3. Is there a right to public education?

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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

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* case¹¹ 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

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.

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 education¹⁶ 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

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 materials²⁴ 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

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

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*

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 Maharashtra & 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

(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

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 protected⁴⁹ 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

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-education.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

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

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

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/C.12/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

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

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: 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

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/C.12/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-

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,

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

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

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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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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

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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