

**PRIVATISATION AND  
HUMAN RIGHTS IN THE  
AGE OF GLOBALISATION**



# **PRIVATISATION AND HUMAN RIGHTS IN THE AGE OF GLOBALISATION**

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## PREFACE

The book you hold is the result of a joint research project on *Privatization and Human Rights* under the auspices of the Center for Human Rights (University of Maastricht, the Netherlands) and the Institute of Human Rights Pedro Arrupe (University of Deusto, Basque Country, Spain).

The research project gathered academics from different parts of the world and combined both a theoretical and a practical approach to a very controversial issue of contemporary international and national economic relations: privatisation as one of the main ingredients of the current process of globalisation. This project aspires to fill a gap in the analyses made of privatisation so far, which mostly take an economic approach. Only recently research has started on the potential human rights implications of privatisation.

The project was launched in 2003. A very fruitful author's conference was convened on the premises of the European Inter-University Center for Human Rights and Democratisation (EIUC, Venice, Italy). Taking into account the comments made by the authors and invited guests, we initiated the editorial review process that led to the publication of *Privatisation and Human Rights in the Age of Globalisation*. At the occasion of the publication of the book, a Conference took place in Maastricht on the 25<sup>th</sup> February 2005, with the presence of most of the contributors. The book has also served as the basis for a specialized course in the framework of the European Master Degree in Human Rights and Democratisation at the Institute of Human Rights of the University of Deusto.

We would like to take the opportunity to thank all people that participated in the long process of completion of this book. We would like to explicitly mention the staff of the Maastricht Center for Human Rights under the academic guidance of Professor Fons Coomans, and under the administrative coordination of Chantal Kuypers. Our publisher, Intersentia, showed great interest in the project from the beginning, and offered unrelenting support in all stages of production of the book.

Felipe Gómez Isa and Koen De Feyter  
Bilbao and Venice  
January 2005



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# PRIVATISATION OF EDUCATION AND THE RIGHT TO EDUCATION

FONS COOMANS and ANTENOR HALLO DE WOLF

## 1. INTRODUCTION

This chapter discusses the privatisation of education from a human rights perspective. The transfer of responsibilities in the area of education, arguably one of the most important tasks of the state, to the private sector has generated heated discussion and has been regarded by many as potentially detrimental to the right of access to education by the most vulnerable sectors of society. In contrast, supporters of educational privatisation have praised it as a solution to the problems that plague public education and they argue that it will only help to increase parents' choice in deciding which type of education is best for their children, increase efficiency and quality in the area of education as well as help streamline public finances. Within the debate of educational privatisation, little attention has been paid so far, however, to what international human rights law in general, and the right to education in particular has to say with respect to the operation and consequences of privatisation in the area of education. This chapter attempts to fill this vacuum and provides some insights on the debate from a human rights perspective. Section 2 provides a review of the normative content of the right to education and the obligations of states. In an attempt to clarify the issue at the centre of this chapter, Section 3 presents a definition of privatisation in the area of education, as we understand it. This definition is complemented with a description of several means and methods in which the privatisation of education is currently taking place. In addition, some attention is also paid to the relationship between the liberalisation of the trade in educational services and the privatisation of education. Section 4 briefly analyses the potential human rights issues that the different methods of education, privatisation may create.

## 2. THE CONTENT OF THE RIGHT TO EDUCATION AS A HUMAN RIGHT

### 2.1. *The scope and meaning of Article 13 ICESCR*

Section 2 aims at clarifying the normative content of the right to education and of the corresponding obligations of States. It focuses on the nature, meaning and scope of Article 13 and 14 of the International Covenant on Economic, Social and Cultural Rights which is the main universal treaty text that includes right to education as a human right.<sup>1</sup> The content and scope of Article 13 ICESCR will be analysed here from the angle of the text of the Article itself and from the text of the General Comment on the right to education, adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) in December 1999.<sup>2</sup> The present section will also discuss concepts and approaches developed in the academic debate about strengthening implementation of economic, social and cultural rights and apply them to the right to education.

With respect to the right to education as laid down in international documents, two aspects can be distinguished. On the one hand, realisation of the right to education demands an effort on the part of the state to make education available and accessible. It implies positive state obligations. This may be defined as the right to receive an education or the social dimension of the right to education. On the other hand, there is the personal freedom of individuals to choose between state-organised and private education, which can be translated, for example, in parents' freedom to ensure their children's moral and religious education according to their own beliefs. From this, stems the freedom of natural persons or legal entities to establish their own educational institutions. This is the right to choose an education or the freedom dimension of the right to education. It requires the state to follow a policy of non-interference in private matters. It implies negative state obligations. Both aspects can be found in Articles 13 and 14 ICESCR. Article 13(2) and Article 14 cover the social dimension, while Article 13(3) and (4) embody the freedom dimension.

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights, concluded 16 December 1966, entered into force 3 January 1976, 999 UNTS 3.

<sup>2</sup> See General Comment no. 13, on the right to education (Art. 13 of the Covenant), adopted by the CESCR during its Twenty-first Session (December 1999), UN Doc. E/C.12/1999/10. The CESCR is the body that supervises implementation of the Covenant by state parties. A General Comment is a non-binding but authoritative interpretation of a treaty provision that also gives guidelines for the legislation, policy and practice of state parties.

The right to education laid down in Article 13 ICESCR is a universal right, granted to every person, regardless of age, language, social or ethnic origin or other status. Articles 13 and 14 are rather comprehensive in comparison to other rights in the Covenant. They set out the steps to be taken by states in realising the right to education. This particularly applies to paragraph 2 of Article 13, which enumerates the separate steps with a view to achieving the full realisation of this right.<sup>3</sup> At issue here is the specific obligation of the state to make education available and accessible in a non-discriminatory way. In performing this duty, states have a degree of discretion within the limits of the standards set in Article 13 and the key provisions of Article 2(1).

In its General Comment on Article 13, the CESCR defines Article 13(2) as the right to receive an education. It distinguishes between four interrelated and essential features of education, namely:<sup>4</sup>

- a) **Availability:** functioning educational institutions and programmes have to be available in sufficient quantity in a State;
- b) **Accessibility:** educational institutions and programmes have to be accessible to everyone, without discrimination, also implying physical and economic accessibility;
- c) **Acceptability:** the form and substance of education, including curricula and teaching methods, have to be relevant, culturally appropriate and of good quality;
- d) **Adaptability:** education has to be flexible, so that it can adapt to the needs of changing societies and communities, and respond to the needs of students within their specific social and cultural context, following the best interests of the child, as affirmed in the Convention on the Rights of the Child.

This four “A” scheme is a useful device to analyse the content of the right to receive an education, as well as the general obligations for a state party resulting from it.<sup>5</sup>

## **2.2. The core content of the right to education**

### **2.2.1. The ‘core content’ concept**

In this section, we intend to make some general observations on the concept of a core content of economic, social and cultural rights, and,

<sup>3</sup> The present contribution does not deal with the aims of education laid down in Article 13(1).

<sup>4</sup> General Comment no. 13, § 6.

<sup>5</sup> This scheme has also been used by the Special Rapporteur on the Right to Education in her preliminary report, see UN Doc. E/CN.4/1999/49, chapter II.

illustrate these observations by identifying some elements of the core content of the right to education. Generally speaking, proper discussion of the core content of individual rights began around fifteen years ago. The term ‘core content’ is to be regarded as a useful means or instrument in helping to analyse and clarify the normative content of economic, social and cultural rights, which are often described as vague and open-ended, with a view to assess the conduct of states in this field in general, and to identify violations in particular. The CESCR referred to the term in its General Comment on Article 2(1):

(...) the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State party in which a significant number of individuals is deprived of essential foodstuffs, or essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.<sup>6</sup>

The Committee has also referred to the concept in general comments on substantive rights, such as on food and education.<sup>7</sup> In the academic literature, Alston has argued for the use of the term ‘core content’, postulating that ‘each right must (...) give rise to an absolute minimum entitlement, in the absence of which a state party is to be considered to be in violation of its obligations’.<sup>8</sup> In our opinion, the core content of a right must be understood as meaning its essence, i.e. that essential element without which a right loses its substantive significance as a human right.<sup>9</sup>

### 2.2.2. Elements of the core content of the right to education

First the scope of the right to education needs to be identified as all those elements of the right covered by human rights treaty provisions. That does

<sup>6</sup> General Comment no. 3, The nature of state parties obligations (Art. 2(1) ICESCR) (1990), UN Doc. E/1991/23, Annex III, § 10.

<sup>7</sup> See UN Doc. E/C.12/1999/5 and UN Doc. E/C.12/1999/10. We will deal with elements of the core content of the right to education as identified by the Committee in this General Comment later on.

<sup>8</sup> PH. ALSTON, ‘Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights’, 9 HRQ (1987) 332, at 353.

<sup>9</sup> See A.P.M. COOMANS, *De Internationale Bescherming van het Recht op Onderwijs* (The International Protection of the Right to Education) (Ph.D Thesis Maastricht University, Leiden: NJCM Boekerij, 1992) 38-39. See also *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1986), UN Doc. E/CN.4/1987/17, Principle no. 56, also published in 9 HRQ (1987) 122-135.



not only include provisions dealing explicitly with the right to education, such as in the ICESCR, the Convention on the Rights of the Child (CRC) and the European Convention on Human Rights, but also overlapping elements of other rights. Examples include the right to non-discrimination, freedom of religion (respect for the religious convictions of parents concerning the choice of education for their children), freedom of association (freedom to establish schools), right to privacy (free choice of education, without interference by the state) and the right to work (for teachers and the right to vocational training).

Some of the elements, which make up the core content of the right to education, are stipulated in Articles 13 and 14 ICESCR. Other elements may be inferred from these provisions.

– *Access to education on a non-discriminatory basis (Accessibility)*

First, the essence of the right to education means that no one shall be denied a right to education. In practice, this means an individual right of access to the education available, or in more concrete terms, the right of access to the existing public educational institutions on a non-discriminatory basis.<sup>10</sup> In addition, education provided for by the state should be of the same quality for all groups in society; girls, for example, should not be given education of an inferior quality in comparison with boys.<sup>11</sup> Accessibility includes two other dimensions: physical accessibility – education has to be within safe physical reach; economic accessibility – education has to be affordable for all.<sup>12</sup>

– *The right to enjoy free and compulsory primary education (Availability)*

A second element of the core content of the right to education is the right to enjoy primary education in one form or another, not necessarily in the form of traditional classroom teaching. As primary education is fundamental for the development of a person's abilities it can be rightfully defined as a minimum claim. Primary education includes the teaching of basic learning needs or basic education. Apart from a school and classroom system, primary education may be given in less traditional forms, such as village or community based, or in the open air. This may be necessary due to shortcomings of the formal school system (lack of adequate buildings, teaching materials or teachers), or because parents are unable to pay for participation in the formal school system.

<sup>10</sup> Compare Art. 2(2) ICESCR, Art. 26 ICCPR and Limburg Principles no. 35 and 37.

<sup>11</sup> See Art. 1(1) UNESCO Convention Against Discrimination in Education (1960) for a definition of the term 'discrimination in education'.

<sup>12</sup> General Comment no. 13, § 6.

According to Article 13(2) (a), primary education shall be compulsory. This implies that no one, for example parents or employers, can withhold a child from attending primary education.<sup>13</sup> A state has an obligation to protect this right from encroachments by third persons. Obviously it is not sufficient that primary education is compulsory by law. What is also necessary is an official state inspection service to supervise and enforce this duty with respect to parents, schools, employers and pupils themselves.

Article 13(2) (a) also stipulates that primary education shall be free. The degree to which primary education is really free is determined by a number of direct and indirect costs<sup>14</sup> such as school fees,<sup>15</sup> expenses for textbooks and supplies, costs for extra lessons, expenses for meals at school canteens, expenses for school transport, school uniforms or other items of clothing and footwear and medical expenses and boarding fees, where applicable. In some countries it is common practice that the village community or parents provide labour for constructing, running or maintaining the school; this may be seen as a form of indirect costs for those involved. Another form of indirect costs for parents is taxation. Through the fiscal policy of the state, families contribute to the costs of education. Its effects upon the accessibility of education will depend upon the progressiveness of the tax-system: do low-income groups pay less, in absolute and relative terms, compared to high-income groups?<sup>16</sup> One should also look into the effects of IMF and World Bank Poverty Reduction Strategy Papers upon the accessibility of education if an increase in education fees is part of the package of measures agreed between the government concerned and the IMF or the Bank. It is then important to know whether financial or other forms of assistance or compensatory measures are available for underprivileged persons and groups to safeguard continued access to education as a human right.<sup>17</sup> When discussing the report of Zaire, the CESCR made it clear that charging fees for primary education is contrary to Article 13(2) (a). A state party cannot justify such a measure by referring to severe economic circumstances: ‘The provision of such education was an

<sup>13</sup> See also General Comment no. 11, § 6.

<sup>14</sup> This paragraph is also based on UNESCO's questionnaire.

<sup>15</sup> According to the UN Special Rapporteur on the Right to Education ‘school fees represent a form of regressive taxation. Their justification routinely points to the inability (or unwillingness) of a Government to generate sufficient revenue through general taxation. Payment for primary schooling ruptures the key principle of taxation whereby people who cannot contribute to public services that are meant for all are not required to do so’, UN Doc. E/CN.4/2000/6, § 52. See also General Comment no. 11, § 7.

<sup>16</sup> See the background paper prepared by K. TOMASEVSKI, Special Rapporteur on the Right to Education of the Commission on Human Rights, UN Doc. E/C.12/1998/18, § 12.

<sup>17</sup> See *The Report on the mission to Uganda by the UN Special Rapporteur on the Right to Education*, UN Doc. E/CN.4/2000/6/Add.1, § 29-34.

obligation, which remained incumbent upon a state party regardless of whichever economic system it had adopted'.<sup>18</sup>

Primary education must have priority in resource allocation, because it deals with the fundamental basis for a person's development and the development of society as a whole.<sup>19</sup> It is the responsibility of the state to provide for primary education and maintain educational services. A government cannot waive that responsibility by giving more room to the private sector, or stimulating public-private partnerships for financing the educational infrastructure.<sup>20</sup> With respect to the right to education in the European Convention, the Strasbourg Court held that a state cannot absolve itself from responsibility by delegating its obligations to private school bodies.<sup>21</sup> In its General Comment on Article 13 ICESCR, the CESCR has stressed that 'Article 13 regards states as having principal responsibility for the direct provision of education in most circumstances'.<sup>22</sup> It has also stressed that states have an immediate duty to provide primary education for all.<sup>23</sup> For those states that have not realised yet compulsory and free primary education, there is an 'unequivocal obligation' to adopt and implement a detailed plan of action as provided for in Article 14.<sup>24</sup> In the context of basic education, it has been argued that 'only the State...can pull together all the components into a coherent but flexible education system'.<sup>25</sup> However, it should be emphasised that Article 2(1) ICESCR allows a state party to use 'all appropriate means' aimed at the realisation of the rights in the Covenant.<sup>26</sup> This would mean, in principle, that privatisation measures in the field of education are not excluded, providing

<sup>18</sup> UN Doc. E/C.12/1988/SR.19, § 10. See also E/C.12/1988/SR.17, § 27, 40, 41 and 48.

<sup>19</sup> See also in this respect, General Comment no. 13, § 51: 'States party are obliged to prioritise the introduction of compulsory, free education'.

<sup>20</sup> In a number of African countries, state monopoly on education is coming to an end. In addition, there is a tendency to involve the private (business) sector in the funding and building of schools. The privatisation of education is supported, and sometimes even imposed, by the IMF and the World Bank within the framework of adjustment and austerity programmes. See about this development, *UNESCO Sources*, no. 102 (June 1998), 12-13.

<sup>21</sup> Case of *Costello-Roberts v. UK*, ECtHR 25 March 1993, Series A No. 247-C, § 27.

<sup>22</sup> General Comment no. 13, § 48.

<sup>23</sup> General Comment no. 13, § 51.

<sup>24</sup> General Comment no. 11, § 9.

<sup>25</sup> UNICEF, *The State of the World's Children* (New York: UNICEF, 1999) 63.

<sup>26</sup> The CESCR has interpreted this clause in the following manner: 'While each state party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the "appropriateness" of the means chosen will not always be self-evident. It is therefore desirable that states parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances'. General Comment no. 3 and 4.

that they contribute to the progressive and effective realisation of the right to education.

– *Quality of education (Adaptability)*

Another core element of the right to education, which is less concrete and consequently more difficult to assess is a certain quality of education for each separate educational level. A state party is under an obligation to provide and maintain this quality; or else, attending classes would be meaningless. When assessing this quality, a state should take into account various factors, such as the results of students' tests, the efforts and training-level of teachers, the availability and quality of teaching materials and the condition of school buildings, etc. The quality level of education should also encompass standards regarding the purposes of education as defined in Article 13(1) ICESCR and Article 29(1) CRC. The level of quality is to be determined by the national educational authorities and supervised by an independent educational inspection unit.

– *Free choice of education (Acceptability)*

Still another element of the core content of the right to education is free choice of education without interference by the state or a third person, in particular, but not exclusively with regard to religious or philosophical convictions. This element would be violated in case a state fails to respect the free choice of parents with regard to the religious instruction of their children.<sup>27</sup> This means, in practice, that a state must ensure an objective and pluralist curriculum and avoid indoctrination.<sup>28</sup> This is important, because public education entails the danger of political goals, i.e. the most influential 'philosophy of life' will be promoted by the state.<sup>29</sup> However, it should be realised that in many countries there is only limited or no opportunity to attend education of one's own choice: either there is only state-controlled education, or in a mixed system, private education is too expensive for parents to afford.<sup>30</sup> On the basis of international human rights law, there is no obligation for a state to provide financial support to

<sup>27</sup> COOMANS, *supra* n. 9, 39 and 238.

<sup>28</sup> Case of *Kjeldsen, Busk Madsen and Pedersen*, ECtHR 7 December 1976, Series A No. 23, § 26, 27. The Court emphasised that Art. 2 of the First Protocol should be interpreted in the light of Art. 8 (right to privacy), Art. 9 (freedom of conscience and religion) and Art. 10 (freedom to receive information) of the European Convention on Human Rights.

<sup>29</sup> Compare Art. 17(3) African Charter on Human Rights and Peoples' Rights which states: 'The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State'.

<sup>30</sup> Private education means: educational institutions established and run by private individuals or organizations. These private institutions may be partially or fully funded by the State, or alternatively, receive no financial contributions from whatever local, regional or national public authority.

private educational institutions. If it does, however, it should do so on a non-discriminatory basis.<sup>31</sup>

### **2.3. A typology of obligations relating to the implementation of the right to education**

In order to further analyse and specify the normative content of the right to education and the nature and content of the corresponding obligations of the state, we propose to follow an ‘obligations approach’ developed in the academic debate. To be more specific, it is suggested to use a typology of state obligations as an analytical tool to provide a better understanding of the scope and nature of these obligations in the process of realisation of economic, social and cultural rights and the right to education in particular. It is now common practice to distinguish between the obligations ‘to respect’, ‘to protect’ and ‘to fulfil’, which states parties to the ICESCR have towards individuals under their jurisdiction. This typology of state obligations is also applied in recent General Comments of the CESCR, such as the comments on the right to food and the right to education.<sup>32</sup> The first level is the ‘obligation to respect’. This obligation prohibits the state itself to act in contravention of recognised rights and freedoms. This means that the state must refrain from interfering with or constraining the exercise of such rights and freedoms. The second level is the ‘obligation to protect’. This requires the state to take steps – through legislation or by other means – to prevent and prohibit the violation of individual rights and freedoms by third persons. The third level concerns the ‘obligation to fulfil’. This obligation may be characterized as a programme obligation and implies more of a long-term view for its implementation. In general, this will require a financial input, which cannot be accomplished by individuals alone. This typology of obligations is applicable to economic, social and cultural rights as well as to civil and political rights. It demonstrates that the realisation of a particular right may require either abstention and/or intervention on the part of governments.

The obligation ‘to respect’ the right to education requires the state to abstain from interference. It must not prevent children from attending education, for example, by closing educational institutions in times of political tension in non-conformity with the limitations clause of Article 4 ICESCR.<sup>33</sup> In addition, it requires that the state does not discriminate on

<sup>31</sup> See the views of the Human Rights Committee in the Case of *Arieh Hollis Waldman v. Canada* (1999), UN Doc. CCPR/C/67/D/1996.

<sup>32</sup> See General Comment no. 12, § 15 and General Comment no. 13, § 46-50.

<sup>33</sup> General Comment no. 13, § 59.

the basis of sex or ethnic origin, with respect to admission to public schools. Detailed standards of non-discrimination and equal treatment of individuals in education are laid down in the UNESCO Convention against Discrimination in Education (1960), particularly in Articles 1 and 3. The obligation ‘to respect’ can be characterised as an obligation of conduct: it requires that the state follows the course of action specified in the treaty provision.<sup>34</sup> The obligation ‘to protect’ requires the state to guarantee the exercise of the right to education in horizontal relations (between private groups or individuals), for example, it must protect against discrimination in admitting students to private schools. Another example of the obligation to protect is the adoption and enforcement of legislation to combat child or bonded labour in private labour relations, or arrangements for monitoring and enforcing compulsory primary education.

The nature of the right to education is such that positive state action is needed to achieve the full realisation of this right. In the opinion of the CESCR, ‘it is clear that Article 13 regards states as having principal responsibility for the direct provision of education in most circumstances’,<sup>35</sup> which can be seen as an elaboration of the obligation to fulfil. The obligation ‘to fulfil’ requires states to make the various types of education available and accessible for all and to maintain that level of realisation. In order to achieve that aim, states must take a variety of measures. Although legislation may be necessary to provide a legal framework at the outset, the realisation of this right needs policy measures, financial and material support.<sup>36</sup> The obligation ‘to fulfil’ implies that states have a substantial degree of latitude in complying, depending upon the specific level of education and taking into account the wording of the treaty obligation.<sup>37</sup> Therefore, the obligation ‘to fulfil’ should be characterised as an obligation of result, leaving the choice of means to the state, providing the result achieved conforms to international standards.

### Minimum Core Obligations

Specific elements of the core content of the right to education give rise to concrete obligations to ensure minimum levels of enjoyment. These obligations may be characterised as minimum core obligations as defined by the CESCR in its General Comment on the nature of state parties’

<sup>34</sup> See COOMANS *supra* n. 9, 231-232 and M. NOWAK, ‘The Right to Education – Its Meaning, Significance and Limitations’, 9 NQHR (1991) 418 at 421-422.

<sup>35</sup> General Comment no. 13, § 48.

<sup>36</sup> See the Limburg Principles no.17. Legislative measures would be imperative if existing legislation is contrary to the obligations under the Covenant, see Limburg Principles no. 18.

<sup>37</sup> General Comment no. 13, § 48.

obligations.<sup>38</sup> Such obligations are not limited to cost-free (negative) obligations to respect, but also include positive obligations to protect and to fulfil. Minimum core obligations resulting from the core content of the right to education apply irrespective of the availability of resources.<sup>39</sup> According to the Committee, the minimum core obligations with respect to the right to education includes an obligation: ‘to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary higher and fundamental education; and to ensure free choice of education without interference from the state or third parties, subject to conformity with “minimum educational standards” (article 13(3) and (4))’.<sup>40</sup> There is clearly overlap with the core elements we discussed above, but there are also differences, such as the reference to the objectives of education mentioned in Article 13 (1), an element, which we left out as it, in our view would be covered by the quality level of education.

#### **2.4. Some observations on the relationship between privatisation and violations of obligations resulting from the right to education**

Criteria for determining violations of economic, social and cultural rights have been developed in the academic debate and by the CESCR. The Limburg Principles and Maastricht Guidelines list rather detailed examples of such situations.<sup>41</sup> In addition, a ‘violations approach’ to determine violations of economic, social and cultural rights has been developed by Audrey Chapman.<sup>42</sup> In its General Comment on Article 13 ICESCR, the CESCR gives a few examples of violations of the right to education, defined as breaches of state obligations.<sup>43</sup> In the area of privatisation, the general state duty to protect seems to be particularly relevant, because the state has to ensure that the right to education is fully enjoyed by learners once private bodies take care of educational services. A state has to exercise due

<sup>38</sup> General Comment no. 3, § 10.

<sup>39</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HRQ (1998) 691, § 9. See also V. DANKWA, C. FLINTERMAN, S. LECKIE, ‘Commentary to the Maastricht Guidelines on Economic, Social and Cultural Rights’, 20 HRQ (1998) 705 at 717.

<sup>40</sup> General Comment no. 13, § 57.

<sup>41</sup> Limburg Principles no. 72 and Maastricht Guidelines, § 14 and 15.

<sup>42</sup> A.R. CHAPMAN, ‘A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights’, 18 HRQ (1996) 23-66.

<sup>43</sup> General Comment no. 13, § 58-59.

diligence in controlling the conduct of such bodies and is legally responsible for this.<sup>44</sup> This was confirmed by the ECHR in the case of *Costello-Roberts* where it held that, although the case related to the issue of maintaining school discipline by a headmaster of an independent (private) school, such an issue may nonetheless engage the responsibility of the state party under the European Convention on Human Rights.<sup>45</sup> Thus, in the case of privatised education a shift in the scope and content of state obligations can be observed. There is more emphasis on the obligation to protect: the role of the state as regulator rather than provider receives more importance.

As a general rule, one could say that decisions to start privatisation in the sphere of education, grounded in the rationale of efficiency, should from a human rights perspective, not increase inequality in society, but rather contribute to a better realisation of the right to education for vulnerable groups. Seen from this angle, a state has an obligation to respect existing levels of protection, or put differently, to abstain from measures that would reduce the extent to which the right to education is guaranteed at a given moment. This is required in order to avoid such a policy being qualified as a violation of the right to education.<sup>46</sup> It is submitted that, generally speaking, decisions to privatise in the area of education should meet the requirements of availability, accessibility, adaptability and acceptability of education. This implies, inter alia, that when parts of the educational system of a country are privatised, enjoyment of the core elements of the right to education as a human right must be secured. A state has an obligation to monitor this. If the state system provided for a programme of positive action to promote the participation of girls in school, then such a programme must be continued. Privatised education for girls and boys must conform to the standards laid down in the UN Convention on the Elimination of Discrimination Against Women.

An example of a breach of the obligation to protect is the failure to ensure and supervise that private educational institutions conform to minimum educational standards as required by Article 13 (3) and (4) ICESCR.<sup>47</sup> Another example is the situation in which a state party does not prevent or consent to rising school fees required by privatised educational institutions, when it is clear that such a practice would endanger economic

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<sup>44</sup> Maastricht Guidelines, § 18.

<sup>45</sup> Case of *Costello-Roberts*, supra n. 21, § 28.

<sup>46</sup> Compare Maastricht Guidelines, § 14 *d* and *e*.

<sup>47</sup> General Comment no. 13, § 59 and Maastricht Guidelines, § 15 *d*.



accessibility of education of specific groups of the population.<sup>48</sup> The obligation to protect would also be violated if the educational authorities in a state do not combat and prevent prohibited forms of discrimination in the admission of learners to privatised educational institutions. It should be remembered that the basic standard of non-discrimination applies to all forms of education, be they public, privatised or private.<sup>49</sup> For example, the prohibition of discrimination on the basis of race also applies to the admission of pupils to private and privatised schools.<sup>50</sup>

### 3. PRIVATISATION OF EDUCATION: DEFINITION OF MEANS

There is no unambiguous and agreed upon definition of the term privatisation. Many scholars disagree on a concrete definition of the term privatisation, although sometimes it is easier to point out situations that might indicate that privatisation is taking place or has actually occurred. This is due to the fact that privatisation can take many forms and facets. Most of the scholars, however, appear to agree that privatisation usually involves a transfer of assets, management, functions or responsibilities previously owned or carried out by the state to private actors.<sup>51</sup> From the perspective of the topic at the centre of this paper, it is similarly difficult to concretely define what is meant by the term “privatisation of education” or to come up with a particular description of what privatisation of education actually is.<sup>52</sup> In any case, with privatisation we do not mean liberalisation, which is altogether a different phenomenon entailing the opening up of hitherto closed markets to competition. This process is strengthened by developments taking place in the framework of the World Trade Organisation (WTO).<sup>53</sup>

<sup>48</sup> Compare Maastricht Guidelines, § 14 *c*.

<sup>49</sup> See Art. 1 and 2 UNESCO Convention Against Discrimination in Education and General Comment no. 13, § 31-36. However, Art. 2(a) UNESCO Convention permits separate educational systems or institutions for boys and girls, provided that certain conditions are met. Art. 10(c) CEDAW provides for the encouragement of co-education.

<sup>50</sup> See Art. 5(e) (v) and 2(1) (d) International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>51</sup> See also C.R. BELFIELD, & H.M. LEVIN, *Education privatisation: causes, consequences and planning implications*, (Paris: UNESCO International Institute for Educational Planning, 2002) 19.

<sup>52</sup> See on the complexity of defining privatisation in general and privatisation of education, J. MURPHY, *The Privatisation of Schooling: Problems and Possibilities* (Thousand Oaks: Corwin Press, 1996) 4-5.

<sup>53</sup> However, it must be noted that privatisation and liberalisation can, and often do go together. For a discussion on the liberalisation of educational services and privatisation see section 3.2 below.

Perhaps a good way of defining the privatisation of education is to first take a look at its motivations and aims. In general, privatisation has been hailed as a way to counter what is perceived to be a failure of governments to provide certain services in a cost-effective and efficient way. Privatisation has multiple objectives, many of which are conflicting with each other.<sup>54</sup> These objectives include fiscal objectives such as the reduction of public spending, attracting (foreign) investment, improving corporate efficiency and performance, introducing competition into monopolistic markets, as well as objectives of a more political nature. The general view appears to be that privatisation allows for more flexibility and efficiency for the provision of certain services than its provision by the state would allow. With regard to education, the objectives of education privatisation appear to be primarily geared towards reducing the participation of the state in the 'provision, financing and/or control of educational services to improve its quality, efficiency and effectiveness.'<sup>55</sup> Other commentators have also noted that another important objective of privatisation in the field of education is enhancing parents' choice in education by giving them the option to choose the school they deem to be the best for their children.<sup>56</sup> Belfield and Levin have identified three main factors (other than ideological) contributing for the privatisation of education.<sup>57</sup> The first one is the high demand for quality education from parents. If governments cannot meet this demand for financial or organizational reasons then parents will start looking for other alternatives for publicly provided education. A second factor is the perceived decline in the quality of publicly provided education and the lack of appropriate funding for public education. The decline of quality in education can be perceived in the overcrowding of schools and classrooms, the inability of the state to provide primary and secondary education in certain regions or areas, the problem of attracting and paying qualified teaching staff and the diminishing attention paid to the quality of curricular content. Finally, globalization, market liberalization and the intervention of international financial institutions such as the World Bank have compelled governments to take steps to rationalize their tasks, reduce

<sup>54</sup> *Privatising State-Owned Enterprises: An Overview of Policies and Practices in OECD Countries* (Paris: OECD, 2003) 8.

<sup>55</sup> HELGA CÚELLAR MARCHELLI, *Decentralization and Privatisation of Education in El Salvador: Assessing the Experience* (National Center for the Study of Privatisation in Education Teachers College, Columbia University, Occasional Paper No. 19, 2001) 3.

<sup>56</sup> See, for example, MURPHY, *supra* n. 52, 132-133, where he recollects a number of scholarly views that emphasize the role of choice as a key word for the privatisation of education. See also CÚELLAR MARCHELLI, *ibid.*, 4.

<sup>57</sup> BELFIELD & LEVIN, *supra* n. 51, 29-33. See also I. KITAEV, *Private Education in Sub-Saharan Africa: A Re-examination of Theories and Concepts Related to its Development and Finance* (Paris: UNESCO International Institute for Educational Planning, 1999) 58-59.

the size of government and government spending and increase efficiency. Public education has not escaped this (global) development.

Taking these factors and aims into account, the definition for privatisation of education can be reasoned in the following manner. Education privatisation entails the deliberate move towards more private and less public schooling with respect to its provision, financing, management and regulation.<sup>58</sup> By necessity, this involves increasing the role of private actors (parents, companies or non-governmental organizations) in one or all of these aspects of education. However, it should be stressed that education privatisation as defined above, does not necessarily mean that the state is completely excluded from participating in any of these or other aspects related to education, such as monitoring or conflict resolution. Privatisation of education must also not be mistaken with private education. Privatisation of education is in essence the transfer of responsibilities in certain areas of education that are under government control (provision, financing, management or regulation) to private actors. Private education can under specific circumstances imply privatisation, but the term is usually reserved to denote formal schooling that has been established on private initiative by individuals or groups without direct governmental involvement, is privately funded, sponsored and managed, and operates autonomously from and not under direct control of the state. In other words, private education operates independently of the public education system.<sup>59</sup> Privatisation of education as used in this chapter, on the other hand, implies a deliberate policy of delegating (educational) state functions to private entities with the aim of realizing the above-mentioned objectives and under influence of the factors already noted.<sup>60</sup>

### **3.1. Methods of education privatisation**

Privatisation in education is a complex issue in terms of means and methods for its implementation. Various commentators, experts on education and privatisation advocates have described several methods by

<sup>58</sup> See also CUÉLLAR MARCHELLI, *supra* n. 55, 3 and J. FITZ, *Education Management Organizations and the Privatisation of Public Education: A Cross-National Comparison of the USA and the UK* (National Center for the Study of Privatisation in Education Teachers College, Columbia University, Occasional Paper No. 22, 2001) 3.

<sup>59</sup> For a discussion on the difficulty of defining private education, see KITAEV, *supra* n. 57, 41-44.

<sup>60</sup> In this respect, it can be stated that education privatisation implies an act of commission by the State. However, it cannot be ruled out that under exceptional circumstances the State, through acts of omission or sheer inability also engages in forms of privatisation of education. This could be the case of delegating educational functions to private actors in regions where the State has insufficient means of ensuring the accessibility to primary or secondary education. See KITAEV, *supra* n. 57, 76.

which the privatisation of education can take place.<sup>61</sup> These methods encompass different approaches and are generally related to the way education is funded and managed, the way education is provided and the roles of the state and the private sector in providing alternatives for public education and its regulation.<sup>62</sup> These approaches also reflect the intensity of privatisation. In other words they relate to the question of how far the state maintains a (leading) role in education. In this respect, one could distinguish between different levels of intensity in the methods of privatisation in the education sector. On the far end of the spectrum, one can encounter absolute privatisation whereby all the aspects related to the funding, management, ownership and regulation of education/schooling are almost completely transferred to the private sector and the role of the state is greatly reduced. As noted above, this does not necessarily mean that the state does not have any other (meaningful) role in education.<sup>63</sup> It would appear that such a radical form of privatisation rarely occurs. On the other hand, the state maintains a great deal of involvement in the education sector with respect to the funding, management, ownership and regulation, but decides to contract out certain specific services (such as pupil transportation or the provision of school materials and meals) to the private sector. In between these two extremes, there are various gradations of privatisation involving the (partial) transfer of competences in the area of funding, management or ownership to private parties. These types include voucher systems and charter schools and the contracting out of formal educational functions and management. For the purposes of this paper, these more limited types of privatisation will be further examined in respect of its impact on the right to education.

### 3.1.1. Privatisation of education through alternative funding

Privatizing education through alternative funding usually takes place by means of educational vouchers. Education vouchers represent a system of

<sup>61</sup> See, for example, MURPHY, supra n. 54, 21, where ten different types of privatisation in education are distinguished.

<sup>62</sup> See also J. TOOLEY, P. DIXON AND J. STANFIELD, *Delivering Better Education: Market Solutions for Educational Improvement* (Adam Smith Institute (Research), 2003) 8.

<sup>63</sup> For example, in the United States the US Supreme Court has recognized that even in the case of traditional private education, individual states have the power to '[...] reasonably [...] regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare'. See *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 US 510 (1925). See also F.R. KEMERER AND C. MALONEY, 'The Legal Framework For Educational Privatisation and Accountability', 150 *West's Education Law Reporter* (2001) 598 at 589-590.

financing education whereby the state provides parents with funds (usually in the form of a certificate or coupon) to send their children to schools of their choice.<sup>64</sup> These schools can be either public or private and would ideally compete with each other to attract the students with vouchers by offering better education in a more efficient and cost effective way.<sup>65</sup> The idea of using vouchers to finance education was first touted in 1962 by economist M. Friedman, who argued that there was a compelling case for the public financing of education because of the public benefits arising out of education.<sup>66</sup> At the same time, he maintained that the state should retreat from the business of providing education (which should be left to the free market) and should have minimal regulatory role to protect the public interest. Several different types of voucher systems have been developed. Some voucher systems are meant for all children (universal), while others are targeted at special target groups such as children from low-income families.<sup>67</sup> Universal vouchers have only been used in Sweden<sup>68</sup> and in Chile,<sup>69</sup> while targeted voucher schemes have been applied in countries such as the United States and Colombia. One of the most compelling arguments in favour of voucher systems is that it allegedly increases the choice of parents. Additionally, it could allow children of low-income families to attend (private) schools, which would otherwise be difficult for them to attend due to financial constraints.<sup>70</sup> Further, the competition for voucher-holding students would allegedly force schools in the voucher system to take into account the educational needs of students and parents more, since parents could decide to withdraw their children from school if it does not meet their expectations and place them in another one which does. To a certain extent, this implies that the monitoring and regulation

<sup>64</sup> See H. LEVIN, 'A Comprehensive Framework for Evaluating Educational Vouchers', 24 *Educational Evaluation and Policy Analysis* (2002) 159.

<sup>65</sup> KITAEV, supra n. 57, 86.

<sup>66</sup> M. FRIEDMAN, 'The Role of Government in Education', in *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962, reissued in 1982) 85-107. See also LEVIN, supra n. 64, 160-161.

<sup>67</sup> TOOLEY, DIXON AND STANFIELD, supra n. 62, 8.

<sup>68</sup> Ibid. See also M. CARNOY, 'National Voucher Plans in Chile and Sweden: Did Privatisation Reforms Make for Better Education?', 42 *Comparative Education Review* (1998) 309 at 309.

<sup>69</sup> Ibid. See also M. CARNOY AND P. MCEWAN, *Does Privatisation Improve Education? The Case Of Chile's National Voucher Plan* (Stanford University School of Education, International Comparative Education Program), available at: <<http://www.stanford.edu/dept/SUSE/ICE/carnoy/Chilepaper.pdf>> (last visited on 1 April 2004) and C. HSIEH AND M. URQUIOLA, *When Schools Compete, How Do They Compete? An Assessment of Chile's Nationwide School Voucher Program* (National Center for the Study of Privatisation in Education Teachers College, Columbia University, Occasional Paper No. 43, 2002).

<sup>70</sup> See E.M. KING, P.F. ORAZEM AND D. WOHLGEMUTH, 'Central Mandates and Local Incentives: The Colombia Education Voucher Program', 13 *The World Bank Economic Review* (1999) 467 at 467.

of a voucher school is in the hands of the parents.<sup>71</sup> Opponents of voucher programs argue that the voucher system may take away public schools of much needed financial resources. For example, in 1994 a voucher system in Puerto Rico was declared unconstitutional by the Supreme Court, because a provision in the constitution that public funds may only be used for public schools prevailed.<sup>72</sup> In the United States, individual states may consider the provision of public funds to non-public schools not to be in accordance with a state's constitution under the public purpose doctrine. According to this doctrine, the use of public funds for non-public purposes is forbidden.<sup>73</sup> Additionally, vouchers may only benefit pupils from higher income families. Another argument against the voucher system is that private schools participating in a voucher program may end up picking and choosing select students, thus leaving the least potential students in public schools.<sup>74</sup>

Other possible examples of privatisation through alternative funding are tax-exemptions and subsidies to private educational facilities as a means of increasing competition with public schools.

### 3.1.2. Privatisation of education through the delegation of school management and instructional services

Another common type of education privatisation takes place through the delegation of management and instructional services of publicly funded and owned schools to private entities (either non-profit or for profit). Examples of this type of privatisation can be observed in so-called 'charter schools' which are gaining popularity in the United States<sup>75</sup> and the contracting-out of management of public schools to Educational Management Organizations (EMOs). A further example is the delegation of management and instructional services to non-governmental organizations

<sup>71</sup> See further the section below on the privatisation of education through the delegation of regulation and monitoring.

<sup>72</sup> Tribunal Supremo de Puerto Rico, *Asociación de Maestros v. José Arsenio Torres*, 30 November 1994, 94 DTS 12:34, mentioned in K. TOMASEVSKI, *Education Denied – Costs and Remedies*, (London: Zed Books, 2003) 114.

<sup>73</sup> See J.H VALLARELLI, 'State Constitutional Restrictions on the Privatization of Education', *72 Boston University Law Review* (1992) 381 at 393–394.

<sup>74</sup> KING, ORAZEM AND WOHLGEMUTH, *supra* n. 70, 468.

<sup>75</sup> As of January 2004, 2,996 charter schools are operating in the United States. Information available at: <<http://www.edreform.com/index.cfm?fuseAction=stateStats&pSectionID=14&cSectionID=44>> (last visited on 14 April 2004). According to the US Education Secretary Rod Paige, the number of charter schools should be expanded nation-wide, see *The Miami Herald*, 20 June 2004.

or communities not linked to the state that take over education duties in areas where the State has not been able to do so.

### a. Charter schools

Charter schools are autonomous educational institutions, which are established through (local) legislation and financed through public funds. They operate, however, outside the framework of public education and usually enjoy more freedom with regard to regulations and restrictions.<sup>76</sup> Charter school legislation enables parents, teachers, school administrators, private corporations or other members of the community to enter into a formal agreement with the local government or school education agencies by signing a contract or charter to establish a charter school that provides free public education.<sup>77</sup> Although the content of charter legislation may vary, it usually focuses on who may apply for a charter (individuals, public or private schools, non-profit or for profit organizations), the way the school is going to be run, the amount of public funding it should receive and the amount of freedom the school will have in respect of determining its operations and education regulation. Additionally, charter legislation may stipulate whether the management of these schools may be delegated to non-profit or for-profit private parties such as EMOs (see further below). Charter schools may operate autonomously in areas such as curriculum, instruction, budget, and personnel in exchange for being held accountable for student performance.<sup>78</sup> The content of the charter itself can also vary, although it usually contains provisions regarding the academic goals to be achieved by the charter school and the penalties for not living up to these

<sup>76</sup> J. BUCKLEY AND S. KÚSCOVÁ, *The Effects of Institutional Variation on Policy Outcomes: The Case of Charter Schools in the States* (National Center for the Study of Privatisation in Education, Teachers College, Columbia University, Occasional Paper No. 79, 2003) 3. See also K.A. TUREKIAN, 'Note and Comment: Traversing the Minefields of Education Reform: The Legality of Charter Schools', 29 CONN.L. REV. (1997) 1365 at 1373 and A. BROY, 'Charter Schools and Education Reform: How State Constitutional Challenges Will Alter Charter School Legislation', 79 N.C.L. REV. (2001) 493 at 494. Charter schools have also been defined as being public schools that have been contracted out to the private sector, although it would seem that this definition could be too restrictive in light of the varieties of charter schools that can exist. See E. BETTINGER, *The Effect of Charter Schools on Charter Students and Public Schools*, (National Center for the Study of Privatisation in Education, Teachers College, Columbia University, Occasional Paper No. 4, 1999) 2.

<sup>77</sup> See *Charter Schools: New Model for Public Schools Provides Opportunities and Challenges*, United States General Accounting Office, report no. GAO/HEHS-95-42 (18 January 1995) at 1. See also TUREKIAN, supra n. 76, 1373-1374. Those interested in applying for a charter are usually required to submit information regarding the proposed educational program, governance procedures, the criteria for student admission and means of assessing student performance.

<sup>78</sup> United States General Accounting Office, report no. GAO/HEHS-95-42, *ibid*.

goals.<sup>79</sup> The relative freedom from public educational regulation and the wide amount of discretion given to charter schools to determine their organization and functioning makes such schools flexible, but at the same time gives rise to doubts with regard to their accountability. It is also worthy to note that one of the expected results from the freedom charter schools, an improvement in performance and quality in education appears not to have materialized in the United States.<sup>80</sup> In a report recently prepared by the American Federation of Teachers the performance of charter schools in a number of states was compared to that of traditional public schools. The results suggest that pupils in public schools performed better in maths and reading than those in charter schools (including charter schools from states where greater autonomy is granted to charter schools than in other states).<sup>81</sup> Although the report admits that not all of its results are representative, the underperformance of charter schools in comparison to public schools revealed by this report casts some doubt with regard to their suitability as possible alternatives for public schooling.

#### **b. Contracting out of management to EMOs**

Contracting out of management of public schools to EMOs is probably one of the most controversial methods of privatizing education and entails a takeover of the management of publicly funded schools.<sup>82</sup> This type of privatisation involves the replacement of publicly appointed school administrators of either traditional public schools or (as is often the case in the United States) charter schools. The state continues to fund the schools managed by EMOs while the latter receive the authority to manage the schools and establish the curriculum.<sup>83</sup> EMOs can also be allowed to staff the school and provide instructional services. In the United States, but also in the United Kingdom, contracting out of management to EMOs has usually taken place in poorly performing public schools.<sup>84</sup> In an effort to

<sup>79</sup> This penalty could include closure of the charter school for not meeting its goals. See BETTINGER, *supra* n. 76, 4, describing the content of charters in Michigan.

<sup>80</sup> See *The New York Times*, 'Nation's Charter Schools Lagging Behind, U.S. Test Scores Reveal', 17 August 2004.

<sup>81</sup> See *Charter School Achievement On The 2003 National Assessment Of Educational Progress*, American Federation of Teachers, AFL-CIO, August 2004, available at: <<http://www.aft.org/pubs-reports/downloads/teachers/NAEPCharterSchoolReport.pdf>>. (last visited on 20 August 2004).

<sup>82</sup> L.D. Solomon, 'Edison Schools and the Privatisation of K-12 Public Education: A Legal and Policy Analysis', 30 *Fordham Urban Law Journal* (2003) 1281 at 1283.

<sup>83</sup> *Ibid.*, at 1284.

<sup>84</sup> TOOLEY, DIXON AND STANFIELD, *supra* n. 64, 16. Currently, only one school in the United Kingdom has been subject to this method of privatisation: the former King's College in Surrey (now known as Jubilee High School) became the first public school in which the management



improve the quality, standards and results with regard to student achievement of failing public schools, local public education authorities have resorted to this method of education privatisation. The EMOs' business consists of attaining these results, while attempting to lower the overall costs of managing the schools by reducing central overhead expenses.<sup>85</sup> One of the best-known EMOs is Edison Schools, which has managed to gain a growing number of management contracts in the United States and is increasing its operations in the United Kingdom and elsewhere. EMOs could help to relieve the state from managing failing schools so that it can devote its attention to improving education elsewhere. On the other hand, the use of EMOs could be problematic with regard to accountability and quality. Concerning the latter, it has been argued that the efforts of EMOs to reduce costs in managing and operating schools could lead to a deterioration in the quality of education.

### c. Community-managed schools

In a number of developing countries, NGOs and/or local communities with no links to the State have taken over the management of schools (or started schools of their own) and are providing instructional services in areas where the state has not been able to provide for proper public schooling, often due to a lack of resources. In Mali, for example, community schools have overtaken state schools in the first stage of primary education.<sup>86</sup> Another example of this type of management delegation is the EDUCO program in El Salvador. Under this type of privatisation, education is decentralized and the direct involvement of parents and community groups is strengthened.<sup>87</sup> In El Salvador, for example, EDUCO schools are managed autonomously by community education associations. The members of these associations are parents of the students who have been elected for the task and have received basic training in school management<sup>88</sup> Although this privatisation method may help to provide for increased access to education in areas where formal public education is not available, questions can be raised with regard to the quality of the education provided by community

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has been contracted out to an EMO, Nord Anglia. (Check spelling Nord or North in reference) See *BBC News Online*, 'Private firm to run ailing state school', available at: <http://news.bbc.co.uk/1/low/education/1345930.stm> (last visited on 8 April 2004).

<sup>85</sup> EMOs try to achieve this by spreading the general costs through the expansion of their operations to more public schools and at the same time increase their revenues. See SOLOMON, *supra* n. 82, 1299.

<sup>86</sup> *Education For All Global Monitoring Report 2003-2004*, (Paris: UNESCO, 2003) at 139.

<sup>87</sup> E. JIMENEZ AND Y. SAWADA, 'Do Community-Managed Schools Work? An Evaluation of El Salvador's EDUCO Program', 13 *The World Bank Economic Review* (1999) 415 at 416.

<sup>88</sup> *Ibid.*

associations with only basic training in education and school management. Another question is whether such schools that operate with the help of members of the community contribute to greater gender equality in access to education and in services provided for the school.<sup>89</sup>

### **3.1.3. Privatisation of education through the delegation of regulation and monitoring**

The implementation of voucher programs, the establishment of charter schools or the delegation of management to private entities as in the case of community-managed schools has paved the way to a third method of privatisation of education. Under voucher programs, charter schools and community-managed schools, some aspects of monitoring the operation and performance has been transferred from the state to private entities (usually parents). For example, under voucher programs, the responsibility of deciding whether a school is performing well enough (thus, in fact monitoring the operation of the school) is left in the hands of the parents. They can decide whether or not to keep their children in a voucher school or transfer them to another educational institution.

Additionally, a transfer of regulatory powers can be observed in the case of charter schools. Charter schools are in general, uninhibited from the central regulatory mechanisms of the individual states or local education authorities. To a certain extent, this implies that charter schools are free to set up their own regulatory mechanisms and regulations in areas such as the curriculum, budget, personnel and student discipline, thus taking over some of the tasks previously carried out by the State.<sup>90</sup>

## **3.2. Liberalisation in trade in services and education privatisation**

One of the major accomplishments of the Uruguay Round of multilateral trade negotiations was the conclusion of the General Agreement on Trade in Services (GATS) in 1994 together with the other agreements resulting in the further development of rules of international trade law and the establishment of the WTO.<sup>91</sup> GATS has been drafted to facilitate the trade in services such as education through the acceptance of four modes of

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<sup>89</sup> *Education For All Global Monitoring Report 2003-2004*, supra n. 87, 140.

<sup>90</sup> This usually depends, of course, on individual state legislation in the United States. For a discussion of the amount of freedom which charter schools can actually have, see KEMERER AND MALONEY, supra n. 63, 609.

<sup>91</sup> See M.E. FOOTER, 'The General Agreement on Trade in Services: Taking Stock and Moving Forward', 29 *Legal Issues of Economic Integration* (2002), 7 at 7.

service supply<sup>92</sup> and the gradual removal of domestic regulatory barriers that could negatively impact on the trade in services. In order to make possible the liberalization of trade in services, states are required to negotiate whether they are going to commit themselves to (progressively) open up their markets to services of their choice.<sup>93</sup> States that make such commitments must then draw up a schedule where these commitments are laid down,<sup>94</sup> and which specify, the sectors subject to (progressive) liberalization. This schedule should also specify *inter alia*, the terms, conditions and limitations on market access to these sectors, the conditions and qualifications on national treatment and the timeframe for implementation and entry into force of these commitments. A careful reading of GATS reveals that the agreement is neutral with respect to privatisation. The agreement does not prescribe privatisation of any of the services that have been committed for liberalisation, including educational services. In fact, the agreement excludes certain services from its application.<sup>95</sup> The services excluded are those that are supplied in the exercise of governmental authority. These are defined as those services, which are supplied neither on a commercial basis nor in competition with one or more service suppliers. The WTO secretariat notes that basic education (that is, primary and secondary education) directly provided by the government may fall within the scope of this exception.<sup>96</sup> States, however, would be free to open up their education markets to allow parallel provision of private schooling. A look at the specific commitments made by states in the area of education services does not demonstrate that states are committing themselves to privatise these services.<sup>97</sup> It would also appear that education services are

<sup>92</sup> Art. I GATS. These four modes are cross-border supply, consumption abroad, commercial presence and presence of natural persons (respectively identified as modes one, two, three and four). With regard to the liberalization of trade in educational services, modes two to four are the most relevant: students will travel abroad to follow educational programs, educational institutions or companies will like to provide their educational services through establishing a commercial presence in other countries, and teachers and other school staff or representatives will have to be present in other countries to provide educational services.

<sup>93</sup> Art. XIX GATS.

<sup>94</sup> Art. XX GATS.

<sup>95</sup> Art. I § 3 (b) and (c) GATS.

<sup>96</sup> Education Services, Background Note by the Secretariat, WTO – Council for Trade in Services, Doc. No. S/C/W/49, 23 September 1998 (98-3691), §. 13.

<sup>97</sup> A list of commitments made until now by states engaging in GATS negotiations can be found at <http://tsdb.wto.org/wto/WTOHomepublic.htm>. Norway's commitments with regard to educational services states for example that "[p]rimary and secondary education are public service functions. Authorization may be given to foundations and other legal entities to offer additional parallel or specialized education on a commercial or non-commercial basis."

one of the least committed sectors under GATS.<sup>98</sup> On careful consideration of the GATS rules on domestic regulation including the removal of national regulatory barriers, the provisions on general exceptions to the agreement and the rules on market access<sup>99</sup> also reveals that states, which choose to open up their markets to the provision of educational services, still have the right to apply regulatory measures for protection of legitimate national policy objectives in the area of education. They may even limit their national treatment obligations through their commitments. These measures, of course, have to be necessary and proportionate to protect these legitimate interests and should not be used by states as an excuse to escape the commitments that they have agreed upon.<sup>100</sup> Arguably, the protection of the requirements of availability, accessibility, adaptability and acceptability to guarantee the right to education could fall under these legitimate interests that can be protected through regulation.<sup>101</sup> In other words, states have the right under GATS to set up regulation in the sector of education that is necessary to protect and guarantee the right to education. In our opinion, on its own, the liberalisation of trade in education services does not *per se* bring privatisation of education or force states to privatise schooling. States remain free to provide public education without privatising it and still allow the parallel provision of private education, by opening up access to the education market. Additionally, GATS would appear to provide enough room for states to come up with regulatory measures to protect the right to education. These measures would also apply if states wish to privatise education in order to take further advantage of the liberalised education market. Nevertheless, we also emphasize that a human rights approach to international trade in general, and to the trade in services in particular, as advocated by the UN High Commissioner of Human Rights<sup>102</sup>, is indispensable to cope with any potential problems that the liberalisation of the trade in (education)

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<sup>98</sup> Education Services, Background Note by the Secretariat, WTO – Council for Trade in Services, Doc. No. S/C/W/49, 23 September 1998 (98-3691), § 37. While this note by the WTO Secretariat is not recent, a survey of the commitments currently available confirms this view.

<sup>99</sup> Art. VI, XIV and XVI GATS. Article XIV GATS allows states to take measures necessary for the protection of public morals. The right to education could also fall within this provision.

<sup>100</sup> On the question of how to assess when a measure is really necessary to protect legitimate interests and an overview of the relevant jurisprudence of the WTO's dispute settlement system in this regard see 'Necessity Tests' in the WTO, Note by the Secretariat, WTO – Working Party on Domestic Regulation, Doc. No. S/WPDR/W/27, 2 December 2003 (03-6404).

<sup>101</sup> See further section 4 *infra* for a further analysis of these requirements in view of potential human rights issues connected to the privatization of education.

<sup>102</sup> Liberalization of the Trade in Services and Human Rights, E/CN.4/Sub.2/2002/9 (18 June 2002).

services might bring. In this respect, it is also not unthinkable that the WTO dispute settlement system in the future will have to take into consideration, states' human rights obligations when dealing with trade disputes.<sup>103</sup>

#### 4. ANALYSIS OF POTENTIAL HUMAN RIGHTS ISSUES

We have already noted above the nature of the state's obligations with respect to the right to education. Additionally, we have noted the criteria for determining violations of the right to education. In short, privatisation in the area of education has to take into account and meet the requirements of availability, accessibility, adaptability and acceptability of education. If the privatisation policies endanger these requirements, the state has a duty to abstain from these measures (in other words, the State has an obligation to respect the enjoyment of the right to education). In this respect, the State has also a duty to exercise due diligence in controlling the conduct of private parties, who have taken over tasks from the state in the area of management, provision and monitoring of education. With respect to the privatisation of education through alternative funding, a number of problems relating to the requirements of availability and (economic) accessibility can be envisaged. A violation of a core minimal obligation of the right to education with respect to the right to enjoy free primary education as mandated by article 13(2) (a) ICESCR may occur if a voucher system leads to the charging of fees by primary schools that previously were free, and the system does not correctly target pupils from low-income families to compensate for this. This could also be the case when the amount of money the vouchers provide is not sufficiently high enough to cover the costs of schooling. Additionally, if competition for pupils through the voucher systems leads to a decline in the number of public schools in a certain area due to pupils preferring private schools, the requirement of physical accessibility could be affected too.

With respect to the privatisation of education through the delegation of management to private parties or contracting out of the management of public schools to EMOs, potential problems can arise. One such problem is if privatisation results in situations where these private entities resort to charging fees for primary education or engage in discriminatory practices, such practices could deny access to pupils from low-income families, due to their lack of financial contribution. Similarly, denying access to children

<sup>103</sup> See in this regard E.U. PETERSMANN, 'The "Human Rights Approach" Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?', 7 *Journal of International Economic Law* (2004) 605.

with disabilities due to the additional costs they might incur for the school, as well as to children with different ethnic background or gender, would result in a violation of the core obligations of the right to education. Additionally, a violation of the right to education would arise if charter or EMO-managed schools do not provide education of sufficient quality and therefore do not live up to the requirement of adaptability. This could be the case of under-performing charter schools in several states of the United States as suggested by the August 2004 report of the American Federation of Teachers.<sup>104</sup> Finally, a violation of the right to education could arise if EMOs, in their attempt to reduce overhead costs as noted above, start standardizing curricula, without taking into account the specific set of circumstances of individual schools, or the cultural background in which the schools operate. Here the role of the state remains important in determining and imposing minimum curricular standards to all schools (public, private or privatised). Moreover, the state has a duty to monitor and approve curricula from charter and EMO-managed schools.

Another human rights-related problem with regard to the privatisation of education is the question of accountability and availability of adequate remedies. The state has to exercise due diligence to prevent violations of rights by private entities and thus remains ultimately responsible for their conduct. Questions, however, can be raised with regard to the immediate accountability of privatised education actors and the remedies available to the victims. This is important as in the United States, as well as in the context of international and regional human rights treaties, direct civil and human rights actions can only be brought against the state. This is due to the fact that in principle, the US Supreme Court and international human rights monitoring mechanisms do not acknowledge the third party effect (*drittwirkung*) of civil and human rights. These rights only apply in the context of relationships between state and individuals.<sup>105</sup> If private schools, charter schools or schools, the management of which, has been contracted out to EMOs are not considered an entity pertaining or belonging to the state or operating under state supervision, then considerable doubts may be raised with respect to the accountability aspect and the ability of victims to seek effective remedies.<sup>106</sup> This could be more of a problem especially in the case of charter schools, the management of which has been delegated to private for-profit education companies. The problem of

<sup>104</sup> See section 3.1.2 (a) *supra*.

<sup>105</sup> However, as noted above, international and regional human rights monitoring mechanisms have noted that states have an obligation to protect individuals from human rights abuses committed by private parties.

<sup>106</sup> TUREKIAN, *supra* n. 76, 1383-1384. See also KEMERER AND MALONEY, *supra* n. 63, 596-597.

accountability may, at first sight, appear to be less pressing with regard to schools, the management of which has been contracted out to EMOs. In such situations the state remains immediately and fully accountable since it involves public schools for which the state was already accountable. However, it should not be ruled out that accountability problems could also appear in this context. Kemerer and Maloney, for example, note that while it may be indisputable that charter schools can be considered to be state actors in the context of US constitutional law, this is less clear for contracting out arrangements and private schools participating in voucher programs.<sup>107</sup>

The accountability problem can be also compounded with problems related to the availability of effective legal remedies open to parents and students. If a (charter) school whose management has been contracted out to an EMO fails to achieve its performance objectives and the contract is rescinded, which legal remedies are available to parents and students? Conn notes in this respect that courts in the United States generally do not recognize causes of action for parents who are concerned that schools or teachers are not providing quality education since determining what is quality of education could be very difficult and ambiguous.<sup>108</sup>

As already noted, charter schools operate autonomously from local education regulations.<sup>109</sup> However, this does not mean that they are completely free from any type of regulation or that they are not publicly accountable. Experience in the United States suggests that the degree of regulation to which charter schools are subjected, varies from individual state to state. In some states, regulation for charter schools is more stringent than in other states leading to a higher degree of public accountability. In others, charter schools are expected to meet similar or the same requirements as public schools with respect to the content of the curriculum, teacher certification, student assessment and student discipline.<sup>110</sup> Additionally, case law in the United States suggests, that under certain circumstances, the signing of a charter, (which effectively delegates an important aspect of governmental authority in the field of education) does not preclude charter schools from being regarded as public institutions due to their public funding. Nor are they precluded, due to the fact that

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<sup>107</sup> KEMERER AND MALONEY, *supra* n. 63, 593.

<sup>108</sup> K. CONN, 'When School Management Companies Fail: Righting Educational Wrongs', 31 *Journal of Law and Education* (2002) 245 at 258-259.

<sup>109</sup> TUREKIAN notes that charter schools in the United States may even apply for a complete waiver from a state's individual education code. TUREKIAN, *supra* n. 77, 1374.

<sup>110</sup> KEMERER AND MALONEY, *supra* n. 63, 619.

those who are performing the delegated functions operate under governmental authority and have been authorized to do so through a legislative act.<sup>111</sup> As a result, charter schools in the United States appear to be bound by the amendments to the US Constitution including important civil rights and civil rights legislation from individual states. This is in spite of the Supreme Court case law suggesting that a strong relationship between the state and the charter school would have to be proven before one can conclude this.<sup>112</sup> A similar reasoning could apply with regard to international human rights and could make it easier to make decisions by privatised schools to be amenable for administrative and judicial review before competent educational authorities or a court of law. Nevertheless, we are of the opinion that public accountability of privatised schools and availability of remedies and recourse from their decisions, should be specifically and unambiguously provided for by law. This is in order to avoid any vacuums or uncertainties with regard to the status of these schools and their decisions. This regulatory role of the state is clearly within the scope of the obligation to protect.

## 5. CONCLUDING REMARKS

We conclude that privatisation of education services is not prohibited by international human rights law. We also conclude that the liberalisation of trade in educational services does not necessarily lead to the privatisation of education. Although the General Comments of the CESCR and the case law of the ECHR emphasises the role of the state in the provision of education, it is stated nowhere that this role should be exclusive. A human rights-based approach to privatisation of education would require a formal legal basis in law. The state should see to it that minimum core obligations are met. This means that privatised education has to be accessible (physi-

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<sup>111</sup> Ibid., 598-600, where KEMERER AND MALONEY discuss the US Supreme Court's case law and circumstances under which US constitutional law may apply to private parties when they are performing delegated core governmental functions.

<sup>112</sup> See *Rendell-Baker v. Kohn*, 457 US 830 (1982), where the Supreme Court citing previous case law ruled that an answer to the question whether an infringement of federal rights by a private school is attributable to the State depends on a number of factors: whether the private party is funded by the state (a mere financial relationship is not sufficient and probably a deeper financial dependability, maybe based on a statute would be necessary to reveal a strong financial link); whether the alleged action is compelled or influenced by state regulation (this regulation should be extensive and relevant); whether the private actor performs a 'public function' (entailing a function that has been 'traditionally the exclusive prerogative of the State'); and whether there is a 'symbiotic relationship' between the private party and the state (this could be the case when a private entity provides a service in public property). See also KEMERER AND MALONEY, *supra* n. 63, 601.



cally and economically) under all circumstances. The notion of economic accessibility requires that there is no financial barrier for learners, if privatised schools provide for a substantial part of educational services that used to be provided for by the state educational system. In the case of fees, there should be arrangements to compensate the high costs for low-income families. The use of voucher programs as a means of addressing this issue should be carefully regulated and should allow for clear and unambiguous criteria with regard to their applicability and targeting. Privatised schools, either charter or EMO-managed, are under an obligation to uphold non-discriminatory access to schools; they should not discriminate on the basis of, for example, ethnic origin, colour or economic capacity. Accessibility also means equal accessibility for boys and girls. The state should monitor that privatised schools do not prefer boys to girls in the selection of pupils, or that the number of girls that attend school decreases once the school is run by a privatised institution (due to an increase in fees).

It is also crucial that the overall quality level of education (of state organised and privatised institutions) is to be guaranteed, once a process of privatisation has started. This, is particularly so when privatisation would mean a transfer of resources from the public system to the privatised institutions. The creeping development of an impoverished public education system must be avoided. However, it would be 'human rights proof' to say that privatisation of educational services is acceptable in case the state-organised system is of bad quality and unable to accommodate an increase in the number of pupils. Such a scenario would be in conformity with Article 2(1) ICESCR.

The law, which lays down the legal foundation for the privatisation of education, should stipulate that mechanisms and remedies will become available for administrative and judicial review of decisions of competent educational bodies. It should also provide for the public accountability of those private bodies that exercise public functions in the sphere of education. This means that privatisation enabling legislation should be unambiguous about delineating the status of privatised educational institutions, such as charter schools or schools in which management has been delegated to EMOs, and reaffirming the public character of their activities.

There are a number of functions in the area of education, which in our view, cannot be privatised, as they require a single institution to set uniform

standards and monitoring procedures in a neutral and objective way.<sup>113</sup> The state is the only institution that should have this legal authority and capacity. These functions relate to the recognition of diplomas, determining and approving the essentials of the curriculum of schools, the recognition of non-public schools, determining and supervising the qualifications of teachers, the monitoring and enforcement of compulsory schooling and the inspection of the quality level of education at individual schools.

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<sup>113</sup> According to the UN Special Rapporteur on the Right to Education 'the essential role of the State is to set educational strategy, determine and enforce educational standards, monitor the implementation of the strategy and put in place corrective action'. See UN Doc. E/CN.4/1999/49, § 42.