



*EXPLORING THE NORMATIVE CONTENT OF THE RIGHT TO EDUCATION AS A HUMAN RIGHT: RECENT APPROACHES**

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1. INTRODUCTION

Although the right to education is little known as a *human right*, it has a solid basis in the international law on human rights. It has been laid down in several universal and regional human rights instruments. Examples are the Universal Declaration on Human Rights (Art. 26), the European Convention on Human Rights and Fundamental Freedoms (Art. 2 of the First Protocol), the UNESCO Convention against Discrimination in Education and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Articles 13 and 14)¹. Over the years, a number

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1. See also, the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5(e)(v)), the Convention on the Elimination of All Forms of Discrimination against Women (Art. 10), the Convention on the Rights of the Child (Arts. 28 and 29), the African Charter on Human Rights and Peoples' Rights (Art. 17), the Protocol of San Salvador to the American

of studies have been published regarding the important question: what does realisation of the right to education entail?² However, little international and national case-law is available on the various dimensions of the right to education as a human right. This is partly due to the fact that economic, social and cultural rights, the right to education being one of them, have been seen for a long time as ‘secondary rights’ compared to civil and political rights. Their so-called ‘vague’ wording, programmatic nature and lack of justiciability have caused their second rank status among governments and courts. These developments have contributed to a lack of common understanding of these rights in terms of the content of rights and the nature of states’ obligations. For example, the relatively few cases decided by the European Court of Human Rights on the right to education and its rather limited interpretation of that right have contributed to the idea that the right to education, because of its resource-consuming and programmatic nature, cannot be enforceable from the state. These traditional views about the legal nature of economic, social and cultural rights have gradually given way to more recent and modern approaches that depart from the indivisibility of all human rights (civil and political *and* economic, social and cultural). Efforts have been undertaken recently to strengthen implementation of economic, social and cultural rights by clarifying their normative content in more detail and by specifying the nature and content of state obligations. Contributions to this

Convention on Human Rights (Art. 13) and the African Charter on the Rights and Welfare of the Child (Art. 11).

2. To mention just a few old and recent studies within the framework of the United Nations: Ch. AMMOUN, *Study of Discrimination in Education*, U.N. New York, 1957; K. TOMASEVSKI, *U.N. Special Rapporteur on the Right to Education, Preliminary Report on the Right to Education*, U.N. Doc. E/CN.4/1999/49, and Progress Reports, U.N. Doc. E/CN.4/2000/6, U.N. Doc. E/CN.4/2002/60 and U.N. Doc. E/CN.4/2003/9.



change of perspective and approach have come from academics³ and from the expert body that monitors implementation of the ICESCR, the UN Committee on Economic, Social and Cultural Rights, in particular its General Comments (CESCR)⁴. It is interesting to note that the most important developments in the field of economic, social and cultural rights relate to achieving a stronger implementation of this particular treaty world-wide. The present article deals with these doctrinal trends and developments from a general perspective, and with the implementation of the right to education in particular.

The present article aims at clarifying the normative content of the right to education and of the corresponding obligations of States. It focuses on the nature, meaning and scope of Article 13 and 14 of the International Covenant on Economic, Social and Cultural Rights which is the main universal treaty text that includes right to education as a human right⁵. These provisions are of great importance for setting up and maintaining educational systems in countries all over the world, because they cover a variety of aspects of the right to education, framed in terms of state obligations. Section 2 deals with the scope of the right to education as a human right and its special characteristics, in particular with regard to the ICESCR. In section 3 other relevant universal instruments will be discussed briefly. Section 4 deals with the concept of a core content of human rights, with particular

3. See A. EIDE, C. KRAUSE, A. ROSAS (eds.), *Economic, Social and Cultural Rights: a Textbook*, second revised edition, Dordrecht, Martinus Nijhoff, 2001 and A. CHAPMAN & S. RUSSELL, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerp, Intersentia, 2002.

4. These General Comments may be consulted at the Treaty Body Data Base of the Office of the U.N. High Commissioner for Human Rights, <http://www.unhchr.ch/tbs/doc.nsf>.

5. International Covenant on Economic, Social and Cultural Rights, concluded 16 December 1966, entered into force 3 January 1976, 999 *United Nations Treaty Series*, 3. Spain is a State Party to this treaty since 27 July 1977.

attention for the core content of the right to education. Finally, section 5 discusses the feasibility of using a typology of state obligations ('to respect', 'to protect', 'to fulfil') in order to specify the nature of (minimum) state obligations resulting from treaty provisions and as a mechanism to determine whether a state is complying with its obligations in relation to the implementation of the right to education.

2. THE SCOPE AND MEANING OF ARTICLE 13 ICESCR

The scope and meaning of Article 13 ICESCR will be analyzed here from the angle of the text of the Article itself, its legal history and, in addition, from the text of the General Comment on the right to education, adopted by the CESCR in December 1999⁶. A General Comment is a non-binding, but authoritative interpretation of a treaty provision that also gives guidelines for the legislation, policy and practice of State Parties.

With respect to the right to education as laid down in international documents, two aspects can be distinguished. On the one hand, realisation of the right to education demands an effort on the part of the state to make education available and accessible. It implies positive state obligations. This may be defined as the right to receive an education or the social dimension of the right to education. On the other hand, there is the personal freedom of individuals to choose between state-organised and private education, which can be translated, for example, in parents' freedom to ensure their children's moral and religious education according to their own beliefs. From this stems the freedom of natural persons or legal entities to establish their own educational institutions. This is the right to choose an

6. See General Comment No. 13 on the right to education (Article 13 of the Covenant), adopted by the CESCR during its twenty-first session, (December 1999), U.N. Doc. E/C.12/1999/10.



education or the freedom dimension of the right to education. It requires the state to follow a policy of non-interference in private matters. It implies negative state obligations. Both aspects can be found in Articles 13 and 14 ICESCR. Article 13(2) and Article 14 cover the social dimension, while Article 13(3 and 4) embody the freedom dimension.

Speaking in terms of individual rights, the right to education has been defined in the European context as a right of access to educational institutions ‘existing at a given time’ and the right to draw benefit from the education received, which means the right to obtain official recognition of the studies completed⁷. When Article 13 ICESCR was drafted, the UNESCO representative suggested the following definition of the right to education: ‘The right of access to the knowledge and training which are necessary to full development as an individual and as a citizen’⁸, which is a rather broad and general definition. Both definitions refer to the social dimension of the right to education.

The elements of the freedom of education are well expressed in paragraphs 3 and 4 of Article 13: the freedom of choice and the freedom to establish. This aspect of freedom is typical for a democratic, pluralist society; its origin lies in ideas about respect for individual liberty.

The right to education laid down in Article 13 ICESCR is a universal right, granted to every person, regardless of age, language, social or ethnic origin or other status. Articles 13 and 14 are rather comprehensive in comparison to other rights in the Covenant. They set out the steps to be taken by states in realising the right to education. This particularly applies to paragraph 2 of Article 13, which enumerates the separate steps with a view to

7. *Belgian Linguistic Case*, Case relating to certain aspects of the laws on the use of languages in education in Belgium, Judgment of the European Court on Human Rights, 23 July 1968, Publications of the Court, Series A, vol. 6, p. 31.

8. U.N. Doc. E/CN.4/SR.226, at 14 (4 May 1951).

achieving the full realisation of this right⁹. At issue here is the specific obligation of the state to make education available and accessible in a non-discriminatory way. In performing this duty, states have a degree of discretion within the limits of the standards set in Article 13 and the key provisions of Article 2(1). An important question here is which obligations may arise from these two provisions. In order to answer this question, an analysis needs to be made of the meaning of the terms 'to recognise' and 'to respect' which designate the character and scope of the obligations in Article 13.

(i) The undertaking "to recognise" the right to education

The drafting history of the Covenant in general and of Article 13 in particular show that the use of the term 'to recognise' in that provision is closely linked to the idea of progressive realisation. The opening words of the original draft for paragraph 2 of Article 13 did not contain the term 'to recognise', but rather the expression 'it is understood'. It was subsequently changed into the clause 'The States Parties to the Covenant recognise', in order to have a term with a stronger legal significance¹⁰. The meaning of the term 'to recognise' was expounded by the representative of UNESCO in 1951 during the preparatory work in the Commission on Human Rights as follows: 'recognition meant first and foremost that States should accept the obligation to do all in their power to achieve certain clearly defined aims, without, however, undertaking to attain them in a specified period. Admittedly, they could be achieved only by slow degrees, and the time involved would vary according to the relative magnitude of the problems

9. The present article does not deal with the aims of education laid down in Article 13(1).

10. See U.N. Doc. A/C.3/L.621, A/C.3/L.625 and A/3764 (Report of the Third Committee, 1957).



of each country and the means at its disposal'¹¹. In order to stress the progressive nature of the obligation to realise the right to primary, secondary and higher education, the clause 'with a view to achieving the full realisation of this right' was added. This was believed to be necessary, since it would be unrealistic to expect that states would be capable of realising these levels of education immediately¹². In short, the term 'to recognize' does not mean the absence or soft character of obligations for states: 'Rather recognition triggers the application of general state obligations under Article 2(1)'¹³. It should be stressed, however, that one should differentiate between sub-paragraphs 2(a) (primary education), 2(b) (secondary education) and 2(c) (higher education) of Article 13. The obligation contained in sub-paragraph 2(a) ('Primary education shall be compulsory and available free to all') is unconditional, plainly defined, without a reference to progressiveness. Sub-paragraphs (b) and (c) contain conjugations of the verb 'to make' and this strengthens their character of progressive realisation. That the legal obligation contained in sub-paragraph 2(a) is stronger can also be inferred from Article 14 which is devoted to the implementation of compulsory and free primary education for all for States Parties who have not yet reached that goal. The Committee on Economic, Social and Cultural Rights attaches great value to the guarantee of compulsory and free primary education. When discussing, for example, the report of Zaire, the Committee made it clear that charging fees for primary education is contrary to Article 13, par. 2(a). A State Party cannot justify such a measure by referring to severe economic circumstances: 'The provision of such education was

11. U.N. Doc. E/CN.4/AC.14/SR.1, at 14 (17 May 1951).

12. U.N. Doc. A/3764 and Add. 1, para. 33 and 42.

13. Ph. ALSTON and G. QUINN, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", in: *Human Rights Quarterly*, 9 (1987), pp. 156-229 at 185.

an obligation which remained incumbent upon a State Party whatever economic system it had adopted'¹⁴.

In its General Comment on Article 13, the CESCR defines Article 13(2) as the right to receive an education. It distinguishes between four interrelated and essential features of education, namely¹⁵:

a) availability: functioning educational institutions and programmes have to be available in sufficient quantity in a State;

b) accessibility: educational institutions and programmes have to be accessible to everyone, without discrimination, also implying physical and economic accessibility;

c) acceptability: the form and substance of education, including curricula and teaching methods, has to be relevant, culturally appropriate and of good quality;

d) adaptability: education has to be flexible, so that it can adapt to the needs of changing societies and communities, and respond to the needs of students within their specific social and cultural context.

This four "a" scheme is a useful device to analyse the content of the right to receive an education, as well as the general obligations for a State Party resulting from it¹⁶.

(ii) The undertaking "to respect" the freedom of education

According to Article 13(3) States Parties undertake to have respect for the liberty of parents to choose other than public schools for their children and to ensure the religious and moral education of their children. The same obligation is encountered in

14. U.N. Doc. E/C.12/1988/SR.19, para. 10; see also E/C.12/1988/SR.17, para. 27, 40, 41 and 48.

15. General Comment no. 13, para. 6.

16. This scheme has also been used by the Special Rapporteur on the right to education in her preliminary report, see U.N. Doc. E/CN.4/1999/49, chapter II.



other international instruments such as the International Covenant on Civil and Political Rights (Art. 18(4)), the European Convention on Human Rights (Art. 2 of the First Protocol) and the UNESCO Convention against Discrimination in Education (Art. 5(1b)). At first sight, this obligation only has a negative meaning, *i.e.* a protection against state interference. From the case law of the Strasbourg supervisory bodies on Article 2 of the First Protocol to the European Convention, it can be concluded, however, that the obligation 'to respect' should be interpreted in a positive sense as well; it requires a positive, tolerant attitude from the State towards the religious or philosophical convictions of parents when a State wants to introduce subjects into the public school curriculum which may interfere with those convictions¹⁷. The European Commission, for example, stated: 'Article 2 not only prohibits the State from *preventing* parents from arranging the education of their children outside the public schools, but also requires the State actively to respect parental convictions within the public schools. This requirement is then obviously not met simply by the observance by the respondent Government of the prohibition, and by the availability of private schools or alternative means of education other than the public schools'¹⁸. A positive way to respect parental convictions is, for example, the granting of exemption for certain subjects of the curriculum. It is submitted that the term 'to respect' in Article 13(3) of the Covenant has a similar meaning. The character of the obligation 'to respect' is such that it ensures a domain which is free from state interference. This type of obligation fits in well with obligations relating to the implementation of civil and political

17. See the *Case of Kjeldsen, Busk Madsen and Pedersen*, Report of the Commission of 21 March 1975, Publications of the Court Series B, vol. 21, p. 46. See also the *Case of Campbell and Cosans*, Judgment of the Court of 25 February 1982, Publications of the Court Series A, vol. 23, p. 18.

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

rights, such as the right to privacy and the right to family life. No further measures of implementation are required for it to function in the domestic legal order of State parties. It is of an immediate nature.

Another element of the freedom of education is the liberty of individuals and bodies to establish and direct educational institutions outside the system of State schools. Article 13(4) does not contain the term 'to respect', but prohibits the state to interpret Article 13 in such a way that it interferes with this liberty, in other words violates such freedom. The functioning of this liberty within the domestic legal order of a State is subject to such minimum standards as may be laid down by the State. It is evident that such standards may not frustrate this freedom. In fact, this paragraph obliges the state in principle to take a similar course of conduct as in the implementation of the obligation 'to respect' of paragraph 3. The term 'liberty' was expressly chosen over the term 'right' in order to ensure that Article 13(3) 'should not be understood as imposing upon States Parties to the Covenant the obligation to provide religious education in public schools'¹⁹.

3. OTHER RELEVANT INTERNATIONAL INSTRUMENTS

In this section I want to highlight briefly two universal treaties which contain extensive provisions on the right to education. The first instrument to be discussed is the Convention on the Elimination of All Forms of Discrimination Against Women adopted in 1979. The first sentence of Article 10 mentions the purpose of this provision, namely an obligation for States Parties to eliminate discrimination against women in order to ensure

19. U.N. Doc. A/3764 and Add.1, Report of the Third Committee of the General Assembly (1957), para. 47.



them equal rights with men in the field of education. In order to realise that goal States Parties must ensure, among others, on a basis of equality of men and women, access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality. In addition, States Parties are under an obligation to take specific measures to meet the specific educational needs of girls and women, such as the reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely, and access to specific educational information relating to women's health and family planning. It is obvious from this Article that States Parties have positive obligations which may have drastic effects for those States in which discrimination of girls and women is a structural and systemic characteristic of society and every day life.

The second instrument to be mentioned here is the Convention on the Rights of the Child, adopted in 1989. The typical feature of obligations of States Parties resulting from this treaty is the idea that the best interests of the child must be the guiding principle for measures taken for the care and protection of children (Article 3(1)). Articles 28 and 29 deal with educational rights of children. These provisions link up with the corresponding Articles of the Universal Declaration of Human Rights and the ICESCR. However, compared to these provisions the Convention on the Rights of the Child contains a number of special characteristics which deserve a brief discussion here. At first, Article 28(1a) puts more emphasis on the progressive realisation of the right to primary education (use of the verb 'to make'), while Article 13(2a) and 14 of the Covenant are more mandatory and strict. Furthermore, Article 28(2) stipulates that States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. Such a provision is lacking in other instruments, with the exception of

Article 11(5) of the African Charter on the Rights and Welfare of the Child. Article 28(2) would imply, in my view, that corporal punishment at schools is contrary to the rights of the child. Article 28(1e) emphasises the importance of regular school attendance and the reduction of drop-out rates, aspects which are also lacking in other instruments. Article 29(1) is more extensive and specific with regard to the aims of education in relation to the development of a child's personality. Finally, Article 32(1) provides for protective measures by the State against economic exploitation of children (child labour) which might impede their education. In conclusion, one may say that this Convention adds a number of important elements for the protection and education of children which mean a step forward on the way of securing their rights²⁰.

4. THE CONCEPT OF A CORE CONTENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

4.1 *The 'core content' concept*

In this section, I want to make some general observations on the concept of a core content of economic, social and cultural rights, and illustrate these observations by identifying some elements of the core content of the right to education.

It is well-known that economic, social and cultural rights have long been neglected in the human rights debate. This is partly due to the fact that, in the words of Philip Alston, their promotion and realisation require skills and expertise that are alien to lawyers, diplomatic representatives, national policy makers, officials of international organisations and NGO representatives who have

20. A comparative analysis of international provisions concerning the right to education may be found in a paper prepared by Mr. José L. GOMEZ DEL PRADO, U.N. Doc. E/C.12/1998/23.

focused mainly on civil and political rights²¹. Generally speaking, proper discussion of the core content of individual rights has started only some fifteen years ago²². The term ‘core content’ is to be regarded as a useful means or instrument in helping to analyse and clarify the normative content of economic, social and cultural rights, which are often described as vague and open-ended, with a view to assess the conduct of states in this field in general, and to identify violations in particular. Thus, the analysis of this concept should not be regarded as an end in itself. The core content approach should also be seen as an answer to the notion of progressive realisation and resource availability that are part of Article 2(1) ICESCR. This notion may be used as an ‘escape clause’ by states to delay or question realisation of economic, social and cultural rights. Within the Committee on Economic, Social and Cultural Rights, the body which supervises the implementation of the ICESCR by State Parties, there seems to be fairly general agreement on the use of the term ‘core content’. The Committee has made explicit reference to the term on a number of occasions²³. During the ninth session of the

21. Ph. ALSTON, “The importance of the inter-play between economic, social and cultural rights, and civil and political rights”, in: *Human Rights at the Dawn of the 21st Century*, proceedings of the interregional meeting organised by the Council of Europe in advance of the World Conference on Human Rights, Strasbourg, 1993, pp. 59-74, at 65. See for an overview of developments regarding legal character, implementation, standard-setting and supervision, Fons COOMANS, “Economic, Social and Cultural Rights”, in: *SIM Special No. 16*, Netherlands Institute of Human Rights, Utrecht, 1995, pp. 3-51 and Fons COOMANS, “The Role of the UN Committee on Economic, Social and Cultural Rights in Strengthening Implementation and Supervision of the International Covenant on Economic, Social and Cultural Rights”, in: *Verfassung und Recht in Übersee*, 35 (2002), pp. 182-200.

22. See, for example, B.C.A. TOEBES, *The Right to Health as a Human Right in International Law*, Intersentia-Hart: Antwerpen, Groningen, Oxford, 1998, chapter V.

23. See for example, Statement to the World Conference on Human Rights on behalf of the Committee on Economic, Social and Cultural Rights, in: U.N. Doc. A/CONF.157/PC/62/Add.5, Annex I, para. 16.

Committee in December 1993, a general discussion was to be held on the right to health with particular emphasis on the idea that ‘there is a minimum core content of each right which constitutes a “floor” below which conditions should not be permitted to fall in any State Party’²⁴. Likewise, the Committee refers to the term in its General Comment on Article 2(1): ‘(...) the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, or essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*’²⁵. The Committee has also started to use the concept in general comments on substantive rights, such as on food and education²⁶. In the academic literature, Alston has argued for the use of the term ‘core content’, postulating that ‘each right must (...) give rise to an absolute minimum entitlement, in the absence of which a State party is to be considered to be in violation of its obligations’²⁷.

24. U.N. Doc. E/C.12/1993/11, para. 5.

25. The nature of States’ parties obligations (Article 2, paragraph 1 ICESCR), General Comment no. 3 (1990), U.N. Doc. E/1991/23, Annex III, para. 10.

26. See U.N. Doc. E/C.12/1999/5 and U.N. Doc. E/C.12/1999/10. I will deal with elements of the core content of the right to education as set by the Committee in this General Comment later on.

27. Ph. ALSTON, “Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights”, in: *Human Rights Quarterly*, 9 (1987), pp. 332-381, at 353. See also the Advisory Report no. 18, “Economic, Social and Cultural Rights”, of the NETHERLANDS ADVISORY COMMITTEE ON HUMAN RIGHTS AND FOREIGN POLICY, The Hague, 1994, at 10, 11.

As far as I am aware, the basis for the core content approach has been developed and elaborated by Esin Orücü, a Turkish author who based her ideas on an analysis of the German Constitution of 1949, the Turkish Constitution of 1961 and Dutch case law on the interpretation of the freedom of speech provision in the Dutch Constitution. First of all, one should define the scope of a right. The scope relates to all the elements covered by one or more treaty provisions dealing with a particular right. In her view, the normative scope of each right consists of three distinct parts: a core, a circumjacence and an outer edge. In other words, it is a concept with a layered structure. The core can be defined as ‘an irreducible minimum, (..), for every right, which can be universally acceptable and used by all courts to protect the minimum content of a right’. It deals with ‘the unrelinquishable minima within the normative scope of that right’²⁸. Article 19 of the German Grundgesetz, dealing with limitations of basic rights, provides in Section 2: ‘In no case may the essence of a basic right be encroached upon’. This provision sets, in other words, a limit to limitations of rights. According to Orücü, the limit to limitations is the membrane distinguishing the core from the circumjacence: ‘every limitation advances from the outer edge of the right towards its core, but at this membrane it has to stop’²⁹.

Another effort to clarify the normative content of human rights by means of a core content approach was made during an interdisciplinary conference convened by the University of Fribourg (Switzerland) in 1989³⁰. According to the conclusions of this colloquium, the core of a human right corresponds to the

28. E. ORÜCÜ, “The Core of Rights and Freedoms: The Limit of Limits”, in: T. CAMPBELL, D. GOLDBERG, S. MCLEAN, T. MULLEN (eds.), *Human Rights - from Rhetoric to Reality*, Oxford, 1986, pp. 37-60, at 38, 52.

29. Orücü, at 48.

30. See P. MEYER-BISCH (ed.), *Le noyau intangible des droits de l’homme*, Actes du VIIe Colloque interdisciplinaire sur les droits de l’homme à l’Université de Fribourg (23-25 novembre 1989), Fribourg, 1991.

concept of ‘substance’ of a right. The substance of a right may be determined according to two lines. The first way refers to the content of a right as an incompressible minimum, while the second way defines the substance of a right as a threshold below which the integrity of human dignity is no longer respected³¹.

As far as economic, social and cultural rights are concerned, perhaps Article 4 ICESCR can be of use to render the term ‘core content’ more specific and workable in practice. This Article provides for limitations to the enjoyment of the rights conferred, but imposes criteria for such limitations. They may not, for example, conflict with the nature of a right. In my view, the nature of a right must be understood as meaning its core or essence, *i.e.* that essential element without which a right loses its substantive significance as a human right³². This idea is also implicit in Article 5(1) of the Covenant which provides, *inter alia*, that limitations of rights to a greater extent than is provided for in the Covenant are not allowed. In fact, therefore, the core content embodies the intrinsic value of each human right. It is a non-variable element of a substantive right. The European Court on Human Rights has also stressed in a number of its judgments that ‘limitations [of the right to have access to a court] applied must not restrict or reduce the access left to the individual in such a way or to such an extent that *the very essence of the right* is impaired’³³. Thus there seems to be a link between the core

31. Proceedings of the Fribourg Conference, at 238-242.

32. See A.P.M. COOMANS, *De Internationale Bescherming van het Recht op Onderwijs (The International Protection of the Right to Education)*, Ph.D Thesis, Maastricht University, Leiden, 1992, at pp. 38-39. See also “The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986)”, U.N. Doc. E/CN.4/1987/17, Principle no. 56, also published in the *Human Rights Quarterly* 9 (1987), pp. 122-135.

33. ECHR, *Ashingdane Case*, 28 May 1985, Publ. Court Series A, Vol. 93, pp. 24-25 (emphasis added), *Case of de Geouffre de la Pradel v. France*, 16



content approach and certain aspects of the case law of the Strassbourg Court.

The elements of a right which cannot be regarded as part of its core content (the 'peripherals' or circumjacence and outer edge) are not less important, but constitute - as it were - a derivative or consequence of the core content. The character of these elements is such that they can often be realised only progressively; for example, they impose on governments considerable (financial) obligations, which for many States are not currently achievable. In addition, these peripheral elements are mostly less essential for the very existence of that right as a human right.

The core content of a right should be universal; a country dependent core would undermine the concept of the universality of human rights. The question is of course whether the core content of a right should be general and abstract or detailed and concrete. My answer would be that a workable definition should be somewhere in between. In general terms the core of a right should be the same everywhere. However, it should be 'translated' or operationalised at the national or regional level, taking into account national or regional characteristics and circumstances and the specific needs of individuals and groups. However, from a conceptual perspective, the needs of the people and the available opportunities in a state should not determine the core of a right. It should rather be the other way around, starting with the right itself.

In case the core of a right has been realised in a rich state without much difficulty, that would not mean that such a state may lean back and argue that it is complying with its treaty obligations. On the contrary, the task would then be to implement the peripheral part of the scope of a right. In other words, point of departure for a core content approach would be, in my view, the

concept of human dignity. The core of a right is to be considered as an expanding floor (not a fixed ceiling), or a bottom from which governments should endeavour to go up, trying to reach higher levels of realisation. This also creates a link to the idea of progressive realisation contained in Article 2(1) ICESCR that embodies a dynamic element, meaning that realisation does not stop when a given level has been reached.

Complying with obligations which relate to the core of a right should not be dependent upon the availability of resources. In other words, when a government is facing policy dilemmas as a result of limited or insufficient financial resources, priority should be given to the realisation of the core of a right. In this respect it is interesting to note here that the CESCR has qualified core obligations as non-derogable³⁴. In conclusion, the content of a right determines the nature of state obligations, not the other way round. Indeed, the individual right (the norm) should be central. The norm, including its core, gives rise to state obligations, part of them relating to the core (core obligations). Core obligations may be negative as well as positive.

The core content approach to economic, social and cultural rights has nothing do with another issue often discussed in relation to these rights, that is their justiciability. Whether are not an economic, social or cultural is justiciable in a specific case, does not depend on identifying the core elements of that right. Justiciability is dependent on the characteristics of the domestic constitutional system of a country, the wording of the (treaty) provision that is invoked before a court, the characteristics and the facts of the case under review and the attitude of the judiciary. Consequently, core elements and peripheral elements of a right may equally be justiciable or non-justiciable.

34. CESCR General Comment no. 14 (2000) on the right to the highest attainable standard of health, U.N. Doc. E/C.12/2000/4, para. 47 and CESCR, Statement on Poverty and the ICESCR, U.N. Doc. E/C.12/2001/10, para. 18.



4.2 *Elements of the core content of the right to education*

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

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

Access to education on a non-discriminatory basis

First, the essence of the right to education means that no one shall be denied a right to education. In practice, this means an individual right of access to the education available, or in more concrete terms, the right of access to the existing public educational institutions on a non-discriminatory basis³⁵. An example of a violation of this right is restricting access to the existing public educational institutions to people belonging to a specific ethnic, linguistic or religious group, for example the practice in some European countries of discriminating against Romani

35. Compare Article 2(2) ICESCR, Article 26 ICCPR and Limburg Principles at 35 and 37.

children in getting access to certain types of education³⁶. In addition, education provided for by the state should be of the same quality for all groups in society; girls, for example, should not be given education of an inferior quality compared to boys³⁷. Another (extreme) example was the situation in Afghanistan where the Taliban regime banned girls and women from all types of educational institutions³⁸. A more subtle case relates to the rule and practice in schools in some African countries to force female students to disclose their pregnancy and to leave the school once the pregnancy has been discovered. This has been found discriminatory against women in a case before the Botswana Court of Appeal³⁹.

The right to enjoy free and compulsory primary education

A second element of the core content of the right to education is the right to enjoy primary education in one form or another, not

36. See, Fons COOMANS, “Discrimination and Stigmatisation Regarding Education: The Case of the Romani Children in the Czech Republic”, in: J. WILLEMS (ed.), *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities*, Antwerpen, Intersentia, 2002, pp. 225-250.

37. See Article 1(1) UNESCO Convention Against Discrimination in Education (1960) for a definition of the term ‘discrimination in education’. In 1996, the Kuwaiti Parliament adopted a bill which provided for the segregation of male and female students in higher educational institutions. In my view, this segregation will lead to discrimination of women, given the influence of Muslim groups in that country. See the Dutch daily newspaper NRC Handelsblad, 3 July 1996.

38. See Human Rights Watch, *1999 World Report* at <http://www.hrw.org/worldreport99/women/women3html>. See also the report of the U.N. Secretary-General on the situation of women and girls in Afghanistan, U.N. Doc. E/CN.4/Sub.2/2000/18.

39. See on this case, E. K. QUANSAH, “Is the Right to Get Pregnant a Fundamental Right in Botswana?”, in: *Journal of African Law*, 39 (1995), pp. 97-102.



necessarily in the form of traditional class-room teaching. Primary education is so fundamental for the development of a person's abilities that it can be rightfully defined as a minimum claim⁴⁰. For example, the Supreme Court of India has held the right to (primary) education to be implicit in the right to life because of its inherent fundamental importance⁴¹. International law on human rights does not define the term 'primary education', but guidelines for using this concept and others have been developed within the framework of international organisations, such as UNESCO⁴². Primary education relates to the first layer of a formal school-system and usually begins between the ages of 5 and 7 and lasts approximately six years, but in any case no fewer than four years⁴³. Primary education includes the teaching of basic learning needs or basic education. The term 'basic education' is nowadays often used, for example within the framework of international conferences on education, such as the World Declaration on Education for All (Jomtien, Thailand 1990 and Dakar 2000). Basic education relates to the content of education, not to the form (formal or non-formal schooling) in which it is presented. As has been laid down in the Jomtien Declaration: 'the focus of basic education must, therefore, be on actual learning acquisition and outcome, rather than exclusively

40. The Conclusions of the Fribourg Colloquium, referred to above (footnote 30), stipulate that 'the right to read and write, with respect for cultural identity, forms part of the core both of the right to education and of the right to information; it is guaranteed, as a minimum, by the right to free and compulsory primary education' (p. 241).

41. *Unni Krishnan and Others v. State of A.P. and Others*, 4 Febr. 1993, (1993) 1 SCC 645.

42. See, for example, UNESCO's Statistical Yearbook and the Revised Recommendation concerning the Standardization of Educational Statistics (1978).

43. UNESCO Statistical Yearbook 1996, p. 3. See also the Preliminary Report of the Special Rapporteur on the Right to Education, U.N. Doc. E/CN.4/1999/49, paras.75-79 and A. Melchiorre, *At what age?...*, 2002, to be consulted at www.right-to-education.org.

upon enrolment, continued participation in organized programmes and completion of certification requirements' (Article 4). Apart from a school and classroom system, basic education may be given in less traditional forms, such as village or community based, or in the open air. This may be necessary due to shortcomings of the formal schoolsystem (lack of adequate buildings, teaching materials or teachers), or because parents are unable to pay for participation in the formal schoolsystem. Basic education within the context of the right to primary education as an element of the core content of the right to education would, in my view, include literacy, numeracy, skills relating to one's health, hygiene and personal care, and social skills such as oral expression and problem solving⁴⁴. In addition, basic education must also include some teaching of concepts and values as have been laid down in Articles 26(2) of the Universal Declaration of Human Rights, Article 13(1) of the Covenant and Article 29(1) Convention on the Rights of the Child, including respect for human rights. One very important precondition for primary education as a core element is that education should respect the rights of minorities and indigenous populations in the sense that it

44. An example may illustrate the practice of basic education: in India, the Social Work and Research Centre (SWRC), an Indian ngo has been working with the poorest of India's rural population. This ngo has set up a number of schools in which "children are made aware of their rights through songs, puppets and classroom theatre. The curriculum gives them an idea about language and reading and writing in Hindi, as well as the basics of mathematics. Then they make links between letters and words, and between words and phrases. Over the following years, they are taught about social and rural behaviour, how to be self-sufficient, and about the caste system. Then come the theories of social and political thinkers and national heroes, as well as lectures on agriculture and cattle breeding. The focus of the lessons is the environment they live in. The children are taught to make arid land cultivable, and the destructive effect of chopping down trees for firewood. Powerful links are established between the school and everyday working life". Quotation from J-C. KLOTZ, "India: the children's republic", *Unesco Sources*, No. 116 (October 1999), p. 6.



should recognise their cultural identity, plight and heritage. An example would be the teaching of literacy in the child's first language⁴⁵.

Usually, basic education is aimed at children within the framework of primary schooling. However, basic education is also relevant for other persons who lack the basic knowledge and skills. This dimension is called fundamental education in terms of Article 13(2d) ICESCR. This type of education is rather broad and would include, among others, basic literacy and numeracy skills, but also basic professional skills which enable people to function as a member of society, to take part in social and cultural life, to generate income, to participate in projects aimed at community development, and to have access to and utilise information from a variety of sources (for example, computer technologies). The enjoyment of this right is not limited by age or gender; it extends to children, youth and adults, including older persons; it is an integral component of adult education and life-long learning⁴⁶. Providing secondary and other forms of education would not belong to the core of the right. These levels of education have less priority from the perspective of the essence of basic education.

Primary education as a core element would also mean that no one, for example parents or employers, can withhold a child from attending primary education⁴⁷. A state has an obligation to protect this right from encroachments by third persons. The obligation of the state to provide for primary education may be characterized both as an obligation of conduct and an obligation of result. When seen from the perspective of Article 14 of the Covenant it

45. See about these aspects F. P. DALL, "Children's Right to Education: Reaching the Unreached", in: J. R. HIMES (ed.), *Implementing the Convention on the Rights of the Child - Resource Mobilization in Low-Income Countries*, The Hague: Martinus Nijhoff, UNICEF, 1995, pp. 143-183, at 153, 158-163.

46. General Comment no. 13, para. 23, 24.

47. See also, General Comment no. 11, para. 6.

is an obligation of conduct, because it requires a state to set up and work out a plan of action, within two years after becoming a Party to the Covenant, for the progressive implementation of compulsory primary education free of charge for all within a reasonable number of years. On the other hand, it is also an obligation of result in terms of meeting basic learning needs which may be complied with through a variety of delivery systems (*e.g.* formal or non-formal) and means, providing specific levels of knowledge and skills will be realised.

According to Article 13(2a), primary education shall be compulsory. Usually the starting age for compulsory primary education is at six or seven, but the duration between countries varies considerably. Worldwide there is a trend to lengthen compulsory schooling beyond primary schooling. The ratio for a minimum duration of compulsory schooling beyond eleven years of age is that it should last at least to the minimum age of employment⁴⁸. Obviously it is not sufficient that primary education is compulsory by law. What is also necessary is an official state inspection service to supervise and enforce this duty with respect to parents, schools, employers and pupils themselves.

There are a number of factors which may influence actual attendance of children at school⁴⁹. These include inadequacy of school services, such as the distance between a student's home and the school, due to lack of transportation facilities, and lack of running water and sanitation facilities at school. Other factors relate to the socio-economic and cultural status of parents. These include inability to pay for school attendance of their children,

48. See the Progress report submitted by Katarina Tomasevski, Special Rapporteur on the Right to Education, U.N. Doc. E/CN.4/2000/6, para. 46 and Table 3.

49. These factors are largely drawn from UNESCO's questionnaire for the consultation of Member States on the implementation of the Convention against Discrimination in Education, UNESCO Doc. 23 C/72, Annex A (1985).



traditional attitudes which downgrade education of girls in particular, loss of family income that a child attending classes would otherwise earn, other constraints arising from religion, class, occupation or custom and the inability of parents to help their children in the learning process. Particular relevant is the physical and mental health condition of children which may influence school attendance. Other factors which may negatively influence school attendance include teaching given in a language other than the child's mother tongue, a school timetable which is incompatible with seasonal work by children, particularly in rural areas and the phenomenon that teaching materials and methods do not fit in with the cultural background of children and their parents (adaptability of education).

Article 13(2a) also stipulates that primary education shall be free. The degree to which primary education is really free is determined by a number of direct and indirect costs⁵⁰, such as school fees⁵¹, expenses for textbooks and supplies, costs for extra lessons, expenses for meals at school canteens, expenses for school transport, school uniforms or other items of clothing and footwear, medical expenses and boarding fees, where applicable. In some countries it is practice that the village community or parents provide labour for constructing, running or maintaining the school; this may be seen as a form of indirect costs for those involved. Another form of indirect costs for parents is taxation. Through the fiscal policy of the state, families contribute to the costs of education. Its effects upon the accessibility of education will depend upon the progressiveness of the tax-system: do low-

50. This paragraph is also based on UNESCO's questionnaire.

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

income groups pay less, in absolute and relative terms, compared to high-income groups?⁵² One should also look into the effects of IMF Structural Adjustment Programmes and Poverty Reduction Strategy Papers upon the accessibility of education if an increase in education fees is part of the package of measures agreed between the government concerned and the IMF. It is then important to know whether financial or other forms of assistance or compensatory measures are available for underprivileged persons and groups to safeguard continued access to education as a human right⁵³.

Primary education must have priority in resource allocation, because it deals with the fundamental basis for a person's development and the development of society as a whole⁵⁴. This would be in line with the idea of a core content of rights which should be seen as a bottom or floor from which states should endeavour to go up. It is the responsibility of the state to provide for primary education and maintain educational services. A government cannot waive that responsibility by giving more room to the private sector, or stimulating public-private partnerships for financing the educational infrastructure⁵⁵. With respect to the right to education in the European Convention, the Strassbourg Court held that a State cannot absolve itself from responsibility

52. See the background paper prepared by Ms. Katarina Tomasevski, Special Rapporteur on the right to education of the Commission on Human Rights, U.N. Doc. E/C.12/1998/18, para. 12.

53. See the report on the mission to Uganda by the U.N. Special Rapporteur on the Right to Education, U.N. Doc. E/CN.4/2000/6/Add.1, para. 29-34.

54. See also in this respect, General Comment no. 13, para. 51: "States parties are obliged to prioritise the introduction of compulsory, free education".

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



by delegating its obligations to private school bodies⁵⁶. In its General Comment on Article 13 ICESCR, the CESCR has stressed that 'Article 13 regards States as having principal responsibility for the direct provision of education in most circumstances'⁵⁷. It has also stressed that States have an immediate duty to provide primary education for all⁵⁸. For those States that have not realised yet compulsory and free primary education, there is an 'unequivocal obligation' to adopt and implement a detailed plan of action as provided for in Article 14⁵⁹.

Special facilities for persons with an educational back-log

Related to the aspects discussed above is another element of the social dimension of the right to education which, in my view, would belong to its core content. This concerns the obligation for the State to take special measures or provide special facilities for those persons who are faced with an educational back-log, or who would otherwise have no access to education at all without those special facilities. One can think of girls in rural areas, street and working children, children and adults displaced by war or internal strife and disabled persons⁶⁰. The type of education to be given to these people should be geared for their specific educational needs and will often require specially trained teachers.

56. *Case of Costello-Roberts v. UK*, Judgment of 25 March 1993, Publ. Court Series A, Vol. 247-C, para. 27.

57. General Comment no. 13, para. 48.

58. General Comment no. 13, para. 51.

59. General Comment no. 11, para. 9.

60. Compare Article 3 Jomtien Declaration. See also the Statement to the World Conference on Human Rights on behalf of the Committee on Economic, Social and Cultural Rights, U.N. Doc. A/CONF.157/PC/62/Add.5, Annex I.

Quality of education

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

Free choice of education

Still another element of the core content of the right to education is free choice of education without interference by the State or a third person, in particular, but not exclusively with regard to religious or philosophical convictions. This element would be violated in case a State fails to respect the free choice of parents with regard to the religious instruction of their children⁶¹. This means, in practice, that a state must ensure an objective and pluralist curriculum and avoid indoctrination⁶². This is important,

61. See COOMANS (1992), at 39, 238.

62. Case of *Kjeldsen, Busk Madsen and Pedersen*, (1976), Judgment of the European Court of Human Rights, Series A, Vol. 23, at 26, 27. The Court emphasised that Article 2 of the First Protocol should be interpreted in the light of Article 8 (right to privacy), Article 9 (freedom of conscience and religion) and Article 10 (freedom to receive information) of the European Convention on Human Rights.



because public education entails the danger of political goals, *i.e.* the most influential ‘philosophy of life’ will be promoted by the State⁶³. However, it should be realised that in many countries there is only limited or no opportunity to attend education of one’s own choice: either there is only state-controlled education, or in a mixed system, private education is too expensive for parents⁶⁴. On the basis of international human rights law, there is no obligation for a State to provide financial support to private educational institutions. If it does, however, it should do so on a non-discriminatory basis⁶⁵.

These core elements undoubtedly constitute the very essence of the right to education as a human right. Violation of one or more of these elements by the State would entail that the right would lose its material and intrinsic value as a human right.

The right to be educated in the language of one’s own choice

A more controversial question is whether the right to be educated in the language of one’s own choice is part of the core content of the right to education. In the *Belgian Linguistic Case*, the European Court on Human Rights stated that ‘the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be’⁶⁶. This

63. Compare Article 17(3) African Charter on Human Rights and Peoples’ Rights which states: ‘The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State’.

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

65. See the views of the Human Rights Committee in the case of *Arieh Hollis Waldman v. Canada* (1999), U.N. Doc. CCPR/C/67/D/1996.

66. *Belgian Linguistic Case* (1968), Judgment of the European Court of Human Rights, Series A, Vol. 6, at 31.

means that it is the State that determines whether a specific language is to be a national or official language as a medium of instruction in education. In addition, the Court stressed that an individual cannot claim a right to State-funded education in the language of his own choice. The Court rejected positive state action for rewarding such a claim⁶⁷.

On the other hand, it is submitted that a State must respect the freedom of individuals to teach, for instance, a minority language in schools established and directed by members of that minority. This does not imply, however, that a State must allow the use of this language as the only medium of instruction; this would be dependent on the educational policy of the State. As a minimum, however, states must not frustrate the right of members of national, ethnic or linguistic minorities to be taught in their mother tongue at institutions outside the official system of public education. However, there is no state obligation to fund these institutions. This right of members of minorities is solidly established in international law⁶⁸. It used to be a cornerstone of the minority protection system established under the auspices of the League of Nations. Moreover, the right of minorities to establish, for their own account, educational institutions in which

67. Compare the critical observations of the Committee on Economic, Social and Cultural Rights when it discussed the periodic report of Mauritius on the implementation of the ICESCR. The Committee noted with concern that Kreol and Bhojpuri, the only languages spoken by the large majority of the population, are not used in the Mauritian educational system. See U.N. Doc. E/C.12/1994/8, para. 16.

68. See, for example, Article 27 International Covenant on Civil and Political Rights, Paragraphs 32-34 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), and Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN General Assembly Res. 47/135 (18 Dec. 1992)). See also, within the context of the Council of Europe, Article 8 of the European Charter for Regional or Minority Languages (1992) and Articles 12-14 of the Framework Convention for the Protection of National Minorities (1994).



they are entitled to use their own language, was characterized by the Permanent Court of International Justice as ‘indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact’. The Court considered these institutions as ‘suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics’⁶⁹. It is in this sense that the right to be educated in the language of one’s own choice belongs to the core content of the right to education. It is one of the elements of a State’s obligation to respect that right.

4.3 *Peripheral elements*

Other elements within the scope of Article 13 ICESCR would, in my view, not belong to the core content, but should be characterized as peripheral elements. General availability of different forms of secondary education, including vocational guidance and training, and higher education would belong to this peripheral part of the scope of the right to education. The same classification would apply to the progressive introduction of free secondary and higher education (compare Article 13(2b and c) ICESCR, 28(2b and c) CRC). Other examples of peripheral elements include providing access to specific educational

69. Permanent Court of International Justice, *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, Series A/B No. 64; text in: HUDSON, *World Court Reports*, vol. 3 (1938), pp. 484-512, at 499, 496. For a more recent example, see the observations of the Committee on Economic, Social and Cultural Rights concerning the realisation of the right to education of members of the Gypsy minority in Romania. The Committee noted that Gypsies continued to face discrimination in schools. The Committee recommended the Romanian Government to adopt an active non-discrimination policy with respect to this minority, to encourage their participation in cultural life and to assure proper participation in educational activities by children belonging to that group. See U.N. Doc. E/C.12/1994/4, para. 12, 15.

information to help to ensure the health and well-being of families, including information on family planning (Article 10(h) CEDAW); promoting education of refugees (Article 22(2) Convention Relating to the Status of Refugees); and promoting the instruction of children belonging to indigenous peoples in their own indigenous language (Article 28(1) ILO Convention no. 169). Although these elements are important for the full realisation and enjoyment of the right to education, they are less essential from the perspective of the fundamental values embodied in the right to education. In a way, these elements may be seen as derivative of the core claim and guarantee of the right to education. Other elements are even more remote from the core of the right to education. These elements include the introduction and maintenance of an adequate fellowship system, adequate material conditions for the teaching staff, and the availability of a coherent overall system of schools at all levels (local, regional and national). In addition, setting up a system for educational and vocational information and guidance (Article 28(2d) CRC), in my view, also belongs to this part of the scope of the right to education. Another example is the obligation to develop and implement education programmes for indigenous and tribal peoples, in cooperation with these peoples, in order to address their specific educational needs and to preserve and promote the practice of indigenous languages (Article 27(1), 28(3) ILO Convention No. 169). A final example is the obligation for a State party to eliminate any stereotyped roles of men and women in educational types and programmes (Article 10(c) CEDAW). The components mentioned here do not touch directly upon the core of the right as defined above, but are more remote from the essence of this right. Consequently, state obligations resulting from these elements are not minimum obligations.



5. A TYPOLOGY OF OBLIGATIONS RELATING TO THE IMPLEMENTATION OF THE RIGHT TO EDUCATION

In order to further analyse and specify the normative content of the right to education and the nature and content of the corresponding obligations of the State, I propose to follow an obligations approach developed in the academic debate. To be more specific, it is suggested to develop a typology of State obligations as an analytical tool to provide a better understanding of the scope and nature of these obligations in the process of realisation of economic, social and cultural rights and the right to education in particular. Part of the traditional view about implementation of these rights was that they only give rise to positive obligations, while civil and political rights embody only negative obligations for the State. However, it has been recognised increasingly that all human rights give rise to multiple types of duties, or put differently, to a spectrum of duties. The full protection of a human right, whether civil, political, economic, social or cultural, requires compliance with different duties, both positive and negative ones. Obligations are interdependent and interrelated, aimed at the full realisation of a right. The idea of a typology of obligations has been developed by the American political philosopher Henry Shue in his book *Basic Rights*⁷⁰. It was elaborated further by different human rights scholars, one of them being the Norwegian human rights expert Asbjorn Eide⁷¹. He identified three levels of obligations with respect to the implementation of the right to food⁷². He distinguished between

70. H. SHUE, *Basic Rights – Subsistence, Affluence and U.S. Foreign Policy*, Princeton, New Jersey, Princeton University Press 1980, second edition 1996.

71. See for an extensive discussion of this development, M. SEPÚLVEDA, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerpen: Intersentia, 2003, chapter V.

72. A. Eide, *The Right to Adequate Food as a Human Right*, U.N. Doc. E/CN.4/Sub.2/1987/23, para. 66-71. For a more recent discussion of the levels

the obligations ‘to respect’, ‘to protect’ and ‘to fulfil’, which States parties to the ICESCR have towards individuals under their jurisdiction. This typology of state obligations is also applied in recent General Comments of the CESCR, such as the comments on the right to food and the right to education⁷³. The first level is the ‘obligation to respect’. This obligation prohibits the State itself to act in contravention of recognised rights and freedoms. This means that the State must refrain from interfering with or constraining the exercise of such rights and freedoms. The second level is the ‘obligation to protect’. This requires the State to take steps – through legislation or by other means – to prevent and prohibit the violation of individual rights and freedoms by third persons. The third level concerns the ‘obligation to fulfil’. This obligation may be characterized as a programme obligation and implies more of a long-term view for its implementation. In general, this will require a financial input which cannot be accomplished by individuals alone. This typology of obligations is applicable to economic, social and cultural rights as well as to civil and political rights. It demonstrates that the realisation of a particular right may require either abstention and intervention on the part of governments. On the basis of Eide’s proposal for a ‘food security matrix’⁷⁴, it is possible to devise a comparable matrix to identify the nature and levels of obligations relating to the implementation of the right to education. The matrix is presented as an appendix to this article. The matrix distinguishes between the ‘social’ dimension and the ‘freedom’ dimension of the right to education, discussed above. Within each dimension, a further itemisation is proposed. The ‘social’ dimension includes

of state obligations, see A. EIDE, “Economic and Social Rights”, in: J. SYMONIDES (ed.), *Human Rights: Concept and Standards*, Aldershot, Ashgate-Dartmouth and UNESCO Publishing, 2000, pp. 109-174, at 124-128.

73. See General Comment no. 12, para. 15 and General Comment no. 13, para. 46-50.

74. EIDE (1987), at p. 29.



the elements of accessibility and availability of education, whereas the ‘freedom’ dimension refers to the liberty to choose and the liberty to establish. The proposed matrix does not offer an exhaustive list of concrete State action, but merely serves as an illustration of possible options for States. Other forms of conduct or measures can be put in, depending on the educational situation in each country. The matrix is applicable to both developing countries with an inadequate educational system and to countries in which there is a highly developed system of education. It is a device for the elaboration and clarification of the scope and nature of obligations and it can help to determine whether a State’s legislation, policy and practice are in conformity with its obligations under the Covenant. The nature of the obligations remains the same; only the measures taken to implement the obligations differ. In rich countries, for example, it is necessary to maintain the existing level of education in a quantitative and qualitative sense, because a drop in services would endanger the accessibility and availability of education.

The following examples illustrate how the matrix can be applied⁷⁵. The obligation ‘to respect’ the right to education requires the State to abstain from interference. It must not prevent children from attending education, for example by closing educational institutions in times of political tension in non-conformity with the limitations clause of Article 4 ICESCR⁷⁶. In addition, it requires that the State does not discriminate on the basis of sex or ethnic origin, with respect to admission to public schools. Detailed standards of non-discrimination and equal treatment of individuals in education are laid down in the UNESCO Convention against Discrimination in Education (1960), particularly in Articles 1 and 3. The obligation ‘to respect’ can be characterised as an obligation of conduct: it

75. For other examples see, General Comment no. 13, para. 50.

76. General Comment no. 13, para. 59.

requires the State to follow the course of action specified in the treaty provision⁷⁷. The obligation ‘to protect’ requires the State to guarantee the exercise of the right to education in horizontal relations (between private groups or individuals), for example, it must protect against discrimination in admitting students to private schools. Another example of the obligation to protect is the adoption and enforcement of legislation to combat child or bonded labour in private labour relations, or arrangements for monitoring and enforcing compulsory primary education.

The nature of the right to education is such that positive State action is needed to achieve the full realisation of this right. In the opinion of the CESCR, ‘it is clear that Article 13 regards States as having principal responsibility for the direct provision of education in most circumstances’⁷⁸, which can be seen as an elaboration of the obligation to fulfil. The obligation ‘to fulfil’ requires States to make the various types of education available and accessible for all and to maintain that level of realisation. In order to achieve that aim, States must take a variety of measures. Although legislation may be necessary to provide a legal framework, primarily, policy measures, financial and material support are needed to realise this right⁷⁹. The obligation ‘to fulfil’ implies that States have a substantial degree of latitude in complying, depending also upon the specific level of education and taking into account the wording of the treaty obligation⁸⁰. For example, *primary education shall be compulsory and available free to all* (Article 13(2)(a)) versus *the progressive introduction of free secondary education* (Article 13(2)(b)) ICESCR. Imple-

77. See COOMANS (1992), at 231, 232 and M. NOWAK, “The Right to Education - Its Meaning, Significance and Limitations”, in: *Netherlands Quarterly of Human Rights*, 9 (1991), pp. 418-425, at 421, 422.

78. General Comment no. 13, para. 48.

79. See the Limburg Principles, no. 17. Legislative measures would be imperative if existing legislation is contrary to the obligations under the Covenant; see Limburg Principles, no. 18.

80. General Comment no. 13, para. 48.



mentation of the latter clause gives more latitude to the state than the former. Therefore, the obligation 'to fulfil' should be characterised as an obligation of result, leaving the choice of means to the State, providing the result achieved conforms to international standards.

Minimum Core Obligations

It can be seen from the matrix that specific elements of the core content of the right to education give rise to concrete obligations. These obligations may be characterised as minimum core obligations (m.c.o.), as defined by the CESCR in its General Comment on the nature of States parties obligations⁸¹. Such obligations are not limited to cost-free (negative) obligations to respect, but also include positive obligations to protect and to fulfil. Minimum core obligations resulting from the core content of the right to education apply irrespective of the availability of resources⁸². It is interesting to note that the CESCR also briefly refers to the core content concept in its General Comment on Article 13, but framed in terms of core obligations for the state, echoing the wording of General Comment no. 3 on the nature of states' obligations. According to the Committee, the minimum core obligation with respect to the right to education includes an obligation: 'to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational

81. General Comment no. 3, para. 10.

82. "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", *Human Rights Quarterly* 20 (1998), pp. 691-704, para. 9. See also V. DANKWA, C. FLINTERMAN, S. LECKIE, "Commentary to the Maastricht Guidelines on Economic, Social and Cultural Rights", *Human Rights Quarterly* 20 (1998), pp. 705-730, at 717.

strategy which includes provision for secondary higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards” (article 13(3) and (4))⁸³. There is clearly overlap with the core elements I discussed above, but there are also differences, such as the reference to the objectives of education mentioned in Article 13 (1), an element which I left out, because in my view it would be covered by the quality level of education. The CESCR clearly decided to retain the ‘obligations’ language used in General Comment no. 3. In practical terms, however, there seems to be little difference between the core content approach on the one hand, and the core obligations approach on the other, because core elements of rights of individuals need to be translated into core obligations for the state. However, it may be argued that it is crucial to retain as a point of departure the right of the individual, rather than the obligations of the State, because the latter derive from the right, at least from a human rights perspective.

6. CONCLUDING REMARKS

This article contains an effort, from a legal perspective, to shed more light on the normative content of the right to education. Contributions from other disciplines are necessary, because many activities and measures dealing with the implementation of this right will be of an administrative, financial or pedagogical nature. It should be emphasised here that the core content/core obligations approach is rather recent and still in a stage of development and elaboration. Important questions remain, such as the degree of specificity required for core elements to be workable. There is also a risk that identifying core elements of a

83. General Comment no. 13, para. 57.



right and corresponding minimum obligations might lead to a neglect of peripheral elements of the same right and to an undermining of the universal character of that right. However, it is my opinion that the search for core elements of economic, social and cultural rights and minimum obligations serves, first of all, analytical purposes. From a human rights perspective, it is of the utmost importance to clarify (vague) treaty norms in order to make clear to governments what the precise meaning is of treaty obligations that they have accepted voluntarily, and next to scrutinise acts and omissions of governments in terms of observance of these rights and obligations. In addition, it is important to assist monitoring bodies, both at the intergovernmental and non-governmental level, in their work to identify violations and to request governments to redress those violations and to alter their legislation and policy-practice. Finally, clarification of rights and obligations in the field of economic, social and cultural rights may contribute to strengthening the justiciability of these rights at the national and international level. After all, from a perspective of equality, interdependence and indivisibility of human rights, the overall aim should be to strengthen the legal character of economic, social and cultural rights which, unfortunately, have been neglected too long.



Matrix of state obligations relating to the right to education

Dimensions of the right to education	SOCIAL DIMENSION (The right to receive an education)		FREEDOM DIMENSION (The right to choose an education)	
	ACCESSIBILITY	AVAILABILITY	LIBERTY TO CHOOSE	LIBERTY TO ESTABLISH
TO RESPECT	Respect free access to public education both in legislation, policy and practice without discrimination [m.c.o];	Respect existing public education in minority languages;	Respect religious and philosophical convictions (granting exemption), Respect freedom of school choice, Respect human dignity, Respect teaching in minority languages [m.c.o];	Respect free establishment of private schools (subject to legal minimum standards); Respect (cultural) diversity in education;
TO PROTECT	Apply and uphold equal access to education in legislation, policy and practice against violations by third persons (parents, employers) Adopt and implement legislation against child labour	Regulate recognition of private educational institutions and diplomas;	Combat indoctrination or coercion by others; Protect legally freedom to choose [m.c.o]; Combat discrimination in the admission of students to private institutions; Guarantee pluralism in the curriculum;	Apply and uphold the principle of equality of treatment; Protect legally private teachers' training institutions and diplomas;
TO FULFIL	Provide special educational facilities for persons with an educational back-log (e.g. the disabled, girls, drop-outs, street children) [m.c.o]; Eliminate passive discrimination; Introduce progressively free secondary and higher education; Promote scholarship system;	Secure compulsory and free primary education [m.c.o]; Train teachers; Make transportation facilities and teaching materials available; Combat illiteracy; Promote adult education; Guarantee quality of education [m.c.o];	Promote pluralism in the curriculum; Promote intercultural education;	Provide financial and material support to institutions for private education on a non-discriminatory basis;

m.c.o = minimum core obligation