



The Right to Education and its Conceptual Development from an Historical Point of View¹

Do Direito à Educação e seu desenvolvimento
conceitual do ponto de vista histórico

El derecho a la educación y su desarrollo
conceptual desde una perspectiva histórica

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Abstract

This article focusses on the conceptualization of the right to education from a historical point of view. First, I analyze the historicity of this right according to the liberalism ideology and the constitutionalism perspective, which are understood as functional processes to the configuration of the modern Nation-States. Second, I define this right following the development of the International Human Rights law, which has included education as one of the core human right. Finally, I explore some of the consequences of the definition of the education as a human right at the recent historical periods, when political reforms were made by right-oriented governments in Western societies and they have promoted the privatization of education.

Keywords: History of the right to education. Human rights. Privatization of education.

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Resumo

Neste artigo é realizada uma conceituação do direito à educação a partir de uma perspectiva histórica. Primeiro, a historicidade desse direito é analisada, no âmbito do desenvolvimento do liberalismo e do constitucionalismo, como processos convergentes na configuração dos Estados nacionais modernos. Segundo, são abordadas as definições derivadas do desenvolvimento do direito internacional dos direitos humanos e da própria definição de educação como um direito humano fundamental. Finalmente, uma problemática do escopo da educação como direito é apresentada com base nos recentes processos históricos de reformas que promovem a privatização educacional.

Palavras-clave: História do direito à educação. Direitos humanos. Privatização da educação.

Resumen

En este artículo se realiza una conceptualización del derecho a la educación a partir de una perspectiva histórica. En primer lugar, se analiza la historicidad de este derecho, en el marco del desarrollo del liberalismo y del constitucionalismo como procesos convergentes en la configuración de los Estados nacionales modernos. En segundo lugar, se plantean definiciones derivadas del desarrollo del derecho internacional de los derechos humanos y de la propia definición de la educación como un derecho humano fundamental. Finalmente, se presenta un planteo problemático de los alcances de la educación como derecho en función de los procesos históricos recientes de reformas educativas, implementadas por gobiernos de la moderna derecha, las cuales han promovido la privatización educativa.

Palabras clave: Historia del derecho a la educación. Derechos humanos. Privatización de la educación.

Introduction

Contemporary definitions of the right to education seem to omit an important aspect, its pedagogical side. There is extensive legal bibliography on the understanding of social rights in general, and their connection with public policies. However, although education is considered among those rights, the bibliography does not focus on the analysis of education as an autonomous right. It is considered indirectly through the study of neighboring rights, such as the right to health, or to equal opportunities, among others (Abramovich & Courtis, 2002; Alegre & Gargarella, 2007). Other works, this time from the field of education sciences, refer to the right to education, but limit themselves to the study of the problems and constraints for the effective realization of this right, or they rather emphasize the conditions of exclusion, inequality and the impact across different social groups (Abritta, 2017; Barrios, 2006; Ezcurra et al, 2019; Finnegan & Pagano, 2008; More Rocha et al, 2012; Muñoz, 2012). The definition of the content of the right to education is not specified in these works. It is assumed that everyone understands what is meant, or it is restricted to school enrollment rates and, at best, to the financing of the sector.

It should be noted that at present, international human rights instruments define different aspects of the right to education as a civil, political, economic, social and cultural right, and also as a right of children and young people. At the same time they emphasize non-discrimination as a principle of human rights. However, it might be purposeful to conceptualize the contents of the right to education in terms of its educational aspects, that is of its scope regarding the setting of the curriculum, a substantive side in terms of educational opportunities of the principles of formal, material and recognition equality. All of this is not restricted to the definitions provided by the legal sciences (e.g. public international law and constitutional law), but requires instead the aid of the education sciences: of educational policies, the history of education, comparative education and, certainly, of pedagogy (Ruiz, 2020).

This piece presents a conceptualization of the right to education from a historical perspective. It surveys definitions from a variety of frames, as a way to contribute to the elucidation of this concept. Firstly, the historicity of this right will be examined in the context of the development of liberalism and constitutionalism, both understood as convergent processes in the configuration of modern nation states, in the age of human rights. Secondly, some definitions are raised which are inseparable from the development of international human rights law and from the definition of education itself as a fundamental human right. according to international human rights instruments and of normative consecrations based on internationalized constitutionalism during the second half of the 20th century. Finally, a problematic approach to the scope of education as a right is presented, based on the historical traces that its conceptual development possesses in the Western world, and the possible analytical issues that should be problematized, with special attention to the imprints that the recent history of educational policies have left in the scope of this right.

Conceptual Definitions in the light of Modernity's historical imprints: Liberties, Christian Reforms and Classical Liberalism

One of the key concepts in the history of school systems that emerged in the 19th century is the shaping of the *right to education*. From the history of education and education policy, the analysis of this right allows us to evaluate the scope of the aims and objectives of the educational policies implemented by the state, as well as the historical processes of inclusion, progression, and also exclusion of the population from the socially-valid knowledge. Additionally — and as an indicator of the centrality of education as a right — it is possible to mention the high confidence that society has in mass schooling of the population

as a way of countering the difficulties presented by other governmental and non-governmental institutions. Consequently, references to the right to education are often included in public agendas, in the platforms of political parties of all ideological orientations, and in the reform programs proposed by international organizations. Those agendas, platforms and programs often postulate that the substantive problems of the present, and the planning of the future, are issues that could be addressed and resolved on the basis of the promotion and development of education. In this sense, it would be fundamental to promote the right to education, which is only quoted but poorly defined or, in any case, is interpreted in their own way by each promoter, or is assimilated within the expansion of schooling coverage (Ruiz, 2020).

That said, it should be noted that the concept of the right to education emerged late in history, associated with the development of public liberties in the West (Volio Jiménez, 1979); like all rights, it must be analyzed in the light of its own historicity. Indeed, according to Bobbio (1991), rights are temporal in nature. They evolve, they are not immutable and static entities; on the contrary, they are redefined according to debates, to historical and cultural contexts, to the correlations of forces in each period, and they reflect the development of societies. Therefore, it is important to acknowledge that a study of rights, like this one, must be analyzed and interpreted according to historical and cultural contexts. What prevailed until Modernity was the conception of duties towards the family, authority, and group of belonging, among others.

This state of affairs began to change in the European Middle Ages, when some claims for freedom arouse around property. However, it was with the 1789 French Revolution, and after the emergence of the classic liberal state towards the end of the 18th century that private and public rights were granted to individuals. Between the 16th and 18th centuries, within the framework of the rise of capitalism as the mode of production of Western Europe, the bourgeois groups had succeeded in removing material and legal obstacles to their actions, in the context of their confrontation with the medieval type of social organization. Face with this new situation, individuals gradually achieved autonomy from their communities, and began to assert their essential personality and dignity. Therefore, what is conceptualized as right was considered in its beginnings in terms of liberties, individual rights of which it was necessary to eliminate the obstacles emanating from the traditional medieval, civil or ecclesiastical authority. In this way, the principles of individual freedom, of legal equality and security, and of private property were the first to be proclaimed and included in the precursory documents of constitutionalism (Volio Jiménez, 1979).

In this sense, Sánchez Viamonte (1907) argues that freedom of teaching, which for centuries had depended on the ecclesiastical monopoly, became a social achievement that fit into the struggle for greater freedom. An important precedent of this was the Protestant Reformation, since its demand of access to evangelization in the vernacular, together with the massive outpouring of texts thanks to the emergence of the printing press, entailed the task of changing the mentalities of society in various orders by the Protestant Churches. Actually, in October 1517, the publication of the *95 Theses* by Martin Luther (1483-1546) resulted in a religious reform that questioned the ecclesiastical hierarchy, postulated the restoration of practices of early Christianity, and promoted direct access to the sacred scriptures. Together with the translation of the Bible from Latin into German, the princes were motivated to create schools for children to learn to read. The interests of princes and those of the bourgeoisie that opposed to the Church were in line with this Protestant movement, since they considered the Catholic dogma was against the developing mercantile interests.

Protestantism went from placing the emphasis on the institution (the Church) to focusing on the soul as the instance of salvation, without the need for mediations between God and the individual. According to Tröhler (2013), this Protestant objective of cultivating the human soul gave rise to a new purpose of education. Protestant reformers stressed the centrality of teaching. Luther himself (1523), in his work *To the Councilmen of All Cities in*

Germany That They Establish and Maintain Christian Schools, argues that the schooling is fundamental and that education is the responsibility of the authorities. The reformers' educational proposal can be summarized into the following ideas: the postulates of universal priesthood and freedom of conscience require universal instruction, and this implies the creation of schools for the people; vernacular should be used in teaching, especially during early childhood, while classical languages would retain their importance in the circled frequented by the children of aristocratic families; and schools should be under the control of secular authorities. In this way, the Protestant Reform was a turning point for the evolution of people's freedoms, and promoted the struggle for civil liberties in later centuries. The Protestant movement expanded throughout Europe and gave rise to different confessions.

At the same time, the Catholic Church responded to the Protestant Reformation with its Counter-Reformation and the implementation of wider educational actions, as those carried on by some monastic orders like the Jesuits. Thus, in 1534 the *Company of Jesus* was created by Ignacio de Loyola (1491-1556). The aim was the conversion and salvation of the souls of heretics so as to evangelize them. Jesuits promoted the evangelization not only of adults but also of the youth, since this constituted an instrument of soul domination. In the years following the creation of the Society of Jesus, Jesuit colleges proliferated. In 1586 there were 162, 147 of which 147 admitted external students. This led to a systematization of the institutions (*ratio*, the final version of which was concluded in 1599). This systematization described in detail the academic and institutional organization of the Jesuit colleges: the teaching of fine arts, the division in grades, the organization of the lessons, and the creation of systems of competition and emulation, devices of permanent surveillance to form the mentality of the young in order to reach their souls (Durkheim, 1976). Jesuit colleges were created by the European overseas colonies, particularly those in the Americas. Its expansion stopped when, in the context of the Bourbon Reforms promulgated by the Spanish crown in the eighteenth century, the Jesuits were expelled from their domains.

In this way, the reformists and the counter-reformists (the Jesuits) gave rise to a more direct bond between the child, conceived as a future adult, and their path to God. The reformists considered that the child's body should be educated in a particular direction (the divine), and that meant the recognition of its rational capacity that is ready to be convinced. Accessing faith through Bible reading or receiving a specific education (that of the Jesuit school), involved achieving the conquest of the soul and the recognition of a rational subject, either as a subject who can achieve self-knowledge through the Protestant pastoral guide, or as a subject to be convinced by the constant accompaniment of the Jesuits. The strengthening of the soul in virtue (which would be later called *civic*) is the pedagogical project that would be installed in the following centuries in an orderly European modernity, which was intended to ensure the common good and progress (Tröhler, 2013).

Among the subsequent changes, the most notable one is the organization of space, particularly within the Catholic sphere, since there was a reorganization of the churches' physical spaces so as to massively spread the doctrine. Churches went from the circular plan, that lent itself to symbolic worship, to the longitudinal plan, of big dimensions, fitting a larger number of parishioners in a suitable environment for preaching and for the teaching of the Catholic faith. It can be argued that, with the advent of Christianity, the moral and religious teachings blended together: instruction saved the soul. Therefore, the need arose for an environment for preaching and teaching, for the spread of the faith, that is, for the gradual conversion of masses of human beings to the Christian faith. This called for an adequate environment for the gathering of the faithful. Accordingly, several zones were combined and delimited: on one hand, there was an area assigned to the ministers of the church (it still exhibited a semicircular termination) and, on the other hand, the longitudinal plan for the mass gathering of the faithful, in which the two functions of the Church, cult ritual and

indoctrination, merged. In the light of these transformations —the creation of the educational religious orders and the organization of a specific locus to systematically impart religious doctrine—, the Roman Catholic Church claims in many official documents to have originated the current systems of mass schooling (Argan, 1984; Paviglianiti, 1997).²

These innovations within Christianity gradually spread and contributed to the shaping of the modern school. In any case, towards the end of the 18th century the demands for more freedom in teaching and learning increased as a form of protest. These demands were brought into the more general struggle for freedom from the social constraints which had existed for centuries: the freedom of individuals prevailed over the Church for the exercise of what are now called the rights to teach and learn: “Freedom of education can be translated as the individual's liberation from the Church for the exercise of the rights to teach and learn” (Sánchez Viamonte, 1907: 20).

This disruptive conception has very deep roots in mentalities and politics, since it reflects a change in the underpinning of power: the sovereign (defined by divine right) ceased to be considered the axis of social organization and the individual became the core of social development. Individuals were considered to have rights that had to be recognized and granted by the authority of the state. This would be limited to the functions of administering justice, providing territorial and internal security, and granting individual rights. All this reminds us of Bobbio when he postulated that during the eighteenth and nineteenth centuries the classical liberal state emerged from a double emancipation process that can be described as the “emancipation of the economic and the political powers” (1985: 147).³ Throughout this process, the State ceased to be the secular arm of the Church and became that of the commercial and business bourgeoisie. That is why this author defined it as a State that admitted the loss of the monopoly of ideological power, thus explaining the recognition of civil rights, including religious freedom (which meant the end of the confessional State in the Western world). At the same time, it favored the loss of the monopoly of economic power, by granting economic freedom.

By focusing in particular on the background and the development of the French revolutionary process started in 1789, Sánchez Viamonte argues that the *Déclaration des droits de l'homme et du citoyen* itself shows the negative character that the liberation of the person from the absolute authority of the sovereign — whose power was based on divine right — took on in the beginning. That is why “limits were imposed upon authority when it was exercised directly on people or their domiciles [...]. Thus, they took on the character of prohibitions that gradually adopted positive forms of individual rights, like the inviolability of the person and the inviolability of domicile, thus becoming the static or passive aspect of freedom, which today we call individual security [...]” (1907: 19-20). Those individual liberties came with the lifting of multiple “legal restrictions which might manifest themselves under the form of material obstacles”. Therefore, each right parallels the lifting of some

² Based on this organization of spaces for the spread of the Christian faith and evangelization, different religious orders developed places for mass instruction, with ratios and standard distributions of teachers and students that were the basis for a new institutional form during the 19th century: the modern school on which the modern education systems are modelled. In this historical configuration (that existed in continental Europe first, and later expanded to North America and then to South America through processes of international transfer of speeches and practices), modern nation-States also defined the scope of school education as a right. This can be also understood as a way to justify compulsory schooling as a part of the equalizing manifesto justifying this institutional form.

Modern school has been marked, among other processes, by the shaping of its undetermined and porous spaces and teaching methodologies. Throughout its history, it incorporated a theoretical and structural construction that can be analyzed from the perspective of the *school form* (Vincent, 1994), as well as from the constituent elements of the *school culture* (Julia, 1995).

³ The only monopoly the State would maintain would be the use of legitimate force under the limits of civil rights guaranteed by constitutional documents regulating its use, and that at the same time shaped, as stated Bobbio (1985), the Rule of Law. The liberal State was formed to ensure the free movement of ideas and goods.

authoritarian restriction, and “when the human person is recognized as such, the rights are positively inherent to it” (Sánchez Viamonte, 1907: 20).

Education was not among the rights consistent with the principles of negative and positive liberty, enshrined during the rise of the classic liberal state. However, it is possible to think that the French Revolution had anticipated the political debate on education of the following centuries, since one of the first measures taken by the revolutionaries was the secularization of the educational activities which were in the hands of the Church. In the Jacobin phase of the revolutionary process, around 1793, a gradual democratization of educational actions could be observed with the proclamation of the basic equality of all people and free access to all the educational institutions that had been secularized by the revolutionaries. In this regard, Paviglianiti (1997) understands the evolution of the right to education as a controversial historical phenomenon given the number of disputes, conceptions and forms that it adopted in different historical contexts. The author enquires into how education transformed from being a monopoly of the Catholic Church in the Christian Western world into a right fought over by different social groups, and the state. It also analyzes how education evolved from being conceived as a right of individuals to being a public responsibility. According to her description, the liberal State consolidated during the 19th century as the political organization of society, and it began to regulate all domains of social life, among them, mass schooling. Under the pretext of representing the general will, the State took control of the entire system, its management and organization, as well as its funding.

However, this last assumption has been subject to debate in the different national contexts of the Western world, in some cases more than in others, and mostly because of conflicts over the right of parents to choose the education of their children. In Mediterranean Europe and in the emerging Latin American States, the Roman Catholic Apostolic Church stood as *mother and teacher* by considering itself as the only mediator — by divine right — between God and human beings. On the contrary, according to classical liberalism, the State was the only agent with the power to exercise the function of teaching, since it represented the collective interest (Durkheim, 1976). This strong regulation of mass education and its secular systemic organization by the authority of the State has contributed to the shaping of the *educator State*. This is the name given to the unification and systemic organization of pre-existing school practices that were absorbed by state regulations in continental Europe: in the Nordic States first, in the Mediterranean later, and ultimately in the American. Through those state regulations —which took form through processes of international transfers of educational practices and discourses during the 19th century—, massive free public education systems were set up, around an academic structure of levels and teaching styles, with a growing range of compulsion, especially in the second half of the 20th century.

Nevertheless, within classical liberalism, internal contradictions can be observed in the evolution of the educator State (being the government responsible for formal education), against the right of all inhabitants to express freely their doctrines and ideas. As a result, a State monopoly of the education would not be fostered, but private education would be admitted accompanied by appropriate curricular and organizational regulation. This regulation of the right to private teaching and learning has been questioned by the Catholic Church during the last two centuries. The church contested that power of regulation and defended the freedom of education as a guiding principle so as to keep its power to define the curricula, and to access public funds for the development of private education institutions. Paviglianiti (1997) argues that these disputes between classical liberalism and Catholicism are based, among other things, on the different notions of the principles of legitimacy of the norms that they hold. For the liberal tradition, rules have legitimacy as long as they have been dictated in accordance with the formal procedures laid down in the Constitution. Therefore, their

historical character is acknowledged in accordance with the legal and institutional frameworks of the rule of law. For Catholics, on the other hand, legitimacy is substantive, that is to say that the rules are valid as long as their contents conform to the theological and doctrinal principles of the Christian dogma.

Historical hallmark of the Twentieth Century: International Human Rights Laws, State obligations, and Criticism from the Modern Right

An important turning point from the historical perspective in the configuration of the right to education is the adoption of the international human rights law in the aftermath of World War II. In this post-war context, education became a fundamental right of human beings. Fundamental rights consist of universal situations regarded directly as general rules for all people. They do not imply the existence of rights by themselves, but they imply the obligation to introduce such rights (Ferrajoli, 2016). Education was recognized as a fundamental human right, and began to have a subsidiary content that required the positive intervention of the state to guarantee it is enjoyed by all individuals living in a given country. This happened as a result of the creation of the United Nations Organization (UN) in 1945 and, especially when the *Universal Declaration of Human Rights* was approved in 1948. The consolidation of the international law on human rights, and the consequent irruption of international human rights instruments, and their incorporation into constitutional texts, have brought new legal processes and procedures into the debate about the nature and scope of the right to education, and the corresponding levels of obligations of the state.

In Europe, most countries approved Constitutions that reflected the economic and social changes from the previous years, as well as the reactions to the fascist forms of state organization of the preceding decades. In those European constitutional texts, the representative liberal democracy was adopted to support the institutional organization of the state (be them republics or constitutional monarchies), and new political and social rights were recognized for the population as a whole. Likewise, new forms of political regulation were written into the Constitutions, that accounted for changes in the processes of design and execution of public policies, as a neo-corporatist negotiation, through the institutionalization of councils with tripartite representation reporting on the development of the institutions of the Keynesian Welfare State or *Social State* (Isuani, 1991).

According to Ferrajoli (2016), in European countries such as Italy, Germany, Spain and Portugal (which went through the experience of fascism), rigid Constitutions were approved at the legal level, that is, with a stronger normative force and guarantee-based. This rigid constitutionalism allowed for the constitutionalizing of not only the civil rights and liberties, but also of the social rights as fundamental rights.⁴ All this speaks of a transformation in the form of the state, that was evolving from being basically protective and repressive to becoming increasingly more promotional: the state should not only prevent, it should also promote; the vision of commutative justice (based on the criterion of formal equality) was not enough. The distributive justice should be promoted, that is, distribution should adhere to some criteria. The great transformation of the 19th century demanded the State to assume responsibilities in the face of urbanization, industrialization and

⁴ For this author, guarantorism is a specific feature of the 20th century European constitutionalism. According to his analytical scheme, guarantees are *prohibitions* and *obligations* present in the constitutionally-established rights: the civil liberties represent a step backwards for the state, since they are *prohibitions* to intervene in the sphere of liberties that guarantee individual self-determination; for their part, the social rights imply a step forward, forcing the state to intervene in the lives of its citizens to guarantee the corresponding social benefits. Guarantees are both the prohibitions and the obligations related to fundamental rights within the paradigm of the 20th century constitutional democracy, because they form a block of limits and bonds imposed on all powers, both public and private, political and economic (Ferrajoli, 2016).

proletarianization of society (Polanyi, 1989). In that sense, the institutionalization of school education through massive national-scale systems revealed itself as one of the answers to such demands, which reached a global scale after the second post-war period.

Ferrajoli (2016) points out that social rights were formulated precisely to solve the educational, health and housing problems that were tackled by the Church in traditional societies, or which did not exist, or were not addressed. Moreover, from the 20th century on, survival is artificial and social, since it depends on the degree of social integration of the people: as a result of social division of labor and the growing urbanization, people became increasingly less-sufficient, so their life became much more dependent on the public sphere, with higher levels of complexity in bureaucratic and financial terms. Social rights thus refer to attributes and means to live freely and with dignity.

As previously noted, in that post-war context, the Universal Declaration of Human Rights was the instrument that gave birth to a universal system of protection of these rights under the political commitment of the States to assume a series of obligations to protect, guarantee, favor and promote them. Article 26 of the Declaration refers to education, and lays the foundation of its definition as a human right by establishing that every person has the right to education, and specifies that elementary and basic instruction must be free. According to this article, and since it is a right, the education should therefore aim at the full development of the human personality, and the strengthening of the human rights on the basis of respect and human liberties. States have since recognized education as a human right, and it has been written into the five most important international instruments on human rights, that in chronological order, are the following:

- The Convention on the Elimination of All Forms of Racial Discrimination (adopted in 1965, it came into force in 1969; 169 States have signed it)
- The International Covenant on Civil and Political Rights (approved in 1966, came into force in 1976, and has been subscribed by 151 States)
- The International Covenant on Economic, Social and Cultural Rights (adopted in 1966, it came into force in 1976, and has been subscribed by 148 States)
- The Convention on the Elimination of All Forms of Discrimination against Women (adopted in 1979, it came into force in 1981, and has been subscribed by 174 States)
- The Convention on the Rights of the Child (adopted in 1989, came into force in 1990, and has been subscribed by 174 States)

To these, the American Convention on Human Rights Law, known as the Pact of San José de Costa Rica, should be added. It was adopted in 1969, it came into force in 1978, and has been adhered to by 25 States of the Americas). In the European context, we should mention the norms approved within the framework of the Council of Europe (such as the European Convention on Human Rights and its protocol, and the European Social Charter), and those referring to the order of the European Union, in particular the Charter of Fundamental Rights of the European Union (Meix Cereceda, 2014). On the other hand, the two Covenants approved in 1966 on civil and political rights, and on economic, social and cultural rights, have had a high impact on the definition of education as a fundamental human right, given that they emerged from the need to translate and operationalize the principles established in the Universal Declaration of 1948. To this end, they have defined concrete and specific obligations by the states in matter of education. It is important, also, to highlight that the approval of the international human rights instruments gave rise to international organizations of interpretation of these instruments, as well as of monitoring and controlling of the actions of the states. Within the framework of the international system of human rights, exist the Human Rights Committee and the Committee on Economic, Social and Cultural

Rights; in the regional American context, these tasks of interpretation and monitoring are in the hands of the Inter-American Commission and the Inter-American Court of Human Rights.

In this regard, the jurisprudence and doctrine of the international organisms is exemplary. Its work includes the observation of the Committee on Economic, Social and Cultural Rights in relation to Article 13 of the International Covenant on Economic, Social and Cultural Rights,⁵ as well as the work done by the Former Special Rapporteur for the right to education of the UN Commission on Human Rights, Katarina Tomasevski. In fact, Article 13 of the International Covenant on Economic, Social and Cultural Rights has been the subject of an exegesis by both the Committee on Economic, Social and Cultural Rights (in its General Comment N° 13), and by the analytical development performed by Tomasevski in her role as United Nations Special Rapporteur on the right to education. Both studies — the General Comment N° 13 and the catalog of contents of this right made by Tomasevski— constitute an exhaustive characterization of the content of the right to education based on international obligations which, even if it is not exhaustive, it can indeed be translated into a catalog of basic contents of this right.

As asserted by Tomasevski (2004; 2001), the right to education refers not only to the right of individuals to receive education but, like every human right, also implies specific state obligations. The main contents of the right to education, drawn from this catalog of guaranteed legal positions arising from the states' educational obligations, fit into the *four A's scheme*: affordability, accessibility, acceptability and adaptability (Tomasevski, 2001). As previously stated, the right to education imposes, from the international normative plexus, a set of obligations on nation-States. Considering their contents (Ruiz and Scioscioli, 2017), these obligations can be classified as:

1) The obligation to respect. This obligation is observed when the right to education acts as a right of negative entitlement or of non-interference, in the sense of prohibiting any interference in the exercise of the right that someone can already enjoy by their own means, or by the means generated by the State or other social actors. The obligation to respect implies that the State refrains itself from intervening directly or indirectly in the enjoyment of social law.

2) The obligation to protect. This obligation requires member States to adopt laws or other necessary measures to prevent individuals (subjects other than the state) from causing such damages. The obligation to protect is a subjective right that falls within the right to education, which is not limited to mere objective duties for the state as a simple provider of a public service. It also implies the obligation for the State to organize the education system in accordance with some kind of measures to prevent other individuals or actors from impeding or inhibiting in any way the exercise of the right to education and the guaranteed provisions to its active subjects. This includes measures to be taken by the state when, for example, in private education there is evidence of provisions that unduly obstruct (through the abusive exercise of their freedom of contract or the right of admission), the access or permanence of a teacher or a student in a private educational institution.

⁵ There are important definitions formulated by the rest of the international human rights instruments in matters of the right to education, among which it is worth mentioning (because of the number of states that have signed them, their years of service and the impact they have had): the International Covenant on Civil and Political Rights (article 18), the Convention on the Elimination of All Forms of Racial Discrimination (articles 5 and 7), the Convention on the Elimination of All Forms of Discrimination against Women (article 10) and the Convention on the Rights of the Child (article 28), among others.

3) The obligation to fulfil, perform and guarantee. This agglomerate of obligations is perhaps the most interesting, in light of the social content of the right to education and in view of the context of social exclusion that affects Latin America, in particular with regard to the children. The obligation to fulfil is defined as the need for States to sufficiently recognize the right to education in their political systems and in their national legal systems, and to adopt a national policy accompanied by a detailed plan for the exercise of this right. It should be noted that the obligation to fulfil not only includes benefit obligations (the positive action of granting specific things such as subsidies and school resources), but also those normative obligations which contemplate the dictation of rules so as to regulate procedures for the creation of an effective administrative and justice system with equality of access. Therefore, it is not enough for an education bill to proclaim education as a right for everyone; plans and programs should also be drawn up and executed and funds provided to implement them.

It could be argued that the historical approach initiated in the context of World War II remains in force in discursive terms, but also through the divergent responses that are given around the criteria that should be adopted for social distribution. “Social rights cost money, but the State is not a profit-seeking entity. Its corporate name lies in the guarantee of the rights stipulated in its Constitution, exactly as the profit motive defines the business name of a trading company” (Ferrajoli, 2016: 65). However, since the late 1970s, this historical approach that evolved after the 1948 Declaration, has been criticized as a result of the recomposition of the modern political right, since its proposals have criticized the institutions of the Keynesian Welfare state, and the social rights, for their high cost to the public treasury. These positions anticipate the need for new forms of regulation and funding of public education, which has been redefined, and not necessarily in terms of rights.

From the State reform processes, it is possible to identify in the contemporary debate (which has been fueled from different international arenas, both political and academic), dissimilar opinions about school education, and guidelines to be followed in the states for the development of the contemporary educational systems. In such debates, definitions about education as a human right are often omitted, and it is presented as a public good or even as a market good, even though this meaning is little accepted (Ruiz, 2020). On the one hand, when education is understood as a public good, reference is made to a concept that does not have an unequivocal definition. It could be understood it as an asset that generates benefits or profits that can be claimed by the community as a whole. Although the benefit is not the same for everyone, the fact is that no one is excluded from its consumption or use: consumption is guaranteed for all people. From the perspective of some international funding organizations, basic education integrates the list of public goods.⁶ This notion has directly questioned the role of the State in education, which shows the vast difference between classical liberalism

⁶ On the other hand, thinking of education as a market good implies defining it as a commodity. All market goods generate benefits or profits that can be appropriated only and exclusively by the individual that consumes them; they are goods that conform to the exclusion principle, meaning that it is possible to exclude from consumption those who have not revealed their preferences in the market, by not offering to pay a price for it: if someone does not pay, they are excluded from the consumption of the good. In some reforms proposed by the modern right, like the British government has implemented from the 1980s, these orientations are perceived in the definition of school education as a quasi-educational market (Whitty et al., 1999).

and neoliberalism⁷ in this field, and affects the conceptualization of education as a right. The neoliberal idea of reconversion of education should be referred to the high cost that social rights have, according to them. In this line of thought, as social rights become a burden that must be paid by with taxes, they constitute a factor of disinvestment for the capital. It would result in a cycle of recession, job loss and widespread impoverishment, which can only be reversed through the deregulation of the economic market.

As a result, in many of those state reform policies, from the last decades of the last century, school education has been the subject of a series of measures that favored its redefinition not as a right but as a market good, or as a public good. In different countries, deregulation of private education was a response to the inefficacy and inefficiency of public education, as reported by the those in favor of the reforms. Therefore, different governments have attacked the public education, and instrumented policies that involved notorious changes in the aims of public school and its practices, thus curtailing the exercise of the right to education (Frigerio, 2000; Kaufman & Nelson, 2005; Vior et al., 2016). The consequences of these policies of commercialization of education are far from those promised by their champions (Ball, 2014; Heinrich and Nisar, 2013; Santa Cruz Grao and Olmedo, 2012).

Various studies in different countries have shown that the exacerbation of competition among school institutions in the local educational quasi-markets, instead of increasing diversity led to the instrumentation of market management models to attract students and teachers considered to have the most merit, according to an even growing number of assessments of institutions and actors, while the processes of exclusion increased (Lawn, 2013; Olmedo, Bailey, Ball, 2013; Verger et al., 2016).

On the other hand, as part of the political and ideological contradictions that the idea of education as a right has historically aroused, during the 1980s, in the context of structural adjustment policies, and austerity in the *spending* involved in the implementation of social policies, an intense debate ensued over the roles and responsibilities of the international organizations that emerged in the mid of the 20th century. Thus, the 1980s saw the growing presence of international funding organizations for educational programs. In particular, the World Bank became the most important source of financial resources devoted to educational development, and it promoted particularly sharp and aggressive educational reform policies in countries with poor economies and low levels of human development. Highly influenced by the ideological orientations of the government of the United States, the World Bank contributed to the development of a political framework of educational reforms that promoted the reconfiguration of school systems (especially in the poorest countries, recipients of international loans from the Bank), to reduce their costs and their bureaucracy, and promote strategic investment of the monetary loans in human capital resources, in order to achieve economic growth. Competitive market mechanisms and instruments began to be adopted in school systems, with greater or lesser degree of acceptance by state authorities, and social resistance by the educational communities of these countries (Ruiz, 2016).

⁷ However, while it is true that social rights are costly to enforce, their removal or non-existence would be even more costly. Countries like those located in sub-Saharan Africa do not have social rights. There, the absence of health, food and educational policies results not only in epidemics and malnutrition, but also in the death of millions of people. Precisely, these deplorable conditions in the lives of the people do not provide any incentive neither for productivity nor for economic development (Ferrajoli, 2016).

Discussions and Conclusions: Contemporary History of the Right to Education in the face of Increasing Privatization

The problematic history of the conceptual and political configuration of the right to education has had different characteristics in the European and the American contexts. The shaping of liberties at the end of the Middle Ages, together with the controversial religious reform movements and the consolidation of capitalism as a mode of production, led to demands for freedom and encouraged the mass schooling of the child population, but at the same time gave rise to institutional forms of mass schooling which were functional to the modern society that was taking shape. While it is true that during the 19th century modern school served as a State ideological apparatus (Althusser, 1988), in the last century, the marks of the post-war period, the birth of the international human rights law, and of the Keynesian welfare State have been essential for the recognition of education as a fundamental human right. This contributed to a vigorous normative plexus that led to the establishment of state obligations, that must be the guarantee for the population to exercise and enjoy the right to education that implies (from the conceptual and also political points of view) the strengthening of human development as a process of awareness through open access to knowledge. Nonetheless, the scope of this process could be discussed, especially in contemporary contexts where, despite the history behind those state obligations, public policies go against some of the definitions that the history of the right to education has modelled.

In the last two decades of the 20th century, in parallel to the debate within the United Nations organizations about their role and responsibility in the promotion of basic education for everyone, the World Bank, for its part, became (among other international funding institutions) the largest international instigator of educational reforms on a global scale, and had a decisive role in the design of structural reform processes of the states which were facing the debt crisis at the time. In this way, the public education reform processes sponsored worldwide by this international organism included the deregulation of private education, the incorporation of competition mechanisms between users and institutions for the access to educational services, the introduction of tariffs and fees for the provision of education at some of its levels, and the adoption of business efficiency criteria to evaluate the results of educational systems (Ruiz, 2016).

This is where the public policy paradigm called *responsiveness*, which means to improve the response of public services, come in. There is a belief that it is possible to attain much better response rates from social systems and services to the demands of the immediate community. To this end, a redistribution of the responsibilities in the decision-making process is required. The users of the services should be able to participate in and influence the process directly. In the case of education, it can be seen that there has been a global promotion of school reforms, which includes the decentralization of educational policies, which were in their turn included in the structural reform processes of the State. These policies aimed to achieve a reduction of the national State, alongside an expansion of the interference of the jurisdictional and local states, as well as of the private sector. In this sense, some authors differentiate between privatization *in* and *of* education, namely the line of analysis that differentiates between the so-called *endogenous* and *exogenous* dynamics of privatization. The first one refers to *hidden privatization in education*, that is, “the adoption of ideas, methods and practices of the private sector in order to make the public sector more like a

company and increasingly commercial” (Ball & Youdell, 2008: 8). The second implies “the opening of education services to the private sector through methods based on the economic benefit, as well as the use of the private sector regarding the conception, management and provision of different aspects of public education” (Ball & Youdell, 2008: 9). This points to users of services, and not to subjects who hold a fundamental human right.

In short, as Paviglianiti (1997) has suggested, the historical development of the right to education has been problematic during the age of rights (Bobbio, 1991), and even though the normative definitions derived from the international human rights law have established clear indicators to define the content of this right (at least regarding the obligations of the States), the redefinitions of education, both as a public good or as a market good, limit the scope of those state obligations. Moreover, in some cases they are even omitted or ignored altogether. In different States, or even in different regions within states, contemporary educational policies promote processes that dismantle the scope of the right to education, and ignore its history and its implications for human development.

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