related to this right comply with human rights principles.

Overarching Principle 9
States must ensure access to an effective remedy for violations of the right to education and for any human rights abuses by a private actor involved in education.

Section VI. Implementation and Monitoring of the Guiding Principles

Overarching Principle 10
States should guarantee the effective implementation of these Guiding Principles by all appropriate means, including where necessary by adopting and enforcing the required legal and budgetary reforms.

THE DRAFTING COMMITTEE

A Drafting Committee of nine eminent experts led the drafting process and incorporated the comments from the consultations, with inputs from other experts. Over 50 other recognised experts, a majority of them from the Global South, advised on the text and signed it. These experts act in their individual capacity as members of the drafting group facilitating the elaboration of the Abidjan Principles. The institutions listed with the names of the authors are for the purpose of identification rather than endorsement of the commentary given by these institutions.

Drafting Committee Members

- Professor Ann Skelton [chair of the Committee] (South Africa; UNESCO Chair for Education Law in Africa; Professor, University of Pretoria; Member, UN Committee on the Rights of the Child)
- Professor Aoife Nolan (Ireland; Professor of International Human Rights Law, University of Nottingham; Member, Council of Europe European Committee of Social Rights)
- Dr Jacqueline Mowbray (Australia; Associate Professor, University of Sydney Law School; external legal adviser, Australian Parliament's Joint Committee on Human Rights)
- Jayna Kothari (India; independent; Co-founder and Executive Director, Centre for Law and Policy Research; Counsel, Karnataka High Court & Supreme Court of India)
- Dr Magdalena Sepúlveda (Chile; independent; former UN Special Rapporteur on Extreme Poverty; member of the Independent Commission for the Reform of International Corporate Taxation)
- Dr Maria Smirnova (Russia; independent; Honorary Research Fellow, Manchester International Law Centre, University of Manchester)
- Roman Zinigrad (Israel; J.S.D. candidate, University of Yale; Visiting Fellow, Sciences Po Law School)
- Professor Sandra Fredman (South Africa; Professor of the Laws of the British Commonwealth and the USA, University of Oxford; Director, Oxford Human Rights Hub; Honorary Queen's Counsel)
- Sandra Epal Ratjen (France; independent; International Advocacy Director, Franciscans International)

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