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- ❖ *A triangular relationship for future-oriented education policy?*
- ❖ *Reframing the Right to Education in International Law?*
- ❖ *Contradictory Objections to School Choice*

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The International Journal for Education Law and Policy provides a critical review of contemporary developments in education law. It combines analysis, commentary and documentation on national education legislation and European and international developments in education. The Journal gives high priority to articles, which provide a comparative perspective and offer a link between law and policy issues. Apart from scholarly articles reviewing the implementation of and new developments in educational legislation at the national, regional, European, and international levels, IJELP features special thematic reports and contains special country reports.

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The International Journal for Education Law and Policy

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EDITORIAL

A triangular relationship for future-oriented education policy?

Jan De Groof*

Any attempt to design future scenarios for education is a perilous undertaking.

I do it by way of three interlocking triangles, one constitutional, one managerial and one future-oriented.

First Triptych

The outline for a *first triangular relationship* was encouraged in part by the words of one of the most renowned constitutionalists in the Portuguese jurisdiction. On the question of the international ranking of the institutional articles on education matters, Professor Jorge Miranda (State University of Lisbon) answered without hesitation: ... the *Belgian Constitution!*

We had the chance, during the celebration for *'30 Years of Revision of the Constitution and 60 years of the Schools Pact'*¹, to point out the 'rare beauty' of article 24 of the Constitution, which "will only be tugged at with a trembling hand".

Three actors are involved in this triptych: schools, parents and government.

"Education is free" is not without reason the first paragraph of article 24 Gw. 'Free' also means 'that the school or the provider is responsible for the education provided', among other things in terms of quality; this is, incidentally, explicitly laid down in the Flemish regulations.

The parents - the second actor in the triangular relationship - choose 'the nature of education', to use an old school pact term. They are primarily responsible for their children, as is enshrined in international law. This sometimes leads to complex relationships of parents with the school ('for the sake of the child') and even with their own children. I refer to the recent ICOR conference at Hasselt University on the intertwining of family and educational law².

The government - third actor - is responsible for regulation and control, in principle only on the essential aspects, but it must observe the principle of equality (art. 24 Gw., § 4) and show respect for other rights and freedoms (including § 3, particularly relevant in the headscarf debate, for example).

In turn, these *three supporting actors* (schools, parents, government) are indebted to the 'figure' in the *middle* of the triangle: *the pupil or student and the rights he or she has*. All lines run in his direction. With the *teacher* as the *bridge* par excellence between school, parent, and pupil.

(May I just sigh ...: the difficulty in recent debates is that one no longer sees the 'global

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1 See special issue *TORB* 2018-19, chapters 4-5.

2 See special issue *TORB* 2017-18, chapters 4-5.

picture'. We seem to be condemned to lose ourselves in technicality for the sake of one of these actors).

The field of tension consists of the interaction between freedom of the educators, freedom of school choice by and the associated involvement of parents, and government regulation and control that often does not go to the heart of the matter.

Second Triptych

Then we move towards the second triptych, namely (1) schools; (2) legislative government and (3) the administrative or controlling government with a focus on freedom of education, freedom of policy and quality control. At the heart of that triangle is: the (common) concern for equality and quality for the benefit of the pupil - "inclusive education" according to the reading of SDG4 - and then the efficiency of the means.

The area of tension here is: freedom of education versus control of quality by legislative and administrative authorities.

There are the three levels on which the "supervision of the future" will be grafted.

Input and parallel controls will be scrapped.

Three forms of control remain:

- *Process control*: the transparent observance of the (few) principles of 'good governance', including quality and financial monitoring at the institutional level (at all levels of education), albeit with the possibility of the application of "*comply or explain*".³
- *Output control* is taken care of by the Inspectorate. The Inspectorate will work with validated umbrella tests plus central tests, focusing on the minimum objec-

tives. For higher education: accreditation, in the short term only a European accreditation;

- *International assessment* through comparative indicator programmes and comparative research.

External control will thus be based on peers, on independent expertise and on international parameters. These monitor the *sustainability* (quality and inclusion) of the system, which is at the heart of this triad.

The triptych in supervision, as proposed above, prevents bureaucratic trivialisation or the desire of politicians to take the place of those responsible for education. It invites responsible, 'good governance'.

Third Triptych

The *third triptych* consists of (1) schools, of course; (2) government and ... (3) society. The latter is represented by all segments of *society* involved in education, including civil society.

At the heart of this triangle is the mapping out of *future expectations*: what can society expect from education for pupils and students, and this from a triple perspective of content: education that facilitates the future, that understands the current context, and that unearths the treasury of heritage?

A consensus is sought on this among *stakeholders*: the new democratic legitimacy, subsequently anchored in laws and regulations. First, though, a societal debate, nourished by scientific research and consultation among stakeholders, will take place.

But also: what can schools, colleges and universities expect from the labour market, industry and the socio-cultural middle class? This requires an assignment in three intertwined parts: research, consultation and

³ See my *Principles of good governance for the universities, university colleges and scientific institutions in the Flemish Community. Prove of Recommendations*, Tilburg, 2004.

mutual coordination in implementation and evaluation.

'Ownership' of education does not so much belong to politics: "education" is not an "ordinary policy domain" for which politics sets the goal and indicates how this will be realised in policy terms. On the contrary, it is based on *shared* and *binding* responsibility.

Complementarity and interdependence of this triptych

The task now is to design the triple triptych, i.e. the *constitutional*, administrative and content-related future framework, in its interrelationship and to integrate the European dimension in each case.

The hoped-for future reflection will point to evolutions, relevant to all constituent parts of the triangular relationships.

Thus, the *European dimension* affects every scale, including regulation (and policy) for the legislative and controlling *authorities*, the curriculum (e.g. for *schools*), European citizenship for the education *user*, quality assurance ...

The Flemish/Dutch perspective adds an essential dimension.

Three supporting principles

The supporting principles of these interlocking triangle panels are, incidentally, to be found in European Community law, and I will limit myself to ... three:

(1) The *principle of 'trust'*: trust in the freedom and autonomy of boards of education, 'which are responsible for it' - to quote another school pact principle;

(2) The *principle of loyalty* on the part of the institutions with regard to of the basic regulations, quality assurance and expected outcomes, including accountability ('proven trust'); and

(3) The *subsidiarity rule*: that age-old principle from Christian (Catholic and Protestant) social teaching, now enshrined in the Union Treaty and characterised by both its *horizontal* and *vertical* dimensions.

Regulatory consequences of the future

In their mutual coordination, all this leads to a new systems thinking, an alternative constellation, a (new) 'pact' as it were ...

This revolution already requires raising regulatory and administrative capacity on all fronts. Careful legislation complies with the clear principles and criteria of educational lawmaking, about which this magazine has already had occasion to elaborate on several occasions. More than that: it leads to a complete reversal of the current excessive regulatory drive⁴!

The theme of 'deregulation' has been superseded. The cranking up of the arsenal of rules was initially required to concretize the positive right to education. The hoped-for deregulation subsequently failed.

The third phase, however, involves steering by the legislator on essentials, following a hoped-for consensus on what appears to be 'essential'. To this end, an inventory is drawn up, a bit like Article 35 of the Civil Code, the list of powers that should provide insight into what the federal level may still take on.

⁴ Years ago, I launched an appeal to drastically reduce the number of standards in higher education after my *coordination* and *annotation* of the *higher education legislation*. There was hardly any enthusiasm: after all, it requires groundbreaking reflection.

This marks the end of the legal confusion about the principle of legality⁵. Are essential decisions that belong to the organising powers (school boards) by virtue of their organisational freedom or autonomy taken away from them - which immediately causes a considerable tension with the freedom of education? **[I may have misunderstood the previous sentence]** How this freedom is constrained can be deduced from recent doctoral research⁶.

Self-regulation

The intended *basic standard* is then supplemented by institutional standards and policy plans. The failure of the deregulation concept now leaves room for the new balance: core regulations from the government, clear and accessible on the one hand, and self-regulation on the other: the interpretation and refinement by educational boards. *These* colour in the national contours, according to their mission and destination, and after consultation with all concerned, resulting in '*consulted and supported freedom*'.

The government will then check whether the core objectives are adequately met by the

'*bearers of education*' on behalf of the institutions⁷.

A '*Decree on General Principles*' contains the basic rules of educational law, planning and financing. It cherishes the diversity rather than the uniformity of the educational provision, doing justice to the specific personality and identity of the child. This is then a kind of '*mother law*' that concludes the School Pact Law School period forever.

In the meantime, there is some *urgency* to outline the 'future triptych'.

A first case will best be ... a new agreement on the contours of the minimal attainment levels in connection with a vision on curriculum policy, quality assurance and the role of inspection and central testing - with a view to 2030-2040. A second theme may be the completely rewritten legal position of teaching staff⁸. In parallel, the outlines for the educational legislative framework can be prepared without delay.

For all that, we need innovative thinking at every level and by all stakeholders.

5 This was pointed out by Kurt WILLEMS and myself in our contribution to the *Liber Amicorum André Alen*.

6 Both Johan LIEVENS' and Evelien TIMBERMONT's dissertations contain several concrete examples.

7 If I may use mgr. DAELEMANS' favourite term.

8 TIMBERMONT, E., *De rechtspositie van het onderwijsspersoneel in de Vlaamse Gemeenschap*, Intersentia, Antwerp, 2021.

ARTICLES

Reframing the Right to Education in International Law? Addressing Privatisation, Ignored Extraterritoriality, Lack of Resources, Exclusion, and Unsustainability

Klaus D. Beiter*

*Education is not in a bad place; it is in crisis...
Let's admit that.*¹

Abstract

Changed circumstances since the adoption of the primary international human rights treaties and distinct new challenges require a 'reframing', a reconfiguration, of the right to education. Challenges which have led to a global crisis in education include privatisation (commercialisation, digitisation, etc.); in times of globalisation, the ignored extraterritoriality of states' international human rights obligations; a(n) (ostensible) lack of resources; inequality and exclusion; and unsustainable development. All of these 'phenomena' seem to have their ultimate basis in neoliberal ideology. This article proposes that, rather than creating new or amending existing international hard law, a 'softer law' type of document – a (revised) General Comment by the U.N. Committee on Economic,

Social and Cultural Rights or an international expert document – should consolidate and further develop current international law on the right to education. Such a 'rephrasing' must be seen as an act of rescuing the right to education as a global ethical standard in the field of education based on human dignity. The article concludes by making brief, but concrete suggestions for a first 'scholarly' or doctrinal phase in which proposals for a reformulation are developed.

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2. The International Regulation of the Right to Education
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1 Amina Mohammed, Deputy Secretary-General of the United Nations, Keynote Address, Global Campaign for Education, 3 December 2018, <https://campaignforeducation.org/en/2018/12/03/keynote-address-amina-mohammed-deputy-secretary-general-un>.

- 6.2. 'Human Rights Locked up Behind Domestic Bars': Ignored Extraterritoriality
- 6.3. Poverty and a(n) (Ostensible) Lack of Resources
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Keywords: right to education, reformulation, amendment, International Covenant on Economic, Social and Cultural Rights, privatisation, extraterritorial state obligations, maximum available resources, inclusion, sustainability, neoliberalism

1. Introduction

The global crisis in education may have much to do with complications at the level of implementing the right to education protected by international law. Yet, it will have to be appreciated that, to a significant extent, problems lie at a more fundamental level. The very configuration of the right to education in international law is outdated. The right to education has naively remained a product of the post-war order of the 1950s and 60s. However, the world has changed since. Pondering the effects of Covid-19 for democracy, Wolfgang Thierse, respected visionary of modern social democracy in Germany, underlines that unless humanity is able to resolve what he considers the most crucial problems of our time – globalisation,

digitisation, pluralisation, and lack of sustainability – democracy will not survive.²

Ever since international law laid down the right to education for the first time in the non-binding Article 26 of the Universal Declaration of Human Rights of 1948 and later, in 1966, in the legally binding Article 13 of the International Covenant on Economic, Social and Cultural Rights, this right has – one could argue – developed phenomenally. Many hard and soft law international instruments and interpretative guidelines ('secondary' soft law) have been adopted, at both the global and the regional level, attempting to elucidate the content of the right in different contexts, for example, for different vulnerable groups. National and international courts have rendered pronouncements seeking to outline the exact contours of the right. While all of this has yielded an advanced level of normative 'density' for the right to education, the wealth of scattered materials may, at times, not 'make things easier'. Earlier and later norms may differ. There may be 'excessive' nuances in normative meaning between the norms applicable in different regions. Simultaneously, however, key aspects of the right to education are not addressed, or only very indirectly, by existing documents. As it were, a fundamental problem becomes apparent and this is that the major Thierseian (and related) themes have not, to the extent necessary, led to a reconfiguration of the right to education as we find it laid down in current international law.

This begs the question: Is there a need to 'reframe' the central hard law provision on the right to education in international law – this is probably Article 13 of the International

² Wolfgang Thierse, 'Forum Frauenkirche: Demokratie in der Coronakrise: Gut bewährt oder außer Kraft gesetzt?', Wortwechsel, 18 September 2020, Deutschlandfunk Kultur, <https://www.ardaudiothek.de/episode/wortwechsel/forum-frauenkirche-demokratie-in-der-coronakrise-gut-bewaehrt-oder-ausser-kraft-gesetzt/deutschlandfunk-kultur/89842516>.

Covenant on Economic, Social and Cultural Rights – to make the right ‘fit’ for the future? While certain aspects do require separate hard law regulation (e.g., international taxation rules benefiting education and other social services), this article overall proposes a different path. It argues in favour of a ‘softer law’ type of document which consolidates the norms constituting international education law, as founded on the right to education, and develops them further. Any such document must be progressive, that is, ‘normatively audacious’, in nature. It must further adequately allow for pluralistic or particularist approaches to influence the design of norms. Finally, its success crucially depends on whether it is able to effectively respond to the major challenges of our time. The worldwide crisis in education in a large measure has to do with an inability to respond to what are perceived as the five major challenges here: *firstly*, neoliberal ideology and the privatisation of social services, including education, *secondly*, in times of globalisation, the absence of extraterritorial human rights paradigms which recognise obligations of states to respect, protect, and fulfil human rights, including the right to education, beyond their national borders, *thirdly*, poverty and a(n) (ostensible) lack of resources (due to ‘hands-off’ taxation policies, permitted global profit-shifting, and austerity politics), *fourthly*, pluralisation, non-acceptance of ‘otherness’, and resultant exclusion, and, *fifthly*, unsustainable lifestyles and societies. Covid-19 could have been added as a separate major challenge. Yet, its full effects on education remain to be seen. It will, however, also be referred to.

2. The International Regulation of the Right to Education

The endeavour to codify the right to education in international law started in 1948 with the adoption of the Universal Declaration of Human Rights by the United Nations (U.N.).³ Article 26(1) first of all provides that ‘[e]veryone has the right to education’. It goes on to stipulate certain requirements for education at the various levels of the education system. Article 26(2) then articulates aims of education, notably that in terms of which ‘[e]ducation shall be directed to the full development of the human personality’. Finally, Article 26(3) protects freedom in education, here specifying the ‘prior’ right of parents to choose their children’s education.

While the Universal Declaration, as such, is not legally binding, the basic formula encountered here has been replicated in many of the subsequent conventions that do create binding obligations under international law regarding the right to education. Arguably, the most important binding provision on the right to education in international law is Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Adopted by the U.N. in 1966, the Covenant

3 U.N. General Assembly, Universal Declaration of Human Rights, General Assembly Resolution 217 (III) A, adopted 10 December 1948, U.N. Doc. A/RES/217 (III) A, art. 26.

entered into force in 1976.⁴ Again there is first a restatement of the right to education in the first sentence of Article 13(1). Article 13(2) lays down requirements of availability and accessibility of education for the different levels of education. These are formulated more rigorously for the lower, and less rigorously for the higher levels. While primary education ‘shall be’ ‘compulsory and available free to all’, secondary education is to ‘be made’ ‘generally available’ and ‘accessible to all’. Higher education need *only* ‘be made’ ‘equally accessible to all, on the basis of [individual] capacity’. Secondary and higher education are to be made ‘pro-

gressively free’.⁵ Insofar as the ‘urgency of realisation’ is concerned, a literal interpretation of the relevant provisions would thus require primary education to be realised *immediately*; secondary and higher education *progressively* (over time). The aims of education are specified in Article 13(1), ‘the full development of the human personality’ being ‘perhaps the most fundamental’.⁶ The freedom aspect of the right to education is articulated in Article 13(3) and (4): The latter states that anybody may establish and direct private schools, the former that parents may send their children to private schools and, generally, are entitled ‘to ensure the religious and moral education of their children in conformity with their own convictions’.

The basic formula of the right to education equalling ‘*social dimension*’ (*the state setting up an education system*) plus ‘*freedom dimension*’ (*restraint by the state in education guaranteeing the liberties of individuals*), both dimensions understood in the light of ‘*aims of education*’, is found in the education provisions of other essential legal instruments as well,⁷ notably, Articles 4 and 5 of UNESCO’s Convention against Discrimination in Education (CDE) of 1960 (the Convention’s drafts actually having significantly influenced the formulation of Article 13 of the ICESCR), Articles 28 and 29 of the Convention on the Rights of the Child (CRC) of 1989, Article 13

4 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), art. 13 [hereinafter ICESCR]. For comprehensive analyses of Article 13 of the ICESCR, see Gebert, P. (1996), *Das Recht auf Bildung nach Art. 13 des UNO-Paktes über wirtschaftliche, soziale und kulturelle Rechte und seine Auswirkungen auf das schweizerische Bildungswesen*, Leo Fürer AG, St. Gallen; Beiter, K.D. (2006), *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*, Martinus Nijhoff, Leiden, Part B. For comprehensive analyses of the right to education in international law more generally, see Lonbay, J. (1988), *The Right to Education: An Analysis of International Law concerning the Right to Education and its Application in Belgium, France and Ireland*, unpublished doctoral thesis, European University Institute, Florence, Part Two; Coomans, F. (1992), *De internationale bescherming van het recht op onderwijs*, Stichting NJCM-Boekerij, Leiden; Hodgson, D. (1998), *The Human Right to Education*, Ashgate/Dartmouth, Aldershot; Beiter (see above) Part A; Monteiro, A.R. (2021), *Revolution of the Right to Education*, Brill/Sense, Leiden. For an analysis of the right to education in Article 28 of the Convention of the Rights of the Child, see Verheyde, M. (2006), ‘Article 28: The Right to Education’, in: Alen, A. and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, Leiden. For an analysis of the aims of education in Article 29(1) of the latter convention, see Lile, H.S. (2021), *The Convention on the Rights of the Child as a Legal Framework for School Curricula*, Routledge, Abingdon and New York, NY. For analyses of the right to education from a broader ‘normative’ perspective, see Spring, J.H. (2000), *The Universal Right to Education: Justification, Definition, and Guidelines*, Lawrence Erlbaum Associates, Mahwah, NJ; McCowan, T. (2013), *Education as a Human Right: Principles for a Universal Entitlement to Learning*, Bloomsbury, London. For an annotated bibliography of significant books and articles published on the right to education, see Lee, J. (2020), ‘The Human Right to Education: Definition, Research and Annotated Bibliography’, *Emory International Law Review*, 34, pp. 757-823.

5 ICESCR (n 4) art. 13(2)(a), (b), and (c) dealing with primary, secondary, and higher education, respectively. Primary education usually refers to the first six years of schooling, starting at age 5 to 7, secondary education to the subsequent six years of schooling. Higher education builds on secondary education. See UNESCO (2012), *International Standard Classification of Education: ISCED 2011*, paras. 122, 141, 146, 164, 200, <http://unesdoc.unesco.org/images/0021/002191/219109e.pdf>.

6 See U.N. Committee on Economic, Social and Cultural Rights [CESCR], General Comment No. 13, *The Right to Education* (Art. 13 of the ICESCR), U.N. Doc. E/C.12/1999/10 (8 December 1999), para. 4 [hereinafter General Comment No. 13] (commenting on the aims of education of Article 13(1) second and third sentence).

7 For overall analyses of the right to education in international legal instruments in accordance with this formula, see Coomans (n 4); Beiter (n 4).

of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988, and Article 11 of the African Charter on the Rights and Welfare of the Child of 1990.⁸ The Revised European Social Charter of 1996 covers aims of education and the social dimension, the freedom dimension being addressed by the 1952 Protocol (No. 1) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950.⁹ The Revised Arab Charter on Human Rights of 2004 covers all three components in a more rudimentary fashion.¹⁰ The (non-binding) ASEAN Human Rights Declaration of 2012 covers aims of education and the social dimension, but omits the freedom dimension.¹¹ The African Youth Charter of 2006 similarly covers only aims of education and the social dimension.¹² While there are many similarities between the formulations of the various instruments, there are also – more or less significant – differences. Hence, comparing the CRC with the ICESCR, one may note that the element of ‘free education’ is weaker in the former. Its introduction

in primary education is described in terms of ‘making’ education free, articulating a sense of progressiveness that is absent in the ICESCR. For higher education, the CRC, unlike the ICESCR, does not mention ‘the progressive introduction of free education’ at all.¹³ In another respect, however, the CRC is more ‘enlightened’. It does not accord parents a (rather draconian) right ‘to ensure the religious and moral education of their children in conformity with their own convictions’, but only a right ‘to provide direction’ to the child in the exercise of his or her religious or educational rights ‘in a manner consistent with the evolving capacities of the child’.¹⁴

While legal instruments may follow the stated pattern more or less clearly, a plethora of international documents yet address the right to education in their own specific way. Some of these are comprehensive human rights instruments, protecting all (or many) human rights of all persons, others address specific topics or the rights of certain vulnerable groups in society. As a comprehensive instrument, there is the ECHR, which, in its first protocol, merely negatively states that ‘[n]o person shall be denied the right to education’, additionally protecting the freedom of parents ‘to ensure ... education and teaching in conformity with their own religious and philosophical convictions’.¹⁵ The African Charter on Human and Peoples’ Rights of 1981 succinctly states that ‘[e]very individual shall have the right to education’, not elaborating on this any further.¹⁶ Legal instruments, binding and non-binding, dealing with specific topics or vulnerable groups that contain provisions on education rights have been adopted at U.N. and regional level. By

8 (UNESCO) Convention against Discrimination in Education, 14 December 1960, 429 U.N.T.S. 93 (entered into force 22 May 1962), arts. 4, 5 [hereinafter CDE]; Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990), arts. 28, 29 [hereinafter CRC]; Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [Protocol of San Salvador], 17 November 1988, OAS Treaty Series No. 69 (1988), 28 I.L.M. 156 (1989) (entered into force 6 November 1999), art. 13; Organisation of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 1 July 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force 29 November 1999), art. 11.

9 European Social Charter (Revised), 3 May 1996, ETS No. 163, 2151 U.N.T.S. 277 (entered into force 1 July 1999), art. 17; Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No. 9, 213 U.N.T.S. 262 (entered into force 18 May 1954), art. 2 [hereinafter P-1 ECHR].

10 (Revised) Arab Charter on Human Rights, 22 May 2004 (entered into force 15 March 2008), arts. 41, 30(3).

11 ASEAN Human Rights Declaration, 18 November 2012, principle 31.

12 African Union (AU), African Youth Charter, 2 July 2006 (entered into force 8 August 2009), art. 13.

13 Compare ICESCR (n 4) art. 13(2)(a), (c) with CRC (n 8) art. 28(1)(a), (c) respectively.

14 Compare ICESCR (n 4) art. 13(3) with CRC (n 8) arts. 5, 14(2).

15 P-1 ECHR (n 9) art. 2.

16 OAU, African Charter on Human and Peoples’ Rights [Banjul Charter], 27 June 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982) (entered into force 21 October 1986), art. 17(1).

way of example regarding U.N. instruments, provisions on education rights may thus be found in instruments providing protection against discrimination. Article 5(e)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979, and Article 5 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981 provide protection against racial, gender, and religiously-motivated discrimination, respectively, in the educational context.¹⁷ Provisions on education rights may also be found in instruments addressing the rights of refugee and stateless persons, internally displaced persons, and persons caught up in armed conflict, the rights of migrant workers, the rights of disabled persons, the rights of older persons, the rights of detained persons, the rights of (members of) minorities, the rights of (members of) indigenous peoples, and the rights of peasants and other people working in rural areas. A variety of legal instruments dealing with specific topics or vulnerable groups that contain provisions on education rights have been adopted at the regional level by the Council of Europe, the Organization of American States, and the African Union.

Finally, legal instruments addressing specific topics related to the right to education have been adopted under the auspices of certain U.N. specialised agencies. UNESCO – as the prime U.N. specialised agency with competence in the field of education – has

thus adopted instruments on topics such as equality of opportunity and treatment for all in education, technical and vocational education and training, adult education, human rights education, the status of teachers, or open educational resources. Apart from the CDE,¹⁸ UNESCO adopted, inter alia, the Convention on Technical and Vocational Education in 1989¹⁹ as well as soft law Recommendations on/Concerning the Status of Teachers in 1966 (together with the ILO), Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms in 1974, the Status of Higher-Education Teaching Personnel in 1997, Adult Learning and Education in 2015, Technical and Vocational Education and Training also in 2015, and Open Educational Resources in 2019. UNESCO's standard-setting instruments in the sphere of education must be seen to 'give content' to Article 13 of the ICESCR. By virtue of Articles 22 and 23 of the Covenant, which accord U.N. specialised agencies, such as UNESCO, the responsibility to conclude conventions and adopt recommendations in fields of the Covenant, Article 13, together with UNESCO's standard-setting instruments on education, may be regarded as 'an international education code'.²⁰ Also the ILO has adopted instruments on topics related to the right to education. Hence, the Convention (and Recommendation) concerning Minimum Age for Admission to Employment of 1973 and the Convention (and Recommendation) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999 pursue as one objective that of safeguarding access to education by fight-

17 International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 U.N.T.S. 195 (entered into force 4 January 1969), art. 5(e)(v); Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) 1249 U.N.T.S. 13 (entered into force 3 September 1981), art. 10; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA Resolution 36/55, 25 November 1981, art. 5, respectively.

18 CDE (n 8).

19 Convention on Technical and Vocational Education, 10 November 1989, 1649 U.N.T.S. 143 (entered into force 29 August 1991).

20 Similarly, see Gebert (n 4) pp. 66-67, 73 (also speaking of 'an international education code' in this context).

ing child labour.²¹ The Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989 protects inter alia the education rights of (members of) indigenous peoples.²²

Beyond all the above hard and soft law norms, there exist a multitude of interpretative guidelines ('secondary' soft law) that are to aid in shedding light on education rights as protected in the various standard-setting instruments. The U.N. human rights treaty monitoring bodies, for example, adopt General Comments. Well-known are General Comments Nos. 11 and 13 on Plans of Action for Primary Education (Article 14 of the ICESCR) and the Right to Education (Article 13 of the ICESCR), respectively, as adopted by the Committee on Economic, Social and Cultural Rights (CESCR).²³ The Committee on the Rights of the Child (ComRC) adopted its General Comment No. 1 on the topic of the Aims of Education (Article 29(1) of the CRC).²⁴ General Comments, Principles and Guidelines, and Recommendations construing education rights have also been adopted by regional human rights bodies. There are also those interpretative guidelines prepared by international legal experts. An example are the (Abidjan) Guiding Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private

Involvement in Education of 2019.²⁵ Beyond the structured guidelines, assistance in construing the right to education may be sought in the many pronouncements rendered by national and international courts and other tribunals around the world that have adjudicated aspects of the right to education in the course of this and the previous century. In his book on *The Revolution of the Right to Education*, Agostinho dos Reis Monteiro provides an inventory of more than 150 cases dealing with different facets of the right to education.²⁶

3 Nature of, and Obligations Arising under, the Right to Education

The above exposition shows that the formulation of provisions on the right to education in international documents reveals that the right certainly has two different aspects: a social and a freedom aspect.²⁷ The *social* aspect highlights the character of the right to education as an economic, social, and cultural right. As such, it encompasses positive duties of the state to establish and administer a comprehensive education system, providing infrastructure and resources. The requirements of the availability and accessibility of education, clearly borne out by the existing formulations of the right, have their locus in the social aspect. While 'availability' signifies the provision of schools, teachers, educational programmes, learning materials, libraries, information and communications technology, and so on, 'accessibil-

21 Convention concerning Minimum Age for Admission to Employment, 26 June 1973, ILO Convention No. 138, 1015 U.N.T.S. 297 (entered into force 19 June 1976); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17 June 1999, ILO Convention No. 182, 2133 U.N.T.S. 161 (entered into force 19 November 2000).

22 Convention concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, ILO Convention No. 169, 328 U.N.T.S. 247 (entered into force 5 September 1991), Part VI.

23 CESCR, General Comment No. 11, Plans of Action for Primary Education (Art. 14 of the ICESCR), U.N. Doc. E/C.12/1999/4 (10 May 1999); General Comment No. 13 (n 6).

24 U.N. Committee on the Rights of the Child (ComRC), General Comment No. 1, The Aims of Education (Art. 29(1) of the CRC), U.N. Doc. CRC/GC/2001/1 (17 April 2001).

25 Guiding Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education, 13 February 2019, Abidjan, Côte d'Ivoire [hereinafter Abidjan Principles]. The Abidjan Principles have been published in (2019) *International Human Rights Law Review*, 8, pp. 117-48.

26 Monteiro (n 4) app. D.

27 See Coomans (n 4) pp. 45-46 or Beiter (n 4) pp. 38-39 (defining both aspects).

ity' denotes the elimination of obstacles to physical access, of de iure and de facto discrimination, and of fees and other costs in education.²⁸ These two requirements refer to the right to education in a more literal sense of the term. Nevertheless, as the first U.N. Special Rapporteur on the Right to Education, Katarina Tomaševski, appointed to the post in 1998, had elucidated, education as a human right has developed to the point where it also covers rights *in* education. The notion that education at all levels must not only be available and accessible, but also acceptable and adaptable – that is, also have an adequate 'inner core' – reflects this conviction.²⁹ 'Acceptability' means that the education agenda, all activities in education, the content, and teaching methods must be relevant, culturally appropriate, of good quality, and generally human rights-conform.³⁰ 'Adaptability' means that education must (be able to) adjust so as to respond to current and changing needs of learners and communities.³¹ The requirements of the acceptability and adaptability of education, not expressly reflected in the existing formulations of the right to education, must be read into these, notably by relying on the clearly stated aims of education. Like 'availability' and 'accessibility', 'acceptability' and 'adaptability' have a strong rooting in the social aspect of the right to education, emphasising the duty of states to actively ensure the realisation of an education system in which education is both acceptable and adaptable. However, both are rooted in the freedom aspect as well – perhaps especially 'acceptability'. 'Acceptability' refers to many classical liberties (e.g.,

freedom of expression or respect for personality rights) and educational or professional freedoms of students and teachers in education, that need to be respected for education to be 'acceptable'. The *freedom* aspect of the right to education highlights the character of the right to education as a civil and political right. It alludes to the freedoms that should prevail in education, such as respect for parental convictions and absence of indoctrination in public schools, the right to establish and direct private schools which may follow alternative educational approaches, and student and teacher academic freedom in institutions of higher education.³²

As of late, approaches to the right to education have sometimes lost sight of the fact that the right to education is not a typical economic, social and cultural right, but also a civil and political right. At times, the freedom aspect is accorded step-motherly attention. Let me explain this by referring to the right to establish private schools. This right is of vital importance to protecting freedom and diversity and minorities of all kinds in education. In the same way that there is in a constitutional state a system of checks and balances whereby tiers of government oversee one another, private education always also is a control of public education, and vice versa. Civil and political rights in education are an important safeguard against uniformity and tendencies of monopoly, potentially even indoctrination by the state – all of these detrimental to quality, freedom, and dignity

28 General Comment No. 13 (n 6) para. 6(a), (b), respectively.

29 For an exposition of the 'rights to and in education' model and the '4 A' scheme, see Tomaševski, K. (2001), Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable, Novum Grafiska, Gothenborg (see the useful tables on pp. 12, 14).

30 General Comment No. 13 (n 6) para. 6(c).

31 *ibid* para. 6(d).

32 It may thus be noted that the right of parents 'to ensure the religious and moral education of their children in conformity with their own convictions' is protected not only in Article 13(3) of the ICESCR, but also, in identical terms, in the ICESCR's sister Covenant on civil and political rights, in Article 18(4) of the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976), art. 18(4).

in education.³³ Lest there be any misunderstanding, this is not an argument in favour of more private education. It is an argument in favour of *the crucial potential role of private education as a checks and balances element in respect of public education*. This role of private education is acknowledged as a commonplace among education law scholars, whatever their political leaning. One may detest the religious character, ethos, or elitism of some private schools, or especially the commercial nature or market-orientation of for-profit providers (that should only be allowed to play a noteworthy role at post-secondary levels), yet, a certain presence of these institutions fulfils an important systemic role. This does not lie in the fact that the institutions, in a generalised fashion, constitute a valid substitute for lacking public schools (in this regard, private schools can only fulfil a supplementary function), but in ‘the mere fact that they may be there’ (and are actually chosen by some). In this sense, therefore, private education may and must always be a feature of a balanced education system. This does not mean that the state should not rigorously ensure the maintenance of quality and related technical standards and full respect for human rights in private schools. It also does not mean that the state is not principally obliged to make an offer of free (or, as appropriate, progressively free), quality, public education to everybody (or to those with the requisite intellectual capacity in the case of higher education) (and must try to be better than private education). Nonetheless, private schools must have sufficient space to offer what may be seen as an alternative that deserves that name. It may be noted that international legal instruments, such as the ICESCR or the CRC, refer to *minimum* stand-

33 See Beiter (n 4) pp. 146-47, 259-60, 311, 445, 450-53, 559-60, 561-67 (state to protect and fund private education benefiting specific, often vulnerable groups), 39-41, 537 (private education contributing to freedom in education).

ards that must be met by private schools, not *maximum* standards.³⁴ The precise purpose of a private school is that it may offer an education perhaps in another language, perhaps incorporating substantially different content, perhaps following a very alternative pedagogical approach, perhaps based on very distinctive values, all in contrast to what public education may offer. Moreover, to the extent that *non-commercial* private schools are concerned, the law should recognise a clear duty of the state to fund these to some degree, namely in accordance with their systemic relevance, as described here.³⁵

This author continues to endorse the expert (Abidjan) Guiding Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education – being one of the 55 experts who adopted the Principles in 2019 – because they address a serious problem, specifically in the context of developing countries, namely the growth of commercial providers in education undermining public education.³⁶ In the light of growing trends of privatisation in education, the Abidjan Principles, in a nutshell, are aimed at protecting the provision of free, quality, public pre-primary, primary, and secondary education that is adequately resourced by the state, and, simultaneously, at ensuring that states strictly regulate private actors in education by making them comply with mini-

34 Emphasising this point, see also Gebert (n 4) p. 608. Similarly, see Zinigrad, R. (2021), ‘Parental Rights in Education under International Law: Nature and Scope’, in: Adamson, F. and others (eds), *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, Edward Elgar, Cheltenham and Northampton, MA, pp. 79-103, at p. 99 (‘the regulation of private education must be lower than ... for the system of public education’).

35 Arguing in favour of such a duty, see also Beiter (n 4) pp. 563-67. Similarly, see Zinigrad (n 34) pp. 84-88 (‘a general state obligation to fund private education ... subject to a list of rigorous regulations’).

36 Abidjan Principles (n 25). The preamble thus recognises that ‘in particular commercial actors, which treat education as a market good, threaten the fulfilment of the right to education’.

imum education standards, which states are obliged to lay down, and observe accepted human rights in education. Yet, the Abidjan Principles are not a flawless document. Legitimate and necessary attempts at protecting *public* education will also, with some conviction, have to support *private* education as a permanent structural feature (checks and balances element) of any education system. Neither can be thought without the other. A nuanced approach must further look at the types of institutions one is talking about (e.g., whether they are commercial or non-commercial entities) and which important functions they fulfil (or do not fulfil) (e.g., whether they advance freedom and pluralism in education, protect minorities, or merely pursue profit-making, etc.). The Abidjan Principles do not always bear out such a nuanced approach. There is no space here to elaborate on this, but it may be noted that the Abidjan Principles, in their substantive provisions, devise a more generalised formula for encountering private actors in education, setting out equally stringent requirements for commercial and non-commercial private actors. This may not do justice to especially smaller non-commercial providers, whose contribution is ‘more valuable’ from a right to education standpoint than that of notably the large chains of commercial operators, at the other end of the scale, who put personal profits before benefits to students.³⁷ However, the Abidjan Principles’ rigorous approach can, for now, be explained in the light of the urgency of responding to the sell-out of education systems in developing countries, but it should be rectified at a future point.

37 Also the Abidjan Principles’ stipulation that public funding to a private school can only ever be ‘a time-bound measure’ (ibid Guiding Principle 65.a) is problematic as it reveals an understanding of private education as principally something that should eventually become redundant – an understanding that only the state should eventually be able to serve all within a public education system.

It is clear, therefore, that the right to education is a ‘hybrid’ right.³⁸ Yet, while evidencing characteristics of civil and political, and economic, social and cultural rights, it is also – and this is not immediately apparent from typical formulations of the right – a group right. It is a special feature of the right to education that it embodies elements of all three generations of human rights at the same time.³⁹ In his recent book on *Development and the Right to Education in Africa*, Azubike Onuora-Oguno underlines the ‘inextricable link’ between the right to education and the right to development.⁴⁰ Article 1(1) of the U.N.’s Declaration on the Right to Development of 1986 defines the right to development as the ‘human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised’.⁴¹ The right to development is the right to ‘a process of development’ centred around the concept of equity and justice progressively leading to improved levels of realisation of human rights – in other words, it covers both achieving the objectives of development and the way they are achieved.⁴² As a group right, the right to development grants claims to ‘nations’ not only vis-à-vis their own state, but also vis-à-vis other states, encompassing claims to both separate and joint action by such states, amongst others within international organi-

38 Beiter (n 4) pp. 37-43.

39 Similarly, see Nowak, M. (1995), ‘The Right to Education’, in: Eide A., Krause C. and Rosas A. (eds), *Economic, Social and Cultural Rights: A Textbook*, 2nd rev edn, Martinus Nijhoff, Dordrecht, pp. 245-71, at pp. 254-55 (‘certain links with the so-called solidarity rights of the “third generation of human rights”’).

40 Onuora-Oguno, A.C. (2019), *Development and the Right to Education in Africa*, Palgrave Macmillan, London, p. 45.

41 Declaration on the Right to Development, UNGA Resolution 41/128, 4 December 1986, art. 1(1).

42 Sengupta, A. (2002), ‘On the Theory and Practice of the Right to Development’, *Human Rights Quarterly*, 24, pp. 837-89, at pp. 848-52.

sations.⁴³ Consequently, attempting an own definition, the right to education, understood ‘as a right to development’, while built on individual rights, is

the collective right of a people to claim ‘ownership’ of the state’s education system, to ensure it reflects local content and responds to local needs (rather than the system being superimposed by an autocratic domestic regime or by external actors), so as to assure it can become an engine for development that benefits that people (rather than, for example, foreign economies or cultures), thereby creating a foundation for the realisation of all recognised human rights in a country.

In the ICESCR, the normative basis for education as a right to development lies in Article 13 read with Article 1 on the right of ‘all peoples’ (as collectives) to self-determination.⁴⁴

Virginia Dandan, as Independent (U.N.) Expert on Human Rights and International Solidarity, prepared a draft declaration on the right to international solidarity, for ultimate adoption by the U.N. General Assembly.⁴⁵ She considers this right to belong to individuals (on this, see the following paragraph), and to *peoples*.⁴⁶ Dandan identifies as one form of international solidarity that of ‘international co-operation’. This would require concrete assistance by those states in a position to provide such assistance to any state lacking the capacity and resources necessary to realise human rights, notably

core entitlements.⁴⁷ This could be described as an obligation to *provide*. Hence, a state that is unable, for instance, to offer primary education to its population would be entitled to claim such assistance. At a more general level, not really associated with the spending of money (and hence also usually less contested), international solidarity requires states to work together in the endeavour of creating an international enabling environment conducive to the universal fulfilment of human rights. They are to do so by developing protective international policies and legal standards, encouraging international fora to follow interpretative practices that are supportive of human rights, undertaking human rights impact assessments of existing and prospective international policies, rules, conduct, and projects, reforming international organisations, and so on.⁴⁸ Dandan terms this ‘preventive solidarity’ – ‘collective actions to safeguard and ensure the fulfilment of all human rights’.⁴⁹ This could be described as an obligation to *facilitate* – here, to obey and advance the right to education through adequate international trade, intellectual property, investment, taxation, finance, development co-operation, and education policy frameworks. The right to international solidarity in the above sense is a group right.

43 On the various sets of relationships covered by the right to development, see De Feyter, K. (2013), *Towards a Framework Convention on the Right to Development*, Friedrich-Ebert-Stiftung, Geneva, pp. 4-5.

44 ICESCR (n 4) arts. 1, 13. The Declaration on the Right to Development points out that the right to development ‘implies the full realization of the right of peoples to self-determination’: Declaration on the Right to Development (n 41) art. 1(2).

45 Dandan, V., Report of the Independent Expert on Human Rights and International Solidarity, Annex, Draft Declaration on the Right to International Solidarity, U.N. Doc. A/HRC/35/35 (25 April 2017), pp. 15-20.

46 Draft Declaration (n 45) art. 4.

47 Draft Declaration (n 45) art. 2(c). See also Dandan, V., Report of the Independent Expert on Human Rights and International Solidarity: Human Rights and International Solidarity, U.N. Doc. A/70/316 (12 August 2015), paras. 34-53 (explaining the concept of ‘international co-operation’). On the concept of ‘core entitlements’, see n 76 below.

48 The description of the obligation here in terms of ‘the creation of an international enabling environment’ and of the types of measures required, is, by way of analogy, broadly based on the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 29 [hereinafter Maastricht Principles]. For a reproduction of, and commentary to, the Maastricht Principles, see De Schutter, O. and others (2012), ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, *Human Rights Quarterly*, 34, pp. 1084-1169.

49 Draft Declaration (n 45) art. 2(a). See also Dandan (n 47) paras. 23-33 (explaining the concept of ‘preventive solidarity’).

Article 2(1) of the ICESCR, the Covenant's central implementation provision, states that Covenant rights – and thus also the right to education in Article 13 – are to be realised 'through international assistance and co-operation'. Reading Covenant rights in the light of Article 2(1) and Article 1 on the collective right to self-determination, this may be construed to provide a foundation for the related group right to international solidarity in the Covenant – also in respect of the right to education.⁵⁰

However, a reading of Article 13 with Article 2(1), on its own, covers the above notion of international solidarity too, as giving rise to obligations of states parties to *facilitate* the realisation of the right to education in states around the world and, where in a position to do so, to *provide* concrete assistance to other states parties in need to help secure fulfilment of the right to education in those states parties – but the rights implicated then are the rights of *individuals*. The stated obligations are extraterritorial state obligations (ETOs) under Article 13 read with Article 2(1), requiring states parties to further the right to education as the right of individuals beyond their own territory.⁵¹ The rights implicated may thus be enforced through justiciable claims accruing to individuals located in other states parties whose rights have been violated there. Apart from ETOs to facilitate and to provide (jointly obligations to *fulfil*), there also exist ETOs to *respect* and to *protect*. ETOs to respect (negatively) oblige states parties not to engage in any conduct which infringes the right to education of individuals in other states parties. ETOs to protect (positively) oblige states parties to protect individuals in other states parties against infringements of their right to educa-

tion committed by private actors 'linked to' the former states parties. While ETOs were not clearly envisioned at the time of drafting the early international human rights instruments, the expert Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 2011 now provide clearer contours to that concept in international human rights law.⁵²

Finally, the right to education is an empowerment right like no other human right. As this author has explained elsewhere, education has enormous liberating potential, enabling the individual to think critically. Education stands for civil and political empowerment. Freedom of information, expression, assembly, and association are facilitated by education. A person with education will be able to exercise the right to vote and stand for political office with much more confidence, and be better prepared to challenge orthodox political views. Education is the key to socio-economic development, facilitating a person's participation in economic life and moving up the social ladder. Education also enhances opportunities to take part in cultural life.⁵³ As the Committee on Economic, Social and Cultural Rights has formulated it, '[e]ducation is both a human right in itself and an indispensable means of realising other human rights'.⁵⁴ In view of the fundamental nature of the right to education, its position 'somewhere further down' in human rights documents should be questioned. It should feature, it is submitted, *before* all other human rights listed. Additionally, akin to human dignity, it should be considered a source of human rights in the preamble of documents.

50 ICESCR (n 4) arts. 1, 2(1), 13.

51 In support of extraterritoriality, it should be noted that the ICESCR does not contain a jurisdictional clause limiting jurisdiction to a state party's territory.

52 ETOs to respect, protect, and fulfil are defined in Principles 19-22, 23-27, and 28-35, respectively. ETOs to facilitate are notably referred to in Principle 29, ETOs to provide in Principle 33. See Maastricht Principles (n 48) Principles 19-35.

53 Beiter (n 4) pp. 28-30.

54 General Comment No. 13 (n 6) para. 1.

4 Reframing the Right to Education in International Law?

Based on the above one could argue that the normative development of the right to education has attained quite an advanced level. A large variety of international hard and soft law instruments, interpretative documents, and judicial and quasi-judicial pronouncements set out detailed rules on which entitlements are covered by the right, and which concomitant duties arise for states. As has been argued by Monteiro, the law of education, normatively built on the right to education, now constitutes a separate field of international law – *international education law*.⁵⁵ Yet, the fact remains that education rights are scattered over many sources. In their application, the education rights laid down in legal instruments focusing on specific vulnerable groups may be limited to a particular geographical region (as is the case with regard to the education rights in certain regional legal instruments that focus on ethnic minorities, disabled, older, or internally displaced persons),⁵⁶ in which case they do not unfold protective effect for those in other regions. Earlier and later norms on the same issue, or the corresponding norms as applicable in different regions, may further exhibit ‘excessive’ nuances in normative meaning.⁵⁷ There are regional norms, for example, in the Arab region, that conflict

with global norms.⁵⁸ Certain norms are more-over legally binding, others ‘just’ persuasive as soft law. This is not per se a problem, but for as long as international education norms remain highly unconsolidated, this could lead some to accord a reduced significance to soft law norms. The actual problem is thus rather the lack of consolidation.

The overview under the previous heading has also shown that crucial normative dimensions of the right to education may not be easily discernible from the black letters of the law and may further remain undetailed or vague even in interpretative guidelines on such law. Accordingly, the ‘inner core’ dimensions of the right to education (‘acceptability’ and ‘adaptability’) are arrived at essentially deductively. The same is true for the right to development-dimensions of the right to education. Similarly, there is no express statement in any human rights treaty to the effect that states parties bear obligations to respect, protect, and fulfil the right to education extraterritorially. Even if one accepts these ideas – as one should, of course – what then are their *exact* normative implications, left open also by available interpretative guidelines?

Regarding the inherent features of education as a human right, the CESCR’s General Comment No. 13 defines ‘the 4 A’s’, including ‘acceptability’ and ‘adaptability’. Yet, more than 20 years after the General Comment’s adoption, these definitions appear broad and in need of further refinement. Moreover, are there perhaps even additional ‘inner core’ dimensions not covered by the CESCR’s General Comment No. 13? Jan De Groof and Gracienne Lauwers have suggested that the realisation of the right to education in many ways relates to it being made a lived reality at the local level, this requiring *education law* to be

55 Monteiro (n 4) pp. 1-13.

56 Conventions protecting the rights of national minorities, including their education rights, exist in Europe, but not in America or Africa. Conventions protecting the rights of disabled or older persons, including their education rights, exist in America and Africa, but not in Europe. A convention protecting the rights of internally displaced persons, including their education rights, exists in Africa, but not in Europe or America.

57 The ASEAN Human Rights Declaration (n 11), for instance, does not at least implicate the right to establish and direct private schools.

58 Article 12 of the Covenant on the Rights of the Child in Islam of 2005, for instance, subjects education rights to the Shari’a in various respects. See art. 12(1), (2)(iv), (4).

adequately designed to facilitate this. They argue in favour of further dimensions:

The outcome could be a reviewed General Comment 13 [twenty] years after its adoption. The traditional 4-A scheme (availability, accessibility, adaptability, acceptability), as laid down in General Comment 13 on Article 13 of the Covenant on Economic, Social and Cultural Rights could be completed with a formal set of 4 A's (adequacy, accountability, awareness, advocacy) reflecting the role of the law and the legal framework as factors contributing to the effective implementation of educational rights at community level.⁵⁹

Yet, is 'adequacy' different from 'acceptability'? Is 'accountability' not too much of a neoliberal hammer? And, what would be the exact difference between 'awareness' and 'advocacy'? For sure, however, enhanced localisation is of cardinal importance. Another 'inner core' dimension implicitly, but not clearly covered at the moment is that of 'inclusiveness'.⁶⁰ Its addition would, of course, disrupt the 'letter A'-based elaboration of features.

Regarding right to development-dimensions of the right to education, what exactly would these entail? In what ways must a government allow 'the people' meaningful participation in the design of the national education system? To what extent must states be able to remain free to follow autonomous education policies that will yield 'nationally sensitive' development without undue external interference? Zehlia Babaci-Wilhite notes, for example, that

[r]eforms in Africa are being undertaken on the basis of an unrealistic agenda that is incorporating Western curriculum and using Western languages. ... [E]mulation of Western development and Western educational systems are regarded as

the way forward for Africa. Scientifically speaking, this does not form a basis for capability-based educational development, nor does it bring social justice and quality in education.⁶¹

Decoloniality in education could thus become a claim against donor states, the Organisation for Economic Co-operation and Development (OECD), the International Monetary Fund (IMF), the World Bank, the World Trade Organization (WTO), and so on. Altogether, is it then not necessary to spell out the detailed implications of the right to education 'as a right to development'? The same may be asked in respect of international solidarity (international co-operation, preventive solidarity, reactive solidarity) as a group claim. Again, what are the detailed implications of that right – a right with clear links to the right to development – for education?

Regarding extraterritorial state obligations as referred to earlier, which obligations exactly does a state bear under the right to education? In what way, for example, does the right to education create ETOs for states when they devise education policies within the OECD? The OECD, because of its 'one-size-fits-all' education policies, has also been termed 'the World Ministry of Education'.⁶² Its PISA (Programme for International Student Assessment) tests lack local context and pursue worldwide uniformity in education. Their underlying philosophy is that of market fundamentalism.⁶³ Similarly, in what way does the right to education create ETOs for states in their capacity as members of

59 De Groof, J., Report: Fulfilling the Right to Education (September 2009), UNESCO, Paris, p. 25.

60 While 'inclusiveness' may perhaps be subsumed under all of the '4 A's', notably the element of 'adaptability', it has become quite a distinct concept in the last few years. See also Section 6.4. below.

61 Babaci-Wilhite, Z. (2015), *Local Languages as a Human Right in Education: Comparative Cases from Africa*, Sense Publishers, Rotterdam, p. 107.

62 Spring, J. (2015), *Globalization of Education: An Introduction*, 2nd edn., Routledge, Abingdon and New York, NY, ch. 3.

63 Hence, see the open letter addressed to the OECD's director of PISA, Andreas Schleicher, by a group of more than 80 concerned academics in 2014, 'OECD and Pisa Tests Are Damaging Education Worldwide: Academics', *The Guardian* (6 May 2014), <https://www.theguardian.com/education/2014/may/06/oecd-pisa-tests-damaging-education-academics>.

the World Bank? The Bank likes to call itself 'one of the largest external education financiers for developing countries'.⁶⁴ The Bank's education funding, however, openly violates the right to education by propagating fees in education, furthering commercial private education, and failing to adequately support public education.⁶⁵

Many more concrete facets of the right to education remain underdeveloped. Just three may briefly be mentioned here by way of example. *Firstly*, international humanitarian law, in the form of the Geneva conventions and protocols thereto, knows a few isolated provisions addressing education rights. Despite references in the protocols requiring children to be provided with the care and aid they need, the overall context shows that international humanitarian law does not really identify children as a vulnerable group beyond 'civilians' as such, in need of special protection. There is no holistic perspective on the protection of children's rights, including in the sphere of education, in times of both international and non-international armed conflict. The perspective is further from parental rights. The child's best interests remain largely unconsidered.⁶⁶ Also the law on refugees and internally displaced persons needs to place stronger emphasis

on the availability of education post-conflict as a 'necessity of life' that must be fully and immediately provided.

Secondly, it is well-known today that the length of instruction *in* (not only *of*) the mother tongue is the most important factor for the educational and life success of students. Yet, linguistic human rights in education have not been adequately concretised at a normative level (in the form of a convention or U.N. Declaration). Hard and soft law norms usually give states an option to choose whether to provide opportunities to learn the mother tongue *or* to have instruction in the mother tongue.⁶⁷ They further do not specify the precise language entitlements at the various levels of education in any detail. As Tove Skutnabb-Kangas explains, however, multilingualism, with mastery of the mother tongue at its heart, must form the basis of any sound education policy⁶⁸ (also in monolingual countries). This must be so from pre-primary up to higher education, and apply to permanent, but also more temporary or recent minorities (e.g., asylum-seekers, recognised refugees, or immigrant minority communities).

Thirdly, the right to *higher* education has largely fallen into oblivion. It is only recently that a first monograph dealing with *The Human Rights-Based Approach to Higher Education* has been published.⁶⁹ While universities have been massified for largely economic reasons, there is no endeavour on the part of states to make higher education progressively free (as required by Article 13(2)(c) of the ICESCR).⁷⁰ While students in higher education should, in accordance

64 This or similar phrases recur on the Bank's website.

65 Illuminating in this regard, see Robertson, S.L. (2012), 'The Strange Non-Death of Neoliberal Privatization in the World Bank's Education Strategy 2020', in: Klees, S.J., Samoff, J. and Stromquist, N.P. (eds), *The World Bank and Education: Critiques and Alternatives*, Sense Publishers, Rotterdam, pp. 188-206. Even if public critique sometimes leads to adjustments in World Bank policy, neoliberal features tend to subsequently reappear in a different guise.

66 Generally, in the sense described here, see Hamilton, C. and El-Haj, T.A. (1997), 'Armed Conflict: The Protection of Children under International Law', *International Journal of Children's Rights*, 5, pp. 1-46. Certain protection is available under the system of the CRC and its protocols. See further the efforts at doctrinally identifying or developing protective principles in the educational context: Hausler, K., Urban, N., McCorquodale, R. and Smith, S. (2020), *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook*, 2nd edn., British Institute of International and Comparative Law, London.

67 See, e.g., the U.N.'s Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Resolution 47/135, 18 December 1992, art. 4(3).

68 Skutnabb-Kangas, T. (2000), *Linguistic Genocide in Education: Or Worldwide Diversity and Human Rights?*, Lawrence Erlbaum Associates, Mahwah, NJ, pp. 567-649.

69 Kotzmann, J. (2018), *The Human Rights-Based Approach to Higher Education: Why Human Rights Norms Should Guide Higher Education Law and Policy*, OUP, Oxford.

70 ICESCR (n 4) art. 13(2)(c).

with the accepted aims of education, enjoy an education that fully develops their human personality and fully enhances their capacity as citizens,⁷¹ they have instead been made consumers of an education product. Higher education has become a service freely traded under the WTO's General Agreement on Trade in Services (GATS). Furthermore, individual academic freedom of university teachers, academic self-governance, collegiality, institutional autonomy, and tenure have been subjected to rigorous processes of erosion, in conflict with UNESCO's Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997.⁷² Under neoliberal pressures, higher education has been demoted from public to private good. As Katarina Tomaševski had noted, education, especially higher education, is being 'moved from international human rights law to international trade law.'⁷³ Overall, a comprehensive normative reaffirmation of the public interest and human rights in higher education is urgently required.

However, what all of the above crucially reveals is a problem of a more fundamental nature. Major themes as reflective of today's foremost challenges to democracy, human rights, education, or human survival have not, to the extent necessary, led to a reconfiguration of the right to education as laid down in current international law. The reference here is to topics such as the privatisation of public goods; globalisation, but

ignorance of the need for the extraterritoriality of states' international human rights obligations; pluralisation, non-acceptance of 'otherness', and exclusion; ideologically motivated reluctance to secure adequate resources for social services; or development that is not sustainable. This will be reverted to in Sections 5 and 6 below.⁷⁴

There are many doctrinal aspects of the right to education that international documents may (or may not) bear out, but that at any rate remain vague in their full normative implications. The right to education possesses a core (and also a wider) content of normative standards to be assured. However, ever since Fons Coomans in the 1990s and early 2000s had explained that the core content of the right to education covers (negative) non-discriminatory access to education, the availability of compulsory and free primary education for all, respect for free choice in education notably as regards religious and philosophical convictions, the guarantee of quality in education, the taking of special measures for persons with an educational back-log, and the right to be educated in the language of one's own choice (in private schools),⁷⁵ the core content has not really been explored, or asserted, further. This would be of significance as non-guarantee of a core element – in other words, non-compliance with a minimum core obligation⁷⁶ – summarily constitutes a prima facie violation of the right to education that would have to be justified in terms of strict reasonableness criteria (e.g., under Article 2(1) or 4 of the ICESCR). A reliance on a

71 See, e.g., CRC (n 8) art. 29(1)(a), (d) (development of the personality 'to the fullest potential', preparation for 'responsible life in a free society', respectively).

72 Attesting to this for European countries, see Beiter, K.D., Karran, T. and Appiagyei-Atua, K. (2016), "Measuring" the Erosion of Academic Freedom as an International Human Right: A Report on the Legal Protection of Academic Freedom in Europe', *Vanderbilt Journal of Transnational Law*, 49, pp. 597-691. In part VII of the article, the authors refer to a wealth of sources attesting to the commercialisation of higher education globally and its damaging effect on higher education as a human right.

73 Tomaševski, K. (2001), *Removing Obstacles in the Way of the Right to Education*, Novum Grafiska, Gothenborg, p. 22.

74 See Sections 5 and 6 below.

75 Coomans, F. (2004), 'Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches', *Persona y Derecho*, 50, pp. 61-100, at pp. 72-92.

76 According to the CESCR, each right of the ICESCR entails also minimum core obligations to satisfy minimum essential levels of that right: CESCR, General Comment No. 3, *The Nature of States Parties' Obligations* (Art. 2(1) of the ICESCR), U.N. Doc. E/1991/23 (14 December 1990), para. 10.

lack of resources would be difficult here. The CESCR, in its General Comment No. 13, provides a similar, but not identical list. Instead of quality, it refers to the aims of education. It includes 'a national educational strategy ... for secondary, higher and fundamental education', but not mother tongue education.⁷⁷ These lists may have to be updated and, in any event, require concretisation.

At a further level, Article 4 of the ICESCR permits limitations of Covenant rights, including the right to education in Article 13, provided these are 'compatible with the nature of these rights'.⁷⁸ What is 'the nature', or the essence, of the right to education? This seems a more restricted concept than the core content as the former must always remain intact. For example, fundamental aspects of non-discriminatory access could probably be held to form part of the right's essence. Also the right to education's 'essence' is a topic in need of further elucidation, to ensure 'limitations are properly limited'.

Another doctrinal aspect that should benefit from normative clarification is that of 'deliberately retrogressive measures' in respect of the right to education, or 'the calculated obstruction of, or halt to, the progressive realisation' thereof. Also these will count in a summary fashion as forms of prima facie violations, to be justified in terms of strict reasonableness criteria.⁷⁹

However, looking at the language of Article 2(1) of the ICESCR, when – beyond the core content – will there be non-compliance with the right to education by a state party not having achieved 'sufficient progress' in realising the right to education, or by not having

'taken steps', or by not having used 'the maximum of its available resources'? Deviating from the rather clear-cut two-pronged process of enquiry applied in the above cases of violations, states parties whose conduct is queried here will, in terms of a more discretionary approach, have to demonstrate the 'reasonableness' of their measures, and thus non-violation of the right to education. What would be relevant indicators to monitor compliance with the stated elements in relation to the right to education? (Indicators will, however, also be needed to assess compliance with core aspects of the right to education.)

Yet another topic to be explored further is that of discerning which elements of the right to education should be considered 'justiciable', that is, amenable to adjudication and legitimately decided on by a court or quasi-judicial tribunal.⁸⁰

In the light of all of the above, is there not a need to 'reframe' the right to education in international law? In what way should any such 'reframing' occur? Should there be a revision of the central hard law provision on the right to education in international law, Article 13 of the ICESCR? Article 29 of the Covenant does provide for an amendment process. Any amendment adopted by a majority of states parties present and voting at a specially convened amendment

77 General Comment No. 13 (n 6) para. 57.

78 ICESCR (n 4) art. 4.

79 The expert Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997 recognise these as violations of economic, social, and cultural rights; see para. 14(e), (f). The Guidelines are published as (1998) 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', *Human Rights Quarterly*, 20, pp. 691-704.

80 See, e.g., Coomans, F. (2009), 'Justiciability of the Right to Education', *Erasmus Law Review*, 2, pp. 427-43; Formisano Prada, M. (2011), *Empowering the Poor Through Human Rights Litigation*, UNESCO, Paris, pp. 47-56 (subchapter on 'The Right to Education'); (2013), *INTERIGHTS Bulletin*, Litigating the Right to Education in Africa, 17 (whole issue devoted to the topic); Giraudy, C. (2014), *Summaries of Jurisprudence on the Right to Education* (Center for Justice and International Law, Washington, D.C.); De Paz González, I. (2018), *The Social Rights Jurisprudence in the Inter-American Court of Human Rights: Shadow and Light in International Human Rights*, Edward Elgar, Cheltenham and Northampton, MA, pp. 123-45 (chapter on 'Jurisprudence on the right to health and education'); (2021), *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights: Right to Education* (Council of Europe/European Court of Human Rights, Strasbourg).

conference, subsequently approved by the U.N. General Assembly, and then ratified by a two-thirds majority of all states parties to the Covenant can bring about a binding change in the text.⁸¹ It is, however, unrealistic, in fact, dangerous, to attempt any revision of Article 13. It will not realistically be possible to untie Article 13 without untying all the other Covenant provisions as well. It does not make sense to modernise a single provision without doing the same with regard to all other provisions. Then there is the question whether any agreement that enhances the status and protection of the right to education would be likely to be forthcoming. In times of a global political climate not at all favourable towards human rights, this is highly unlikely. Although the U.S. has returned to 'principled governance' with the Biden administration in 2021, there is yet a general lack of responsible leadership and of a democratic, inclusive, and humane vision among leaders of most influential states in the world today that would be necessary to drive and sustain the process. There is a renunciation of multilateralism, accompanied by a surge in nationalism, not boding well for any affirmation of universal values. The 'clash of civilisations' is more intense than ever.⁸²

In times where states are 'exiting' public service systems and profit-oriented private firms are arrogating to themselves the role of the 'new protectors' of human rights, as is visible in the Sustainable Development Goal process,⁸³ a possible scenario is that a revision of Article 13 would lead to 'constitutionally' enshrining the systemic role of private actors in guaranteeing human rights at the international level, in truth a project tantamount to sacrificing human rights. What if a

revised treaty provision does actually include enhanced protective standards? In times of the outright denial of human rights in some parts of the world and unbridled capitalism and socio-economic privation in others, human rights have regrettably lost much of their power of moral persuasion – wherefore Makau Mutua has recently lamented that the age of human rights is over.⁸⁴ In this circumstance, the textual revision of a human rights treaty or any of its provisions by those violating human rights every day simply lacks credibility.

Another consideration is the following: The symbolic value of Article 13, and of the ICESCR as a whole, is greater than perceived deficiencies and outdatedness. Together with the U.N. Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, the ICESCR, irrespective of its imperfection, constitutes a historic achievement for international human rights law, not thoughtlessly to be tampered with. The imperfection is a reflection of an honest endeavour of states at the time to find a compromise that yet adequately protects human rights. Also very important, it should be remembered that fundamental human rights instruments, more than any other legal instruments, are 'living' instruments. A *dynamic* interpretation of their provisions seeking to adapt the law to changed circumstances, convincingly argued, can achieve virtually anything...⁸⁵

81 ICESCR (n 4) art. 29.

82 Huntington, S.P. (1996), *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, NY.

83 On the role of private actors in the Sustainable Development Goal process, see also Section 6.5. below.

84 Mutua, M. (2015), 'Is the Age of Human Rights Over?', in: McClennen S.A. and Schultheis Moore A., *The Routledge Companion to Literature and Human Rights*, Routledge, Abingdon and New York, NY, pp. 450-58.

85 See Schlütter, B. (2012), 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in Keller, H. and Ulfstein, G. (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy*, CUP, Cambridge, pp. 261-319, at pp. 296, 311 ('It is fair to conclude that the principle of dynamic interpretation has been accepted by all UN treaty bodies ... dynamic interpretation is an accepted method of interpretation of international norms, both in general international law as well as in human rights law').

The way forward must be a different one: While certain fields do require separate hard law regulation (e.g., international taxation rules benefiting education and other social services), overall the better solution would be a 'softer law' type of document which consolidates the norms constituting international education law, as founded on the right to education, and develops them further.⁸⁶ Soft law refers to rules that are 'in the process of becoming' binding rules of international law in the form of any of the recognised sources of international law. The rules concerned must enjoy a degree of acceptance by states to truly qualify as soft law.⁸⁷ Soft law does not necessarily become hard law. This may not even be a goal it strives for. While 'primary' soft law declares certain norms for the first time, the document contemplated here would rather be 'secondary' soft law. 'Secondary' soft law, as an interpretation of hard law, is norm-filling rather than norm-creating. Dinah Shelton says in respect of 'secondary' soft law:

In this regard, hard law and soft law interact to shape the content of international obligations. Soft law formulates and reformulates the hard law of human rights treaties in the application of this law to specific states and cases. Paradoxically,

*this secondary soft law may be harder than the primary soft law declaring new standards.*⁸⁸

However, would soft law be a worthy substitute for hard law? As has correctly been pointed out – in the instance referred to here, based on evidence from the field of the protection of minority rights in a certain regional context where an array of hard and soft law standards co-exist – the significance of standards is not primarily determined by their 'hardness' or 'softness'. What matters is whether a rule is 'effective'. For a soft law rule to be effective, it must be sufficiently developed and clear, but also flexible. Moreover, the rule should be accompanied by 'persuasive' implementation mechanisms such as dialogue, supervision, or assistance (all three of these present, for example, in the case of General Comments, as adopted by the U.N. human rights treaty bodies).⁸⁹ Once this is the case, not following the rule will generally be considered 'non-compliance', although the rule is not hard. From the perspective of the effective protection of human rights, soft law, because it can produce the detailed rules required for the implementation of a treaty, is often better suited than hard law to achieve actual protection.⁹⁰ In another field, that of the protection of the rights of internally displaced persons, the essential protective international instrument at the global level, the soft law Guiding Principles on Internal Displacement of 1998, as formulated by Francis Deng as former Representative of the

86 Máttyás Bódig similarly states, 'the ICESCR, as we find it today, may not be fit for purpose in the twenty-first century. As a redraft does not seem feasible in the foreseeable future, doctrinal development by way of soft law may be the only practicable way of getting right the character of economic and social rights in international law': Bódig, M. (2016), 'Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights', in: Lagoutte, S., Gammeltoft-Hansen, T., and Cerone, J. (eds), *Tracing the Roles of Soft Law in Human Rights*, Oxford University Press, Oxford, pp. 69-88, at pp. 84-85.

87 See Gammeltoft-Hansen, T., Lagoutte, S., and Cerone, J. (2016), 'Introduction: Tracing the Roles of Soft Law in Human Rights', in: Lagoutte, S., Gammeltoft-Hansen, T., and Cerone, J. (eds), *Tracing the Roles of Soft Law in Human Rights*, Oxford University Press, Oxford, pp. 1-13, at p. 5 (providing this definition).

88 Shelton, D. (2000), 'Commentary and Conclusions', in: Shelton, D. (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford, pp. 449-64, at p. 461.

89 See however also, as relevant, the criteria mentioned in n 98 and accompanying text.

90 See Holt, S., Machnyikova, Z. and Packer, J. (2016), 'The Role of Soft Law in Minority Rights Protection and Diversity Management: Reflections from Practice', in: Lagoutte, S., Gammeltoft-Hansen, T., and Cerone, J. (eds), *Tracing the Roles of Soft Law in Human Rights*, Oxford University Press, Oxford, pp. 293-320, at pp. 293-94, 319 (broadly making all these observations in the minority rights context).

U.N. Secretary-General on the human rights of internally displaced persons, have empirically been shown to have triggered a change in state behaviour and are often cited as an instance of ‘the innovative use of soft law’.⁹¹ Soft law, it should finally be remembered, is created and adapted much easier, and thus a more flexible instrument, than hard law.

A ‘softer law’ type of document consolidating and further developing the right to education could notably take two forms: *Firstly*, there could be an endeavour to revise the CESCR’s General Comment No. 13. The General Comments of the U.N. human rights treaty bodies, though not legally binding as such, have considerable legal weight.⁹² In accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties, ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ is to be taken into account in construing the treaty.⁹³ States parties’ participation in the supervisory processes of the ICESCR, entailing the submission of reports by states parties on measures of implementation they have taken, the examination of the reports by the CESCR, and the subsequent issuing of Concluding Observations on state performance by the Committee, may be seen to reflect such practice. The Committee’s findings are then systematised in its General Comments. As accepted interpretations of Covenant provisions by the authoritative supervisory organ, the interpretations become so closely intertwined with the provisions themselves that they can almost be

said to be binding in the same way that the provisions are. This is probably what Shelton has in mind when she says that ‘hard law and soft law interact to shape the content of international obligations’. The scholarly literature clearly identifies the legal analytical function of General Comments, explaining that these may flesh out the rights and obligations of the Covenant, fill legal gaps, and harmonise substantive outcomes across treaty bodies.⁹⁴ Eckart Klein and David Kretzmer opine with regard to the General Comments of the U.N. Human Rights Committee that these

*assist[] in the strengthening of human rights standards and their evolution. Seen from this aspect it might well be that the General Comments one day will be seen as the most far-reaching and sustainable contribution of the Committee to the international protection of human rights.*⁹⁵

Secondly, there could be an endeavour to prepare an international expert document interpreting the right to education in international law. It would be drawn up by a diverse group of independent experts with knowledge and experience in the field of the right to education *and* education law. The document should ideally comprise normative principles supplemented by legal commentary. Such a document, in terms of its legal status, could be regarded as reflective of ‘the teachings of the most highly qualified publicists of the various nations’, as a subsidiary means in determining rules of international law, in the sense of Article 38(1)(d) of the

91 Orchard, P. (2010), ‘Protection of Internally Displaced Persons: Soft Law as a Norm-Generating Mechanism’, *Review of International Studies*, 36, pp. 281-303.

92 Keller, H. and Grover, L. (2012), ‘General Comments of the Human Rights Committee and their Legitimacy’, in Keller, H. and Ulfstein, G. (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy*, CUP, Cambridge, pp. 116-98, at p. 194 (‘soft law does not inevitably lead to soft legitimacy’).

93 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980), art. 31(3)(b) [hereinafter VCLT].

94 Keller and Grover (n 92) p. 194. In their chapter, the authors discuss ways of strengthening the normative legitimacy of General Comments (focusing on the U.N. Human Rights Committee). See also Bódig (n 86) pp. 86-87, who, focusing on the General Comments of the CESCR, holds that ‘[t]he overall doctrinal record of the Committee is positive ... [but] [t]he most obvious defect ... is [that] the Committee has failed to ensure the coherence and clarity of its doctrinal work’.

95 Klein, E. and Kretzmer, D. (2015), ‘The UN Human Rights Committee: The General Comments: The Evolution of an Autonomous Monitoring Instrument’, *German Yearbook of International Law*, 58, pp. 189-229.

Statute of the International Court of Justice.⁹⁶ It could, however, also be regarded as soft law, to the extent that non-state actors can play a role in international norm-creation processes, a development that may perhaps be observed.⁹⁷ Its normative force would depend on the genuine independence of the experts involved, their proper expertise, how representative of different legal and cultural traditions they are, whether the suggested principles are based on solid research and correctly derived from the international legal sources, how well the document is promoted globally, regionally, nationally, and locally, whether it enjoys recognition by other experts and national and international bodies, and the extent to which it is absorbed into the daily practices and routines of international organisations, government departments, legislatures, courts, the private sector, and civil society.⁹⁸ Relevant examples of independent expert documents in the field of human rights include the Maastricht Guidelines, the Maastricht Principles, or the Abidjan Principles, all referred to elsewhere in the discussion.⁹⁹ The document contemplated here would however be far more extensive, consolidating a whole area of law. At this point, it should just be mentioned that the adoption of a soft law Declaration on the Right to Education by the U.N. General Assembly (or any similar form of directly

state-formulated soft law) cannot really be considered a third option. Its preparation would likely suffer from many of the same problems that any reformulation of hard law would (absent political leadership, private sector capture of process, outcome lacking moral credibility). Moreover, purporting, as it would, to create new rather than interpret existing law, its relation to existing hard law would raise many questions, potentially undermining hard law.

5 Criteria for a Reformulation: Progressive, Pluralistic in Outlook, Problem-Oriented

However, if there is to be a reformulation of the right to education, what should the nature thereof be? Crucially, it would have to meet three important criteria: It should be progressive, ‘forward-pushing’ in nature, i.e., through its techniques of drafting advance the normative development of the right to education. Furthermore, it should allow sufficient space for regional (or national) specificity, i.e., be pluralistic in outlook. Finally, it should strengthen the right to education normatively, making it amply robust to adequately respond to the major challenges or threats – the crises – of our time. Hence, a reformulation must be problem-oriented.

Firstly, therefore, it is not enough for a reformulation to merely amount to a collection of existing norms. While existing norms need to be systematised, they must then be read constructively and be reformulated to accord the most effective protection from among the various readings available. The reformulation must identify possible interpretations that amount to progressive solutions for problems where no solutions, or only unsatisfactory ones, exist at the moment. In other words, the worth of the reformu-

96 Statute of the International Court of Justice, 18 April 1946, art. 38(1)(d).

97 Gammeltoft-Hansen, Lagoutte and Cerone (n 87) pp. 3, 8.

98 In principle, these criteria apply for any General Comment as well. Magdalena Sepúlveda similarly enumerates these five criteria: 1. the independence and expertise of the drafters and signatories; 2. the diversity of the drafters and signatories; 3. the rigour and persuasiveness of the principles drafted; 4. their practicality; and 5. their validation: Sepúlveda Carmona, M. (2021), ‘Human Rights Guiding Principles: A Forward-Looking Retrospective’, in: Adamson, F. and others (eds), *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, Edward Elgar, Cheltenham and Northampton, MA, pp. 25–51.

99 Maastricht Guidelines (n 79); Maastricht Principles (n 48); Abidjan Principles (n 25).

lation endeavour will depend on the extent to which a reformulation, through generous but yet legitimate means of interpretation within the meaning of the Vienna Convention on the Law of Treaties,¹⁰⁰ normatively adds to the right to education – that is, is *progressive*, ‘forward-pushing’ in nature. Broad proclamations in human rights treaties to the effect that the states parties ‘recognise the right of everyone to education’, preceding the enumeration of more concretised entitlements, facilitate such ‘progressiveness’. With regard to this statement in Article 13(1) of the ICESCR, the literature holds that this

should be understood as ‘an open-ended fundamental norm in the sphere of education’.¹⁰¹

To mention two examples of ‘progressive’ interpretation: where Article 13(2)(a) of the ICESCR requires primary education to be ‘free’,¹⁰² nothing prevents an interpretation holding that this entails the absence not only of actual fees, but also of other direct charges and *all* indirect expenses in primary education. Similarly, where Article 4(3) of the U.N.’s Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities stipulates that states should offer persons belonging to minorities adequate opportunities ‘to learn their mother tongue *or* to have instruction in their mother tongue’,¹⁰³ there is no convincing reason why ‘these two’ should not be read conjunctively. Teaching *in* and *of* the mother tongue must be offered. The principle of the *effective* protection of human rights justifies both the above interpretations.¹⁰⁴

Where no progressive interpretations are possible within what are still acceptable means of construction, the need for international legislative activity will have to be indicated, simultaneously identifying desirable solutions. Duly respecting the principle of systemic integration in international law,¹⁰⁵ in preparing the reformulation, all relevant international legal norms (treaties, custom, general principles of law) and their interpretation by international and national fora and respected commentators should be taken into consideration. Also national legal norms that are indicative of what may become gen-

100 VCLT (n 93) arts. 31-33. These rules allow more leeway than is commonly thought. Apart from the ordinary meaning of treaty terms, their context and the treaty’s object and purpose are to be taken into consideration (VCLT, art. 31(1)). Together with the context of treaty terms, there must be taken into account ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ (VCLT, art. 31(3)(b)). Since the states parties are the masters of their treaty, any such practice may even implicitly amend a treaty. There may thus be a blurring of the line between interpretation and amendment: Dörr, O. (2018), ‘Article 31: General Rule of Interpretation’, in: Dörr, O. and Schmalenbach, K. (eds), Vienna Convention on the Law of Treaties: A Commentary, 2nd edn., Springer, Berlin, pp. 559-616, para. 77. Accordingly, in drafting a new General Comment, on the one hand, existing progressive Concluding Observations that manifest a trend are also to be taken into account. On the other hand, the General Comment in itself can constitute a practice that can move beyond existing interpretations. Together with the context, there must also be taken into account ‘any relevant rules of international law applicable in the relations between the parties’ (VCLT, art. 31(3)(c)). This is an application of the principle of systemic integration in international law. Parts of international judicial practice apply the term ‘rules of international law’ less restrictively and consider not only binding, but also non-binding documents as material relevant for interpretation: Dörr and Schmalenbach (above) para. 100. Hence, relevant progressive hard and soft law instruments promoting human rights generally or the right to education specifically are also to be taken into consideration. The interpretation of a treaty is moreover ‘a single combined operation’: International Law Commission, Draft Articles on the Law of Treaties with Commentaries, Article 27: General Rule of Interpretation [now VCLT, art. 31], Commentary, Introduction, para. 8, reproduced in Yearbook of the International Law Commission (1966, vol. II), at pp. 219-20. Consequently, all the above interpretative processes will be relevant, even if treaty terms are (ostensibly) clear. The interpretative process as a whole is to be guided by the notion of ‘good faith’ (VCLT, art. 31(1)). This justifies *inter alia* an interpretation of treaty terms in accordance with the principle of effectiveness.

101 ICESCR (n 4) art. 13(1) first sentence; Gebert (n 4) 286-88; Beiter (n 4) 460-62.

102 ICESCR (n 4) art. 13(2)(a).

103 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (n 67) art. 4(3).

104 See Schlütter (n 85) p. 286 (‘Regardless of its association either with the good faith or the object and purpose principle, the principle of effectiveness itself is firmly rooted both in general international law and in human rights law.’).

105 See n 100 above.

eral principles of law recognised by civilised nations, and, generally, innovative national legal solutions, should be taken into account. *Secondly*, a reformulation of the right to education should be *pluralistic in outlook*, here signifying that its legitimacy would hinge on whether it allows *room for regional (or national) specificity*, for the social and cultural norms of differing societies to be respected in education. The legal anthropological scholar Manfred Hinz, while cherishing the potential of cultural relativism for ‘fruitful provocation’, points to the reality of globalisation. Yet, globalisation, he emphasises, should have a ‘cosmopolitan face’. It must respect regional and national particularities if it is to accomplish ‘the return of justice’.¹⁰⁶ Also this author has previously, commenting on the right to education in the African context, argued in favour of ‘soft’ universalism or ‘soft’ relativism:

Soft universalism or relativism, frankly, constitutes the only viable option because it accommodates both the global and the particularist, ensuring that the global incorporates a particularist perspective and ensuring that the particularist does not deviate too much from the global. Human rights may perhaps be said to be relatively universal, and, these days, this seems to be accepted by most African commentators, too. There is ample scope for ‘domesticizing’ human rights in Africa that may and should be used. Domesticization implies, of course, that regional norms, to the extent that they do not merely replicate global norms, must complement, but not contradict, uncontentious corresponding global norms.¹⁰⁷

Not an easy task, the art will be to achieve the right balance between universalism and particularism.¹⁰⁸ By way of example, one might have to accept that globally stipulated minimum ages for admission to employment, designed to protect children’s health, well-being, and development, including their education rights, as set out in the ILO’s Minimum Age Convention (No. 138 of 1973),¹⁰⁹ are too Western-centric. They do not adequately respect social constructs of childhood prevailing in Africa or Asia. The Convention, by way of implication, forbids any type of child labour for children below the age of thirteen years. In many non-Western societies, in which children are seen as bearers of duties towards their families and communities, certain lighter forms of work are considered part of the responsible upbringing of a child. In this sense then, ‘learn and earn’ approaches potentially contentious under the Minimum Age Convention should be deemed permissible, if legitimate in terms of regional or national social norms, to the extent that a child’s right to education, and other human rights, are not jeopardised.¹¹⁰ An example of where there is little scope for flexibility is that of school discipline in the form of corporal punishment and comparable types of non-physical violence. The fact that regional or national social norms may endorse such practices should be irrelevant. Once a disciplinary measure in principle would impinge on a child’s dignity, it will not be permissible. There is thus also no room for ‘reasonable’ chastisement in these instances, as human dignity is indivisible. Cultural values should, however, play a role in the design of appropriate forms of positive discipline which, in line with the child’s evolving capacities, pro-

106 Hinz, M.O. (2009), ‘Human Rights between Universalism and Cultural Relativism? The Need for Anthropological Jurisprudence in the Globalizing World’, in: Bösl, A. and Diescho, J. (eds), *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, Konrad-Adenauer-Stiftung, Windhoek, pp. 3-32, at pp. 26-27.

107 Beiter, K.D. (2017), ‘Is the Age of Human Rights Really Over? The Right to Education in Africa: Domesticization, Human Rights-Based Development, and Extraterritorial State Obligations’, *Georgetown Journal of International Law*, 49, pp. 9-88, at p. 17 (footnotes omitted).

108 *ibid* at p. 29.

109 Convention concerning Minimum Age for Admission to Employment (n 21).

110 See Beiter (n 107) pp. 30-31 (on this example and relevant references).

vide the necessary direction to children to assist their growth towards responsible life in society.¹¹¹

Thirdly, crucial for the success of any reformulation of the right to education is the extent to which it is *problem-oriented*, that is, *fully responds to the major challenges or threats of our time*. Such challenges thus become major challenges to be addressed by the right to education. Challenges may threaten ‘the survival’ of the right to education itself. A central challenge is neoliberalism. This questions the very status of education as a human right. Neoliberalism prefers seeing education being converted into a freely tradeable private good. Another challenge – globalisation – may render the right to education in its current configuration a largely ineffectual instrument. Hence, we live in times where many violations of the right to education (or any other human right for that matter) in a state do not flow from the acts or omissions of one’s own government, but are the result of the acts and omissions of other states acting, or neglecting to act, globally or in international organisations. In such times, orthodox notions of the mere territorial applicability of obligations under international human rights law imply that such violations would simply have to be accepted as ‘sad facts of life’ against which one cannot do anything. The right to education and other human rights must crucially be understood to create extraterritorial state obligations. Other challenges are related to poverty which in a large measure persists due to the passive fiscal policies of states in conjunction with a lack of international solidarity in advancing global tax justice. States are unwilling to levy, collect, and spend taxes and to co-operate in establishing a functional international taxation framework. Adequate taxation is vital to help secure the resources

required for the realisation of the right to education and other human rights universally. Challenges also flow from increased global interconnectedness and migration. Where different cultures encounter one another in an ‘unmitigated’ way, this easily precipitates the much-dreaded ‘clash of civilisations’. The wrong education intensifies tensions. Education will have to address non-acceptance of ‘otherness’ and actively promote inclusion. Challenges further lie in threats concretely facing humankind. Unsustainable lifestyles cause planetary destruction, endangering the survival of the human species. Again, the wrong economic system, the wrong values, and the wrong education exacerbate the crisis. A much stronger emphasis must be on ‘education for sustainable development’. The right to education needs to find an adequate response to all these challenges. In what follows, an overview of these major challenges or threats – the five major ‘causes of crisis’ – for the right to education worldwide is provided.

6. Addressing the Five Major Causes of Crisis for the Right to Education Worldwide

6.1. Neoliberal Ideology and Privatisation

There is, in the wake of neoliberalism, a trend of privatisation in education, covering phenomena such as the proliferation of for-profit private schools offering so-called ‘low-cost’ education (in especially developing countries), public educational institutions operating like businesses (‘student as customer’, line and performance management of staff, etc.), or public-private partnerships becoming a notable feature of education sys-

111 See *ibid* at pp. 31-32 (on this example and relevant references).

tems.¹¹² The literature warns of the dangers entailed by the emergence of a 'global education industry'.¹¹³ In 2014, it was calculated that the value of the global education market is US\$ 4,3 trillion.¹¹⁴ Some suggest that it will be at least US\$10 trillion in 2030.¹¹⁵ As a fundamental tenet of neoliberalism, extending provision by the market is supposed to lead to better quality, enhanced efficiency, and increased choice. Research shows, however, that, if social disadvantage is accounted for, private education does not perform better than public education.¹¹⁶ Enhanced efficiency (lower costs) further comes at a price in conflict with human rights – standardised teaching methods, underpaid teachers, etc.¹¹⁷ Moreover, choice through privatisation implies fees, leading to the exclusion of the most vulnerable in society.¹¹⁸ The prob-

lematic nature of privatisation lies in the fact that it 'describes a direction of change',¹¹⁹ a continuous moving away from a division of responsibilities between 'the public' and 'the private' in education that would need to be retained for a society to remain able to guarantee free quality education to everyone.

The privatisation of education is greatly facilitated by its digitisation. This refers to the increased use of Information and Communications Technology (ICT) and 'edu-tech' in administering and delivering education. As digital products are let rather than sold, providers of educational materials and supplies can now exercise a perpetual powerful influence on education. The Covid-19 pandemic and the enforced social distancing this has entailed have accelerated this process. Naomi Klein thus notes that Covid has been 'the moment' for the tech giants (Google, Microsoft, Amazon, Pearson, etc.) in spheres of the public sector, such as education. Global investment of venture capital in edu-tech more than doubled from US\$7 billion in 2019 to a record US\$16.1 billion in 2020.¹²⁰

If we understand privatisation as the provision by the private sector of services traditionally provided by the state, then during the pandemic, a vast part of schooling ... has been privatised.¹²¹ ... Once schools become dependent on the tech giants' systems for teaching in class, homework, management and communications, and once a certain threshold is reached in the number of schools they operate in, then the state delivery of

112 On this trend, see Verger, A., Fontdevila, C. and Zancajo, A. (2016), *The Privatization of Education: A Political Economy of Global Education Reform*, Teachers College Press, New York, NY.

113 See, e.g., Ball, S.J. (2012), *Global Education Inc.: New Policy Networks and the Neo-Liberal Imaginary*, Routledge, Abingdon and New York, NY; Verger, A., Lubienski, C. and Steiner-Khamsi, G. (eds) (2016), *World Yearbook of Education 2016: The Global Education Industry*, Routledge, Abingdon and New York, NY; Parreira do Amaral, M., Steiner-Khamsi, G. and Thompson, C. (eds) (2019), *Researching the Global Education Industry: Commodification, the Market and Business Involvement*, Palgrave Macmillan, London.

114 See Robertson, S.L. (2017), 'Making Education Markets through Global Trade Agreements', *Globalisation, Societies and Education*, 15, pp. 296-308, at p. 296 (citing these figures mentioned by Bank of America, Merrill Lynch).

115 These figures are mentioned by Holon IQ, a global education market 'intelligence' company, on its website, <https://www.holoniq.com/2030/10-trillion-global-education-market> (10 July 2021).

116 See, e.g., Baum, D.R. (2018), 'The Effectiveness and Equity of Public-Private Partnerships in Education: A Quasi-Experimental Evaluation of 17 Countries', *Education Policy Analysis Archives*, 26(105), pp. 1-29. Based on inter alia PISA results, UNESCO finds that '[t]here is no consistent evidence that privately financed schooling produces higher achievement than publicly financed schools when fair comparisons are made': Lewin, K.M. (2015), *Educational Access, Equity, and Development: Planning to Make Rights Realities*, UNESCO, Paris, p. 95.

117 Day Ashley, L. and others (2014), *The Role and Impact of Private Schools in Developing Countries: A Rigorous Review of the Evidence*, University of Birmingham and others, p. 52 ('lower costs were often clearly related to lower teacher salaries').

118 *ibid* ('findings relating to improved equity and access were overwhelmingly negative').

119 Starr, P. (1988), 'The Meaning of Privatization', *Yale Law & Policy Review*, 6, pp. 6-41, at p. 13.

120 Klein, N. (2020), 'How Big Tech Plans to Profit from the Pandemic', *The Guardian* (13 May 2020), <https://www.theguardian.com/news/2020/may/13/naomi-klein-how-big-tech-plans-to-profit-from-coronavirus-pandemic>.

121 See Fleming, N. (2021), 'After Covid, Will Digital Learning Be the New Normal?', *The Guardian* (23 January 2021), <https://www.theguardian.com/education/2021/jan/23/after-covid-will-digital-learning-be-the-new-normal> (quoting Ben Williamson, education researcher at the University of Edinburgh).

*education becomes entirely dependent on private companies.*¹²²

Digitisation, despite its opportunities, in many ways does not advance the right to education. It risks impairing the ability of students to think critically, undermines human values in education, and paves the way for the commercialisation of education.¹²³ Online distance learning can supplement, but never replace on-site schooling with teachers, as this ‘would affect the heart and purpose of the right to education.’ Education is ‘a social act carried out by a community of learners who require real, human interaction.’¹²⁴ The ‘reimagination’ of education is not achieved through its digitisation – currently entailing ‘the capture’ of limited public resources for education by commercial actors¹²⁵ – but through ensuring ‘additional social workers, mental health counsellors, school nurses, enriching arts courses, advanced courses and smaller class sizes.’¹²⁶

Neoliberalism has regrettably become ‘the common sense’ in education.¹²⁷ While education used to be a social right, much of whose value was intrinsic and substantially resulted from its exercise in community with others, neoliberalism has recast education in a way as to emphasise its external provision. Education now signifies a pure transaction through which the student is granted access to a product against a fee. Value is added through credentials, which connote (assumed) skills

needed by the labour market, thus leading to earnings as a reward for the individual’s decision to invest in themselves, ‘investment in the self’ being the principal duty of *homo oeconomicus*. In this way, education is demoted from a social right to a mere individualist, contractual right, a property right, under neoliberalism.¹²⁸ Neoliberalism is fundamentally antithetical to human rights. *Homo oeconomicus* has little in common with *homo humanum*, the vision of humans as dignified beings which underlies human rights law.¹²⁹

The right to education needs to be strengthened to adequately respond to the threat of privatisation – and more generally – neoliberal ideology in education. Free (or, as appropriate, progressively free), quality, public education must be available to everybody (or to those with the requisite intellectual capacity in the case of higher education), wishing to make use of it.¹³⁰ The Abidjan Principles of 2019 reiterate this: states must ‘prioritise[e] ... the provision of free, quality, *public* ... education.’¹³¹ Private educational institutions may not ‘supplant or replace’ public education, but only ‘supplement’ it.¹³²

122 See *ibid* (quoting Jen Persson of the English campaign group Defend Digital Me).

123 Singh, K., Report of the Special Rapporteur on the Right to Education: Issues and Challenges to the Right to Education in the Digital Age, U.N. Doc. A/HRC/32/37 (6 April 2016), para. 112.

124 Boly Barry, K., Report of the Special Rapporteur on the Right to Education: Impact of the Coronavirus Disease Crisis on the Right to Education: Concerns, Challenges and Opportunities, U.N. Doc. A/HRC/44/39 (30 June 2020), para. 47.

125 *ibid* para. 51 (warning of the danger of such ‘a capture’).

126 Klein (n 120) (quoting Andy Pallotta, president of the New York State United Teachers union).

127 Torres, C.A. (2009), *Education and Neoliberal Globalization*, Routledge, Abingdon and New York, NY, p. 74.

128 For a fascinating description of this transmutation, see Murphy, J. (2018), ‘Neoliberalism and the Privatization of Social Rights in Education’, in: MacNaughton, G. and Frey, D.F. (eds), *Economic and Social Rights in a Neoliberal World*, Cambridge University Press, Cambridge, pp. 81-102, at pp. 90-93.

129 See Tomaševski, K., Progress Report of the Special Rapporteur on the Right to Education, U.N. Doc. E/CN.4/2000/6 (1 February 2000), para. 67 (‘the notion of human capital questions the inherent worth of each human being which underpins human rights’).

130 In this vein, see also Mowbray, J. (2021), ‘Is There a Right to Public Education?’, in: Adamson, F. and others (eds), *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education, and the Role of Private Actors in Education*, Edward Elgar, Cheltenham and Northampton, MA, pp. 52-78.

131 Abidjan Principles (n 25) Guiding Principles 17a, b, 29, 34.

132 *ibid* Guiding Principle 48a.

6.2. 'Human Rights Locked up Behind Domestic Bars': Ignored Extraterritoriality

Resulting from a lack of expertise, infrastructure, or resources, which has local causes, the education systems of especially developing countries will often not live up to the demands of the right to education under international human rights law. More frequently, however, non-compliance has another cause. In times of globalisation and internationalisation, education law and policy will often be designed and implemented in accordance with agendas which have been set elsewhere by foreign or global actors, who often believe in the neoliberal project. These agendas may be the ultimate reason why in many states public education is not adequately funded, the household cost of education increases, commercial education providers proliferate, the hegemony of Western education curricula persists, vulnerable groups have to be content with inferior educational opportunities, and instrumentally-oriented curricula fail to enhance the full liberating potential of education. In these cases, it does not make sense to brand non-compliant states human rights violators, as the ultimate reason for the violation has a different, global, international source. The application of mere territorial human rights paradigms clearly does not suffice in a globalised world characterised by a harsh North-South divide. The problem is that human rights 'have been locked up behind domestic bars to prevent their universal application to globalization and its much needed regulation. Extraterritorial obligations ... unlock human rights'.¹³³ The ETO concept has been discussed above.¹³⁴ Based on the Maastricht Principles of 2011, ETOs to respect, protect,

133 ETO Consortium, <https://www.etoconsortium.org> (last visited on 13 April 2021).

134 See Sections 3 and 4 above.

facilitate, and provide under the right to education need to be elucidated for various contexts, to bind states when acting alone or with others, including in international organisations, to observe and advance human rights 'beyond borders', whenever their conduct is reasonably linked to the well-being of those beyond their borders.¹³⁵ Identifying and formally endorsing such ETOs is a pivotal exercise in the reconfiguration of the right to education.

6.3. Poverty and a(n) (Ostensible) Lack of Resources

Yet another challenge to the right to education is poverty and states' (ostensible) lack of resources. Education costs money. Applying the human rights logic to education, there are two consequences flowing from this. Firstly, the funding of (at any rate public) education is the responsibility of the state¹³⁶ (although there may be some role for private funding of public education especially in higher education). Secondly, the individual (at any rate in public education) must be rigorously freed (as appropriate, progressively) from the burden of paying for education.

135 For first attempts at this, see Beiter (n 107) pp. 48-87 (addressing ETOs to facilitate inter alia in relation to bilateral development assistance and cooperation in the field of education, the lending operations of the IMF and the World Bank and their effects on education, and free trade in education services under GATS and GATS plus agreements); Beiter, K.D. (2019-2020), 'Not the African Copyright Pirate is Perverse, But the Situation in which (S)He Lives: Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization "From Below" in IP Law', *Buffalo Human Rights Law Review*, 26, pp. 1-79 (focusing on ETOs to facilitate in relation to improving educational uses of copyright-protected materials under the international copyright regime), and Beiter, K.D. (2021), 'SDG 4: Quality Education', in: Michaels, R., Ruiz Abou-Nigm, V. and Van Loon, H. (eds), *UN Sustainable Development Goals and Private International Law*, Intersentia, Cambridge (in press) (analysing ETOs to protect in relation to a state's commercial actors in education operating abroad).

136 Views differ on whether states are obliged to provide funding to private education. According to the somewhat dated view of the CESCR, no such obligation exists under Article 13 of the ICESCR: General Comment No. 13 (n 6) para. 54.

Regarding the former, under Article 2(1) of the ICESCR, states parties have agreed to use 'maximum available resources' to realise economic, social, and cultural rights.¹³⁷ As a former U.N. Special Rapporteur on the Right to Education has explained, '[i]nternational human rights law assumes that states are both willing and able to generate resources needed for education through general taxation'.¹³⁸ States should raise at least 20% of their gross domestic product in taxes if they are to be able to realise education for all and other human rights.¹³⁹ Taxation must be progressive and socially just. States should directly tax income and wealth in a way that, roughly, the top 10% pay 90% of taxes. Tax exemptions, insufficiently diversified tax bases, tax avoidance and evasion, and lax tax collection need to be placed on the agenda. States will have to co-operate to achieve global tax justice. They must address the practice of multinationals shifting profits to tax havens.¹⁴⁰ It will thus be necessary to internationally agree on minimum tax rates and the abolition of financial secrecy legislation.¹⁴¹ Furthermore, austerity politics need to be terminated. At least 6% of GDP and at

least 20% of public expenditure need to be spent on education.¹⁴² There are also other measures that will release resources that need to be taken. Transparency International's instructive Global Corruption Report of 2013 focusing on education notes that corruption in education is 'among the most significant barriers to ... realising the universal right to education'.¹⁴³

Regarding the second point, that of fees in education, all charges in primary and secondary education must be eliminated. This covers not only actual fees, but also other direct charges, and further *all* indirect expenses such as charges imposed by parent or school committees, charges for examinations or certificates, learning materials, school uniforms, school meals, school transport, boarding, extra-curricular activities, and so on.¹⁴⁴ It should be noted that fee exemption schemes designed to benefit the poor are not enough to comply with international human rights law!¹⁴⁵ Crises such as the Covid pandemic highlight the evil of school fees and demonstrate how these impact especially the most vulnerable in society. The parents concerned are among the first to experience the financial effects of the pandemic notably because low-paid jobs are the first to be cut. Children drop out of school because their parents cannot pay school fees anymore.¹⁴⁶ Hence, the U.N. Special Rapporteur on the Right to Education urges states in the pandemic to

137 ICESCR (n 4) art. 2(1).

138 Tomaševski, K. (2001), *Free and Compulsory Education for All: The Gap between Promise and Performance*, Novum Grafiska, Gothenborg, p. 21.

139 *Education for All Global Monitoring Report, Increasing Tax Revenues to Bridge the Education Financing Gap*, Policy Paper 12, March 2014, p. 9 [hereinafter *Increasing Tax Revenues*]. OECD countries raise on average 37% of GDP in taxes, developing countries less than 15%: *Accounting for Poverty: How International Tax Rules Keep People Poor* (ActionAid UK, September 2009), p. 5.

140 With regard to many of the issues mentioned here, see De Schutter, O., Lusiani, N.J. and Chaparro, S. (2020), 'Re-Righting the International Tax Rules: Operationalising Human Rights in the Struggle to Tax Multinational Companies', *International Journal of Human Rights*, 24, pp. 1370-399.

141 The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting of July 2021 is a promising step in the right direction: *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (1 July 2021), <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf>.

142 *Increasing Tax Revenues* (n 139) p. 9.

143 Transparency International (2013), 'Introduction to the Global Corruption Report: Education', in: Sweeney, G., Despota, K. and Lindner, S. (eds), *Global Corruption Report: Education*, Routledge, Abingdon and New York, NY, pp. 3-10, at p. 3.

144 Largely sharing this view, see Tomaševski, K., *The State of the Right to Education Worldwide: Free or Fee: 2006 Global Report* (August 2006), p. 247.

145 *ibid* at p. 247.

146 See Haberland, N. and Abuya, T., 'What the COVID-19 Pandemic Is Showing Us About the Global Learning Crisis' (Council on Foreign Relations, 10 May 2021), <https://www.cfr.org/blog/what-covid-19-pandemic-showing-us-about-global-learning-crisis> (reporting that the main reason why students in Kenya dropped out when schools re-opened were school fees).

impose moratoria on the payment of school fees and to provide cash transfers to families as an immediate measure.¹⁴⁷ The ICESCR requires higher education to be made progressively free. The ideal of free higher education has strangely withered away over the last few decades. Free higher education, it needs emphasising, has less to do with the availability of resources than is often alleged, but rather with political choices.¹⁴⁸

All taken together, ideology, the failure to tax, a lack of international solidarity in achieving global tax justice, austerity, and corruption continue to obstruct resource mobilisation and allocation directed at financing public services, including free, quality, public education. The real problem is not poverty as such or a lack of resources, but unfairly accumulating wealth not reasonably redistributed to realise human rights. In reframing the right to education, specific domestic and extra-territorial state obligations will have to be clearly specified to address resource scarcity.

6.4. Pluralisation, Non-Acceptance of 'Otherness', and Exclusion

In a globalised world characterised by a plurality of cultures whose members 'encounter' one other, one could accept the 'clash of civilisations' as inevitable. For this reason, conservatives try to prevent any mingling from taking place right from the start. In today's world, this is unrealistic. The alternative of letting various cultures simply live alongside each other in any society – this can be described as *laissez-faire* mosaic mul-

ticulturalism – will not work either. As one can see everywhere, this is exactly what precipitates the clash of civilisations. The necessary solution is that, which has been termed the 'confluence of civilisations'.¹⁴⁹ Its premise is that of intercultural dialogue. This is directed at understanding and respecting the 'other' – and, in this way, at reducing the distance between the 'nous' and 'les autres'. Not accepting 'otherness', as Seyla Benhabib underlines, is tantamount to denying others' dignity and equality. It produces 'disrespect, domination, and inequality'.¹⁵⁰ Education must play a far greater role in facilitating intercultural dialogue. Non-acceptance of 'otherness' is one of the major challenges for the right to education. In this writer's view, the need for intercultural dialogue has three important implications for education systems: firstly, the undue hegemony of Eurocentric epistemology in education globally needs to be broken (decoloniality),¹⁵¹ secondly, education must 'promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups'¹⁵² (through intercultural education, ensuring 'inclusiveness', 'restrained' identity politics in education, enhanced freedom *from* religion, etc.), and, thirdly, education must respect cultural difference by catering for the different educational needs of cultural groups in a proactive manner (multicultural education) (e.g.,

147 Boly Barry, U.N. Doc. A/HRC/44/39 (n 124) para. 84(e).

148 See Garritzmann, J.L. (2016), *The Political Economy of Higher Education Finance: The Politics of Tuition Fees and Subsidies in OECD Countries, 1945–2015*, Palgrave Macmillan, London (the author shows that, among European countries similarly placed economically, whether these opted for student finance systems entailing low or high fees (and low or high subsidies) was directly correlated to which political parties were (when) in power and for how long).

149 Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools (2007), Prepared by the ODIHR Advisory Council of Experts on Freedom of Religion or Belief, OSCE/ODIHR, Warsaw, pp. ii–iii.

150 Benhabib, S. (2002), *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton University Press, Princeton, pp. 8, 24 ('On the Use and Abuse of Culture', "'Nous" et les "Autres"').

151 See, e.g., Manthalu, C.H. and Waghid, Y. (2019), 'Decoloniality as a Viable Response to Educational Transformation in Africa', in: Manthalu, C.H. and Waghid, Y. (eds), *Education for Decoloniality and Decolonisation in Africa*, Palgrave Macmillan, London, pp. 25–46, at p. 38 ('Africa is largely on the passive receiving end of modern education. Few developed nations orchestrate the constitution of education globally.').

152 ICESCR (n 4) art. 13(1).

respecting the language rights of members of minorities and indigenous peoples in education).¹⁵³

There is no reason to understand ‘otherness’ restrictively as referring to race or culture only. The rejection of ‘otherness’ covers discrimination on grounds such as disability, sexual orientation, gender/gender identity, or poverty. The CESCR has thus made it clear that socio-economic status constitutes a prohibited ground of discrimination under the ICESCR.¹⁵⁴ The Covenant must be read as obliging states parties to advance (substantively) equal opportunities and treatment in, and through, education for all.¹⁵⁵ While education of itself has been described as a ‘programme with anti-discriminatory tendencies’,¹⁵⁶ states parties will have to do more and address ‘systemic discrimination’ in education (again, the Covid pandemic has exacerbated the effects of such discrimination in education)¹⁵⁷ through ‘an active approach’, ‘temporary special measures’, and ‘devoting greater resources to traditionally neglected groups’ in the field of education.¹⁵⁸ Developing the notion of ‘inclusive’ education may prove useful in this context. ‘Inclusiveness’ as

a concept originates in the sphere of disability law. The requirement regarding education here is that learners with disabilities should be included in a regular classroom setting (and, as needed, be reasonably accommodated on an individual basis), as this will be the most beneficial for their development. One could, however, define ‘inclusiveness’ more comprehensively as the endeavour to eliminate barriers so as to enable all students – whatever their intellectual strengths or weaknesses, impairments, backgrounds, cultural origins, gender, personal dispositions, and so on – to participate in learning experiences and the learning environment together with their same-aged peers (again, where necessary, being reasonably accommodated on an individual basis); inclusive education differs from exclusion, segregation, and integration.¹⁵⁹ All this also implies that a segmented school system, in which learners with (allegedly) differing intellectual capacities learn in different types of schools, should as far as possible be avoided, as it tends to replicate socio-economic stratification.¹⁶⁰ In sum, therefore, the potential of the right to education to respond to the challenge of the non-acceptance of ‘otherness’, inequality, and exclusion needs to be significantly strengthened.

6.5. Unsustainable Lifestyles and Societies – and the Use(lessness) of the SDGs

Finally, we live in the age of the Anthropocene, an epoch beginning around 1950, and

153 ‘Intercultural education’ involves ‘educational policies and practices by which the members of different cultures, whether in a majority or minority position, learn to interact constructively with each other’. ‘Multicultural education’ refers to ‘educational policies and practices which meet the separate educational needs of groups in society which belong to different cultural traditions’. See Report of the International Seminar on Intercultural and Multicultural Education, held at Montreal, Canada from 29 September-2 October 1999, U.N. Doc. E/CN.4/Sub.2/AC.5/2000/WP.4, para. 6.

154 CESCR, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Art. 2(2) of the ICESCR), U.N. Doc. E/C.12/GC/20 (2 July 2009), para. 35 [hereinafter General Comment No. 20].

155 Reading ICESCR (n 4) art. 13 (right to education) with art. 2(2) (non-discrimination with regard to Covenant rights), in the light of General Comment No. 20 (n 154) para. 8(b) (obligation to eliminate ‘substantive discrimination’).

156 Gebert (n 4) p. 174.

157 See Boly Barry, U.N. Doc. A/HRC/44/39 (n 124) para. 80 (drawing attention to this).

158 See General Comment No. 20 (n 154) paras. 12, 39 (‘systemic discrimination’ and its elimination).

159 Broadly based on Davis, J. and others (2020), ‘Inclusive Education as a Human Right’, in: Graham, L. (ed), *Inclusive Education for the 21st Century: Theory, Policy and Practice*, Allen & Unwin, Sydney, ch. 4, esp. tbl 4.1.

160 As for primary education, see, e.g., Kovach, J.A. (1998), ‘Macroecological Reforms as a Strategy for Reducing Educational Risks Associated with Poverty’, *Journal of Education Policy*, 13, pp. 167-178, at p. 174 (stating that the literature clearly shows that ability grouping at this level contributes to inequalities for poor children).

defined by reference to the fact that, for the first time, it is humans that have a profound – and devastating – impact on the Earth system. Humanity is in the process of destroying the foundations for life on Earth. There is an imminent need to address unsustainable lifestyles and societies. In the endeavour of saving the planet, the U.N. adopted a comprehensive 2030 Agenda for Sustainable Development in 2015.¹⁶¹ The Agenda postulates 17 Sustainable Development Goals (SDGs), to be achieved by 2030. SDG 4 focuses on education.

SDG 4 constitutes the third global commitment of its kind to deal with lack of adequate access to education in many countries of the world. The first undertaking was that of Jomtien of 1990, calling for ‘basic’ education for all and laying the basis of the Education for All (EFA) movement.¹⁶² This was followed, in 2000, by the undertaking of Dakar, complemented by Goal 2 of the U.N.’s Millennium Development Goals (MDGs). Both notably sought the achievement of universal primary education by 2015.¹⁶³ SDG 4, envisaging ‘inclusive and equitable quality education’ and ‘lifelong learning opportunities for all’ by 2030, is much broader in scope. SDG 4 has been concretised by the Incheon Declaration and Framework for Action, adopted at the World Education Forum, held at Incheon in 2015.¹⁶⁴

Positive aspects when adjudged from a human rights perspective are particularly the express targets of the completion of *free*

primary and *secondary* education by all,¹⁶⁵ access to early childhood care and pre-primary education for all (not as a rule explicitly referred to in international human rights treaties),¹⁶⁶ ‘inclusive’ learning environments, providing a link to the concept of substantive equality, and ‘quality’ education (also not usually explicitly mentioned in treaties).¹⁶⁷ The SDG framework accords ‘education for sustainable development’ (ESD) a crucial role in the context of sustainable development.¹⁶⁸ There are perhaps two facets of ESD. On the one hand, it is an integral part of the right to quality education. On the other, ESD is ‘an enabler of sustainable development’, facilitating attainment of most other SDGs.¹⁶⁹ This aspect had in principle already been identified in the U.N.’s famous Brundtland report of 1987, which had explained that education ‘can enhance a society’s ability to overcome poverty, increase incomes, improve health and nutrition, and reduce family size’,¹⁷⁰ thus including issues now covered by the SDGs. Nevertheless, the SDG framework has many flaws. It still does not reflect a genuine human rights approach. It avoids the language of *obligations* to respect, protect, and

161 General Assembly Resolution 70/1, Transforming Our World: 2030 Agenda for Sustainable Development, 21 October 2015.

162 World Conference on Education for All, World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs, 5-9 March 1990, Jomtien, Thailand.

163 World Education Forum, Dakar Framework for Action, 26-28 April 2000, Dakar, Senegal, para. 7(ii); General Assembly Resolution 55/2, United Nations Millennium Declaration, 18 September 2000, para. 19, point 2.

164 World Education Forum, Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal 4, 19-22 May 2015, Incheon, Republic of Korea.

165 The economist Alison Wolf, analysing credible data, concludes that work success in any, thus also the highest paying jobs of the economy ultimately is the result of the mastery of core skills acquired in the lower levels of education (primary and secondary education). In many ways, therefore, higher education seems mainly to fulfil a mere credentialing function when it comes to securing access to higher paying jobs: Wolf, A. (2002), *Does Education Matter? Myths about Education and Economic Growth*, Penguin, London, ch. 2 (‘Which Skills Matter?’).

166 See Siraj-Blatchford, J. (2016), ‘Preface’, in: Siraj-Blatchford, J., Mogharreban, C. and Park, E. (eds), *International Research on Education for Sustainable Development in Early Childhood*, Springer, Cham, p. v. (‘it is important to recognise the relevance of Early Childhood Care and Education (ECCE) to the achievement of many of the ... SDGs’).

167 GA Resolution 70/1 (n 161) SDG 4, Targets 4.1, 4.2, 4.3, 4.a.

168 *ibid* SDG 4, Target 4.7.

169 See UNESCO World Conference on Education for Sustainable Development, Aichi-Nagoya Declaration on Education for Sustainable Development, 10-12 November 2014, Aichi-Nagoya, Japan, para. 6 (referring to both these facets).

170 World Commission on Environment and Development, Report: ‘Our Common Future’, U.N. Doc. A/42/427 (4 August 1987), ch. 4, para. 61.

fulfil human rights.¹⁷¹ Primary education that is compulsory and available free to all, as a recognised immediate minimum core obligation, becomes progressive in nature, to be attained by 2030 only.¹⁷² Development is to be financed through economic growth rather than redistributive taxes.¹⁷³ For SDG goals to be reached in terms of this approach by 2030, ‘we would need to increase the size of the global economy by a factor of 12, which, in addition to making our planet uninhabitable, will obliterate any gains against poverty’.¹⁷⁴ In the application of SDG 4 indicators, the focus is excessively on learning outcomes.¹⁷⁵ As Tristan McCowan underlines, in assessing the essence of education as a human right, the emphasis must not be on learning outcomes, but on opportunities to engage in educational processes that are valuable.¹⁷⁶ There is no indicator measuring the availability of *free* education.¹⁷⁷ No clear obligations have been laid down for international organisations or states as members of international organisa-

tions.¹⁷⁸ Private actors, notably business corporations, are accorded an unrealistic, indeed unacceptable role in the achievement of the SDGs. Corporations, quintessentially driven by profit motives, are the prime destructors of the environment, perhaps the most egregious violators of human rights, and they fail to contribute their fair share in taxes. It is more than cynical to now call on these actors to save the planet.¹⁷⁹ There is also no endeavour whatsoever to subject these actors to the human rights responsibility or accountability framework that has been developed for business since the adoption of the U.N. Guiding Principles on Business and Human Rights of 2011.¹⁸⁰

The overall tone of the SDGs is neoliberal. Theodor Adorno famously says, ‘[t]here is not a right life in the wrong one’.¹⁸¹ The SDGs try to make corrections within an overall incorrect system that is left untouched. In sum, any reframing of the right to education must spell out the full normative implications of ESD, but already now will have to look ‘beyond’ the SDGs.

7. The Way Forward

This article has sought to provide a first conceptual comment on the need to ‘reframe’ the right to education in international law.

171 See Williams, C. and Blaiklock, A. (2016), ‘Human Rights Discourse in the Sustainable Development Agenda Avoids Obligations and Entitlements’, *International Journal of Health Policy and Management*, 5, pp. 387-90 (noting the absence of such obligations).

172 Compare General Comment No. 13 (n 6) paras. 51, 57 (the provision of primary education is an ‘immediate duty’, it is a ‘minimum core obligation’).

173 See GA Resolution 70/1 (n 161) SDG 8, Target 8.1 (‘sustaining’ economic growth).

174 Critiquing the ‘endless material growth’ approach, see the Open Letter to the U.N., signed by Noam Chomsky, Thomas Pogge, Naomi Klein and others, <http://www.globalsocialjustice.eu/index.php/articles/1053-open-letter-to-the-un-signed-by-chomsky-pogge-klein>, created 29 September 2015.

175 See Wulff, A. (2019), ‘SDG 4: The Ideological Battle over SDG 4’, in: Adams, B. and others (eds), *Spotlight on Sustainable Development 2019: Reshaping Governance for Sustainability: Transforming Institutions – Shifting Power – Strengthening Rights* (Reflection Group on the 2030 Agenda for Sustainable Development), pp. 113-16, at p. 115 (‘overemphasis on a small part of the SDG 4 agenda – learning outcomes’).

176 McCowan, T. (2010), ‘Reframing the Universal Right to Education’, *Comparative Education*, 46, pp. 509-525, especially at p. 521.

177 See the concern raised in this regard by the Global Campaign for Education, Re: Global Indicator for Target 4.1, Letter to the U.N. sent on behalf of 214 civil society organisations, academics, and education professionals, 4 March 2016.

178 In fact, there exist no accountability mechanisms whatsoever for any type of actor. Provision is only made for voluntary participation in monitoring mechanisms.

179 See Scheyvens, R., Banks, G. and Hughes, E. (2016), ‘The Private Sector and the SDGs: The Need to Move Beyond “Business as Usual”’, *Sustainable Development*, 24, pp. 371-82, at p. 379 (describing the role accorded to business in the SDG process as ‘fundamentally unrealistic’).

180 See Jägers, N. (2020), ‘Sustainable Development Goals and the Business and Human Rights Discourse: Ships Passing in the Night?’, *Human Rights Quarterly*, 42, pp. 145-73, at p. 173 (‘Arguably, the SDGs offer a powerful, rival regime to that of business and human rights’).

181 Own translation from original German quote: ‘Es gibt kein richtiges Leben im falschen’: Adorno, T.W. (1951), *Minima Moralia: Reflexionen aus dem beschädigten Leben*, Suhrkamp, Berlin, p. 59.

It should constitute the prelude to an envisaged book project that will pursue this idea further and make concrete proposals for reform. In his exchanges with staff members and other advisers to the global Right to Education Initiative (RTE),¹⁸² participants in the adoption and circulation of the Abidjan Principles, and many scholars working on the right to education in countries around the world, one thing has become clear to the author: Changed circumstances since the adoption of the primary human rights treaties and distinct new challenges require a reconfiguration of the right to education. 'Phenomena' leading to the global crisis in education identified here include neoliberal ideology and privatisation; in times of globalisation, the ignored extraterritoriality of states' international human rights obligations; poverty and the ideology of lacking resources; pluralisation, non-acceptance of 'otherness', and exclusion; unsustainable lifestyles and societies; and pandemics, digitisation, and the business-driven 'reimagination' of education.

It has been argued that, rather than creating new or amending existing international hard law, a 'softer law' type of document – a (revised) General Comment of the CESCR or an international expert document – consolidating and further developing current international law on the right to education, through a dynamic and effective interpretation thereof, would probably be the best solution. Where relevant, the need for international legislative activity would have to be pointed out. The question is, what should the way forward be? There should, it is submitted, be two distinct phases in the reframing endeavour, a first 'scholarly' or doctrinal one and a second 'rephrasing' one. The second entails the actual drafting of the document

by those qualified to do so and need not concern us further at this point. It is the first 'scholarly', doctrinal phase that calls for commitment now.

As part of this first phase, the discussion of the specific challenges for the right to education identified in Section 6 of this article needs to be expanded, as it were, to serve as a point of reference for the further analysis. The '4 A' scheme discussed earlier may usefully (at least initially) be applied to ascertain domestic obligations, the Maastricht Principles to identify extraterritorial obligations with regard to the right to education. Based on this exposition, some 30 or 40 highly qualified scholars on the international right to education should be invited to critically comment on the need for reform in their specific (sub)areas of expertise (privatisation, gender discrimination, minority issues, OECD, World Bank, and so on), specifically in each instance making concrete proposals for reform. Additionally, the handful of scholars identified in this article who have produced comprehensive treatises on the right to education should, in view of their holistic understanding of the right to education, be invited to make comments and formulate reform proposals as well. Each of the various contributions may, of course, form the subject of further debate in the academic literature. Two or three scholars (as the editors of a comprehensive research handbook) could subsequently consolidate the proposals made. This would then serve as the basis for further work in the second 'rephrasing' phrase.

Indeed, education is globally in crisis. It is probably correct to say that it is an ideology, neoliberalism, which lies at the root of this crisis. Once a consciously propagated ideology, neoliberalism has meanwhile taken on a life of its own. Its rhetoric pervasively bleeds into our everyday lives. People instinctively absorb its messages much like we breathe

182 The Right to Education Initiative (RTE) is a global NGO seeking to promote realisation of the right to education universally, <https://www.right-to-education.org>.

air.¹⁸³ Reframing – or reconfiguring – the right to education in international law is really an exercise in rescuing the right to education as a global ethical standard in the field of education from neoliberalism, under which this standard has withered away since the 1980s. Noreena Hertz in her recent book *The Lonely Century* says of neoliberalism that this

*has made us see ourselves as competitors not collaborators, consumers not citizens, hoarders not sharers, takers not givers, hustlers not helpers, people who are not only too busy to be there for our neighbors but don't even know our neighbors' names. ... [It has] normalized indifference, made a virtue out of selfishness, and ... marginalized values such as solidarity, community, togetherness, and kindness.*¹⁸⁴

The discussion has shown that neoliberalism underlies the privatisation, commercialisation, and digitisation of education. It provides the justification for 'hands-off' taxation policies, austerity politics, and fees in education. Inequality and exclusion, as Thomas Piketty demonstrates, are related to neoliberal capitalism as well.¹⁸⁵ Neoliberalism fatally believes that failure, irrespective of race, gender, or socio-economic status, always is the result of insufficient investment in oneself, a lack of hard work. The absence of solidarity in neoliberalism to which Hertz refers also explains why, at the global level, the notion that states, inter alia when acting as members of international organisations, bear extraterritorial obligations to create an international enabling environment condu-

cive to the universal fulfilment of the right to education (and all other human rights) has not found support among influential states. As a consequence, the neoliberal policies of such states or international organisations will continue travelling like tsunamis to the developing world, causing devastation to education there. Katarina Tomaševski had laconically remarked in her 2006 report on fees in education,

*[g]lobally, drivers of education are a bank [the World Bank] (which does not advocate free public services because by definition they do not make money) and governments of countries that are exporting their education services (which would lose billions if education became a free public service).*¹⁸⁶

Finally, neoliberal lifestyles and societies are per se unsustainable lifestyles and societies. Regrettably, the SDG framework, rather than providing a solution, codifies neoliberal recipes. Paulo Freire, perhaps the most important educational philosopher of the second half of the twentieth century, highlights the fundamental problem of neoliberalism for education:

There is a lot of fatalism around us. An immobilizing ideology of fatalism, with its flighty post-modern pragmatism, which insists that we can do nothing to change the march of social-historical and cultural reality because that is how the world is anyway. The most dominant contemporary version of such fatalism is neoliberalism. With it, we are led to believe that mass unemployment on a global scale is an ... inevitability. From the standpoint of such an ideology, only one road is open as far as educative practice is concerned: adapt the student to what is inevitable, to what cannot be changed. In this view, what is essential is technical training, so that the student can adapt and, therefore, survive. ... [My response] is a decisive

183 Goodwin, P., Miller, K. and Chaput, C. (2017), 'Accountable to Whom? The Rhetorical Circulation of Neoliberal Discourse and its Ambient Effects on Higher Education', in Nguyen, K.H. (ed), *Rhetoric in Neoliberalism*, Palgrave Macmillan, London, pp. 15-37, at pp. 16-17.

184 Hertz, N. (2021), *The Lonely Century: How to Restore Human Connection in a World that's Pulling Apart*, Currency, New York, NY, chs. 1, 11.

185 Piketty, T. (2014), *Capital in the Twenty-First Century*, transl. by Goldhammer, A., Harvard University Press, Cambridge, MA and London.

186 Tomaševski (n 144) x.

*no to an ideology that humiliates and denies our humanity.*¹⁸⁷

The fundamental problem therefore is that neoliberalism denies human dignity. In the wake of the Covid pandemic and its immense costs, calling for Keynesian-style state intervention, the Financial Times, a central mouthpiece of neoliberalism, remarkably declared neoliberalism dead recently.¹⁸⁸ Yet, seeing is believing. Ultimately, *'Totgesagte leben länger!'* ('Those declared dead, live longer!') Reframing – and rescuing – the right to education in international law is owed to the children (and adults) of the world, who all are entitled to a quality education that confirms their humanity.

187 Freire, P. (1998), *Pedagogy of Freedom: Ethics, Democracy, and Civic Courage*, transl. by Clarke, P., Rowman & Littlefield, Lanham, MD, ch. 1.

188 Editorial board (2020), 'Virus Lays Bare the Frailty of the Social Contract: Radical Reforms are required to Forge a Society that will work for all', *Financial Times* (3 April 2000), <https://www.ft.com/content/7eff769a-74dd-11ea-95fe-fcd274e920ca>.

The political limits of the law

An essay on education and social justice in South Africa

Jonathan D Jansen, Samantha Kriger, Cyrill Walters

In one school, a child drowns in a pit toilet, suffocated by human waste. In another school, a child introduces us to their brand-new transgender toilet. In a rural black school, the children are sent home without any learning materials and the next time they will have any contact with teachers is with the staggered return of children when the lockdown is lifted three months later. In an urban, former white school, children are also sent home after the lockdown announcement but seamlessly connect with teachers soon afterwards to continue blended learning using sophisticated online technologies from a dropdown menu available to the school. In one school, a young girl is refused admission to the school because she did not have a mask; the grade 7 learner does the 7km walk back home and is raped at knife-point. In another school, children enter an organizational environment which is fully mitigated against the coronavirus and enjoy access to small-sized classrooms in which social distancing is easily observed. In one school, children are dropped off at or inside the gates of schools by parents in fancy cars. In another part of the country, school-going children wade through swollen rivers in the hope that they will make it safely to the other side.

These are real stories, multiplied thousands of times in the daily life experiences of learners and teachers alike. Of course, these are portraits of poverty and inequality, but they are fundamentally about social injustices perpetrated every single day in our public schools throughout South Africa.

In this essay we offer a *reflective narrative* account of cases of social justice and education in democratic South Africa. This method of analysis is different from approaches to social justice in education described as philosophical, practical, theory-driven, or focused narrowly on democratic citizenship (Hyttén and Bettez 2011).

The value of stories in the narrative analysis of education law is that it foregrounds the human experience in accounts that are lively, vivid, expressive, rich, and sometimes dramatic. However, reflective analysis moves beyond 'telling' to offer critical considerations of the meanings of these accounts for education law and human lives in a young democracy like South Africa. Most of all, the reflective narrative intends to draw attention to complexity in making sense of the authority but also the limits of the law as an instrument for achieving social justice in education. Our narrative method of writing draws attention to a series of critical cases in education law presented in the form of interconnected stories. The seven illustrative cases selected for analysis are drawn from school infrastructure, corporal punishment, education

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finance, learner admissions, the school curriculum, employment equity, and language policies.

The conceptual lens for the analysis is a restorative justice in education which is one particular instance of the broader concern with social justice in school and society. We do not, however treat restorative justice in narrow terms concerned with issues of discipline in the classroom and the repair of human relationships (teachers, learners etc.) in this regard (Winn & Winn 2021). Our disciplinary focus is therefore not psychology but politics, not the individual wrongdoing but systemic injustice and its reparative demands.

In regard to the dramatic stories that started these essays, we know them and we see them in everyday life, but we have learnt to look away. If we ponder these gross injustices for too long, we are rendered helpless and racked with guilt. So, there are psychological defenses we deploy to learn to live with such horrific injustices. We measure and publish indicators of inequality to demonstrate concern while building careers around smart metrics of development. We set and pursue transnational goals for quality education like the Sustainable Development Goals (the SDGs), even if earlier attempts failed such as Education for All (Jansen 2005). Multilateral agencies invest heavily in these targets conveying a sense of busyness and concern. National governments, including South Africa, make impressive policy announcements about 4IR and that every child will learn about coding when it is an open secret that more than half the children who start school do not finish after 12 years. We hope but we also pretend that by setting goals, allocating money, and deploying people that this signals at the very least, good intent. From the perspective of political psychology, this too is a way of coping with the burden of

inequality and the visibility of injustice in the education system (Cohen 2007; Bal & van der Bos 2014).

For the privileged individual there are patterned ways of coping. Some give money towards a school bursary fund for “the disadvantaged.” Others might pay the fees of the child of the domestic worker. Many play some role in philanthropy whether through a local NGO or the Rotary Foundation. We find ways of making the burden of injustice lighter and while all these contributions ameliorate the plight of individuals and whole families, none of them solve the systemic character of injustice. The problems reflected earlier in the contrasting fortunes of better-off and worse-off schools do not go away. That is because a radical meaning of social justice is concerned not with amelioration but with the structural basis for injustice i.e., the rules, visible and invisible, that *sustains* unequal and unjust education.

It is a reasonable conclusion that individual commitments to social justice can at best alter or improve the lives of individuals or families and even sometimes whole communities (think of the work of Gift of the Givers as an example), but that it would take a government to change the educational inequalities in a country. One of the key instruments for affecting this change would be the law. Some colleagues believe in something called transformative constitutionalism, the idea that the constitution could be mobilized to effect radical change in society (Davis & Klare 2010). In our example, the progressive application of the law could yield social justice in education. If that is so, why do children still die in pit latrines? Or better still, why are there still non-flushing toilets in more than 2,000 schools? Consider, for example, this recent picture on the unresolved state of school infrastructure in South Africa:

Table 9 shows that school facilities and resources are also lacking. For example, only 25.8% of public schools have a library, 19.7% have a science laboratory, 31% have a computer facility, and 57% have sports facilities. Most schools are not well resourced and certainly do not adequately cater for children learning in an increasingly high-tech, high-skilled economy.

Table 9: Public schools and facilities by province, 2019

Province	With electricity	With library	With laboratory	With computer facility	With sports facilities
Eastern Cape	98.0%	7.8%	6.9%	10.0%	35.5%
Free State	100.0%	49.1%	30.2%	38.7%	70.3%
Gauteng	100.0%	63.9%	23.2%	77.0%	77.5%
KwaZulu-Natal	98.9%	26.6%	11.5%	31.7%	45.6%
Limpopo	100.0%	16.2%	6.0%	14.3%	67.5%
Mpumalanga	100.0%	43.0%	12.4%	38.1%	70.8%
North West	100.0%	48.9%	20.2%	40.1%	74.5%
Northern Cape	100.0%	38.2%	23.2%	46.9%	68.9%
Western Cape	100.0%	62.5%	33.7%	54.7%	74.9%
South Africa	99.3%	25.8%	19.7%	31.0%	57.0%

Source: DBE, NEIMS, Standard Report August 2019

The law is a powerful instrument for achieving social justice, but it cannot implement policy and cannot regulate politics. The law has its limits. If every legal provision could be spoken into reality South Africa's education system would long have been transformed. While Equal Education, a progressive NGO could win a case against the Minister of Education for the neglect of school infrastructure, the court decision cannot compel the most senior politician in charge of schools to start building new structures (Equal Education 2018).¹ The reason? The law is intertwined with politics and policy in ways that make a straight line from the courts to the schools a complex and messy one.

Take the example of corporal punishment in schools. It is an illegal act and yet everyday there are hundreds of children who experience the force of physical punishment at the hands of teachers and principals. In both elite and disadvantaged schools, parents accept physical punishment as something reason-

able, that they themselves experienced as alumni, and might even find justification for the act in religion (the rod and reproof give wisdom) or common wisdom (spare the rod and spoil the child). Often parents cite positive benefits from their own schooling: it happened to me, and I did not turn out too badly did I? (Do not be tempted to answer that question!).

In other words, the culture of a community stands tall in the face of the provisions of law. In South Africa, it is very difficult to stop this humiliating practice given centuries of acceptance of the practice of corporal punishment in schools—something sociologists might call the institutionalization of punishment. While some cases make it to court, the practice remains ubiquitous in the school system.

Symbolic actions also play a major role in setting limits on the political pursuit of social justice in education. Consider for example the funding of schools. On paper, there is no longer any discrimination in the funding formula against children receiving unequal financing based on presumptions about their

1 <https://equaleducation.org.za/2018/07/19/statement-victory-for-ee-and-sas-learners-as-court-orders-government-must-fix-the-norms/>

race. As is well-known, there was a sliding scale of per capita funding that placed white children at the apex of the financing model followed by Indian children, Coloured children and then at the bottom, African children.

Spending on white child versus black child (1980s)

White child	R1,211 per annum
Indian child	R771 per annum
Coloured child	R498 per annum
African child	R146 per annum

While it might be hard in the 21st century to comprehend the explicit racism that underpinned the racialized funding of schools and children based on “race”, it is not hard to visualise the consequences of centuries of unequal funding when one compares derelict rural and township schools with elite public and private suburban schools. Those physical structures, and everything inside of them, are a consequence of history.

In response, the democratic government of the post-apartheid era did more than equalize funding; they skewed the funding in favour of disadvantaged schools through a number of pro-poor financing measures. Schools were divided into 5 quintiles schools with Q1 schools (black schools) receiving the largest share of government funding and Q5 schools (mainly former white schools). Q 1-3 are also no-fee schools since government covers their total fee income while Q4-5 rely on school fees to pay teachers, maintain the school and so forth.

On the face of it, this sounds like a very reasonable way in which to restore justice in the face of the blatant inequalities in schools. In other words, as a bold and symbolic action, the democratic government has done its job. These are the kinds of actions that every

President would laud in the annual State of the Nation Address to show what government is doing to create a more just system of education. Is it really that simple? Let us take a closer look.

First of all, what government provides for the poorest schools indeed relieves parents of the burden of school fees. The first problem is one of adequacy (Amsterdam 2006). That is, what schools need to really operate efficiently (in terms of fluidity of operations e.g., every cent used for its intended purpose) and effectively (in terms of achieving their goals e.g., the best results), it needs much more money. In education law in the USA, this problem is called the test of adequacy in school finance. Put differently, it is not enough to give more money than before, it is important also to give enough money to deliver optimal results.

How do we know there is a problem of adequacy? Simple. Look at class size or, in conventional terms, teacher to learner ratios per classroom. In most of the fee-free schools the classes are in excess of 30 or 40 children because there is not enough money to hire more teachers---especially when the department of education has budgetary cut-back such as in the pandemic years---and sometimes also not enough classrooms even if more teachers could be hired. On the other hand, look at the elite schools. Their class sizes remain small, seldom more than 20-25 children per class and much smaller in the primary schools down to the foundation years (grades 1-3). How did this happen? Did the new government not give *more* money to poorer schools?

There is a second problem that now becomes evident. It is not simply that government has given more official funding to poorer schools than to the more privileged schools, it is also that it did not prohibit the elite institutions from raising their own funds. In addi-

tion, there was no ceiling placed on what school governing bodies could leverage from parents in terms of the annual school fees. The result, whatever the relief offered from government to poor schools was “washed out” by the uncapped private contributions of parents whose children attended the more privileged schools. For example, for a long time, the per learner allocation in Q1-3 schools was R1,177 but only R204 in Q5 schools. However, the former white public and private schools could charge anywhere from R30,000 to more than R100,000 per learner for the academic year.

In short, the legally specified additional contributions to poorer schools were not only inadequate in relation to school needs, but they were also insignificant in the quest for a more equal and just school system in the country as a whole (van Dyk & White 2019). In education law and policy, there were at least two ways of responding. One was to significantly increase the volume of funding in favour of poorer schools. Another was to set a cap on private contributions that parents make to schools. The first option was unlikely given that South Africa already spends more money on education (as a percentage of GDP, and as a proportion of the national budget) than most African countries. In addition, the sheer scale of the inequalities between the majority poor schools and the minority privileged schools was such that the gap was unbridgeable in fiscal terms. The second option was undesirable because such pressure would in all likelihood mean that white and middle-class parents would simply remove their children from the public schools and create or join already existing private schools. This would leave the black government to preside over a largely defunct public school system. At the dawn of democracy, this outcome was considered within the ranks of the ruling party and

found to be unattractive. What does all of this mean? That when the law meets politics (and policy) there is an awkward, unseemly dance between them that makes a linear calculation from legal intentions to educational outcomes a lot more unpredictable than the purely rational mind would contemplate.

There is in the back of the mind of the politician and the policymaker another unpleasant truth in relation to South African schooling. It is the sheer levels of inefficiency in the use of given resources that makes officialdom balk at the idea of ‘simply giving more money’ to poorer schools. Teacher productivity is low both in perception and in fact. Turning resources into results is the subject of efficiency studies and on this matter South African has a poor track record. One reason is the famously low measures of ‘time on task’ in classrooms meaning that teachers only teach actively for a relatively small number of the more or less 198 instructional days in the school calendar. It clearly would be a mockery of social justice to pour more resources into such schools when there is no guarantee that additional tax-payer monies would yield better academic outcomes. Social justice, in other words, depends also on what happens to funding received within the school environment---such in the efficient use of paid teacher time. Consider the table below that compares the use of time in South African vs Botswana schools:

TABLE 9.5 Number of mathematics pieces (recorded lessons) of daily work in Grade 6 workbooks by the end of October/ beginning of November 2009

Statistic	Lessons recorded in North West	Lessons recorded in Botswana
Mean	52	77.5
SD	16.00	22.7
Minimum	21	33
Maximum	97	142

Source: North West Province and Botswana Schools Sample, 2009.

M Carnoy, L Chisholm and B Chilisa (eds) "The Low Achievement Trap: Comparing Schooling in Botswana and South Africa"

It is not only the fact that teachers in especially poorer schools do not do more justice (sic) to funds received, but that there is outright corruption in some public schools that further undermines this social project. A major report on corruption in the appointment of educators and principals on the part of the powerful teachers' union was simply not acted on by the national department of basic education (Department of Basic Education 2016). To go against powerful union figures was to confront a deadly politics in places like KwaZulu Natal province. So, the politicians stand back, and the corruption continues. Corruption makes it so much harder to close the gap between quality teachers and leaders in the poorer schools and those in the more privileged sector.

Nowhere are the limits of the law more evident than in the schools admissions policy. If there is one way for parents from historically disadvantaged communities to break the cycle of poverty and break-into middle class status it is through the schools their children attend. We did a major study on the topic titled, *Who gets in and why? Race, class, and aspiration in South Africa's elite schools* (Jansen & Kriger 2020).

Once again, the noble intention of law and policy is to ensure fairness in admission. There are all kinds of policy prescripts and legislative statements that insist on equal education and non-discrimination in education. Read literally, the law and policy make provision for access to any public school without regard to race or class. And yet, South African schools are remarkable in their emphatic institutional differences in terms of race and class. Drive along the main road cutting through the Southern Suburbs of Cape Town and you will witness some of the most

prestigious schools in the world with rolling green landscapes from the City Bowl south towards Fish Hoek. The students are overwhelming white with small and sometimes larger numbers of black middle-class children as well. Less than 10 km away you will find mainly poor and working-class learners whom, try as they might, do not stand the slightest chance of accessing the advantaged schools. Why not?

Our research in the book shows very clearly how elite schools keep out black children despite Constitutional provisions and elements of the Schools Act that promise non-discriminatory education. Schools use the following instruments to stay white and wealthy:

- Zoning, which means that only children who live within a fixed radius from the school can apply for admission. This means that since residential areas around white schools were reserved for whites, the majority populations in each area were obviously white families---apart from recent new arrivals from the emerging black middle classes.
- Sibling privilege, which means that children who have siblings at the school are selected first. Once again, since those children already enrolled tend to be those who gained admission as whites from the area, the privilege of access is reproduced.
- Heritage privilege, which means that children who had parents and grandparents at the school enjoy first choice in a new applicant pool. While some schools claim to have done away with this privilege, many others still wield this particular instrument of access control.
- Fees, which means those who can afford to pay tuition costs which sometimes runs north of R100,000 per annum, are the ones who schools admit. Given historical

- inequities, it is the children of the privileged who are mainly white enjoy access.
- Social selection, which means that elite schools have a range of measures that they use to determine fitness for the school. These measures are often invisible to parents but include parental occupations (and therefore ability to pay), secret questionnaires forwarded to the sending schools about a child, and which ask about behaviour, on-time payments and social habits which have nothing to do with the academic standing of the young learner.

To be sure, there is provision in policy to make access affordable, but the law also allows governing bodies to determine the annual fees of their school. So, for example, a financially struggling parent can apply for admission on the basis of a claim for exemption from fees. The school then sends those “exemption learners” through to the provincial education department which in turn would pay the fees according to a complex formula in the form of a subsidy to the institution. Here’s the rub: the subsidy is a very small percentage of the actual school fees which means that if a school sends through too many exemption learners, their finances will collapse. In response, schools do what any rational organization will do under the circumstances: they send through as few exemption students as possible preferring in their admissions those applicants whose parents can pay the full school fees.

The policy intentions are good but the practical implications thwart the otherwise progressive move to enable poorer children to access the privileged schools. But the follow-up question any student of education law and policy *should* ask in response is this: why would government not force the issue? That is, given evidence that schools can work

their way around these regulatory provisions, why not tighten them up? Why not make it difficult for school governing bodies to maintain a system based on social privilege rather than one founded on social justice? Good question.

Once again, the law meets politics. The Harvard legal scholar Derek Bell gave us the concept of interest convergence theory. In simple terms, the argument goes that whites are prepared to make concessions on the racial integration of schools when their interests converge with those of black parents. We refined his thesis by demonstrating that in South Africa, it is when the racial interests of whites and the class interests of blacks converge, that schools integrate modestly while balancing the concerns of the two sets of parents.

In short, where former white schools did integrate, it was in the main the admission of the black middle classes whose numbers were small enough that enrolments could be successfully managed. Whites could claim they were not racist for there were black students in their schools. Former white schools would point proudly to the changing demographics even as their schools remained for the most part emphatically white in a black majority country.

The black middle classes, in turn, would jealously guard their class interests against the appointment of black teachers and the mass enrolment of black learners; our research shows that when schools “darkened” in these ways, the black middle-class parents moved with white parents to “whiter” schools. “If I wanted my child to have black teachers,” we would hear from black middle class parents, “I would not have come to this school.”

It is in this context that it is important to bear in mind that the new black elite that dominates provincial and national government bureaucracies---where laws and policies are

made---send their children without exception to these former white, elite public and private schools. In other words, they have a vested interest in keeping those schools white because of the troubling but unquestioned assumption that white schools with white teachers with white majority learners offer a better quality of education and, by association, better options in the post-school market. No black professional of any standing or black civil servant sends their child to township schools. Which means, quite simply, why would they overturn through law and policy the small islands of privileged schools that lift their own children into elite universities like the University of Cape Town or Stellenbosch University?

Once again, there is no lack of investiture in the symbolism of policy and legislation provided it does not upset the delicate balance of the conditional terms of desegregation described above. One more example must suffice in relation to school desegregation. In 2019, the provincial MEC for Education in Guateng changed the zoning regulations so that henceforth children could apply to schools from a radius of 30 km from their homes. On the face of it, this appeared to be progressive move since now one of the major instruments for the racialized control of access to privileged schools was removed. It was in fact a case of rank deception. These instruments of admission do not function in isolation of each other. You could lift the zoning regulations, but you still have to pay exorbitant school fees as a condition of admission quite apart from all the other hurdles to access as outlined earlier. Yet the symbolism is powerful, and all the media lapped up the promise of the new regulations promising equity in admissions. Nothing changed with respect to the racial profiles of elite schools.

But the pursuit of social justice is not simply about school infrastructure, corporal punishment, education finance and admissions; it is also about curriculum, that is to say, the content of what we teach. The university student protests pressing for decolonization was in large part about *the 'what' of teaching*. It really does matter whether children in school know more about the two World Wars in Europe and little about the *Mfecane* among the indigenous communities of Southern Africa. Or that young people learn about 'the coming' of the British and Dutch settlers but little about the systematic exploitation of indigenous peoples and the expropriation of their lands.

Yet critical theorists of curriculum warn that merely replacing white nationalist content with black nationalist content hardly counts as emancipatory education. It also matters how you teach alternative content, something educationists call pedagogy. Consider the following example from doctoral research by one of our students. Thobs Gamede wanted to know how two schools in the democratic period teaches two new events in the school curriculum: the one was the Soweto Uprising of 1976 and the other the Sharpeville Massacre of 1960. Both events appeared in the new curriculum.

At the former white Boys high school, the two events were taught in minimal time and facts of the order 'then this happened, then that happened.' Quickly, the require content was covered (sic). At the black Soweto high school, one central to the 1976 Uprising, much more time was spent on the two events. The teacher raised critical questions from the memories of the community and the experiences of older generations. It was as if the two schools were in different countries.

Why did this happen? Because the curriculum is not simply given to schools and transmit-

ted by neutral teachers to receptive student minds---it is interpreted through the ideologies, biographies, and preferences of teachers. Between the cold pages of a textbook and the hearts and minds of the children, stands a teacher whose life experiences and political predilections would give particular meanings to historical events such as the two in question. Simply 'putting' content into the curriculum is a start but hardly enough in the dynamics of a school or classroom to ensure teaching and learning about social justice.

No recent movement in student politics brought more pressure for curriculum change than the interconnected moments of #FeesMustFall and #RhodesMustFall. The press for decolonization seemed to enjoy brought support from student activists to university leaders and the society at large. The rhetoric was persuasive---the university curriculum was still largely centered on Europe, the professors mainly white, and the cultures of institutions largely untransformed. Decolonize the curriculum.

And so, we launched a five-year study to determine how exactly the decolonization of curriculum was taken up within a sample of 10 mainly former white universities (Jansen & Walters 2021). In other words, after the historic protests of 2015-16, did universities in fact implement a decolonized curriculum that took account of the social justice concerns that underpinned activist demands?

The short answer is no but the longer answer is more complex. There were always radical curriculum initiatives on campuses that made the case for social justice, but they were few and far between. The decolonization moment pressed the issue. One of the cardinal mistakes of the activists was the lack of adequate definition for what was meant by decolonization; academics were genuinely confused about meanings and execution especially in the natural sciences, the

medical sciences, and engineering. Now of course, in the social sciences and humanities basic concepts always enjoy a latitude of meanings and it would be unfair to insist on *one* meaning for complex ideas. The *atom* can be defined more or less precisely but a concept like *social justice*, for example, can have many meanings.

Still, the fact that there was no guiding conception of decolonization meant that academics simply made up the meanings in ways that fit their own political ideologies and kept them within their professional comfort zones. A few examples. In the vacuum of meanings, many South African academics took decolonization to mean good teaching. That is, by improving your pedagogy or making assessments simpler and less frequent, you were in fact doing decolonization. For other academics, decolonization meant academic development work; that is, by helping struggling students to overcome learning barriers in, say, science and mathematics, you were decolonizing the curriculum. There was a sizeable number of academics in our study who saw decolonization as the addition of an African example here or there in the curriculum, thereby demonstrating a commitment to social justice in the economics or plant sciences curriculum.

All of these assumed meanings assigned for decolonization were no doubt important interventions in teaching and learning but did they really lead to a radical shift in the dominant knowledge arrangements that define the post-apartheid university? Surely good teaching is more than delivering settled knowledge about South African history or mathematics to the exclusion of, say, histories of slavery or African contributions to geometry? And how can the view of students as "deficits" whose lack of knowledge has to be compensated for---as in dominant academic development models---possibly signal

radical intent? To insert a section on the African butterfly or replace dollars and euros in the economics curriculum with Rands, surely is not what was meant by decolonization as the radical revisioning of what is meant by knowledge on the African content?

Much of what passed as otherwise noble efforts to give meaning to decolonization simply did not change in fundamental ways the curriculum in physics or anthropology or immunology; in fact, most of the 200 academics interviewed for our study would claim that they were more or less teaching the same content in the same ways as they did before the rupture of 2015-16. The interesting intellectual question is why?

One of the things we discovered in our study was the power of institutions to keep things the way they are or, rather, the way they always were. Universities are institutions by which we mean value-driven institutions whose legitimacy depends on following rules and regulations but also norms and values that give them credibility in the broader society. Like schools or religious organizations, institutions are created for social purposes that stretch over time; they are not private sector companies or pop-up shops that come or go with the exigencies of the moment. Notice how many shops or restaurants closed down during the pandemic, some for good, because their existence depends on the crisis of the moment. Not so with institutions; they remain because of their embedded values and durable purposes in society.

When a radical initiative like decolonization threatens the stability of institutions, they respond by absorbing such radicalism---or as one scholar puts it, defangs them---so that the institution and its taken-for-granted practices, endure. Two examples make the point. The most obvious choice for decolonization is the English language in universities. It should ideally be replaced with indigenous

languages long neglected, in fact suppressed, by colonialism and apartheid. Yet English as language of instruction has become institutionalized within South African universities, assuming the status of commonsense in academic teaching and even administration.

Assessment is another example. There are few more obvious candidates for decolonization than assessment. Assessments in the form of examinations typically represent harsh, final, and often unfair judgments about a student's academic worth. For example, a student who entered university from a dysfunctional high school can obviously not be judged by the same standardized form of testing than one who came from a privileged school. There is no consideration in making standardized judgments about academic performance about the very different "opportunities to learn" for the children of the privileged and the children of the poor.

We nevertheless do such assessments routinely because that is how institutions select and sort graduates. Of course, assessments can be made more fair by drawing on a range of competences and capabilities rather than only exam-type, summative evaluations. Yet, most universities despite the decolonization moment still do routine, terminal examinations of all students using a common yardstick of performance.

Now comes the interesting question about the law and higher education. Can there not be legal provisions that compel universities to pursue social justice through the decolonization of the institutional curriculum? Good question but there is a problem.

Universities around the world pride themselves on their autonomy from state control or interference. The long years of apartheid oppression developed within higher education institutions a profound sense of their right to decide what to teach, to make their own academic appointments, and to decide

on whom to teach. To therefore tell a university what should be in the disciplinary curriculum is to raise the hackles of academics. Not that the legal fraternity did not try to do exactly this kind of thing in the recent past. Earlier, reference was made to transformative constitutionalism. An activist concept, an audit panel of the Council on Higher Education (a statutory body responsible for regulation of quality in higher education and the accreditation of academic programmes) tried to enforce the teaching of transformative constitutionalism in the LLB degree of the law schools of South African universities. Despite making adherence a condition of accreditation, the auditors found that a number of law schools simply did not follow their prescript either because of a lack of interest or knowledge or capacity to teach the new concept. None of universities lost their accreditation for non-compliance simply because an external authority cannot dictate to institutions what to teach. If compliance with a legal or policy injunction is difficult in schools, it is much less attainable in universities (Jansen & Walters 2021).

One of the recurring themes in educational institutions is the social justice imperative of what South African legislation calls employment equity. Not meeting your “equity targets” as a university (or a company) is supposed to come with prescribed penalties. But how do you penalize a university for not having enough black professors in the senior ranks when they simply do not exist in sufficient numbers at the moment? Unlike the civil service where a comrade can be deployed without regard for competence in the discipline of project management in a rural municipality, such a practice would be disastrous for the country’s higher education institutions. You cannot produce a professor in nuclear science or electrical engineering without years of intensive training and evi-

dence of scholarly accomplishment. And when the pipeline of black graduates from first degree to postdoctoral fellowships is a trickle of talent because of a dysfunctional school system, among other factors, then legally mandated “targets” will simply not be met.

Not that some universities do not try to bend reality in their favour. Universities like UNISA lowered the bar for senior academic promotions to make it easier for black staff to rise up the advancement ladder. Such institutional behaviour does serious damage to the academic project and to the development of scholarly excellence in the new professoriate. The more serious research universities know that such decisions undermine their own credibility in the international standings of higher education institutions in South/Africa. The point of relevance is that the legislation cannot mandate academic appointment and promotion decisions beyond requiring fairness and equal treatment in decision-making. All universities have institutional policies that require fair play in hiring and advancing staff.

None of these critical reflections intend to suggest that the law has no effect on education policies and practices in South African institutions. In schools the end of racial discrimination in admissions was required and to some extent achieved in post-apartheid legislation. Yet as we have seen, former white schools were still left with significant powers through their governing bodies to manage admissions in ways that kept most of the elite schools as white majority institutions. The effects of the law even in its progressive intent is not straightforward, as another example shows.

One of the puzzling cases from public schools is the unequal effect of legal challenges to what appears to some as social justice concerns. Consider the many court battles over

the language policies of white, Afrikaans schools.

On a regular basis, white Afrikaans schools in parts of the country would resist the pressure to admit non-Afrikaans speaking learners from more crowded township schools on grounds that they did not have adequate space or teachers. More fundamentally, these schools would argue that the introduction of non-Afrikaans speaking children to be taught in English as language of instruction would change the character of the school as an Afrikaans institution. Some might be bold enough to claim that given the demographics of the surrounding areas, the school would eventually cease to be an Afrikaans medium school. After all, the right to be taught in the language of your choice---decided by the governing body---is settled in the constitution, the highest law of the land.

Needless to say, the black communities in the area, supported by the relevant provincial department of education, would make the case that rights of access trump language rights. All provinces, with the exception of the Western Cape, are led by legislatures of the ruling party, the African National Congress. The argument from the provinces would therefore be that to deny access for black learners to former white schools is to protect racial privilege.

The matter goes to court is invariably decided on the basis of access. Many of the former white schools “turn black” (Jansen and Kriger 2020) and departing parents place their children in predominantly white, Afrikaans schools whether public or private, or simply commit to homeschooling.

What is often missed in otherwise solid research on “the effectiveness of legal remedies in education” (Serfontein and de Waal 2013) is the unequal outcomes of court remediation. In all cases, the targets are white, rural, Afrikaans schools with relatively

low enrolments, on the one hand, or white, urban, Afrikaans lower middle class to working class schools also with low enrolments (Vandeyar and Jansen 2008). In both contexts, these schools come under language pressures either because of their rural, low enrolment status in proximity to large areas of black settlement where schools are often overcrowded, or because they offer public education with highly affordable fees for poorer whites that can be accessed by black students whose parents perceive a relatively better quality of education than in disadvantaged and often dysfunctional black schools. The elite white Afrikaans schools do not come under the same pressure to change their language policies because their enrolments are high, and their fees are out of reach to most black families and their children. Being able to retain their single medium Afrikaans status in this way, non-speakers of the language migrate to English speaking schools. It is our thesis, therefore, that there is a less obvious class discrimination at work within the white, Afrikaans speaking school communities when it comes to the changing demographics of enrolments either as a direct result of government action via the courts or in response to declining registrations in urban, white working-class schools.

In most court cases, the drama of a single case of access denied, played out in the public domain, does not mean that social justice prevails for the system as a whole. The Rivonia Primary case is probably the most well-known of such challenges. A (black) parent applied to a (white) primary school and was told the school was full, according to the norms decided on by the school governing body---120 learners per grade. The provincial education department, represented by the Head of the Department (HOD), felt that it had the final authority on admissions and that the child should be admitted. The

case eventually reached the highest court in the land which decided that the government's HOD had the final say in admissions even as it called for fairness, transparency, flexibility, and co-operation between the SGB and the provincial government in disputes about admissions.

What was fascinating about this court decision was that there was no rush to admit learners to former white public schools as a result. Things continued as normal with the SGB's still maintaining control over admissions (and language) policy. A single case did not change the power of white schools to continue managing its enrolments in ways that maintain the racial and class privilege of those schools for complex reasons explained in our book on the subject (Jansen and Kriger 2020).

In sum, court challenges as in the case of Rivonia Primary are brought by singular black middle-class parents with the time and resources to pursue the matter; most parents do not have such luxuries available to them. In addition, there is no political appetite within the black middle classes to radically change the privileged school sector in South Africa precisely because those are the institutions they desire for their own children. So, the status quo remains and social justice for the many remains beyond reach.

We can now finish where most academic essays begin---with definitions or, more appropriately, *conceptions* of social justice and education in the South African context. It is tempting to think of social justice in terms of the following four common conceptions as *distributive* (determining who gets what), *procedural* (determining that everyone receives fair treatment), *retributive* (determining that wrongdoing is punished), and

restorative (determining that wrong things are set right) (Maiese and Burgess 2020).²

This essay has shown that there has been considerable work done in policy and planning to ensure that the allocation of educational resources favour those who were disadvantaged by apartheid; that is, there is a sense of *distributive justice* in government actions on education in favour of the victims of the past injustices. Every single legislative act in education, from the South African Schools Act to the Higher Education Act and their amendments, signal distributive intent. In this sense, government has certainly moved beyond simply ensuring *procedural justice* where everyone receives fair treatment to ensure that public resources are more heavily tilted in favour of the poor e.g., the school quintile system. There is however very little appetite within South African education for *retributive justice* where wrongdoing from apartheid's education past is punished; even in the political sphere, the route of truth and reconciliation was a preferred path for dealing with historical enemies.

Where there is considerable space for rethinking and redoing the legacy of apartheid education is in the sphere of *restorative justice*. The concept means to restore, to set things right, to do justice in the process. There is no evidence of restorative justice in the South African education system. Most South African research tends to focus on (in) equality which is an empirical construct, a measure of the distance between two groups (race, class, gender etc.) when it comes to educational inputs or outcomes (Spaull & Jansen 2019). Some research gives attention to (in)equity which is a normative con-

2 Michelle Maiese and Heidi Burgess (2020) Types of justice, Essay in Beyond Intractability: Knowledge base and conflict fundamentals
https://www.beyondintractability.org/essay/types_of_justice#:~:text=This%20article%20points%20out%20that,All%20four%20of%20these%20are

struct, a statement of the wrongness of what is socially or empirically observed such as the differences in educational infrastructure between the schools of the privileged and those of the poor (Motala and Carel 2019).

Restorative justice offers more than an empirical or normative account of the state of education in three ways. First, it pays attention to history, the restoration or repair of what was broken in the past when it comes to education. This idea is very much exemplified in emeritus Archbishop Njongonkulu Ndungane's The Historic Schools Restoration Project. It recognizes an era in which excellent black schools flourished on the South African landscape before its decimation. The very idea therefore carries the concept of restorative justice, to return to a prior state some of the most distinguished black schools from the country's past.

A practical implication of this insight on restorative justice is to render what is taken-for-granted about schools to be a product of an unjust history. There is nothing natural about the state of inequalities in education; it is a product of a divisive history. The ability to "see" the problem in its historical contours is what makes social justice possible. For it destroys myths—such as the conviction of the privileged that the state of their schools is simply a product of individual effort and sacrifice rather than racial and class advantage.

This is where politics and pedagogy become the same thing: teaching about the unnatural state of inequality is the basis for an informed activism that seeks to restore some semblance of justice in education. It is unsettling (sic) but necessary, this focus on the roots of injustice.

Second, restorative justice in education understands the problem of injustice as relational in nature. That is, you cannot restore justice in schools (or universities) without

paying attention to the obvious---that one part of the system is privileged at the expense of another part of the system. This is a difficult one for such an attribute of restorative justice assumes that you cannot attend to injustice in black, poor schools in isolation of the former white, privileged schools.

What are the practical implications of a relational approach to social justice in education? It means that the schools of the privileged also need to be transformed in ways that restore injustices on their own terms. To be just, black teachers, black students, black principals also need to enjoy access to these former white schools not as a legal or political obligation but as a matter of justice. Former white schools need to be transformed in their cultures, composition, and curriculum in relation to the deep transformation of nearby black schools until all of these institutions are more inclusive of all our children and teachers---which is the next point.

Third, restorative justice means restoring access for *all* our children. The current settlement in which only the black and white middle classes can access the top schools amounts to a case of justice for those with the ability to pay. It is an instance of class discrimination which seldom features in either public deliberations on social justice in education or in the calculations that schools make about diversity or in educational research on the subject.

The practical implication of this observation is clear: all schools need to be affordable for all children and where they are not, compensatory measures should be considered to provide access for talented working class and poor children. Elite schools have the resources to set aside substantial scholarships that target families whose children would otherwise be left out of opportunities for access to top schools. Racial justice is not enough; economic justice is as important.

Fourth, restorative justice must be visibly evident in the concept is to have any purchase in practice. Elsewhere we called the problem *face inequality* in reference to visible injustices in the unequal provision of educational infrastructure for former white and black schools (Jansen 2019). When citizens cannot “see” the restoration of justice in the most obvious places---what schools look like---they would understandably come to believe that an acceptable standard has not been met.

The practical implication of such a standard for social justice is that school infrastructure must be a priority in educational spending. This does not imply the impossible standard of matching the infrastructure of the elite schools, many of which have amassed social and financial wealth over more than a century. It simply means demonstrating a commitment to a more just and visible education for the majority of children reflected in things like the abolition of pit latrines, at the one end of the spectrum, and the provision of school laboratories and libraries at the other end. Such actions make social justice visible in communities.

Fifth, the standard of visibility in restorative justice in education implies that it must also be translational i.e., a social justice commitment must translate resources into results. Any restorative action can only be judged by the extent to which it repairs what is wrong that should be evident in social or, in this case, educational outcomes. Restorative justice therefore means little if it remains in

the domain of legal or policy statements of intent; that time has passed more than two decades into our post-apartheid democracy. Such a conception of social justice in restorative terms places the onus on government and its officials to create systems that are effective and efficient in delivering textbooks to schools on time and translating the gains of learning materials into improved learning outcomes. The failure to do so, in this conception, is not simply a failure of technical processes or staff capabilities but a breakdown in the social justice commitments of government offices and officials.

Taken together, the five standards for the achievement of restorative justice---historical, relational, accessible, visible and translational---constitute a powerful framework for the ongoing pursuit of social justice in education. As restorative measures they seek to repair the wrongs that were done in the past and call out the failure to undo those wrongs in the present. This conception of social justice therefore does not draw hard lines between agential forces under and after apartheid but sees the non-achievement of the standards as inflicting the same harm on victims of a present past. This is not, of course, to suggest any moral equivalence between the apartheid order and the democratic era; it does, however, make the point that from the perspective of the victims of apartheid, the failure to deliver justice in education is not automatically resolved with a change of government.

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Fundamental rights in education: a teaching staff's perspective in view of the recent case law of the European Court of Human Rights

Evelien Timbermont

Introduction and research objectives

When fundamental rights in school contexts are at stake, one primarily thinks of the fundamental rights of children and more specifically their right to education.¹ However, like any other individual, teachers -and more generally anyone employed in an educational institution- are also entitled to the right of respect for their fundamental rights. This includes for example the right to respect for private and family life or the freedom of expression.

Of course, the fact that teaching staff are entitled to a number of fundamental rights does not imply that these rights could not be subject to constraints. It is apparent from the analysis of the European Convention for the Protection on Human Rights and Fundamental Freedoms (ECHR) that several articles provide for the conditions that such restrictions must meet. However, this does not preclude obviousness in assessing an alleged unlawful interference with fundamental rights correctly. The voluminous jurisprudence of the

European Court of Human Rights (ECtHR) provides a striking illustration of this difficult, and in some cases extremely sensitive, endeavour.

Two recent judgments of the ECtHR in which the fundamental rights of teachers, more specifically the freedom of expression and the right to respect for private life, were discussed once again demonstrate that fundamental rights conflicts do not require a general solution but instead demand a consideration of the concrete circumstances in which the conflict occurs. More specifically, it concerns the cases *Mahi v. Belgium*² and *Mile Novaković v. Croatia*³. Both judgments will be analysed in this contribution. Subsequently, the reasoning developed by the ECtHR in both judgments will be assessed and also compared with previous case law of the Court. In doing so, the extent to which educational staff can rely on their fundamental rights of freedom of expression and the right to privacy will be addressed. Rather than developing a conclusive solution to such fundamental rights conflicts, this contribution aims to derive a number of recurring criteria from the jurisprudence of the ECtHR that can serve as a guide for primarily employees

1 Cf. Art. 2 Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. See more in general European Union Agency for Fundamental Rights and Council of Europe (2015), Handbook on European law relating to the rights of the child, Publications office of the European Union, Luxembourg, https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.pdf.

2 ECtHR 3 September 2020, No. 57462/19, *Mahi v. Belgium*.

3 ECtHR 17 December 2020, No. 73544/14, *Mile Novaković v. Croatia*.

and employers, but also for judges who must resolve such conflicts or any other stakeholder concerned.

As far as the scope of the study is concerned, a conscious decision was made to proceed from the context of the aforementioned judgments. Consequently, the focus is on the fundamental rights protection offered by the ECHR, as a result of which for example the European non-discrimination regulations within the framework of Directive 2000/78/EG⁴ remain undiscussed. Furthermore, in view of the scope of the examined rulings, only the right to respect for private life and the freedom of expression will be considered. Thus, the interesting issue of religious symbols in education will not be discussed as this topic deserves a separate inquiry in which, among other things, the freedom of school choice is further considered, but also the interpretation of the concept of neutrality and the relationship between church and state are key issues.

The next part of this contribution consists of a number of general observations on fundamental rights in the field of labour relations. Subsequently, the *Mahi v. Belgium* and *Mile Novaković v. Croatia* judgments will be discussed, following which a number of findings will be drawn from these rulings taking into account the Court's case law. Finally, this contribution ends with a short conclusion on the fundamental rights of teaching staff.

General reflections on fundamental rights in the context of employment

The ECtHR has set a number of benchmarks regarding fundamental rights in an employment context.

First of all, it is important to point out that it is generally accepted that fundamental rights in principle belong to everyone and apply not only in the relationship between state and citizen, but can also be invoked in the relationship between citizens. Clapham rightly states in this respect the ECHR swapped from protecting an individual against state measures to protecting the individual through state measures.⁵ It should also be acknowledged that in the specific context of an employment relationship and for example when recruiting, an employer has essentially considerable freedom of choice as to whether or not to recruit staff. Nevertheless, this discretion is neither absolute and is among other things curbed within the framework of the fundamental rights protection of employees, but also through the application of non-discrimination legislation. Consequently, fundamental rights are relevant as well in the context of a dispute concerning employment.⁶

Reference has already been made in the introduction that a restriction on fundamental rights is not necessarily problematic, since the ECHR itself shows that in certain circum-

4 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal* L 303, 2 December 2000.

5 Clapham, A. (1993), 'The "Drittwirkung" of the Convention', in Macdonald, R. et al. (ed.), *The European system for the protection of human rights*, Martinus Nijhoff Publishers, London, pp. 190.

6 See in this context e.g. Novitz, T. and Fenwick, C. (2010), 'The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice', in Novitz, T. and Fenwick, C. (eds.), *Human Rights at Work*, Hart Publishing, Oxford, pp. 19 et. seq.; De Schutter, O. (2014), *International Human Rights Law*, Cambridge University Press, Cambridge, pp. 427 et. seq.; Lemmens, K. (2018), 'General Survey of the Convention', in van Dijk, P., van Hoof, F., van Rijn, A. and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights*, Intersentia, Cambridge, pp. 26-30.

stances limits can be set.⁷ These restrictions are equally applicable in the specific context of an employment relationship. In principle the ECHR contains for each fundamental right a number of general conditions which legitimate restrictions imposed on this right must satisfy. For example, as regards to the right to privacy the conditions can be found in Article 8, §2 ECHR. It follows from this provision that a restriction is only permitted if it passes the test of three parameters, namely the principles of legality, effectiveness and proportionality. Similar conditions can be found in Article 10, §2 as regards to the freedom of expression.⁸ Consequently, it is also clear that as a general rule fundamental rights can be subject to restrictions. Since fundamental rights in principle belong to everyone and there is no hierarchy between them, it is common for these rights to interact.⁹ Given the ambiguous relationship of fundamental rights towards each other, the resolution of such a conflict will also often be difficult to predict. Thus, it is essential to define both the scope of the conflicting fundamental rights and the criteria to be fulfilled in order for a legitimate limitation of a fundamental right to be imposed.

Hence, the simple fact that teaching staff, just like any other citizen, can rely on their fundamental rights protection in the context of their employment is therefore not to be seen as a huge surprise. Being employed as an employee in a private school or as a civil servant in a public school in no way impairs this

consideration. Bearing in mind the *Fuentes Bobo*¹⁰ and *Vogt*¹¹ case law, the aforementioned distinction according to whether a person is employed in the public or the private sector is of no importance, at least as far as the mere application of Article 10 ECHR is concerned. This finding can be extended to the right to privacy. Some teachers even enjoy a special, and in a number of cases enhanced, freedom of expression, particularly in the context of academic freedom.¹² Nevertheless, a teacher -just like other members of the working population- will in many cases be subject to more restrictions in the context of the execution of his assignment. It is for example assumed that an employee can be expected to have a certain degree of loyalty towards his employer and consequently does not express unfounded or defamatory criticism towards his employer.¹³ That some employees in certain positions are subject to a stricter loyalty, which may even further restrict their fundamental rights, has also been accepted.¹⁴ In the educational context, this can be explained for instance by the fact that in denominational education identical fundamental rights, or at least closely linked fundamental rights, must be assessed and balanced against each other.¹⁵ However, the foregoing is not necessarily an indication that employees will consistently suffer and lose out on their fundamental rights as will also be evident from the following judgments.

7 This does not apply to so-called 'absolute' rights which are assumed not to be subject to restrictions. This concerns for example the right to life. See ECtHR 22 March 2001, Nos. 34044/94, 35532/97 and 44801/98, *Streletz et. al. v. Germany*, para. 72.

8 See as well art. 9, §2 ECHR according to the freedom of religion. Note that restrictions can be justified 'for the protection of the rights and freedoms of others', which opens up a wide range of possibilities in this regard.

9 See more in general Brems, E. (2008), *Conflicts Between Fundamental Rights*, Intersentia, Antwerp.

10 ECtHR 29 February 2000, No. 39293/98, *Fuentes Bobo v. Spain*.

11 ECtHR 26 September 1995, No. 17851/91, *Vogt v. Germany*.

12 ECtHR 20 October 2009, No. 39128/05, *Lombardi Vallauri v. Italy*.

13 ECtHR 26 September 1995, No. 17851/91, *Vogt v. Germany*; ECtHR 21 October 2011, No. 28274/08, *Heinsch v. Germany*; ECtHR 12 September 2011, Nos. 28955/06 et al., *Palomo Sanchez e.a. v. Spain*. See more recently ECtHR 5 February 2020, No. 11608/15, *Herbai v. Hungary*.

14 ECtHR 23 September 2010, No. 425/03, *Obst v. Germany* and ECtHR 23 September 2010, No. 1620/03, *Schüth v. Germany*.

15 See already earlier EComHR 6 September 1989, No. 12242/86, *Rommelfanger v. Germany*.

Analysis of the ECtHR's *Mahi and Mile Novaković* case law

Mahi v. Belgium¹⁶

Factual context

The facts underlying the Mahi decision can be summarised as follows. Mr Mahi has been a teacher of Islamic religion in a school of the French Community in Belgium since 1987. In 2015, he wrote an open letter regarding the role of the media in response to a number of difficulties that arose in his school in the aftermath of the terrorist attack on the Charlie Hebdo magazine. Mr Mahi states in his letter, among other things, that cutting satire infringes on the freedom of expression. He complains about the misinformation of the media, about the political responsibility, etc. The religion teacher aligns himself with the French philosopher Garaudy (n.b. convicted of revisionism and Holocaust denial), whom he refers to as his '*maître de penser*'. Mr Mahi also indicates that homosexuality is an unnatural phenomenon and poses 'a problem'.

After an internal procedural battle, Mr Mahi was referred to another public school approximately 50 kilometres distant from the school where he was originally employed. This relocation was ordered as a disciplinary measure as a result of the aforementioned statements. The Belgian Council of State rejected the appeal lodged by Mr Mahi against this disciplinary measure. Subsequently he brought the case before the Strasbourg court.

Mr Mahi considers the disciplinary measure as a violation of both Article 8 and Article 10 ECHR, guaranteeing respectively the right to respect for private life and the freedom of

expression. More specifically, according to the applicant, the disciplinary measure was not provided for by law and did not involve a necessary measure to protect the legitimate objectives provided for in the relevant provisions.

Decision

First of all, the ECtHR holds that Mr Mahi's claims must be examined solely in the light of Article 10 ECHR.¹⁷

In this respect the Court concludes -not surprisingly, but nevertheless vital- that the disciplinary measure constitutes a restriction on the applicant's freedom of expression.¹⁸

In accordance with the classic three-stage inquiry, the Court firstly holds that the restriction is indeed provided for by national law. It refers to the judgment of the Belgian Council of State. This court ruled that Mr Mahi referred in his open letter several times to his teacher position. In doing so, the applicant violated his duty of discretion as included in the applicable national regulations. The Court perceives no reason to disagree with the view that the duty of discretion is provided for by the applicable national regulations.¹⁹ According to the ECtHR, the restriction serves a legitimate aim, namely preventing disorder and protecting the reputation of the educational institution concerned and, more generally, of the French-speaking Community in Belgium.²⁰ As is common practice, the decision is most detailed on the question of the necessity of the restriction in a democratic society. After having made explicit the prominent and essential character of the freedom of expression, the Court immedi-

¹⁷ *Ibid.*, para. 20.

¹⁸ *Ibid.*, para. 21.

¹⁹ *Ibid.*, paras. 23-25.

²⁰ *Ibid.*, para. 26.

¹⁶ ECtHR 3 September 2020, No. 57462/19, *Mahi v. Belgium*.

ately emphasizes that this freedom can be subject to restrictions as well. Recalling its earlier case law, the ECtHR notes that Article 10 ECHR is applicable within the professional realm and therefore also affects public servants.²¹ In other words, the duty of discretion the government may impose on this specific category of workers does not deprive them of the protection afforded by Article 10 ECHR. Subsequently, the Court examines whether the government's motives for imposing the restriction on the freedom of expression are pertinent and sufficient, and whether the means used to achieve them are proportionate to the legitimate aim as identified above. This inquiry involves the balancing of individual fundamental rights on the one hand and the legitimate interests of a democratic state as set out in Article 10, §2 ECHR on the other. The Court further notes that the facts of the present case are special for two reasons. First, the case relates to a civil servant who considers his right to freedom of expression to be violated. In this respect the Court ruled in his case law²² that the Member States enjoy a margin of appreciation in deciding whether a restriction is proportionate to the objective pursued having regard to the specific nature of the 'duties and responsibilities' set out in Article 10, §2 ECHR.²³ Secondly, this case concerns a teacher for whom it is assumed that the duties and responsibilities linked to their function are also linked to some extent to the activities they engage in outside the school. Reference is made to the *Vogt*²⁴ landmark judgment as well as to more recent case law such as the *Gollnisch*²⁵ judgment.²⁶ As already mentioned, the Belgian Council of State found the applicant's statements to be contrary to

the duty of discretion. The Court agrees with this finding. It points out that establishing that the applicant did not commit a criminal offense does not affect the conclusion that his conduct was incompatible with his duty of discretion. The existing tensions in the school where Mr Mahi was employed even before he published his open letter, appears to the Court as an aggravating circumstance. The mere fact that the applicant wanted to defend himself by means of this letter against the accusations that were made against him does not suffice to disregard his duty of discretion. Moreover, according to the Court, in view of the special context Mr Mahi had a duty to exercise his right to freedom of expression in a moderate way. The decision to use a widely disclosed written document, rather than an oral statement, which could have increased the existing tensions equally occur to the disadvantage of the applicant. Given the above, in particular the potential impact of Mr Mahi's action on his students, the Court does not consider the disciplinary sanction of assigning the applicant to another educational institution approximately 50km away from his initial school to be disproportionate.²⁷

Consequently, in its decision of 3 September 2020 the Court finds that Mr Mahi's application is manifestly ill-founded.

Mile Novaković v. Croatia²⁸

Factual context

The ECtHR's most recent judgment concerns Mr Mile Novaković, a secondary school teacher in Croatia who had been dismissed for failing to teach in the Croatian language.

21 *Ibid.*, para. 29.

22 E.g. ECtHR 26 September 1995, No. 17851/91, *Vogt v. Germany*.

23 *Mahi op.cit.*, para. 31.

24 ECtHR 26 September 1995, No. 17851/91, *Vogt v. Germany*, para. 60.

25 ECtHR 7 June 2011, No. 48135/08, *Gollnisch v. France*.

26 *Mahi op.cit.*, para. 32.

27 *Ibid.*, paras. 34-37.

28 ECtHR 17 December 2020, No. 73544/14, *Mile Novaković v. Croatia*.

Mr Mile Novaković had been employed as a teacher since 1971. As from 1998 he taught in the Darda region in Northern Croatia. During the same period this region had been peacefully reintegrated into Croatian territory after the war of independence that was fought from 1991 to 1995. The secondary school teacher concerned taught in the Serbian language, whereas, pursuant to the applicable regulations it had been mandatory for the government to provide classes in Croatian. Therefore, the education inspectorate prohibited Mr Mile Novaković from teaching. However, this decision was ultimately annulled in 2006 through an administrative appeal procedure. It was held that the regulations did not unequivocally establish which educational language was mandatory to use. Yet the harm had been done in the meantime as in October 1998 Mr Mahi's school was required by the competent authority to continue classes in Croatian. As a result, the employment of Mr Mile Novaković was terminated in 1999 for personal reasons. The grounds for the dismissal show that there was no possibility to offer the person concerned a position in which he could teach in Serbian. Moreover, according to his employer, given the age and the seniority of Mr Mile Novaković, it was not possible to provide him with further training to enable him to provide his teaching in the requested language. The national courts upheld the dismissal.

Before the Strasbourg Court, the applicant argues that his dismissal was unlawful because it violates his right to respect for private life as provided for in Article 8 ECHR.

Judgment

In its reasoning, the ECtHR emphasizes the broad interpretation that can be attributed to the right to respect for private life. With

respect to the application of Article 8 ECHR in the specific context of an employment dispute, the Court refers to its case law in the *Denisov*²⁹ judgment. Therein, it ruled that such disputes do not necessarily have to be excluded from the scope of Article 8 ECHR. The Court recalled two possible pathways through which the right to respect for private life can emerge in a work-related context, namely (i) when a conflict arises as a consequence of reasons relating to private life or (ii) due to the adverse impact of the measure on one's private life. In the former scenario, the Court uses the so-called *reason-based approach* (RBA) while in the latter it favours a *consequence-based approach* (CBA).³⁰

The Court rules that Article 8 ECHR is applicable in this case and that there was indeed a restriction on the right to respect for private life. Relying on the aforementioned RBA and more specifically taking into account that (i) the applicant was dismissed because of the language he spoke and (ii) the grounds for dismissal explicitly showing his age played a role in this decision.³¹

Again the Court fairly quickly concludes that the restriction is in accordance with the law and pursued a legitimate aim, namely the protection of the right of the pupils to an education in Croatian.³² Consequently, the main discussion is once again held on the necessity

29 ECtHR 25 September 2018, No. 76639/11, *Denisov v. Ukraine*, para. 103 e.v.

30 Mile Novaković *op. cit.*, paras. 42-43.

31 *Ibid.*, paras. 48-49.

It is worth noting that the Court assumes the admissibility criteria of art. 35, §1 ECHR are met. Although the applicant never explicitly referred to art. 8 ECHR in the proceedings before the national courts, he was nevertheless suggesting that his dismissal was based on his ethnic origin and had violated his constitutional right to work. In doing so, and given the strong connection between the applicant's personal characteristics and the dismissal, the Court considers that the applicant raised an art. 8 ECHR complaint and thus gave the national authorities the opportunity to repeal violations in this regard. (*Ibid.*, para. 50)

32 *Ibid.*, paras. 59-60.

of the measure in question in a democratic society, and in particular on the existence of an urgent social need and the proportionality of the legitimate aim. In this regard the Court first of all observes that it is indeed legally permissible under national law to provide education in the languages of national minorities and that the language requirements at the time of the dismissal were not made entirely clear.³³ The ECtHR attaches great importance to the specific context of this case; the post-war period and the ethnic origin of the applicant which was a cause of the dismissal. In this context, the Court in particular notes the following. During the same period a number of unlawful dismissals of members of Serbian minorities were conducted. In addition, there was an underrepresentation of national minorities in education.³⁴ While recognizing the importance of the right of pupils to obtain education in Croatian, the Court notes that no alternative measure to ensure the applicant to bring his teaching in accordance with the regulations in force, was ever considered. First, it finds that there is no justification as to why the education inspectorate imposed the most severe³⁵ measure on Mr Mile Novaković. The Court is also reluctant to deal with the employer that simply ignored the possibility of providing additional training despite the observation that this appears to be mandatory under national regulations. The employer based its decision solely on the age and seniority of the person concerned. It is not sufficient to refer to a similar case as in each individual case an appropriate and credible reasoning should be set up in order to demonstrate that additional training offers no relief. According to the Court, the failure to explore this possibility is even more striking given the close

proximity of the languages involved and the fact that the applicant has lived and worked in Croatia for nearly his entire career.³⁶ In view of the above, the Court concluded that the dismissal did not meet an urgent social need, nor was it proportionate in relation to the legitimate objective it was intended to support, namely the right of pupils to receive education in Croatian.³⁷

Consequently, there has been a violation of Article 8 ECHR. In accordance with Article 41 ECHR, Croatia is ordered to pay EUR 5,000 in respect of non-pecuniary damage and EUR 850 in respect of costs and expenses, amounts which will accrue to the successors of Mr Mile Novaković who sadly passed away in 2019.³⁸

Teaching staff's right to respect for private life and freedom of expression in view of the ECHR

As already suggested, the assessment of an interference with fundamental rights of employees is unlikely to receive one single answer.³⁹ Much will depend on the characteristics of both the employee and the employer, but also on the factual context in which a dispute unfolds. Nevertheless, as can be detected from the Court's jurisprudence a number of recurring elements are key in the resolution of such disputes. Hereinafter, the aforementioned rulings of the Court will be analysed in connection with the Court's case

33 *Ibid.*, para. 62.

34 *Ibid.*, para. 63 and 69.

35 I.e. (i) redress of irregularities within a certain period of time or (ii) prohibition to provide teaching.

36 Mile Novaković *op. cit.*, paras. 64-68.

37 *Ibid.*, para. 69.

38 *Ibid.*, paras. 70, 80 and 83.

39 See Ieven, A. (2008), 'Privacy rights in conflict: in search of the theoretical framework behind the European Court of Human Rights' balancing of private life against other rights', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, Intersentia, Antwerp, pp. 52-54; De Schutter, O. and Tulkens, F. (2008), 'Rights in conflict: the European Court of Human Rights as pragmatic institution', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, Intersentia, Antwerp, pp. 169-174.

law. Specifically, it will be examined to what extent they are consistent with the Court's earlier jurisprudence or, whether certain special findings or findings that differ from the Court's case law emerge.

In both cases, the Strasbourg Court recognizes that restrictions of fundamental rights and conflicts in this respect may occur in a professional context. The broad scope that the Court attributes to fundamental rights is particularly striking in the *Mile Novaković* judgment. Although this wide interpretation is consistent with the Court's earlier case law⁴⁰, this is not to be left unaddressed. It is rightly pointed out that a too broad interpretation of fundamental rights may cause these rights to lose their significance and erode them.⁴¹ In particular with regard to Article 8 ECHR it should indeed be acknowledged that the CBA has undeniably broadened the potential scope of the right to respect for private life. However, it should be added that the Court also sets limits. It stresses that employment disputes only fit within the application of the aforementioned provision in exceptional circumstances, notably where the consequences of the restriction are sufficiently severe and significantly affect private life.⁴² However, in the *Mile Novaković* case

the Court applied the RBA. In his dissenting opinion judge Wojtyczek disputes the Court's view on the applicability of Article 8 ECHR and the adequacy of the RBA. In doing so the Court gave an excessively wide interpretation of 'private life', judge Wojtyczek stated. He endorses the view of judge Kuris and also refers to his dissenting opinion in the *Erményi* case: "*The perspective of examining privacy in terms of the right and value protected by Article 8 must be returned to its natural angle. To present it graphically, 8 should indeed be seen as 8 and not – as increasingly tends to be the case – like the sign of infinity: ∞.*"⁴³ Although the basic concern is that a too broad interpretation of the notion of private life may result in the protection of Article 8 ECHR ultimately becoming an empty shell, the lessons drawn from the judgment are not so compelling if placed in a proper perspective. Contrary to judge Wojtyczek claims there is no evidence that the Court would overrule the *Denisov*-test, quite the contrary. The Court applied the RBA as laid down in the *Denisov* judgment to the specific context of this case. The Court rightly attributed a considerable amount of attention to the specific situation in which the dispute arose, namely the post-war context⁴⁴, the unclear national language regulations and the ill-founded decision⁴⁵ of the government on the one hand and the employer on the other to deprive the applicant of the opportunity to continue his activities while less intrusive alternatives were available. Given this specific context, there is little chance that such reasoning would apply more broadly and, for example, in other cases thus giving the employee the freedom to use a specific language in employment. This equally applies to

40 E.g. ECtHR 26 September 1995, No. 17851/91, *Vogt v. Germany*; ECtHR 29 February 2000, No. 39293/98, *Fuentes Bobo v. Spain*; ECtHR 26 February 2009, *Kudeshkina v. Russia*, No. 29492/05; ECtHR 12 June 2014, No. 56030/07, *Fernandez Martinez v. Spain*; ECtHR 25 September 2018, No. 76639/11, *Denisov v. Ukraine*; ECtHR 17 October 2019, Nos. 1874/13 and 8567/13, *López Ribalda et al v. Spain*.

41 D. Clément, Human rights or social justice? The problem of rights inflation, *The international journal of human rights* 2018, vol. 22/2, 155-169. See more in general on the question of human rights inflation: M. Sussi, Novelty in new human rights in A. von Arnould et al, *The Cambridge Handbook of New Human Recognition*, Cambridge University Press, 2020, 29-30 and D. Ingram, "Mediating the theory and practice of human rights in morality and law in R. Maliks and J. Karlsson Schaffer (eds.), *Moral and political conceptions of human rights*, Cambridge University Press, 2017, 99.

42 ECtHR 25 September 2018, No. 76639/11, *Denisov v. Ukraine*, para. 114.

43 ECtHR 22 November 2016, No. 22254/14, *Erményi v. Hungary*.

44 Cf. footnote 34.

45 The Court generally takes a fairly strict view of such unreasoned decisions. See as well ECtHR 19 October 2010, No. 20999/04, *Özpinar v. Turkey*.

the field of education as the language component is an inherent part of the school curriculum.⁴⁶

Referring specifically to the *Mahi* case, it is worth recalling two cases in which the specific situation of religion teachers as well was addressed; *Fernandez Martinez*⁴⁷ and *Travas*⁴⁸. In both cases, the employment relationship of a religious teacher was terminated by the government because the competent religious authority had decided to expel them as religious teacher due to their personal situation. In the *Fernandez Martinez* case it concerned a married priest with five children, while in the *Travas* case the applicant married another woman while still bound by the religious marriage to his previous wife. In both cases, the Court ruled that the applicants could invoke Article 8 ECHR. However, the Court ultimately held that there had been no violation of the right to privacy.⁴⁹ Thus, the Court seems to accept that this particular group of employees must tolerate a more far-reaching infringement of their fundamental rights. Contrary to one might suppose, the special position of a religion teacher does not play a decisive role in the *Mahi* judgment as in this case it is not the religious authority requesting (disciplinary) action, but rather the employer itself with the consent of the competent religious authority. This contrasts with cases, such as for example the *Fernandez Martinez* case

mentioned above, where a decision of the religious authority was at the root of the restrictions on the fundamental rights of the teacher. Thus, mainly the legitimate loyalty requirements of the church were at stake.

Hence, the *Mahi* case concerned a different situation and specifically addressed the duty of discretion of civil servants. In this context the ruling confirms the wide margin of appreciation assigned to the government with respect to the proportionality test and thus to determine whether there is a legitimate restriction on the freedom of expression. Furthermore, it is also clear that whereas the restriction of fundamental rights is linked to the teacher position, this limitation continues to affect the teacher beyond the school premises. The Court indicates that the duty of discretion does not stop at the ringing of the school bell but extends further to certain actions taken by the teacher after his working time. Moreover, in the *Mahi* case a clear link between the professional activities and the open letter was in place. The published letter referred to certain facts that had occurred within the school. The ECtHR clearly attaches importance to the publicity given to the teacher's actions, as well as to the impact on the students. Whether the Court would have reached the same conclusion if there was an indirect link, and for example it concerned a teacher from another school, is not clear. A similar remark can be made with regard to the educational level in which the facts took place. For example, in the *Kharlamov* case⁵⁰ the ECtHR explicitly opposed the -criminal-punishment of a professor who criticized the election procedure of the academic assembly of the university where he was employed. The Court qualified the speech as a matter of public interest and held that there was little scope for restrictions on such debate

46 However, in this specific context a number of provisions will have to be taken into account intended to ensure national minorities to obtain education in their own language (e.g. Framework Convention for the Protection of National Minorities, 1 February 1995, European Treaty Series No. 157, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cdac>).

47 ECtHR 12 June 2014, No. 56030/07, *Fernandez Martinez v. Spain*.

48 ECtHR 4 October 2016, No. 75581/13, *Travas v. Croatia*.

49 Please note that the Grand Chamber's ruling achieved a close majority (nine to eight). A joint dissenting opinion was written by 8 judges in which they concluded the dismissal to be contrary to art. 8 ECHR.

50 ECtHR 8 October 2015, No. 27447/07, *Kharlamov v. Russia*.

and that “*very strong reasons are required for justifying such restrictions*”. In this ruling the Court clearly indicates that the particular context in which the facts occurred played an important role in its assessment, namely an academic setting in which academics enjoy the freedom to express their opinion as a part of their individual academic freedom about the institution where they are employed. The Court also specified that the dignity of an institution cannot be assimilated to the dignity of individuals. The protection of the authority of the university is of purely institutional importance, the Court stated. One cannot necessarily assign the same strength to the university’s authority as to the protection of the rights or reputation of others as referred to in Article 10, §2 ECHR. The Court expressly mentioned that Mr Kharlamov’s opinion had a sufficient factual basis. Moreover, employees involved in a debate of general interest are to some extent entitled to enlarge on certain elements, the Court held in the *Kharlamov* case.⁵¹ Nonetheless, and without intending to balance the allegations of Mr Kharlamov against the statements of Mr Mahi, it should be noted that no such extensive reasoning regarding the substantial scope of the acts alleged by Mr Mahi is to be found. On the contrary, the Court briefly dismisses Mr Mahi’s grievances. This could entail that the (individual) academic freedom expands the freedom of expression of academics. The other teaching staff members have to cope with less freedom and will also have to be careful outside the classroom to avoid making bold statements (closely or remotely) related to their teaching duties.

Conclusion

The importance of teaching staff cannot be overstated. They represent a decisive factor in the pursuit of a sound and high-quality education. In view of the significant social impact of education it could be argued that from a socio-economic perspective teaching staff tend to surpass average employees. As the analysis of the two recent ECtHR rulings revealed, this reasoning cannot be simply extended to the employment status of teachers, in particular with regard to the possibility of restricting their fundamental rights.

Overall, just like other employees teaching staff will be able to find themselves confronted with a limitation of their fundamental rights. Due to the broad scope that the ECtHR attributes to fundamental rights, it will be possible in a number of cases to invoke the protection afforded by the ECHR, although the Court’s case law shows that there are indeed limits to the extended scope. Furthermore, teaching staff will also have to take into account that some of the obligations imposed in the context of employment continue to apply outside school. In this regard, their fundamental rights are permanently reduced.

This does not have to constitute an insurmountable obstacle, either for employers nor for employees. The knife always cuts both ways, as the aforementioned case law of the Strasbourg Court demonstrates. Nevertheless, it is important to be fully aware of the evolutions occurring. This contribution aimed to make a modest but nonetheless effective effort in this regard.

51 *Ibid.*, paras. 27-32.

Investing in education as ‘no regrets’ strategy to guide out of the crisis

Educational system of the future in a Post Pandemic Era

“When planning for a year, plant corn. When planning for a decade, plant trees. When planning for life, train and educate people.”

Chinese proverb: Guanzi (c. 645BC)

Bregje Beerman, Mirjam Bakker, Tyas Prevoo and Edith Hooge

1 Introduction

The consequences of the COVID pandemic are dramatic in many ways and for many people. Among those who face huge challenges are students in Vocational Education and Training (VET). Many VET-students experience barriers in learning and development these days. Distance education puts a strain on the quality of education. Due to online lessons, shortened timetables and lesson cancellations, the amount of provided education and vocational training is reduced. Students experience limited possibilities for internships and apprenticeships, especially in retail, wholesale, care, hospitality and non-medical contact-based professions (such as hairdressers and nail stylists) because businesses (temporarily) closed down or work below capacity. Along with this, they have often lost their (student)jobs, with which they were supposed to finance their studies, and face rapidly deteriorating financial positions as a result. As a consequence, a lot of students have to deal with study delay and increasing study loans as well as poor prospects for a successful start of their professional life. As future labor market is seriously disrupted,

their longer-term career perspectives are under siege, and, in its wake, their prospects for independent living and full participation in society.¹

On the labor market in general, career prospects have decreased. The most vulnerable groups are people with flexible employment contracts and people who work in industries that suffer the most from restrictions such as lockdowns. Young people often have flexible employment contracts and (side)jobs in the catering industry, event industry, and in the field of arts. The youth unemployment rates have increased and for fresh starters in the labor market it is also the hardest to find new jobs.² Young people are one of the hardest hit groups on the labor market.

In many countries, policies and measures are in the make to reduce the negative longer-term effects of the Corona crisis. As VET plays an important role in integrating young people in the labor market and providing them with skills and competences that foster innovation

1 Jongeren Denktank Coronacrisis (2021), *En nu... daden!* Social and Economic Council (SER), The Hague.

2 Denktank Coronacrisis (2021), *Neem iedereen mee: kwetsbare groepen op de arbeidsmarkt*, Social and Economic Council (SER), The Hague.

and entrepreneurship,³ strong VET systems are seen as vital preconditions to overcome economic crises.⁴

In the Netherlands these policies focus, among other things, on stimulating initial and post-initial education and training. During the lockdowns Dutch unemployment rates have increased dramatically: between March and August 2020 unemployment increased from 2.9% to 4.6%. However, of those who lost their jobs, many will eventually find new work. In order to improve their chances on the labor market, investments in knowledge and skills are needed.⁵ These investments not only offer young generations better prospects, they also provide opportunities for all adults to make career switches from one sector to another if needed. More than ever, intersectoral mobility is important. Moreover, on the long run education and training will make people more flexible and widely deployable. Adults will need to be able to switch career paths or acquire new skills and knowledge in order to keep up with changes that occur in their professions. Wide-ranging opportunities to engage in further developing one's knowledge and skills are necessary in order to encourage continuous training, refresher training, retraining and reskilling. Therefore, in addition to investments in and restructuring VET, investments in lifelong development (LLD) are crucial to guide the world out of this crisis.

In this article we explore what exactly is needed to boost VET and LLD as a means to guide out of this crisis and to ensure good quality VET and LLD needed in a post pan-

democratic era. In answering this question, we are focusing on the Netherlands. We consider the Dutch VET-system and LLD as prime examples to observe what is needed now in the middle of the crisis and later, when the pandemic is dying down. Because the Netherlands boasts a well crystallized VET-system, due to its longstanding history with VET. Furthermore, this VET-system is expanded into LLD by a new impetus by Dutch government, in cooperation with the education sector and social partners.⁶

2 Investing in quality VET: free play between the world of school and the world of work

One of the key questions of any education provision is how can we know today how to educate and train people for tomorrow? Strong VET systems are in balance or aligned with (local) labor markets. VET can be regarded as adaptive systems consisting of inputs (e.g. curricula, teaching materials), processes (e.g. vocational training, teaching methods) and outcomes (e.g. knowledge, skills and competence) that are to be aligned to changing labor market needs. The challenge is how to accomplish this alignment. There is no single way for VET institutions to give shape to their external orientation and connectivity. The relations between VET systems and the world of work are diverse in and across Europe. The variations in arrangements, mechanisms, levels, state and market

3 Hooge, E. H. (2015), 'Connecting with the World of Work: Horizontal Accountability Processes in Institutions Providing Vocational Education and Training (VET)', *European Journal of Education*, 50(4), pp. 478-496.

4 European Centre for the Development of Vocational Training (2013), *Renewing VET provision*, Publications Office of the European Union, Luxembourg.

5 Denktank Coronacrisis (2020), *De contouren van een intelligent herstelbeleid*, Social and Economic Council (SER), The Hague.

6 Rutte, M., van Haersma Buma, S., Pechtold, A., and Segers, G. (2017), *Vertrouwen in de Toekomst: Regeerakkoord 2017 – 2021 VVD, CDA, D66 en ChristenUnie*, Retrieved from <https://www.kabinetformatie2017.nl/documenten/publicaties/2017/10/10/regeerakkoord-vertrouwen-in-de-toekomst>; Social and Economic Council (2020), *Voortgangrapportage SER Actie-agenda Leven Lang Ontwikkelen: Najaar 2019 – Najaar 2020*, retrieved from <https://www.ser.nl/nl/thema/leven-lang-ontwikkelen/publicaties/voortgangrapportage-llo-2>

control, degree of formalization, centralization and institutionalization is large.⁷

Dutch regional VET colleges, known as ROCs (Regionale Opleidingscentra) serving multiple branches or *vakinstellingen* (specialized trade colleges, specific to a branch of industry), provide senior secondary vocational education. They prepare students for middle-ranking positions in the service sector, industry and government. Today, they draw some 50% of the students in upper secondary education. Traditionally, Dutch VET was school-based, 'with high content of general education and theoretical knowledge, agreed by the social partners on the basis that a broad knowledge base would facilitate vertical and horizontal occupational mobility as well as economic growth'.⁸ Dutch VET has a dual purpose: on the one hand it prepares for participation in society and on the other hand it prepares for working in a specific occupational field.⁹ In response to the criticism that VET colleges did not prepare students well enough for the workplace, and because of the concerns about the number of young people leaving school with no useful qualification, the system was adjusted in the 1990s. Today, institutions for VET offer a school-based and a work-based pathway, both of them combining learning and training in school and at the workplace, but each in different ratios. In the school-based pathway workplace learning covers 20% to 60 % of the total curricular time. The work-based pathway includes apprenticeships in an employers' organization for at least 60% of

the time, as well as a one- or two-day school release. In both pathways, ROCs and specialized trade colleges deliver the school part and are responsible for the whole learning process, as well as for awarding the qualification.

This tendency to a more practice-oriented VET is not only seen in the Netherlands, but also in other European countries.¹⁰ Cooperation with employers in order to establish forms of work-based learning is a basic form of cooperation between VET providers and employers and enjoys a long tradition in many European countries. It makes the education more relevant for the workplace.¹¹ In addition, dual systems in which working and learning are combined, are associated with a smoother transition from school to work and lower youth unemployment than school-based systems.¹²

In the Netherlands, the COVID crisis has resulted in students in the work-based pathway having to quit their education because they lost their jobs that served as apprenticeships. In addition, there is a shortage of 21.000 places for internships and apprenticeships that reaches. As a consequence, vocational development, learning on the job as well as practical testing and examination can often not proceed, resulting in study delays which means delayed entries on the labor market. It shows how profoundly the world of work is intertwined with the world of school.

Considering the importance of the interconnectivity between the world of school and the world of work, investing in VET means working on policies and measures that intensify the connection, cooperation and free

7 European Centre for the Development of Vocational Training (2013), *Renewing VET provision*, Publications Office of the European Union, Luxembourg.

8 Brockmann, M., Clarke, L., Winch, C. (2008), 'Can Performance-related Learning Outcomes have Standards?', *Journal of European industrial training*, 2008, Vol. 32, No 2/3, pp. 99-113.

9 Westerhuis, A. (2007), 'The Role of the State in Vocational Education: a Political Analysis of the History of Vocational Education in the Netherlands', in: Clarke, L., and Winch, C. (eds), *Vocational Education: international approaches, developments and systems*, Routledge.

10 Brockmann, M., Clarke, L., Winch, C. (2008), 'Can Performance-related Learning Outcomes have Standards?', *Journal of European industrial training*, 2008, Vol. 32, No 2/3, pp. 99-113.

11 Ibid.

12 European Centre for the Development of Vocational Training (2012), *Trends in VET Policy in Europe 2010–2012*. Publications Office of the European Union, Luxembourg.

play between both worlds. Particularly in times of crisis, it is most important for those two worlds to hang on to each other. Policy focus and investment should therefore be on: 1) apprenticeship systems closely integrated with labor market, industry and business; 2) employment-based dual systems of apprenticeship; 3) labor market induction; 4) R&D activities in firms aligned with formal schooling and education; and 5) connecting industry and academia to enhance innovation.

3 Investing in permanent Lifelong development (LLD): joint effort of individuals, employers and government.

During the Covid-crisis, some young people drop out of their VET-school. Later in life, they will still want to be able to get their diploma or certificate and pursue further education. This brings us to the importance of LLD possibilities, especially in a post-pandemic era. Ongoing education, training and development are not just the responsibilities of individuals. Employers and government also take their share. Especially when it comes down to accessible and attractive range of possibilities for vulnerable groups, government faces specific responsibilities. Permanent LLD is best achieved as a joint responsibility of individuals, employers and government. A good infrastructure of post initial education and training contributes to an accessible, affordable range of studies, courses and trainings. To ensure permanence, these are best embedded in an infrastructure supported by education and the labor market.

The Netherlands face some challenges with regard to the LLD infrastructure. First of all, vulnerable groups are underrepresented in

participating in LLD.¹³ Among them are low-skilled adults, who often simply do not find their way to additional education or do not wish to engage in further learning, due to negative learning experiences in the past. In addition, the Netherlands knows relatively many flex workers, temporary workers and casual workers of which is known that they are less often entitled to participate in training and less often invest in it themselves.¹⁴ The second challenge is how to achieve a match between demand and supply. Avoiding fragmentation, enhancing flexibility and quality are issues too, as well as questions regarding who is responsible for participating in LLD (the individual or is there a role for government or social partners?) and last: who pays? In this paragraph we will describe how the Netherlands may overcome these challenges.

In the Netherlands, the COVID crisis will cause today's young people to feel the urge to return to school later in life in order to continue learning, to strengthen their skills or to engage in broader education. It also brings about greater needs for career counselling and retraining for those who (possibly) lose their jobs or see their businesses go bankrupt. Some seek to switch to other jobs within their branch, but often also intersectoral, to so-called 'shortage occupations': the ground stewardess becomes logistics manager for example, or the chef retrains to start a career in health care. This puts an enormous strain on LLD.

For successful LLD provisions, policies should focus on 1) permanent provisions of accessible education, especially for vulnerable groups, 2) developing basic and generic skills

13 Dutch Education Council (2016), *Vakmanschap voortdurend in beweging*, Dutch Education Council, The Hague.

14 Engbersen, G., Kremer, M., Went, R., and Boot, A. (2020), *Het betere werk. De nieuwe maatschappelijke opdracht*, The Netherlands scientific council for government policy, The Hague; Maslowski, R. (2019), *Grenzen aan een leven lang leren*, The Netherlands Institute for Social Research, The Hague.

and career competencies, 3) collaboration between education, social partners and government, 4) providing vouchers or personal budgets. In this paragraph we will elaborate on these four areas.

1) Permanent provisions of accessible education for vulnerable groups

Permanent provisions of accessible education are especially important for vulnerable groups since they are the hardest hit. Permanence can be achieved by making tertiary education accessible for post initial learning. Institutions for tertiary education have the infrastructure and know-how that is needed to provide sustainable trainings and courses. By making use of this infrastructure and know-how, continuous learning can be both affordable and attractive.

In order to enhance attractiveness, flexibility is important. People not always wish or need to take a complete course and some are not able to do so because of personal or professional circumstances. Work-learn combinations are also important to enhance attractiveness. Institutions for tertiary education can expand and maintain their networks so as to create ample possibilities for people to combine working and learning. A lot of professional learning takes place in an informal setting, by doing the job, reflecting on one's actions and talking about the job with other people.¹⁵ People learn new skills and acquire knowledge on the job, for which they should get recognition through certificates and diplomas. Conversely, they are more motivated to learn new skills and acquire knowledge at a training when they can use these skills and knowledge in their jobs. In order to guarantee that these trajectories that combine working and learning are truly acces-

sible to everybody, they should be publicly financed. That does not alter the fact that cooperation between privately and publicly financed education can be valuable in that it exchanges knowledge, knowhow, housing and teaching resources and should therefore be retained.

2) Collaboration between education, social partners and government

Substantive collaboration between state and private education and training, social partners and government is crucial. Too often, supply, financing and organization are fragmented. Those who are responsible for LLD, such as branch organizations, schools, trade unions, businesses and (local) governments should cooperate. This cooperation provides first of all opportunities to untie funds such as O&O-funds. And second, the demand and supply of schooling can be adjusted in a better way. Through collaboration customized solutions are better possible.

3) Developing basic and generic skills and career competencies

Investments are often directed at developing subject-specific knowledge and skills.¹⁶ Especially in times of crisis, investing in subject-specific knowledge and skills seems a wise thing to do in order to promptly train people for new jobs. Although this is important, it is not enough. Focus should also be on enhancing a foundation of basic and generic skills.

Basic skills (literacy and numeracy) and generic skills (particularly digital skills) are prerequisites for active and full citizenship and for participating in the labor market. Adults who struggle with literacy, numer-

15 Eraut, M. (2004), 'Informal Learning in the Workplace', *Studies in continuing education*, 26(2), 247-273.

16 Dutch Education Council (2019). *Lees!*, Dutch Education Council, The Hague.

acy and problem solving in technology-rich environments are at greater risk of missing out on career chances and participating in society.¹⁷ Adults who are functionally illiterate and have difficulties reading and writing, are more often unemployed and have lower incomes than people with higher proficiency in literacy skills. Moreover, they participate less in society as a whole, are less healthy, more likely to mistrust other people and less likely to believe to have impact on political processes.¹⁸ Basic and generic skills cannot be regarded separately but are always connected to content and knowledge. Literacy for example, cannot be developed without content just as communication is not possible without knowledge.

Besides basic and generic skills, career competencies (reflecting on skills and motivations, exploring career opportunities, career planning, establishing and maintaining networks) are also vital for finding ones way in the labor market. They are competencies that need to be attended to through LLD.

4) Vouchers or personal budgets

To guide out of the crisis caused by the current pandemic, cross-sectoral LLD is vital. Although employers usually pay for professional development, cross-sectoral development is usually not paid for by employers. Whoever pays the piper calls the tune. What is needed is a personal LLD budget, or voucher, for all. In this way, employers as well as the self-employed and unemployed, can all enabled to participate in LLD.¹⁹

The personal LLD budgets or vouchers should come with approachable support or counseling services. These services can assist job seekers or those who wish to make career changes by mapping wishes and capacities and outlining possibilities for learning and working.

4 Conclusion and Discussion

One way for a society to become more resilient in times of crisis such as is the result of COVID-19 is a robust, flexible VET system and LLD in line with it. In that way, investing in VET and LLD is a no regret strategy, it is earned back easily. Investing in VET means working on policies and measures that intensify the connection and cooperation between the worlds of work and worlds of school. In times of crisis, it is most important for those two worlds to hang on to each other. Focus should therefore be on apprenticeship systems, employment-based dual systems of apprenticeship, labor market induction, R&D activities in firms aligned with formal schooling and education, and connecting industry and academia to enhance innovation.

Besides, the COVID crisis puts an enormous strain on LLD. Some of today's young people will drop out of VET, so they will feel the urge to return to school later in life. In addition, the crisis brings about greater needs for career counselling and retraining for those who (possibly) lose their jobs. Some seek to switch to other jobs within their branch, but often also intersectoral. For society as a whole but also for individuals, it is important to be well equipped when it comes down to basic skills, general skills and career competencies. Combatting functional illiteracy and in line with it combatting low digital skills is vital to build a society of broadly educated people who can adapt to whatever labor

17 Kankaraš, M., Montt, G., Paccagnella, M., Quintini, G., and Thorn, W. (2016), 'Skills Matter: Further Results from the Survey of Adult Skills. OECD Skills Studies', OECD Publishing.

18 Ibid.

19 Commissie Regulering van Werk (2020), *In Wat voor Land Willen wij Werken? Naar een Nieuw Ontwerp voor de Regulering van Werk*, Commissie Regulering van Werk, The Hague; Dutch Education Council (2016), *Vakmanschap voortdurend in beweging*, Dutch Education Council, The Hague.

market, who are employable, and who are equipped for continuous learning. In order to strengthen LLD, investments and policies should focus on permanent provisions of accessible education, especially for vulnerable groups, developing basic and generic skills and career competencies, collaboration between education, social partners and government, and providing vouchers or personal budgets.

Transmission control of COVID-19 and the reopening of schools: A public policy dilemma in Brazil

Rubens Becak*, Guilherme Castro**

1-) Introduction

The COVID-19 pandemic, caused by the Sars-Cov-2 virus, claimed its first victim in Brazil on 26 March 2020. Ever since this fateful day until the moment this text is written (August 2020), more than 100,000 Brazilians have died because of COVID-19, and the daily death rate stands at over 1,000 people.

Experience has shown that social isolation is proven to be the best strategy so far available to diminish the spread of COVID-19 among the population, especially when combined to other actions like mass testing and contact tracing (COHEN; KUPFERSCHMIDT, 2020). Since schools are places where children from different households reunite, it is part of the social isolation strategy to close schools as well.

However, closing schools is part of a temporary solution and, at the same time, presents other problems. In Brazil, closing schools represents a negation of public goods far beyond education. Schools provide food security, health services and protection against child abuse. The educational system has a transversal function in the accomplishment of social rights in Brazil.

Furthermore, social isolation has a temporal limit, and choosing the best moment to

reopen the educational facilities demands a thoughtful analysis on the part of public authorities. The reopening of schools after the lockdown in a developing country is more complicated than in high-income countries. It is a task which faces a vastly different set of circumstances. First, in Brazil, a higher proportion of households includes both children and the elderly. Second, difficulties in COVID-19 testing in Brazil make it virtually impossible to control the transmission of the virus between children and adults. Third, enforcing social distancing in existing school settings is challenging.

Therefore, at first glance, the reopening of schools represents a puzzle without a solution. The closure of schools is a public health imperative during the pandemic. Nonetheless, maintaining school closures engenders inequalities, which are already a striking feature of the Brazilian educational system. The return to school period is also fraught with many uncertainties.

2-) The inequality of the Brazilian educational system under the COVID-19 pandemic

Initially, it is necessary to clarify that although education is a public service in Brazil, it is also free to private initiatives, according to Article 209 of the Federal Constitution of 1988. The coexistence of public and private schools

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generates disparities in access to the right to education, which is currently hampered by the COVID-19 pandemic.

Public education is universal and free in Brazil as per express constitutional provision (Article 206, IV, Constitution of 1988). High public investments maintain these essential characteristics. However, the budget poses constraint. Since 2015, Brazil has been facing economic stagnation, and the economic impact of the COVID-19 pandemic reduced the expectations of economic growth this year. Moreover, the health crisis has redirected public expenditure from other areas, including education.

According to the 2019 School Census, Brazil has 200,209 schools (BRASIL, 2020c). Of this number, 44% of Brazilian schools are not served by a public network sewer, when adding the use of septic tanks, the proportion drops to 22.4% (KUBOTA, 2020, p.08). Further, the distribution of schools served by a public network sewer is unequal. These schools are concentrated in the more affluent south and southeast regions of Brazil (KUBOTA, 2020, p.09).

Thus, before discussing which personal protective equipment (PPE) is necessary for teachers, the schools' staff and students before the reopening of schools, the Brazilian educational authorities have a primary task of providing clean water, bathroom facilities and cleaning products such as soap, alcohol gel and disinfectants for public schools across the country.

The alternative for educational institutes – the online learning system – has its unique infrastructure problems. The economic and regional disparities in Brazil are the critical factors affecting Internet use for learning. In Brazil's rural areas, an Internet connection is not available. In major cities, low-income families do not have access to broadband Internet connections in their homes. In

effect, people without sufficient means use mobile phones to access Internet services. However, the cellular connection is slow and unstable in Brazil, precluding watching online courses or downloading books.

These disparities in access to the Internet were one of the arguments on the part of students for the suspension of the National High School Exam (ENEM), the Brazilian equivalent to Scholastic Aptitude Test (SAT), this year. Regardless of the protests, the government maintained the ENEM but only postponed the date of the test to November 2020.

In normal circumstances, high-income and middle-class families enroll their children in private schools. In general, these schools have better infrastructures and educational resources than the public system. Aspects such as safety and discipline are decisive factors in comparison with the public system.

Nevertheless, the economic effects of the Covi-19 pandemic have put many private schools out business. The rising unemployment rate makes it difficult for the working-class to afford private education for their children. As a result, the country faces massive migration from private to public schools. For example, in the state of São Paulo, the most populous state in Brazil, the movement of students between private and public schools increased ten times last April (SFAIR; VIEIRA, 2020). This phenomenon will aggravate the situation of an already ailing public educational system.

3-) Transversal function of the educational system in the accomplishment of social rights in Brazil under COVID-19

The closure of schools directly affects both school-age children and adolescents on the one hand and adults and the elderly on the other. It is a grave mistake to solely rely on students' views for analysing the situation. Moreover, by educating infants and the young population, schools provide other public services in Brazil, as explained below. First, public schools guarantee food security, which most low-income children see it realised in their school meals offered by public education institutes as their only source of healthy food. With the interruption of school activities due to the COVID-19 pandemic, many students will not be able to eat properly with the resources available in their homes. Similarly, according to medical studies, poor nutrition is linked with respiratory illness in children and contributes considerably to the early onset of adult illnesses, such as chronic obstructive pulmonary disease (SINHA et al, 2020a).

In response to the threat of famine, the Brazilian central government authorised the distribution of food kits purchased with federal funds among parents and guardians of children and adolescents enrolled in public schools (BRASIL, 2020e). In addition to food kits, food vouchers are also being used in major cities as part of the initiative. However, the execution of the student meal programme is the responsibility of states and municipalities across the country. Unfortunately, in some regions of Brazil, corruption and bureaucracy prevent food from reaching students.

Second, schools provide extra healthcare to students and their families. The initiative *Programa Saúde nas Escolas* (Health

in Schools Programme) is a transversal federal programme that articulates health and education actions in schools' communities (BRASIL, 2007). Such activities encompass periodic clinical evaluation of the students, nutritional assessment of schools' meals, ophthalmological evaluation of schoolchildren, campaigns of oral health and hygiene, psychosocial evaluation of schools' community members and control of students' vaccination schedule.

As the schools closed, this critical health programme was discontinued. Alternatives for the provision of healthcare to children and adolescents are scarce because of displacements made to strengthen the response to COVID-19. Ironically, these measures do not advocate the reopening of schools. If it is true that death rates among school-age children are much lower than among adults (SINHA ET AL, 2020b), it is important to note that the school community is also composed of adults, including teachers and parents.

In Brazil, adults and the elderly generally have more contact with children than those in advanced economies. Increased contact between these groups can facilitate the transmission of COVID-19, and groups at higher risk, such as those with chronic diseases and the elderly, are at risk. According to a study conducted by a Brazilian government health research agency called FIOCRUZ, more than 9 million elderly people and adults with diabetes and heart or lung disease live with school-age children (BRASIL, 2020a). The problem is that Brazil has performed COVID-19 testing for only 6.3% of the population until July 2020 (BRASIL, 2020b). Testing and contact tracing are critical to controlling the virus. However, Brazil's capacity to reduce transmission is abysmal. The reopening of schools in these circumstances means flirting with the second wave of contagion.

Third, schools, nurseries and kindergartens have an important role in labor policy because the educational institutes provide children with care while parents are at work. The COVID-19 pandemic radically changed this aspect. The rise in the use of home as an office has been the corollary of the closure of schools, impacting on gender equality. Brazil is a structurally sexist country where women are held responsible for childcare and housework.

The gender-based wage gap in Brazil is 22.5% (BRASIL, 2020d). In the “new normal” mothers must combine the home office with full time maternity. On the other hand, it is not clear that employers have managed their expectations of women’s work engagement. The result is an increase in disparities between men and women in the labor market. According with Brazilian Census Bureau called IBGE, since quarantine began, 7 million women left the labor market while among men the numbers are in the region of 5 million (ALMEIDA; ANTUNES, 2020).

Finally, schools have an integrated protection network against child abuse. Teachers and school staff in Brazil receive training to identify and prevent signs of violence against children and adolescents. Due to the COVID-19 pandemic, schools are closed. At the same time, social isolation increases the risk of violence against children. Low-income families who live in slums or other houses without adequate living conditions may suffer from stress arising from confinement, which increases domestic conflicts (SILVA; OLIVEIRA, 2020, p. 11). Also, the consumption of alcohol and use of other drugs caused by confinement may increase pandemic tensions. There is strong evidence of the link between drug abuse and crime in the literature (FRIEDMAN, 1998).

Recently, the country was shocked by the case of a 10-year-old girl who was raped by her

uncle. The girl, who was 22 weeks pregnant, tried to have an abortion in her hometown (abortion is legal in the case of rape in Brazil) but was harassed in the hospital by anti-abortion protesters. The girl had to be transferred to another state to have an abortion (PHILLIPS; BRISO, 2020). In this case, the pregnancy period is identical to the beginning of the quarantine. It is hard to say whether the girl’s teacher could have been alarmed early enough if the school had been open. Even so, this event shows the importance of schools as a frontline defense against child abuse. A post-pandemic scenario will demand a plan to welcome children who have been victims of violence.

4-) Conclusions

This paper discussed some issues concerning the reopening of schools under the COVID-19 pandemic. Beyond the binary open–close solution, the above discussion showed there are grey areas that demand creative and transversal solutions on the part of policymakers to respect children’s rights and, simultaneously, avoid the second wave of transmission.

Accordingly, the following ideas are warranted:

1. Disease transmission must be controlled before the reopening of schools so that children can’t be vectors of transmission of COVID-19 to high-risk populations;
2. Food security must be guaranteed with or without the reopening of schools;
3. The economic impact of the pandemic will increase the demand for public education in Brazil, which will require an increase in federal spending on education;
4. A humane strategy to welcome children victimised during social isolation.

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Contradictory Objections to School Choice

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Overview

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The “Secular Pastorate of the State”
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Overview

Opponents of parental choice among schools, whatever their private or organizational motivations, commonly cite in public debates one or both of two objections which, as we will see, are fundamentally contradictory.

The first, which has deep historical roots, could be called the *Civic Republican* objection to school choice. It is the view that a primary purpose of formal schooling is to shape generations of citizens sharing common convictions and an unshakeable loyalty to the nation-state and its goals. To this end, differences among citizens (apart from those on the basis of race) should be minimized, especially those based on regional, cultural and religious identities that might reduce the salience of national identity. Children should

learn together on what Horace Mann (and his Canadian counterpart Egerton Ryerson) liked to call the long school bench of the common school.

This Civic Republican concept, which came to guide public policy toward schooling in the United States, France, and other countries in the 19th century, and took ominous form under totalitarian regimes in the 20th, rejects parental choice and school autonomy as fundamentally undermining the civic purposes of schooling. This argument continues to be invoked by those who contend that “public, not private, schooling is . . . the primary means by which citizens can morally educate future citizens.”¹

A second objection to parental choice has emerged more recently, though we can trace its origins back to Dewey and even to Rousseau; it is what could be called the *Comprehensive Liberal* program for schooling. This theory argues that schools should seek to emancipate pupils from the influence of family, local community, religious and cultural traditions, thus empowering them to choose their own values and identities as autonomous world-citizens.

Advocates of this strategy oppose parental choice as tending to extend the influence of families over children in a manner fatal to their emancipation and autonomy. This undesirable outcome is only reinforced if the parental choice is of a school with a religious character.

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1 Gutmann (1987), 70.

Each of these concepts of the purposes of schooling has been used to oppose parental choice of schools. Each, ironically, serves to undermine the other, helping to explain the current confusion over what can and should be expected from public schools in the United States and other Western democracies. The result is the persistent and tragically-wide gap in educational outcomes – as measured either by academic achievement or by civic virtue – in American society, despite generous funding and constant tinkering with the system.

The paper argues that education should be understood within a wider context that includes families and a variety of civil society institutions, as well as cultural and religious traditions that help to shape the convictions and habits required for a life well-lived.

The author seeks, through this discussion, to clarify the terms of useful policy debates about the requirements of effective schooling for a pluralistic democracy, and to make a persuasive case for structural pluralism in education.

The Civic Republican Argument

The most common criticism of faith-based schools is that they fail to form loyal citizens and even nurture divisive and “sectarian” attitudes within society. Proponents of this view hold that “children can practice the civic virtues and establish them over time as habits of character only within a truly *public* school.”² By “public school,” they mean a school operated by some level of government.

This insistence on the uniquely civic role of government-managed schools and on the dangers represented by schools not under direct government control, especially if they

have a religious character, developed over the course of the 19th century. Increasingly-assertive national states grew unwilling to continue to allow religious organizations not under government direction to play a role in shaping the loyalties and mores of the rising generations.

The exception proving the rule was Prussia (and, after 1870, Germany), widely admired by Horace Mann and other American education reformers as the model for state leadership in education. There, from the 17th century until Hitler in the 1930s, though in modified form as the administrative capacity of government expanded, the publicly-funded Protestant and Catholic clergy served as local agents of the state in supervising popular schooling with a religious identity under detailed government direction.³

What we could call the “Lutheran” model of church subordination to state in Germany and Scandinavia (and, with variations, in England) contrasted with the situation in the Catholic nations of Europe and Latin America, where the power of the Catholic Church and its active engagement in political matters made its role in popular schooling a primary target for “republican” movements from the 1790s through the 1980s. It is no exaggeration to say that the deepest political conflicts in Belgium and France in the 19th century were not over economic issues but over whether popular schooling would be Catholic or secular (*laïque*); similar conflicts occurred in Austria, Italy, Spain, Portugal, Mexico, Argentina, and elsewhere.

A good sense of what advocates of a state monopoly of schooling believed was at stake in their struggle with the Catholic Church over who would educate is provided by the famous statement of General Foy in 1822, that children attending Catholic schools “will have received in these establishments, which are not of the nation, instruction which is not

2 Levinson 1999, 115.

national; and thus the effect of these establishments will be to separate French youth between two camps [*diviser la France en deux jeunesses*].” This warning about *deux jeunesses* would be a constant theme from the Restoration (1815-1830) to the Fifth Republic.⁴

Elite reformers (like Horace Mann in Massachusetts) were convinced that common schooling provided according to their proposed model, a model focused on moral rather than intellectual or vocational development, would eventually make all other reforms unnecessary. Mann confidently predicted that, if schooling were provided according to his prescription, it would be possible to close all the prisons in a generation.⁵ It was only in the 20th century that American public schooling became the massively bureaucratic enterprise that we know today, a process that began in cities struggling with European immigration, led by an emergent class of specialists in “administrative science.”⁶ The process continued with the consolidation of rural districts from nearly 130,000 in 1931 to fewer than 16,000 in 1987 (a process almost never sought by those affected⁷) and the consequent abolishment of what had been the most extensive form of local democracy in the world. There is abundant evidence that leaders in education strongly supported such consolidation, as well

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See Glenn (2011) for a detailed account. 4

Rémond (1985), 114, 31. 5

Messerli (1972), 252; Glenn (1988). 6

The classic account is by David Tyack, *The One Best System* (1974). 7

Tyack (1972), 17.

as the extension of state regulation, as a way to buffer schools from the influence of parents and other local voters.⁸

Despite his ringing rhetoric about *Democracy in Education*, prophet of Progressive Education John Dewey shared this reluctance to allow parents or local communities a role in setting the goals of the educational process. According to Alan Ryan,

[a]s to the vexed issue of the rights of localities to have their school reflect the moral and religious enthusiasms of the area, Dewey's conception of local democracy was indeed as hostile to all such interventions as his conservative critics suspect. It is, to be strictly honest, not entirely clear how he could square his enthusiasm for community vitality with his adamant insistence on a secular and liberal approach to schooling.⁹

The fact is that Dewey's use of the concept of “community” bore little relation to the actual communities in which most people live, just as his use of “democracy” was unrelated to elections and the political process by which Americans reach decisions about matters of common concern. Tyack has pointed out that

[d]espite the popularity of “democratic localism,” professional educators and their elite lay allies did their best to “take the schools out of politics” by weakening local rule and eliminating school districts. They developed an alternative notion of “democracy” as government by experts.¹⁰

In effect, what had been a vigorous sphere of political activity and debate over the concrete and value-laden issue of what should be taught to the community's children, and how, and by whom, was, in Jürgen Habermas's terms, “transformed into . . . a self-maintaining administrative subsystem, so that democracy is in danger of becoming a mere façade.”¹¹

All these forces have combined to reduce the influence of parents and other local citizens over what is taught and what values are conveyed in public schools. Those who have defined and redefined the purposes of schooling over the past century have been

the relatively small “clerisy” of “intellectuals and scholars dedicated to the state precisely as their medieval forebears were to the church,”¹² and moving regularly between universities and government.

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Tyack, Lowe and Hansot (1984), 49-50. 9

Ryan (1995), 364-5. 10

Tyack (2003), 5. 11

Habermas (2011), 15. 12

Nisbet (1988), 65.

The “Secular Pastorate of the State”

In place of the reality of local communities of parents and their neighbors, those defining the goals of education adopted the rhetoric of a great national or (more recently) global community to be created by the appropriate schooling. Although “it was pointless, in the Progressives’ view, to try to preserve or restore the civic and moral ethos of the small town (that had been the failed Populist response), it was now possible to move to a new and higher form of community: the great, national community.”³ In this new and higher form of associated living, replacing all local particularities and narrow loyalties, “the emerging social sciences would tame the disintegrative sociological and psychological effects of modernity . . . organized into the imposing bureaucracies that would now ‘scientifically manage’ all human affairs.”⁴ But national (or world) community is an abstraction with limited power to shape and confirm the character of youth. The establishment by local initiative of thousands of new Evangelical, Jewish, and Islamic schools over recent decades has been in part an effort to “restore the civic and moral ethos” of the local com-

munity, albeit on the basis of free association rather than of geographical residence.

By appropriating the language of “community” to describe the society as a whole, and particularly its political expression in the great body of citizens rallied around their government, the Progressives and their successors conveyed the persistent message that traditional communities of congregation, extended family, ethnic group, or voluntary association were potentially disruptive of the national project to which all loyalty should be directed. As Robert Nisbet has pointed out, “[p]erhaps only under the camouflage of the rhetoric of freedom is the actual power of the state increased more easily than under the camouflage of the rhetoric of community . . . [excluding] anything arising out of kinship, religion, ethnicity, or language. True community lies only within the purview of the state, the state consecrated to the virtue of its citizens, to be sure, but the state, once and for all.”⁵

Michel Foucault described how the State took over from the medieval Church the role and the techniques of the “cure of souls,” with pretensions extending well beyond the maintenance of domestic tranquility and the administration of justice. Often justified by evidence of the breakdown of the family and of the local community, this extension of government’s role tends to exacerbate the conditions that it pretends to alleviate, as the programs of the War on Poverty increased greatly the level of dependency on government. Just as a stay in a hospital exposes one to a variety of illnesses, so the pastoral care of government may make even more government care necessary. “Central government today believes it should be capable of satisfying all human needs,”⁶ but its efforts often

3 Schambra (2000), 326.

4 Schambra (1998), 45.

5 Nisbet (1988), 54.

6 Glazer (1988), 128. 17
Nisbet (1953), viii.

make individuals and local communities less able to meet their own needs.

This development of the role of the State has led governments, including those that swear by their liberal intention to promote freedom, to extend their reach into areas of human life that, as Foucault suggests, were historically the exclusive concern of religious institutions. Nisbet pointed out in 1953 that the “real significance of the modern State is inseparable from its successive penetrations of man’s economic, religious, kinship, and local allegiances, and its revolutionary dislocation of established centers of function and authority.”¹⁷ Two decades later he warned that “political government may be nominally democratic or republican, but it cannot be a genuinely free government if the powers of the state have reached out to encompass all spheres of social, moral, economic, and intellectual existence.”⁷

The bitterness of current debates over a whole range of cultural matters derives from the drive by government, impelled by the logic of bureaucratic procedure, to reduce the infinite variety of human life to routinized categories for treatment in standardized ways. One consequence, despite the many issues about which profound differences exist in contemporary society, is the “conviction that a single, society-wide, winner-take-all agreement must be reached by political-legal means.”¹⁹ As government has taken on a larger and larger role, it inevitably makes decisions and adopts policies that trespass upon matters about which citizens differ profoundly, and the winner-take-all mindset of the opposing camps leaves little room for each, or the disparate groups that they bring together on the pretext of a common enemy, to organize matters as they see fit. In education, “government control of public

schools creates the incentive to make ideological warfare a recurrent part of education policy.”⁸

Traditionally it has been to a large extent the human-level institutions of family, congregation, and voluntary association that have taught, modeled, and reinforced habits of moral obligation, and it is in such local settings that moral issues have been confronted and resolved. The new intrusiveness of government increasingly incapacitates this arena of discussion, compromise, and decision. Peter Berger and Richard John Neuhaus, in making the case for renewed attention to the role of the “mediating structures” of civil society, warned that, unrestrained by the intermediate buffering of local communities and voluntary associations, “the state has an unchallenged monopoly on the generation and maintenance of values.”²¹ Quite apart from the oppression exercised by totalitarian regimes, Berger and Neuhaus warn, “even the most democratic state has at its disposal awesome power to penetrate and control every nook and cranny of social life. It is virtually unavoidable that this power will recurrently be misused, even if the intentions motivating the exercise of power are morally impeccable.”²²

Education, the Chosen Instrument

We could go on to consider how other Progressives – among them Woodrow Wilson, economist Richard Ely, and journalist Walter Lippmann – saw the solution to America’s problems in a greatly strengthened government guided by experts rather than by elected local representatives, but it is appropriate to turn to their ally John Dewey, since it was he who most influentially applied this prescription to popular schooling. Dewey, like other Progressives, saw opportunities, in the

7 Nisbet (1975), 246. 19 Skillen (1994), 39.

8 Arons (1997), 26.

shattering of traditional community life, for moving humanity to a higher level of organization and of consciousness. In one of his first and most widely-read statements about education (significantly called “My Pedagogic Creed” 1897), he held out the promise that “through education society can formulate its own purposes, can organize its own means and resources, and thus shape itself with definiteness and economy in the direction in which it wishes to move.”²³ Dewey continued, over the following highly-influential decades of his career, to promise that “the emerging social sciences would tame the disintegrative sociological and psychological effects of modernity . . . organized into the imposing bureaucracies that would now ‘scientifically manage’ all human affairs.”²⁴

Dewey later argued that World War I represented a great opportunity to convince the public that it needed experts to manage public affairs.²⁵ Centralization of authority would be required because of what he saw as the “disintegration of the family, church, and neighborhood.”²⁶ This failure of the local institutions that had traditionally prepared the young for adult life would, Dewey argued, require a greatly-expanded role for the public school. That role should be guided by experts informed by the new understanding of what he referred to in 1922 as “an engineering issue, the establishment of arts of education and social guidance.”²⁷

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Berger and Neuhaus (1996a), 190. 22

Berger and Neuhaus (1996b), 146. 23

Dewey (1974), 438. 24

Schambra (1998), 45. 25

Schambra (2000), 328. 26

In Lasch (1995), 84. 27

Dewey (1988a), 10.

The Depression provided another opportunity for Dewey and his allies to call for the abandonment of individualism, his code

word for the free market and democratic politics based on competition and cooperation rather than guidance by experts. Dewey wrote in 1934 that there was “only one way out of the existing educational confusion and drift. That way is the definite substitution of a social purpose, controlling methods of teaching and discipline and materials of study, for the traditional individualistic aim.”⁹ In another article the same year, Dewey made explicit that public schools should be a force mobilized to transform society and its economic system, with every detail of its life and activity mobilized to serve a political agenda for which education was only an instrument. He insisted that

*the schools will surely, as a matter of fact and not of ideal, share in the building of the social order of the future according as they ally themselves with this or that movement of existing social forces. This fact is inevitable. . . . according as teachers and administrators align themselves with the older so-called “individualistic” ideals -- which in fact are fatal to individuality for the many -- or with the newer forces making for social control of economic forces. . . . the teacher will . . . not be content with generalities about the desired future order. The task is to translate the desired ideal over into the conduct of the detail of the school in administration, instruction, and subject-matter.*¹⁰

The following year, in “Liberalism and Social Action” (1935), Dewey warned against “attaching undue importance to merely external institutional changes, to changes that do not enter into the desires, purposes and beliefs of the very constitution of individuals.” Translated from his usual cautious language, Dewey was arguing that political action to transform the society and economy were not enough unless supplemented by the deeper penetration of minds and values that education aligned with this political

9 Dewey (1986b), 180.

10 Dewey (1986c), 208.

action could achieve. He goes on, chillingly, to argue that “[s]hould a classless society ever come into being the formal *concept* of liberty would lose its significance, because the *fact* for which it stands would have become an integral part of the established relations of human beings to one another.”

¹¹ As in the society envisaged by Rousseau in *The Social Contract* (“whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free”¹²); for Dewey, individual freedom would be subsumed into the higher societal purpose that would make individual choices unnecessary and even disruptive.

In the 1935 essay, Dewey insists that “[o]rganized social planning . . . is now the only method of social action by which liberalism can realize its professed aims,” but returns to his earlier insistence that control of the economy and social institutions, to be effective, must be supplemented by education capable of transforming mankind at the deepest level.

*Change in patterns of belief, desire and purpose has lagged behind the modification of the external conditions under which men associate. . . . This fact defines the primary . . . responsibility of a liberalism that intends to be a vital force. Its work is first of all education . . . all of the influences that go to form the attitudes and dispositions of desire as well as of belief; which constitute dominant habits of mind and character.*¹³

It is worth lingering over the last phrases; public education is to form, in those being educated, both their desires and their beliefs. Of course, education may not be sufficient to change the habits of mind and character of part of the population; in such cases, “force

may be intelligently employed to subdue and disarm the recalcitrant minority.”¹⁴

Also in 1935, Dewey called for a national system of education, on the grounds that “a strong unified intelligence and purpose must be built up in support of policies that have a definite trend toward a socialized cooperative democracy. The schools cannot remain outside this task.”

Control of schools by parents and other local voters was hampering this great work, though

Dewey held out some hope that

*[i]f the teaching profession can educate itself and the public to the need of throwing off this incubus [of lay control of schools], genuinely educative forces will be released to do their work. In consequence, the freedom and impetus that result will enable the schools, without a centralized system, to develop a system of truly national education -- by which I mean one animated by policies and methods that will help create that common purpose without which the nation cannot achieve unified movement.*¹⁵

Dewey’s emphasis on enhancing the role of the state and its experts, and his lack of respect for the role of parents and local elected officials, may seem strange in a figure so strongly identified with progressive education and its emphasis on freedom. Dewey’s prescription for American education was not simply evoked by the crisis conditions of the Depression, as some of his defenders have argued, but was already evident in his admiring articles about education in the Soviet Union, published in *The New Republic* in 1928. The success of the Communist effort to transform the Soviet economy, society, even families, depended on their “ability to create a new mentality, a new psychological attitude. And obviously this latter problem is essentially one of education. It accounts

¹¹ Dewey (1987a), 31, 36.

¹² Rousseau (1993), 195.

¹³ Dewey (1987a), 39-40, 42.

¹⁴ Dewey (1987a), 61.

¹⁵ Dewey (1987b), 358-9.

for the extraordinary importance assumed in the present phase of Russian life by educational agencies." Thus, according to Dewey, "the final significance of what is taking place in Russia is not to be grasped in political or economic terms, but is found in change, of incalculable importance, in the mental and moral disposition of a people, an educational transformation."³⁵

Dewey's disdain for the role of the family in education finds clear expression in his discussion of the "experiments" that he observed in the Soviet Union:

to anyone who looks at the matter cold-bloodedly, free from sentimental associations clustering about the historic family institution, a most interesting sociological experimentation is taking place, the effect of which should do something to determine how far the bonds that hold the traditional family together are intrinsic and how far due to extraneous causes; and how far the family in its accustomed form is a truly socializing agency and how far a breeder of non-social interests. . . the role of the schools in building up forces and factors whose natural effect is to undermine the importance and uniqueness of family life.³⁶

In a subsequent article, Dewey summed up his conclusion that "[t]he Russian educational situation is enough to convert one to the idea that only in a society based upon the cooperative principle can the ideals of educational reformers be adequately carried into operation."³⁷ By "the cooperative principle," Dewey meant government ownership of the means of production and control over every aspect of society, including schooling and the family.

We have focused on Dewey to illustrate how readily those pursuing an agenda of social improvement choose public schooling as their preferred instrument. How tempting, to work directly upon the minds of a captive audience of children, "to shape the fictile clay of humankind into something stronger,

better, more rational, more efficient, more perfect."³⁸ Horace Mann employed a similar metaphor when he explained his decision to give up his political and legal career and dedicate himself to education reform: "Men are cast-iron, but children are wax. Strength expended upon the latter may be effectual, which would make no impression upon the former."³⁹

From this perspective, schools that have a different agenda, especially if that entails the development of a religion-based perspective that may be critical of some actions of the State, are perceived as a threat to the vital national interest of nurturing loyal citizens. This can lead to strongly hostile reactions by government, and not only under authoritarian or totalitarian

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Dewey (1988b), 221, 223. 36

Dewey (1988c), 230. 37

Dewey (1988d), 234. 38

Hart (2009), 107. 39

In Messerli (1972), 249.

regimes. A good example is the assault on Catholic schooling under France's Third Republic, culminating in the "civic totalitarianism" of Prime Minister Emile Combes, who insisted that "[t]here are, there can be no rights except the right of the State, and there [is], and there can be no other authority than the authority of the Republic."⁴⁰ In what Jean Baubérot characterizes as a *laïcité de combat*, Combes's administration acted on the assumption that religion, at least as represented by the Catholic Church, was socially harmful and must be closely supervised and limited by government. Combes closed three thousand Catholic schools at once, and thousands more several years later.⁴¹

Now it is of course a legitimate empirical question, whether youth who have attended faithbased schools tend to be less desirable citizens than their peers who attend public

schools. It was commonly assumed that this was the case by the Protestant majority in 19th century North America and the secular elite in 19th century Europe.

Only in recent decades, however, has there been social science research seeking to learn whether students in and graduates of faith-based schools are less civic-minded, more intolerant, less patriotic, and in other respects less fitted to be good citizens than those educated by public schools. Studies by James Coleman and other sociologists have dispelled the belief that Catholic schools fail to produce good citizens,⁴² a belief that the contributions of millions of Catholic school graduates to every aspect of American life should have dispelled long before. Though Catholic schools have become part of the American mainstream (through not sufficiently so to remove objections to providing them with public funding), their place on the suspected list has been taken by thousands of evangelical schools, most quite small, that have sprung up over the past forty years, and by Orthodox Jewish and Islamic schools.⁴³ Like Catholic schools in the 19th century, they are suspected of promoting narrow, “sectarian” views, exactly what the proponents of the public school fear.

This is not the place to review the now-extensive research on both immediate and long-term effects of non-government schools in the United States on the development of civic virtue; Patrick Wolf has recently summed up the most valid studies:

When we consider all 86 findings from the 34 studies regarding all of the civic outcomes central to a stable democracy, only three indicate that public schooling outperforms private schooling . . . A whopping 50 statistical findings indicate that private schooling produces significantly better civic outcomes than does public schooling. The remaining 33 findings

Galston (2005), 24-5. 41

Burleigh (2007), 357. 42

Coleman and Hoffer (1987); Bryk, Lee, and Holland (1993); Campbell (2008). 43

See Bedrick, Greene, and Lee (2020.); Glenn (2018).

detect no difference between the two.⁴⁴

Such research has not, however, had a perceptible impact on the perception, among those primarily concerned with the formation of citizens and with national unity, that faith-based schools are a dangerously negative influence. As public awareness increases that there are now several hundred Islamic schools in the United States, we can expect even graver concerns to be expressed about them.

Public schools, by contrast, are “a communications theorist’s dream: the audience is captive and immature. . . the messages are labeled as educational . . . and a system of rewards and punishments is available to reinforce the messages.”⁴⁵ While in the past public schools commonly reflected something like a local consensus on values in the community that funded them and hired the teacher or teachers, they have increasingly been the instrument of cosmopolitan values and perspectives, not those of the society at large (which indeed would be impossible in heterogeneous contemporary societies), but of a secular elite who see public schooling as an effective instrument for cultural as well as social change. A part of the agenda of this elite is to enhance the influence of the State and to weaken so far as possible any challenges to that influence.

Critics have pointed out that there can be unanticipated negative consequences from the effort to establish a state monopoly on the formation of citizens. While intended to reduce social divisions, it can in fact exacerbate them. Charles Bidwell argued, half a century ago, that

*state systems of common schools are established largely to weaken social cleavages that arise from differences such as those of religion, ethnicity, and class and to replace them with ties of common sentiment and political loyalty. But state action to establish or foster a common school system in fact may give a political focus to these cleavages and to antagonisms between the diverse elements of a population and its central government.*⁴⁶

This observation is certainly borne out by the history of the Netherlands, Belgium, and other countries where fierce battles during the 19th century over the control of schooling were followed by a stable “pacification” once both secular and religious forces accepted that they would not be able to provide the education of all the country’s children.⁴⁷ The structural pluralism adopted as the basis for educational provision in these countries – in contrast with the grudging toleration of non-government schools in the United States – has resulted in much less conflict over schooling that Americans have experienced over recent decades.

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Wolf (2020), 55. 45

Mark Yudof, quoted by Salomone (2000), 39.

46

Bidwell (1966), 51. 47

See Glenn (2011).

Do public schools still promote shared convictions?

At the heart of the Civic Republican case for the unique, indispensable, and (preferably) monopolistic role of the public school has been the argument that it serves to develop in its students a common set of ways of understanding and engaging with the world. Whether we call it a secular religion or a republican ideology makes little difference; it is a set of beliefs that claims to serve as the shared basis for participation in American

society and that tolerates no rivals. Nor have these beliefs been marginal to the actual life and work of public schools; historian David Tyack points out that “the invisible hand of republican ideology was often a more powerful force in shaping the common schools than the visible arm of state governments.”¹⁶

Is this just innocent rhetoric? In many cases, no doubt it is, but it can readily come to represent a real counter-faith, especially since, as Franklin Littell has shown, many churches have abandoned any sort of doctrinal rigor or discipline of membership, so that their members have difficulty distinguishing between their nominal faith and the shared civil religion.⁴⁹ This opens the door to a deliberate assault on beliefs that differ from the (secular) understanding of the nature and goals of life. Sociologist Will Herberg warned, sixty years ago, that

*the public school – in many cases, quite unwittingly – is inculcating a counter-religion of secularist self-sufficiency. This counter-religion of secularism is the faith and cult of a small but energetic group that has entrenched itself in many of the centers of teachers’ training in this country. These people have their philosophy of life and education, grounded in their basic secularist commitment, and it would be well if we recognized that they in fact constitute a distinct religious group, side by side with, though everywhere infiltrating, the more conventional religious communities. Their numbers are small, but their influence is not inconsiderable.*¹⁷

Nor, despite frequent talk of “neutrality,” were these militant secularists at all shy about their determination to substitute a civil religion of national (now more likely global) unity and social progress for the benighted beliefs that many children had learned from their families. Dewey insisted in “A Common

16 Tyack (2003), 130. 49

Littell (1971), 97, 159.

17 Herberg (1954), 158. 51

Dewey (1986a), 58.

Faith" (1934) that "[s]uch a faith has always been implicitly the common faith of mankind. It remains to make it explicit and militant."⁵¹ Stipulating for the moment that it is legitimate for schools (whether public, independent, or faithbased) to seek to arouse in their pupils a sense of reverence, to develop in them convictions about the nature of the Good, and to encourage the habit of acting virtuously in accordance with those convictions – many leading educational and political theorists do not agree – it is nonetheless questionable whether the State should be prescribing such measures in schools that it controls and that pupils attend involuntarily. We should at once concede that the government is *not* in fact doing so, or at least in any effective way, in the United States. The "broken covenant" lamented by Bellah is nowhere more apparent than in the public schools, which – unless with unusually strong leadership, and some charter public schools excepted – reflect the normlessness of a consumer society. It has often been said that "tolerance" is the only virtue that public schools seek to teach, a tolerance that has little to do with genuine respect or understanding but is simply a relativism that "has no ethical coherence and . . . provides no language or vision for a common future and therefore offers few if any resources for collective action."¹⁸

The point, then, is not that American public schools are promoting a dominant and unifying ideology, a civil religion, but that the conviction that they *should* be doing so serves as a primary reason for opposing faith-based schools and other schools that are based on a coherent theory of how to form character and a clear understanding of the sort of character and loyalty essential to form so that students will lead useful and fulfilling – flourishing – lives..

18 Hunter (2010), 32.

The "civic republican" vision of the role of public schools has today, in consequence, only a negative function, as the basis for opposing schools that promote alternative sources of meaning and loyalty. What was, or at least is nostalgically imagined to have been, the positive content of an educational program centered on developing patriotic commitment and citizen solidarity has long since been replaced by incoherence. For the American "shopping mall high school," [i]n educational and moral matters, high schools are remarkably wary of telling students what to do. The more student diversity a school contains and the more curricular variety it develops, the less able it is to forge any workable consensus about what educational experiences are of most worth or what kind of mastery is possible or appropriate for all. It is easier to delegate those decisions to students and families. . . . Pluralism is celebrated as a supreme institutional virtue, and tolerating diversity is the moral glue that holds schools together. But tolerance further precludes schools' celebrating more focused notions of education or of character. "Community" has come to mean differences peacefully coexisting rather than people working together toward some serious end.¹⁹ If public schools were in fact more coherent and effective in promoting a common worldview,

the question remains: when does appropriate government concern about the formation of citizens turn into an inappropriate intrusion into the minds and hearts of children, and into the way that families seek to nurture those children into particular models of adulthood? The choice should not be between a society united around a republican ideology mandated in public and non-public schools alike, and the sort of social disintegration that Robert Bellah lamented in

19 Powell, Farrar and Cohen (1985), 3.

The Broken Covenant. In a society marked by deep disagreements about the nature of the Good (or whether in fact there is such a thing), and thus about the goals of education, it is offensive to both freedom and equality to impose any particular view upon all children, either by majority rule or by that of an elite clerisy. Of course they are to be taught, by example as much as by instruction, the common norms of social life and civic participation, but it is not the role of the State to promote one of the competing beliefs about ultimate goods

The debate over setting the goals of education has often been trivialized because of a failure to recognize that the differences “go all the way down.” As sociologist James Davison Hunter reminds us,

[w]hat is ultimately at issue, then, are not just disagreements about “values” or “opinions.” Such language misconstrues the nature of moral commitment. Such language in the end reduces morality to preferences and cultural whim. What is ultimately at issue are deeply rooted and fundamentally different understandings of being and purpose.²⁰

We should applaud the insistence of Horace Mann and John Dewey, that the only school that truly *educates* is one that goes beyond instruction in knowledge and skills to concern itself centrally with the formation of character. Where they went wrong (in their different ways) was in seeking to impose a single model of education; this agenda was based, in turn, upon a false conviction that society could not prosper unless its people shared common beliefs over-ruling the partial beliefs of traditional religions. The public school was to be, in turn, the uniform and unifying crucible of national identity and shared convictions. Unfortunately, as David Tyack put it, the “ search for the one best

system has ill-served the pluralistic character of American society.”²¹

The civic republican objection to faith-based schools was and continues to be based on the challenge that these pose to the unifying project and its pretension to shape the hearts as well as the minds of all the nation’s children. Faith-based schools do so, not because they undervalue the demands of citizenship, but on the basis of an alternative, and deeply-rooted, understanding of reality and of how responsible citizens should contribute to the common good. International experience shows that the interests of national unity and social peace can best be served by a system of structural pluralism in schooling, an arrangement that shows respect for the diversity of deeply held convictions in society.

The Comprehensive Liberal Argument

The educational theorists (often called “educationalists,” and ensconced above all in higher education) who set the prevailing tone for discussion of the goals of education today have managed to turn the vacuity at the heart of the public school into a virtue – which they call the fostering of autonomy, though that does an injustice to a good word – and propose to prescribe it for private schools and even homeschooling as well.

Thus, far from retreating from the attempt to impose a single model of “republican character” through the public schools when it became apparent that those schools were not, or were no longer, capable of meeting that expectation, the clerisy has changed the definition of the character to be developed by public schools while continuing to demand that it be imposed universally. If, before,

20 Hunter (1991), 131.

21 Tyack (1974), 11.

pupils were to be taught to believe and be loyal, now they are to be taught to doubt and question, to shake off commitments.

Part of a wider agenda sometimes called “Comprehensive Liberalism,” this has led to emptying the curriculum of content that once was considered valuable for its own sake; Melanie Phillips complains that English schools “have ceased to transmit to successive generations either the values or the story of the nation, delivering instead the message that truth is an illusion and that the nation and its values are whatever anyone wants them to be.”²² From a very different political standpoint, David Purpel concedes, in a book introduced by two of the icons of leftliberalism in education, that “in some ways the quality of our critical capacities may have been ‘too’ effective in the sense that they have undermined some of the foundations of our civilization.”²³

Today’s public school students are exposed to many of the facts and even documents that were the staple of what we have called the Civic Republican education program, but now these are used by the progressive curriculum as opportunities to develop critical judgment, to speculate about motivation, to uncover hypocrisy. There is nothing wrong with critical judgment, of course, but the danger is that students will become cynical about the whole accumulated wisdom of their society and their culture. Sociologist James Hunter reminds us that

[w]hen moral rules and selves are abstracted from the normative traditions that give them substance and the social contexts that makes them concrete, “values” become little more than sentiments, moral judgments, expressions of individual preference. In such a framework, the defining moral action is the capacity of the individual to choose as he or she sees fit. The individual is capable of making commitments, of course, but these

*commitments are not binding, since one always retains the right of withdrawal. The highest normative ideal, trumping all others, is the ideal of an individual free to move among multiple attachments, and the merit of those attachments is measured by the degree to which they facilitate personal well-being. Unanchored as they are to anything concrete outside the self, the values and virtues encouraged by the leading strategies of moral education provide meager resources at best for sustaining and supporting our farreaching moral commitments to benevolence and justice.*²⁴

The consequence of the Comprehensive Liberal understanding of the goals of education is that “[c]hoosing itself, not what one chooses, becomes the heart of morality.”²⁵ And this leads us back to autonomy, considered the highest level of moral development for “faceless children . . . without real families, real schools, real media influences, real peer groups, or real synagogues and churches. The portrait is of children living outside of history, culture, and a complex social world.”²⁶

Just as Civic Republicanism, as expressed in public schools, took on many of the characteristics of a civil religion, so Comprehensive Liberalism behaves like a dogmatic faith, without the humility toward the Divine that most religions inculcate, and unwilling to acknowledge the virtues of any alternatives. As Craig Engelhardt points out, its “proponents claim to speak from a neutral secular perspective, but the particulars of their concerns, though likely commonplace in their academic circles, do not necessarily reflect common public beliefs or values. While attempting to provide the philosophic foundations for a ‘common education system,’ they end with advocating for an educational system that conforms with their religious views of the good life.”²⁷

22 Phillips (2006), xx.

23 Purpel (1989), 69.

24 Hunter (2000b), 40.

25 Hunter (2000a), 185.

26 Hunter (2000a), 187.

27 Engelhardt (2013), 109.

In his history of the changes in post-war American culture, George Marsden notes “how easily talk about the unassailable ideal of ‘freedom’ in a political sense blended into an ideal of personal attitudes of independence from social authorities and restraints. A key word that was often used to express this taken-for-granted ideal was ‘autonomy.’”²⁸ Under such conditions, however, as Bellah and his co-authors argued in *Habits of the Heart*, the actions and attitudes chosen are arbitrary, and “each self constitutes its own moral universe, and there is finally no way to reconcile conflicting claims about what is good in itself.”²⁹ The only alternatives, given this reality, would be either to impose a single such claim – and this, even if decided by a democratic majority, would be tyranny – or to make room for different understandings of the good.

Ironically enough, given the liberal elite’s scorn for American consumer culture, this emphasis on autonomy is thoroughly consistent with and encourages a lifestyle based on consumerism with no fixed goals. In what philosopher Charles Taylor has called the Age of Authenticity, the only obligation of the fulfilled human life is “bare choice as a prime value, irrespective of what it is a choice between, or in what domain.” The corollary of this defining value is the obligation to respect the choices that others make; thus the only “sin which is not tolerated is intolerance.”³⁰

Thus the most striking aspect of the emphasis, by education theorists, on autonomy and unconstrained choice is its intolerance: autonomy is not itself represented as a choice, allowing individuals to choose, instead, loyalty to a community or a tradition. There is instead for every child, at least in intention, a compulsion to become auton-

omous. Meira Levinson asserts unapologetically that “[f]or the state to foster children’s development of autonomy requires coercion – i.e., it requires measures that prima facie violate the principles of freedom and choice. . . . The coercive nature of state promotion of the development of autonomy also means that children do not have the luxury of ‘opting out’ of public autonomy-advancing opportunities in the same way that adults do.”³¹ Nor should this educational objective of autonomy itself be subject to public debate, since, she insists, it is a fundamental premise of the liberal state which is not open to question!³² Elevating moral autonomy to first place among the virtues, and making all the others – apart from tolerance, the price that autonomy pays to the demands of life in society – matters of free choice, provides no solid basis for healthy families, communities, or democratic systems.³³ While this “liberating” project rests on the habits of many generations, it lacks the authority required to sustain those habits in successive generations.

*A moral code that is, at bottom, self-generating and self-referencing undermines the existence of and adherence to a prevailing communal purpose; it precludes the possibility of any compelling collective discipline capable of regulating social life. Simply put, there is nothing to which the self is obligated to submit. In the end the connection between the autonomous and unencumbered self and these moral ends are not only arbitrary but they are also without binding address. Further still, they lack any coherent social purposes. Any agreement one finds in public life is purely fortuitous.*³⁴

Nor is this stress on self-generated authenticity unrelated to the current and, in some respects, increasing social injustice perpetu-

28 Marsden (2014), 22.

29 Bellah and others (1986), 76.

30 Taylor (2007), 478, 484.

31 Levinson (1999), 38-9.

32 Levinson (1999), 139.

33 See such recent widely-read discussions as Brooks (2019) and Putnam (2020).

34 Hunter (2000a), 191.

ated by our public education system. Andrew Oldenquist describes how urban public schools lost the ability to give structure and direction to the lives of African-American youth, as they had done so notably for European immigrant youth two generations earlier. This, he argues, is the result of a set of ideas which came primarily from professors in the colleges and departments of education and from a number of social scientists. They taught a radical individualism that alienated people from all of their social affiliations excepting the most local, an individualism-gone-mad that sometimes borrowed the slogans of the Left but in reality had practically nothing in common with socialism or collectivism. They preached the equal rights of individuals to respect, to reward, even to truth itself; they taught the supremacy of self-interest over the common good, of the emotions over knowledge and intellect, of children's autonomy over society's need for their socialization; and a thorough relativism according to which the very idea of one person's performance, ability, or even conduct being better than another's was considered demeaning, stigmatizing, and elitist. What is important, of course, is the effect these ideas had on young teachers and, particularly, on the inner-city schools where the federal funds could be spent.³⁵

Liberation from the Family

Comprehensive Liberalism shares with Civil Republicanism a distrust of families as the major potential impediment to shaping a worthy citizenry, and shows little "concept of ordinary people as autonomous decision makers free to reject any vision and to seek their own well-being through whatever social

processes they choose."³⁶ Indeed, it believes that "the chief institutional instrument of repressive authority is the family. . . . moral revolution must overthrow the power of the family – all families. [Wilhelm] Reich makes a standard point: the family, being the training ground of morality, is authoritarian by definition."³⁷ Children must be rescued from the stifling authority of their families if they are ever to achieve autonomous authenticity. Horace Mann and John Dewey have vanishingly little to say about families or parents; indeed, in the hundreds of essays and books about education by the latter, one of the very few mentions of parents places them in unflattering company: "[p]arents, priests, chiefs, social censors have supplied aims, aims which were foreign to those upon whom they were imposed, to the young, laymen, ordinary folk."³⁸ As though parents were not themselves "ordinary folk" whose dearest aims usually involve ambitions for the lives they hope their children will live! This suspicion and even hostility toward the role of families in shaping the young is profoundly offensive to the character of a free society . . . and to human nature itself. Legal scholar John Coons points out that

[t]he right to form families and to determine the scope of their children's practical liberty is for most men and women the primary occasion for choice and responsibility. One does not have to be rich or well placed to experience the family. The opportunity over a span of fifteen or twenty years to attempt the transmission of one's deepest values to a beloved child provides a unique arena for the creative impulse. Here is the communication of ideas in its most elemental mode. Parental expression, for all its invisibility to the media, is an activity with profound First Amendment implications.³⁹

35 Oldenquist (1985), 255-6.

36 Sowell (1995), 122.

37 Rieff (1968), 156.

38 Dewey (1988e), 5.

39 Coons (1985), 511.

Political scientist Amy Gutmann, on the other hand, rejects the argument of those she characterizes as “civic minimalists” that, while government “may outlaw certain clearly unreasonable educational practices,” it should otherwise “support the preferences of parents with regard to their own children’s schooling.” To the contrary, she insists, “democratic education grants democratic governments discretion over how to interpret the demands of civic education, provided the demands are not discriminatory or repressive. Parents do not have a general right to override otherwise legitimate democratic decisions concerning the schooling of their children.”⁴⁰ Of course, much hangs on what one means by “otherwise legitimate,” and much, as well, on “democratic decisions.” Do the latter include, for Gutmann, decisions by local voters through the ordinary political process to ensure that the local school reflects their own values and beliefs? This seems unlikely. After all, it is the pronouncements of the educationists and not the ordinary political process which is considered the guardian of the meaning of “democratic education.” To these authorities it is all about liberation from family and community values for the sake of an imagined autonomy that must not be based on any pre-determined commitments, loyalties, or life-goals other than unlimited self-exploration and self-expression in search of authenticity. William Galston, while acknowledging the philosophical force of the Socratic preference for the “examined life” and the Liberal belief “that individual freedom is incompatible with ways of life guided by unquestioned authority or unswerving faith,” asks whether the liberal state is justified in building them into its system of public education.

40 Gutmann (2002), 27, 29.

*The answer is that it cannot do so without throwing its weight behind a conception of the human good unrelated to the functional needs of its sociopolitical institutions and at odds with the deep beliefs of many of its loyal citizens. As a political matter, liberal freedom entails the right to live unexamined as well as examined lives – a right the effective exercise of which may require parental bulwarks against the corrosive influence of modernist skepticism.*⁴¹

Using compulsory schooling to undermine commitment to the beliefs and loyalties of families and of the voluntary communities to which they adhere is a threat not only to individual freedom but also to the health of society, to its essential social fabric. After all, “the kind of religious faith that liberalism permits must always be superficial and contingent. But the imperative and expectation of constantly changing one’s deepest moral commitments stunts the development of one of the most necessary virtues for liberal regimes – that of self-control, which is developed by *commitment* to principles and persistence in them rather than their perpetual reconsideration and abandonment.”⁴²

The new Establishment

In place of priests or ministers engaged in the cure of souls, then, we have secular “experts” on the appropriate thoughts and attitudes, loyalties and even emotions, determined to make use of the universal scope of government to improve their fellow-citizens. Expertise is all very well in its place, of course; we want experts to design our bridges and fly our airplanes. There is a place also for experts in various aspects of pedagogy. But should we defer to experts in determining the goals of education? Is there a scientific consensus on the nature of the Good Life, of the human

41 Galston (1991), 253-4.

42 Koganzon (2020), 36-7.

flourishing that education should promote? Or is that something for parents to decide with respect to their own children, and for the voluntary associations to which they may choose to entrust them to communicate and reinforce?

Not so, say many “progressive” educators. For example, Meira Levinson calls for schools to be “detached” from local influences and thus to balance “out a current maldistribution of power that unjustly favors parents. As opposed to imposing state tyranny, the detached school actually establishes a needed counterweight to the threat of parental tyranny,” because “the state and not parents should exercise primary control over schooling.”⁴³

While there is no reason to believe that most public schools are successful in providing an education for genuine autonomy, given the abundant evidence on the power of peer pressure on adolescents⁴⁴ and the ever-increasing penetration of electronic media, the rhetoric about autonomy serves as a useful reason for educationists to oppose faith-based schools. The normative confusion of most public school students is seen as less threatening to the goals of Comprehensive Liberalism – it can even be rationalized as openness – than the solid grounding that many students acquire in faith-based schools.

In consequence, the objection to faith-based schools has changed its rationale without becoming any less adamant. Whereas they were suspected, up to the 1960s, of providing *insufficient* indoctrination into the norms and loyalties of the secular civil religion considered essential to American life, they are now accused of *excessive* promotion of norms and loyalties in violation of the right

of children to be liberated to become autonomous self-defining adults.

This is a useful reminder that secularism, all claims to the contrary, is in fact not at all the same thing as neutrality toward religion and those for whom religious faith is a central aspect of life. In fact, secularism as a philosophy “defends a negative opinion about religion itself, seen to be incompatible with individuals’ rational autonomy.”⁴⁵ As Hugh Heclo puts it, for the secularist ideology, the “all but inescapable implication was that to journey toward self-discovery, one had to leave behind the religion of churches, parents, hand-me-down doctrines, and any idea of natural law.”⁴⁶

Far from being a “neutral playing field” on which Judaism, Christianity, Marxism, and other traditions can wage a fair fight for the allegiance of the people,” Robert George points out, “[s]ecularism rests upon and represents a distinct and controversial set of metaphysical and moral propositions having to do with the relationship of consciousness to bodiliness and of reason to desire, the possibility of free choice, and the source and nature of human dignity and human rights. Secularist doctrine contains very controversial views about what constitutes a person – views every bit as controversial as the Jewish and Christian views.”⁴⁷ This far-from-neutral secularism, it has been argued, has become a sort of religious establishment in the public schools.⁴⁸

The result has not, however, been the development among American youth of a confident faith in, say, Secular Humanism, but rather a wavering uncertainty about what to believe and whom to trust, as confirmed by countless recent surveys. Michael McConnell points out that “mush, too, reflects an ide-

43 Levinson (1999), 65, 67.

44 Steinberg (1997).

45 Maclure and Taylor (2011), 29.

46 Heclo (2007), 87.

47 George (1999), 40.

48 Brann (2010), 133.

ological perspective that sharp differences and clear opinions are either dangerous or pointless,” and results in “a capitulation to the often anti-social values of mass youth culture, as conveyed in television, movies, and popular music.”⁴⁹ Comprehensive Liberalism has been effective at weakening ties to family, community, and tradition, but not at supplying an alternative set of anchors for a flourishing life and responsible citizenship.

Conclusion

It is fortunate for individual freedom and for the health of a free society that neither of the arguments we have been considering for the mission of public schooling is being implemented successfully today, but this is no cause for complacency. Education *should* be nurturing civic virtue and loyalty to the common good, it *should* be encouraging youth to think deeply about what commitments to make as the basis for stable character and a flourishing life.

The common public school is notably unsuccessful in educating informed and engaged citizens who possess the virtues required by a pluralistic democracy, nor has it been more successful in developing in its pupils the firmness of character required by true autonomy, able to resist the seductions of consumerism and the internet.

The virtues required for citizenship and for mature human flourishing are nurtured in communities of shared meaning and purpose, and by collaboration among such communities. Primary among these are families and the associations of civil society – often religious or cultural – to which many families give their loyalty and from which they derive settled convictions and dispositions. Schools can be among such associations and thus

play a crucial role in nurturing the qualities essential to citizenship and to upright character, but only if they manifest in every aspect of their life and program a coherent understanding of the requirements of a flourishing life. This need not be religious, but it must not be bureaucratically-imposed, nor can it be based on a lowest-common-denominator of fashionable opinions.

Fortunately, many children and youth who attend incoherent schools are able to bring to that confusing experience qualities of mind and character developed in the home and in the community. Other schools, whether faith-based or organized around a non-theistic understanding of human flourishing, are able to compensate to a significant degree for the lack of strong supports outside the school in the lives of some students. Those youth, however, who experience neither in nor outside of school a stable and coherent setting within which they can develop the skills and settled dispositions required for successful lives are victims of a public education system which has alienated itself from civil society.

Civil society is irreducibly pluralistic, made up not simply of individuals but of families, voluntary organizations, neighborhoods, local businesses and services, and a host of other associations based on mutual interests, shared beliefs, or loyalty to traditions and identities. It is one of the central aims of totalitarian regimes to eliminate all forms of association not directly answerable to the State or its allied Party,⁵⁰ but this is fundamentally contrary to liberal democracy. The freedoms which we enjoy under such a regime are not simply individual; we are free to associate, and such associations themselves possess the right to operate freely within generous limitations.

49 McConnell (2002), 98.

50 Glenn (1995).

Whether motivated by theological considerations or by historical reflection, many would agree that it is essential to place limits on the reach of the State. A free society preserves the independence and integrity of institutions and associations whose independence is secured by both legal protections and their own vitality. These are “the indispensable means by which checks and limits have been placed upon the state’s power and the tendency, always great in democracy, for that power to seek constantly to encompass all manner of ways of life.”⁵¹ And it is within the free associations that make up civil society that the civic as well as the personal virtues are formed upon which the political order itself depends.

In consequence the State, much as it needs virtuous citizens, “should not seek to promote any particular conception of the good life.” It is entirely appropriate, within the give-and-take of a free society, “for individuals or groups to advocate some set of values and to try to persuade others to adopt them, but it is quite another for the state to do so with the backing of its formidable powers.”⁵²

In order to give scope for such nurturing of trust and the settled disposition to act with responsibility toward the common good, a society requires structural or “*political pluralism*, an understanding of social life that comprises multiple sources of authority – individuals, parents, civil associations, faith-based institutions, and the state, among others – no one of which is dominant in all spheres, for all purposes, on all occasions.” Such a society provides “space within which individuals and groups can freely pursue their distinctive visions of what gives meaning and worth to human existence.”⁵³

It is through such healthy pluralism of distinctive schools, each informed by a shared

vision of human flourishing, and not through attempts at a uniform State monopoly of schooling, that engaged citizens are formed.

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51 Nisbet (1975), 74.

52 Kekes (1993), 211.

53 Galston (2005), 1-3.

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DIGITALIZATION OF EDUCATION?

GSTIC Digital technologies for lifelong learning

Saskia Van Uffelen*

Digital skills is not about technology only.

When I started as Digital Champion, we started in 2011, we were still talking about ICT-skills.

Digital skills is more than just ICT-skills, you have to see it as a change of the culture.

It is thus the responsibility of everybody in the society. We need experts and people who can make AI-solutions and code, but we also need people who are eg. capable of defining new financial models. We also need people who are capable of defining new financial models which will make that possible. For example: as long as we in Belgium don't touch our financial system of social security, which was defined 60 years ago, and adapt it to the 21st century then it won't happen. We need to dare to reshuffle funds and funding in a different way. We need other ways of selling, other ways of managing, we need people with the right attitude and values, ... "Who is going to fund the learning?" Well we will need to be creative in finding new ways of getting to the objective of Digital inclusivity.

We need more than only focusing on the technical side of skills.

Let's look back a little on the last few months. I've heard many reasons why we couldn't do hybrid education. I've heard that the schools

weren't ready, that the teachers weren't ready, that the buildings weren't ready or that the parents and/ or children didn't want to, but when you are living in a crisis a lot of those arguments were handled.

We suddenly had to switch to hybrid education. Yes, we came across some hurdles, we found out that even in a country like Belgium we had a lot of vulnerable youngsters who didn't have access to the necessary tools.

Luckily this did not keep us from finding a solution very fast, which we called "Digital For Youth". The organization recovered laptops from the industry, remodeled them with the right software and technology and then distributed them in our education system.

My point is that we cannot withhold ourselves from evolving, thinking and making change. We will need to handle the different hurdles accordingly.

It could be argued that policymaking is slow, but we also need to dare to take initiative and not sit by the sideline.

Yes, we have a challenge of E-inclusion, for sure, so at the same time an active E-taskforce has been created take the necessary steps.

Lifelong learning is not a world of diploma's alone anymore.

As a CEO or Operational Manager, I do not hire people for their diploma's anymore. More importantly, I hire people for their potential.

This is creating a completely different mindset for the supply as well as for the demand,

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but this also requires us to urgently dare to think with long-term visions in our enterprises. We need to start planning beyond the quarter – more long term.

The current the financial model that used is that if we lay off of people, that have routine jobs, it will be accepted by the financial market as an investment to make my organization healthy again on the long term.

We should ask ourselves: “If I would invest the same amount of money in life long-learning can it than also been seen as an investment to make our organizations more healthy going forward?”.

So in the discussion concerning digital skills development, we also need to include the financial analysts as the appreciate the financial performance of our organizations.

As soon as they change the point of measurement, you will see a complete change of behavior regarding the investments in education and lifelong learning for our current employees.

When you hire on potential it will obviously haven an impact on the educational sector.

We do not only need to work on the education of our youngsters. We also need a huge sense of urgency in the education for adults. We need to realise that the whole HR process needs to be transformed in a sustainable way. If eg. the searching companies are still presenting the employees based on their CV then we’re turning into a circle.

It’s also a responsibility of the management. We need to find our balance between personal and professional life again now that we have home- and flexible working.

We need new management skills, we need managers who are capable of trusting their people, because they will not see them in the office anymore. They are the ones who are going to have to adapt or even retrain themselves. It is a responsibility of each and everyone. The management can create an environment which allows people to have access to lifelong learning as part of the long-term vision. For me, as a CEO of my own life, I am responsible for my own development.

I’m also part of the European Governing Board for Digital Skills and Digital Jobs and I’m now trying to form the new version of the National Coalition for Digital Skills and Digital Jobs in Belgium. It should be a coalition based on the Government, the individual citizens, the education sector and the industry. I think that’s the only way we can really crack this hard nut and progress very quickly.

We don’t have a choice. If we are really serious about sustainability goals then we need to be very serious about E-inclusion and if we’re really serious about E-inclusion we cannot do it in a different way. We need all people to participate.

Digital Connectivity, COVID-19 crisis, and catholic schools

Part 1 – Global and regional analysis

Quentin Wodon*

November 2020

Abstract

The COVID-19 pandemic has led to school closures affecting 1.6 billion children globally. In addition, the economic recession generated by the pandemic is leading to higher rates of poverty, with potentially devastating effects for children especially in low income countries. Ensuring that all children have access to distance learning options not only during the current crisis but also in the future is essential for learning outcomes. Unfortunately, digital connectivity is low in many countries, especially in low income settings. Lack of digital connectivity affects not only students in public schools, but also those in Catholic schools which tend to be disproportionately located in low and lower-middle income countries where distance learning options are limited. In this context, the contribution of this paper is twofold. First, the paper discusses the potential impact of the current crisis on students globally and the role that better digital connectivity can play in reducing these impacts. Second, the paper provides an analysis of enrollment in Catho-

lic schools by region and income groups to assess what the impact of the crisis may be on students in those schools. That analysis is complemented by results from a survey of national Catholic education associations about their ability to respond to the crisis.

Keywords: Digital connectivity, COVID-19, Catholic Schools, Distance Learning, Low income countries, sub-Saharan Africa, South Asia.

Introduction

In some ways, digital technologies may represent a threat for an education that aims to contribute to fraternal humanism. The rise of cyber bullying in schools is one example. At the same time, one should not forget that access to digital technologies can also provide major benefits. Most students in Catholic primary and secondary schools today live in countries where access to digital technologies remains low. This has negative consequences for their ability to learn, as illustrated vividly by the impact of the current COVID-19 crisis. In part because of a lack of access to digital technologies, the COVID-19 crisis is having large negative impacts on education systems globally, including for students in Catholic schools.

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As noted in World Bank (2020a), even before the pandemic, many education systems were confronted with a major learning crisis (World Bank, 2018) apart from the fact that more than 250 million children of primary and secondary school age were out of school (UIS, 2019). In low and middle income countries, more than half of all children are affected by ‘learning poverty’. This means that they cannot read and understand an age-appropriate text by age 10 (World Bank 2019). In sub-Saharan Africa, the rate of learning poverty is much higher, with close to nine in ten children not able to read and understand a simple text.

Learning poverty reduces the value of the schooling that children receive. On average, students across countries may complete on average 11.3 years of schooling, yet this is valued at only 7.1 quality-adjusted or learning-adjusted years of schooling when poor learning in school is taken into account¹. A year ago, the World Bank in partnership with UN agencies adopted a target of reducing learning poverty in half by 2030 (World Bank 2019). Because of the effects of the COVID-19 pandemic – and in part due to lack of access to distance learning options, that target is unlikely to be achieved (World Bank 2020b). School closures could increase the learning poverty rate by 10 percentage points in low and middle income countries. This would lead 72 million additional children to become learning-poor (Azevedo, 2020; Azevedo et al., 2020).

In addition, the global economic recession generated by the pandemic – the worst since the great depression (International Monetary Fund, 2020.), is leading to higher rates of poverty and food insecurity, with potentially

devastating effects for children in low income countries (United Nations, 2020). Globally, the negative income effects of the crisis could lead up to 10 million children not to return to schools when they reopen (Azevedo 2020; Azevedo et al., 2020). As to the ability of governments to adequately fund their education system, it will be curtailed as tax revenues drop and other urgent needs – including for the provision of health care and social protection, take precedence.

The large expected increase in learning poverty relates in part to lack of access to digital technologies especially for children who live in poverty and/or in rural areas (UNICEF 2020). Very simply, without options to learn at home during school closures, many children have fallen behind further. The COVID-19 crisis has magnified existing educational inequalities. Based on estimates of the impact of educational attainment and learning on earnings in adulthood, the cost of the losses in leaning-adjusted years of schooling due to the pandemic may reach \$10 trillion.

Students in Catholic schools are not immune to the negative effects of the pandemic, yet fairly limited research across countries has been conducted on how specific segments of national education systems have been affected by the pandemic. In the special issue of the *Journal of Catholic Education* on the crisis, most papers relate to the particular situation of the United States. The two-part paper I published in that special issue is more global, but it remains an exception (Wodon, 2020a, 2020b, 2020c). In this paper, the idea is to follow up on this previous analysis to document more systematically the potential impact of the crisis on students in Catholic schools by looking at the distribution of those students by region and according to the income status of countries. The analy-

¹ Estimate across countries with all countries weighted equally based on the 2020 release of the human capital index at the World Bank.

sis relies on the latest available (pre-COVID) data on school enrollment by country from the Catholic Church (Secretaria Status, 2020). The first section of the paper looks at levels of digital connectivity and impacts of the COVID-19 crisis on learning outcomes by region and income groups. The second section then looks at the exposure of students in Catholic schools to those impacts given their geographic location, and at the specific ability (or lack thereof) of Catholic school networks to respond to the crisis using a survey of national Catholic education associations. Overall, this “Part 1” paper provides broad stylized facts across countries. This is then complemented by a “Part 2” paper which provides a much more detailed analysis for one particular country (Benin) to drill down further.

In addition, in both parts of this paper – the global analysis in Part I and the more detailed analysis for Benin in Part II, an effort is made to draw implications of the findings for students in Catholic schools. This analysis is conducted in part as background material for the forthcoming Global Catholic Education Report 2021 on learning poverty and education pluralism. This analysis remains however somewhat tentative since data on the impacts of the crisis specifically for students in Catholic schools are not available. Still, stylized facts can nevertheless be outlined and are hopefully useful for Catholic educators to be aware of both challenges and opportunities related to the current pandemic and potential policy responses.

Digital Connectivity and the Impact of the COVID-19 Crisis

This section considers two questions: (1) How connected are students digitally across

the world?; and (2) What are the implications of low levels of digital connectivity for the impact of the COVID-19 crisis on student learning? The analysis is conducted according to the World Bank country and income group classification. The World Bank classifies countries in six regions: East Asia and Pacific (EAP), Europe and Central Asia (ECA), Latin America and the Caribbean (LAC), Middle East and North Africa (MNA), North America (NA), South Asia (SAR), and Sub-Saharan Africa (SSA). In terms of income levels, for the World Bank’s 2021 fiscal year, low-income countries (LICs) are those with a Gross National Income (GNI) per capita calculated using the World Bank Atlas method of \$1,035 or less in 2019. Lower middle-income countries (LMICs) are those with a GNI per capita between \$1,036 and \$4,045. Upper middle-income countries (UMICs) are those with a GNI per capita between \$4,046 and \$12,535. Finally high-income countries (HICs) are those with a GNI per capita of \$12,536 or more².

Table 1 provides two measures of digital connectivity available in the World Bank’s World Development Indicators: the number of mobile cellular subscriptions per 100 people³ and the share of individuals using the Inter-

2 It is worth noting that the income group in which countries may change, whether because of economic growth or because of changes in methodology or rebasing of a country’s National Accounts. For the World Bank’s 2021 fiscal year, ten countries moved to a different category than the year before.

3 As explained in the metadata for this variable in the World Development Indicators, mobile cellular telephone subscriptions are subscriptions to a public mobile telephone service that provide access to the PSTN using cellular technology. The indicator includes (and is split into) the number of postpaid subscriptions, and the number of active prepaid accounts (i.e. that have been used during the last three months). The indicator applies to all mobile cellular subscriptions that offer voice communications. It excludes subscriptions via data cards or USB modems, subscriptions to public mobile data services, private trunked mobile radio, telepoint, radio paging and telemetry services.

net⁴. Data for both indicators are collected by the International Telecommunication Union (ITU) and available in the ITU World Telecommunication/ICT Indicators Database. For most regions and income groups, the latest available data point is for 2018, but in a few cases the data pertain to 2017. Globally, the number of mobile cellular subscriptions per 100 people is 106.5. There are however as expected important differences by geographic location and income groups, with fewer subscriptions in sub-Saharan Africa and South Asia and in low income countries.

Yet even in low income countries, many individuals have a mobile phone. By contrast, differences in the share of individuals using the internet tend to be larger. In low income countries, only 16.3 percent of (adult) individuals use the internet, versus 86.8 percent in high income countries. While mobile subscription in high income countries are at twice the level in low income countries, the share of individuals using the internet is more than five times higher in high income countries than in low income countries.

Table 1: Digital Connectivity by Region and Income Group, 2018

	Mobile cellular subscriptions (per 100 people)	Individuals using the Internet (% of population)
Regions		
East Asia and Pacific (EAP)	122.2	54.9
Europe and Central Asia (ECA)	123.8	78.9
Latin America and the Caribbean (LAC)	104.5	65.9
Middle East and North Africa (MNA)	106.0	65.1
North America (NA)	125.0	88.5
South Asia (SAR)	87.4	20.1
Sub-Saharan Africa (SSA)	82.4	18.7
World	106.5	49.0
Income Groups		
Low Income Countries (LICs)	60.8	16.3
Lower-Middle Income Countries (LMICs)	94.3	31.9
Upper-Middle Income Countries (UMICs)	117.3	56.4
High Income Countries (HICs)	127.6	86.8
World	106.5	49.0

Source: Compiled by the author from the World Development Indicators.

4 As explained in the metadata for this variable in the World Development Indicators, internet users are individuals who have used the Internet (from any location) in the last 3 months. The Internet can be used via a computer, mobile phone, personal digital assistant, games machine, digital TV etc.

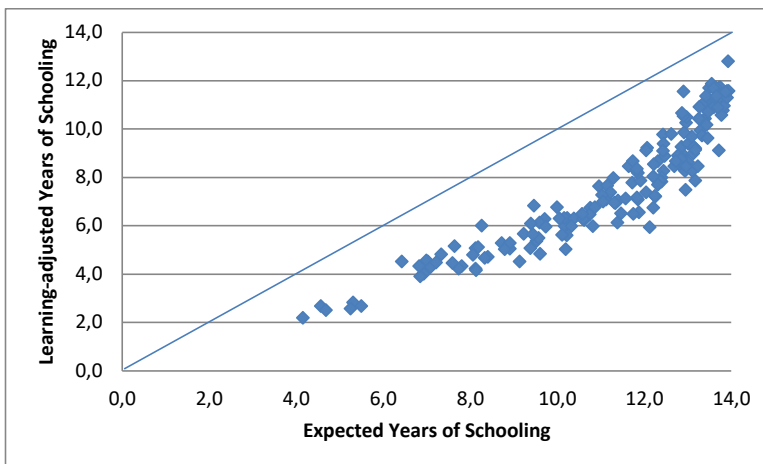
Low levels of digital connectivity in low and lower-middle income countries and in the regions with many such countries (sub-Saharan Africa and South Asia) have implications for the impact of the COVID-19 crisis on students. These implications are clear in work by Azevedo et al. (2020) to estimate the impact of the crisis on learning-adjusted years of schooling. Before providing those estimates, some background on the idea behind the measurement of learning-adjusted years of schooling may be warranted for readers who are not familiar with the concept.

As mentioned in the introduction and as noted in World Bank (2018, see also Bashir et al., 2018 for sub-Saharan Africa), many education systems in the developing world are experiencing a learning crisis. One way to illustrate this crisis is to provide data on harmonized learning outcomes from the World Bank. Figure 1 provides a scatter plot for 173 countries with on the horizontal axis the average number of years of schooling that children in the various countries are expected to complete, and on the vertical axis the learning-adjusted years of schooling

once the typical learning performance of students as measured by international learning assessments is accounted for. The data are from the 2020 release of the Human Capital Index database. To measure the expected learning-adjusted years of schooling across countries, the analysis is based on the performance of students in a range of international student assessments which generates an indicator referred to as the harmonized learning outcomes (HLO).

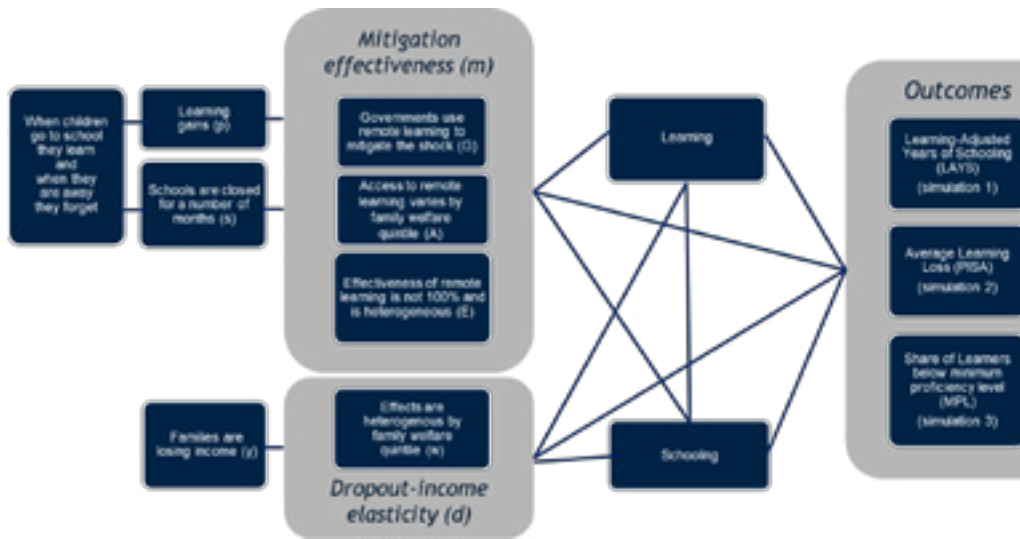
In Figure 1, the gap between learning-adjusted years of schooling and expected years of schooling is shown by the distance between the observations on the scatter plot and the diagonal. In all countries, the learning-adjusted measure is below the expected years of schooling measure due to the fact that some children are not learning in school at the level required for proficiency. Globally, weighting equally all countries for which data are available, children are expected to complete 11.3 years of schooling on average, but because learning performance is too low, this is only valued at 7.1 years under the harmonized learning outcome measure. In other

Figure 1: International Comparison of Learning-adjusted Years of Schooling, 2020



Source: Author based on World Bank Human Capital Index data for 2020.

Figure 2: Pathways of Learning Losses and Simulation Parameters



Source: Acevedo et al. (2020).

words, on average across countries, more than a third (37.2 percent) of the years of schooling that children completed are “lost” due to lack of sufficient learning in school (since $7.1/11.3=0.628$).

The learning crisis has been exacerbated by the COVID-19 pandemic. In order to measure what the impact of the pandemic may have been, Azevedo et al (2020) conduct three sets of simulations using the 2018 release of Human Capital Index database at the World Bank which has data for 157 countries accounting for 97 of the world’s population of children aged 4-17. In an optimistic, the author assume that schools are closed for three months out of a 10-month school year and governments are able to implement highly effective mitigation measures to reduce the impact of the crisis through distance learning. In the intermediate scenario, schools are closed for five months and mitigation measures have a middle level of effectiveness. In the pessimistic scenario, schools are closed for seven months, and mitigation measures have low levels of effectiveness.

The authors consider the potential impact of the crisis on various measures of learning outcomes, but the main estimates are related to the learning-adjusted years of schooling (LAYS) measure which has the benefit to be available for a larger set of countries.

Figure 2 explains the logic of the methodology for measuring learning losses as well as the risk for some children of dropping out of school. The estimate of learning losses due to the COVID-19 crisis for country c , denoted as $\Delta LAYS_c$, is computed as a function of losses in harmonized learning outcomes ΔHLO_c (to account for the fact that even if children remain in school they learn less when schools are closed) and losses in expected years of schooling ΔEYS_c (to account for the fact that some children may drop out of school due to the crisis and especially its economic consequences which makes schooling less affordable for parents). The estimate of losses in learning is itself based on three variables: the length of school closures s_c as a share of the school year, the effectiveness of the measures taken by the country m_c ,

and the learning gains that would normally be observed in a regular year of schooling p_c which stands for school productivity, so that $\Delta HLO_c = f(s_c, m_c, p_c)$. Similarly, the loss in years of schooling is based on s_c and m_c as well as the dropout-income elasticity of children that have attended school by age group (a) and welfare quintile (w) from country c , which is denoted by $d_{c,a,w}$, so that $\Delta EYSc = f(s_c, m_c, d_{c,a,w}, g_{c,w})$. The last parameter in the function is $g_{c,w}$ is the income shock projection of country, which may in some cases be available by welfare quintile w . Two age groups are considered for the potential impact of the income shocks, namely children aged 4-11 and 12-17⁵.

In practice, the analysis in Azevedo et al. (2020) is not done by quintile, but a simulation tool for country-level work provides the ability to specify quintile-specific risks of dropping out (elasticities) resulting from losses in income. For simplicity, the global simulations as well as simulations by region and income group assume the same value for s_c in all countries within a particular scenario, so that only m_c and p_c vary by country based on the data available.

The key parameter for the purpose of this paper is m_c which measures the effectiveness of the mitigation measures implemented by governments to reduce the negative impacts of the crisis on learning outcomes. This parameter is in turn the result of the product of three parameters: (1) G_c , which is the extent to which governments are implementing remote learning measures; (2) A_c , which is the access by students to alternative learn-

ing modalities – this can include not only the internet and mobile phones, but also radio, landline phones, and television, among others; and (3) E_c , which captures the effectiveness of remote learning. All three parameters G , A , and E can take a value between zero and one, with $m_c = G_c \times A_c \times E_c$. In practice, simulations for the global and regional scenarios as well as the scenarios for income groups are done with the same parameters for multiple countries, but country-specific analysis can also be done.

Table 2 provides the results of the simulations under the three scenarios, as well as baseline values for the learning-adjusted years of schooling for 2018⁶. Two other measures of impact are used as shown in Figure 2 – the simulated average learning loss in PISA, and the simulated share of learners who fall below proficiency level, but these measures are available only for a subset of countries and not used here. According to Table 2, the COVID-19 pandemic could result at the global level in a loss of 0.6 year of learning-adjusted years of schooling, from a baseline value of 7.9 years to 7.3 years. This represents a learning loss of about 7.6 percent from the baseline value. In the optimistic scenario, the loss is smaller, while it is larger in the pessimistic scenario.

In absolute value, learning losses are often higher in high income countries and well-off regions because the baseline values are also higher. But proportionately from baseline values, especially in the intermediate and optimistic scenarios, losses in learning are larger in low income countries and in South Asia and sub-Saharan Africa. This is in part because levels of access to remote

5 In practice, the analysis in Acevedo et al. (2020) is not done by quintile, but a simulation tools provides the ability to specify quintile-specific risks of dropping out (elasticities) resulting from losses in income. For simplicity, the simulations in Acevedo et al. (2020) assume the same value for s_c in all countries within a particular scenario, so that only m_c and p_c vary by country based on the data available.

6 The baseline estimates is different from the value mentioned in the introduction because the paper relies on 2018 data, while the introduction mentions the estimates for 2020, but qualitatively the conclusions remain.

learning in those countries are lower. Lack of digital connectivity (and limited coverage for radio and television) is not the only reason for the losses in learning, but they do contribute in those countries to larger proportional impacts. In terms of the solutions that can be adopted by countries to mitigate these impacts, broad guidance on the potential role of 'EdTech' in improving education

systems is provided in World Bank (2020c), while more detailed guidance on how to deal with the current pandemic is available in a series of notes (World Bank, 2020d, 2020e, 2020f). The nature of this guidance is discussed in more details in the second part of this paper devoted to a case study on Benin in sub-Saharan Africa.

Table 2: Potential Effect of the Crisis on Learning-Adjusted Years of Schooling (LAYS) by Region and Income Group

Regions and Income Groups	Baseline	Post COVID-19		
		Optimistic	Intermediate	Pessimistic
Absolute measures				
Regions				
East Asia and Pacific (EAP)	8.7	8.5	8.2	7.8
Europe and Central Asia (ECA)	10.4	10.1	9.7	9.3
Latin America and the Caribbean (LAC)	7.7	7.4	7.1	6.8
Middle East and North Africa (MNA)	7.6	7.4	7.1	6.7
North America (NA)	11.4	11.2	10.8	10.3
South Asia (SAR)	6.2	5.9	5.7	5.5
Sub-Saharan Africa (SSA)	4.9	4.7	4.5	4.3
World	7.9	7.6	7.3	7.0
Income Groups				
Low Income Countries (LICs)	4.5	4.3	4.1	4.0
Lower-Middle Income Countries (LMICs)	6.3	6.1	5.8	5.6
Upper-Middle Income Countries (UMICs)	8	7.7	7.4	7.1
High Income Countries (HICs)	10.7	10.5	10.1	9.6
World	7.9	7.6	7.3	7
Percentage loss from baseline (%)				
Regions				
East Asia and Pacific (EAP)	-	2.3%	5.7%	10.3%
Europe and Central Asia (ECA)	-	2.9%	6.7%	10.6%
Latin America and the Caribbean (LAC)	-	3.9%	7.8%	11.7%
Middle East and North Africa (MNA)	-	2.6%	6.6%	11.8%
North America (NA)	-	1.8%	5.3%	9.6%
South Asia (SAR)	-	4.8%	8.1%	11.3%
Sub-Saharan Africa (SSA)	-	4.1%	8.2%	12.2%
World	-	3.8%	7.6%	11.4%
Income Groups				
Low Income Countries (LICs)	-	4.4%	8.9%	11.1%
Lower-Middle Income Countries (LMICs)	-	3.2%	7.9%	11.1%
Upper-Middle Income Countries (UMICs)	-	3.8%	7.5%	11.3%
High Income Countries (HICs)	-	1.9%	5.6%	10.3%
World	-	3.8%	7.6%	11.4%

Source: Azevedo et al. (2020). Note: Percentage loss from base computed from the top part of the table.

Exposure of Students in Catholic Schools to the COVID-19 Crisis

What does this all mean for students in Catholic schools? In this section, to illustrate how students in Catholic schools may be affected, data on the distribution of students by region and income groups are provided using estimates at the country level from the latest available statistical yearbook of the Church (Secretaria Status, 2020). The basic idea is that for most students in Catholic schools, their exposure to the COVID-19 is not fundamentally different from the exposure of students in public schools. In some countries, Catholic schools may cater proportionately more to students from higher income brackets. This is likely to be the case when lack of state support for Catholic schools leads to substantial out-of-pocket costs for parents, as is the case in the United States, and to some extent in India. But in many other countries where a large number of students are enrolled in Catholic schools, most of the Catholic schools receive support from the state and are actually part of the public education system. This is for example the case in the Democratic Republic of Congo (Wodon, 2017a) and Uganda (Wodon, 2017b).

If the profile of students in Catholic schools in the countries with high enrollment is not that different from the profile of students in public schools, then the estimates of learning losses suggested in the previous section may also broadly apply to students in Catholic schools. And even if there are differences in profiles, the differences may not be so large in terms of the parameters affecting learning losses that they would fundamentally invalidate the stylized facts emerging from the analysis of the previous section. Therefore, providing a profile of enrollment of students in Catholic schools according to the same

regions and income groups as those used in the previous section does provide an idea of what the impact of students in Catholic schools in various parts of the world may be. This is the main objective of this section, but data pertaining specifically to Catholic schools will also be weaved in the analysis after discussing the location of students in Catholic schools globally according to the main regions and income groups.

Globally, the Catholic Church estimates that in 2018, 35.0 million children were enrolled in Catholic primary schools in 2018, the latest year for which estimates are available. In addition, 19.3 million children were enrolled in Catholic secondary schools and 7.3 children enrolled at the preschool level⁷. In the context of efforts by the international community to achieve the Sustainable Development Goals, Catholic schools clearly play an important role in the provision of education. Globally, the Catholic Church is likely the third largest provider of education services after the governments of China and India.

Whether students are enrolled in Catholic or public schools, their level of digital connectivity differs dramatically across countries and often within countries. In turn, as discussed earlier, this can have major implications for the children's ability to learn during a crisis such as the current pandemic. In order to assess the impact of the COVID-19 crisis on students in Catholic schools, a simple analysis of patterns of enrollment in Catholic schools globally is useful. In previous work, I docu-

7 The data are self-reported by the chancery offices of ecclesiastical jurisdictions by filling an annual questionnaire. In general, the data seem to be reasonable, but in some countries weak capacity may mean that the data are not very precise. No distinction is made between public and private Catholic schools. In terms of reporting rates on the other hand, the good news is that in a typical year, only about five percent of the ecclesiastical jurisdictions do not fill the questionnaire, and this is the case mostly for small jurisdictions, so that missing data should not affect overall results substantially.

mented trends in enrollment over time in K12 Catholic schools based on data from the statistical yearbooks of the Church (Wodon, 2018; for a similar analysis on Catholic higher education, see Wodon, 2020d). That analysis relied on geographic categories available in the yearbooks, such as the Americas, Europe, Africa, Asia, and Oceania. These groupings do not correspond to those commonly used today for global work on education. Therefore, here I rely instead on the regional and income level groupings used by the World Bank mentioned above.

Table 3 provides estimates of enrollment in Catholic primary schools and secondary schools by region and income groups. Both the number of students enrolled and the number of schools are reported. A number of interesting findings emerge from the data. First, as noted in Wodon (2018, 2020e), trends over time suggest healthy growth in enrollment over the last 45 years, with the number of students in K12 Catholic schools than doubling between 1975 and 2018 from 29.1 million to 61.7 million students. But most of the growth in enrollment in absolute terms was concentrated in sub-Saharan Africa. As shown in Table 1, the region now accounts for 55.0 percent of all students in Catholic primary schools globally, and 28.0 percent of all students in Catholic secondary schools. The fact that enrollment in K12 education is increasingly being concentrated in sub-Saharan Africa is not surprising given high rates of population growth in the region and gains in educational attainment, especially at the primary level. After sub-Saharan Africa, Latin America and the Caribbean and South Asia have the largest enrollment in primary Catholic schools, while for enrollment in secondary schools South Asia comes in second place, followed by Europe and Central Asia in third place.

In terms of income groups, 40.9 percent of students in Catholic primary schools are in low-income countries, with another 29.7 percent in lower-middle income countries. Less than 30 percent of students in primary Catholic schools live in upper middle and high income countries. For secondary school enrollment, the proportion of students who live in low income countries is smaller, because educational attainment in those countries remains low, but together, low income and lower middle income countries still account for more than half of total enrollment.

Overall it seems fair to state that the education services provided by the Catholic Church at the primary and (to a lower extent) secondary levels tend to serve primarily children in countries with comparatively low levels of economic development. This is good news for the emphasis of the Church placed on the preferential option for the poor⁸, but it also means in the context of this paper that children in Catholic schools are likely to have been affected severely by the COVID-19 crisis. As mentioned earlier, in proportionate terms from the base, the learning losses likely to have resulted from the pandemic are largest in low income countries and in sub-Saharan Africa and South Asia. These are the countries that already start from a low base in terms of education outcomes, so that any further reduction has serious implications for children.

8 On whether Catholic schools succeed in serving the poor in terms of both schooling and learning in the case of sub-Saharan Africa, see Wodon (2014, 2015, 2019, 2020).

Table 3: Enrollment in Primary and Secondary Catholic Schools, 2018

Regions and Income Groups	Primary schools		Secondary schools	
	Schools	Students	Schools	Students
Estimates of number of schools and students				
Regions				
East Asia and Pacific (EAP)	8,814	2,185,191	4,184	2,192,622
Europe and Central Asia (ECA)	15,715	3,131,268	9,424	3,662,365
Latin America and the Caribbean (LAC)	15,631	4,371,221	10,333	2,816,819
Middle East and North Africa (MNA)	725	289,241	460	151,733
North America (NA)	6,723	1,770,710	1,796	864,852
South Asia (SAR)	10,994	3,997,214	7,605	4,207,249
Sub-Saharan Africa (SSA)	44,544	19,267,154	15,739	5,411,658
World	103,146	35,011,999	49,541	19,307,298
Income Groups				
Low Income Countries (LICs)	34,735	14,335,210	9,919	3,274,435
Lower-Middle Income Countries (LMICs)	28,894	10,412,295	15,936	7,581,178
Upper-Middle Income Countries (UMICs)	13,574	4,261,212	10,629	2,978,055
High Income Countries (HICs)	25,943	6,003,282	13,057	5,473,630
World	103,146	35,011,999	49,541	19,307,298
Shares in global estimates of the number of Catholic schools and students				
Regions				
East Asia and Pacific (EAP)	8.5%	6.2%	8.4%	11.4%
Europe and Central Asia (ECA)	15.2%	8.9%	19.0%	19.0%
Latin America and the Caribbean (LAC)	15.2%	12.5%	20.9%	14.6%
Middle East and North Africa (MNA)	0.7%	0.8%	0.9%	0.8%
North America (NA)	6.5%	5.1%	3.6%	4.5%
South Asia (SAR)	10.7%	11.4%	15.4%	21.8%
Sub-Saharan Africa (SSA)	43.2%	55.0%	31.8%	28.0%
World	100.0%	100.0%	100.0%	100.0%
Income Groups				
Low Income Countries (LICs)	33.7%	40.9%	20.0%	17.0%
Lower-Middle Income Countries (LMICs)	28.0%	29.7%	32.2%	39.3%
Upper-Middle Income Countries (UMICs)	13.2%	12.2%	21.5%	15.4%
High Income Countries (HICs)	25.2%	17.1%	26.4%	28.4%
World	100.0%	100.0%	100.0%	100.0%

Source: Author's computations from data in the statistical yearbook of the Church 2020.

A second key finding from the data available in the statistical yearbooks is that there are substantial differences between regions and income groups in the share of students enrolled by level. Globally, primary schools account for 64.5 percent of total enrollment in primary and secondary Catholic schools in 2018, versus 36.5 percent for secondary schools. In sub-Saharan Africa however, pri-

mary schools still account for 78.1 percent of total enrollment, mostly because the transition to secondary schools is still weak in many countries (for example, only four in ten students in Africa complete their lower secondary school according to the World Bank's the World Development Indicators). By contrast, in Europe, primary schools account for less than half (46.1 percent) of total enroll-

ment in Catholic schools. In North America, primary school account for more than two thirds (67.2 percent) of total enrollment in primary and secondary schools, possibly because in the absence of meaningful government funding in the United States, the out-of-pocket cost of enrollment is significant at the secondary level.

While the fact that the Catholic schools has an especially strong presence at the primary level is again encouraging for the mission of the Church, this again has implications for the potential impact of the current crisis on students in Catholic schools. Younger students are likely to suffer more than older students in terms of learning losses due to school closures, in part because it is more difficult for them to benefit from distance learning options. In addition, younger students also have weaker bases to rely upon to keep learning. This is why in many countries efforts have been made to facilitate the return of younger students in school ahead of older students.

Third, there is obviously substantial heterogeneity between countries in the size of their Catholic school networks. Table 4 provides the list of the 20 countries with the largest enrollment in primary and secondary Catholic schools in 2018. Together, these 20 countries account for two thirds of global enrollment in Catholic schools at those levels. Enrollment is largest in absolute terms in India due in part to the sheer size of the country. But the next four countries with the largest enrollment are all in sub-Saharan Africa. These are the Democratic Republic of Congo, Uganda, Kenya, and Malawi. These four countries are all classified as low-income by the World Bank, while India is a lower-middle income country. Note that Belgium and Ireland are the smallest countries included in Table 4. They have a

high number of students enrolled in Catholic schools in part because of education systems that funds almost equally students in Catholic and public schools. In several other countries listed in Table 4, while the number of student enrolled in Catholic schools may be high due to population sizes, the share of all students enrolled in Catholic schools is often low in part due to limited or no state support leading to cost recovery from parents by the schools, and thereby higher costs which may not be affordable for the poor.

Again, many of the countries in Table 4 are low income or lower middle income, and consequently have fairly low levels of digital connectivity. To show how this is the case, the last column in Table 4 provides the latest available estimate on the share of the adult population using the internet. Those shares are especially low in some of the African countries in the Table, but also in India. The share of children able to access the internet from home during the pandemic is likely to be even lower than the share of adults using the internet as measured by the International Telecommunications Union. As a reminder from the previous section, learning losses due to the pandemic were estimated to depend on the effectiveness of the mitigation measures implemented by governments to reduce the impact of the crisis on learning outcomes. This effectiveness parameter depended on whether governments have been implementing remote learning measures, the access rate for student to these measures which depends on digital connectivity as well as access to radio and television which are other media to provide distance learning, and the effectiveness of remote learning. It is clear from the data in Table 4 that the extent of remote learning during the pandemic in low and lower-middle income countries has been severely curtailed by

Table 4: Top Countries by Enrollment in Primary and Secondary Catholic Schools, 2018

	Primary Enrollment	Secondary Enrollment	Combined Enrollment	Individuals using the Internet (% of pop.)
India	3,907,185	4,038,841	7,946,026	20.1%
Democratic Republic of Congo	4,316,789	1,557,110	5,873,899	8.6%
Uganda	4,882,705	450,674	5,333,379	23.7%
Kenya	2,673,575	889,294	3,562,869	22.6%
Malawi	1,835,418	173,315	2,008,733	13.8%
United States	1,278,673	574,887	1,853,560	88.5%
France	630,785	1,134,850	1,765,635	83.3%
Rwanda	1,140,958	352,564	1,493,522	21.8%
Philippines	381,053	798,745	1,179,798	43.0%
Spain	569,872	591,029	1,160,901	90.7%
Argentina	635,426	520,749	1,156,175	74.3%
Belgium	465,302	556,803	1,022,105	90.4%
Mexico	533,076	414,472	947,548	70.1%
Ireland	628,216	310,625	938,841	84.5%
Indonesia	476,144	352,086	828,230	40.7%
Ghana	524,020	289,955	813,975	37.9%
Brazil	598,126	204,650	802,776	70.4%
Nigeria	466,192	326,922	793,114	7.5%
Australia	388,529	362,379	750,908	86.5%
Canada	468,527	278,270	746,797	92.7%

Source: Author's computations from data in the statistical yearbook of the Church 2020.

lack of digital connectivity (radio and television programs, while useful, do not provide access to the same learning materials than digital connectivity).

The above analysis suggests that a majority of students in Catholic schools live in countries where education systems have had a limited ability to limit the negative effects of the COVID-19 crisis on learning outcomes. This is confirmed by analysis in Wodon (2020a, 2020b, 2020c) which relies in part on a rapid survey implemented in April 2020 with representatives from national Catholic education associations. The survey was implemented with the International Office of Catholic Education (*Office International de l'Enseignement Catholique* in French or OIEC). Responses were received from 31 countries

(with the possibility of multiple responses per country) that together account for six in ten students in Catholic schools globally⁹.

A key question in the survey was whether Catholic school networks had been able to implement distance learning solutions for their students, and if so, using which media (options included the internet, radio, television, mobile phones, other means, or none). Table 5 shows that while Catholic school networks in developed countries were able to rely on the internet, networks in developing countries had to rely instead on less versatile media or were not able to implement any

⁹ The set of countries includes 10 education systems (and 11 Catholic school networks due to two different systems in Belgium) in developed countries, 11 systems/countries in Africa, and another 10 systems/countries other developing or emerging countries.

significant distance learning at all. Another question in the survey was whether Catholic school networks were able planning to adapt their curriculum and provide remedial education to enable children to catch up when they would return to school. Again, networks in developing countries and especially in sub-Saharan African countries had limited ability to do so. The survey also suggested that due to the economic impact of the crisis, Catholic school networks in many countries were expecting to lose a substantial number of students in the next school year.

Conclusion

The COVID-19 pandemic has led to school closures affecting 1.6 billion children globally, with major implications for learning poverty defined as the ability of 10-year old children to read and understand a simple age-appropriate text. In addition, the economic recession generated by the pandemic is leading to higher rates of poverty which may lead some children to drop out of school. The pandemic is likely to have affected not only students in public schools, but also students in Catholic

schools which tend to be disproportionately located in low and lower-middle income countries where access to distance learning options are limited and the pressure placed by the economic crisis on the ability of parents to keep their children in school is highest.

There is today a commonly held perception that digital technologies in education may represent a threat for the ability of schools and universities to provide a high quality integral education to their students. The threat is real, but lack of access to digital technologies can also have negative effects. The crisis generated by the COVID-19 pandemic has brought this risk to the fore. Lack of digital connectivity has severely limited the ability of governments as well as Catholic school networks to implement distance learning solutions to mitigate the effects of the crisis. While the risks of digital technologies for integral education should not be underestimated, ensuring that all children have access to distance learning options not only during the current crisis but also in the future is still essential.

Table 5: Ability of Catholic Schools to Respond to the COVID-19 Crisis (% of Countries)

	Distance Learning Solutions by Medium (%)					
	Internet	Radio	Television	Mobile phones	Others	None
Developed Countries	100.0	0.0	27.3	18.2	18.2	0.0
Developing countries	71.3	23.8	19.8	63.4	20.4	19.0
Africa	54.5	45.5	18.2	45.5	18.2	36.4
Other developing countries	89.8	0.0	21.5	83.2	22.8	0.0
	Plans for Students When Catholic Schools Reopen (%)					
	Plans for adapting the curriculum	Plans for remedial education		No plans		
Developed Countries	81.8	72.7		0.0		
Developing countries	58.6	43.4		24.1		
Africa	36.4	27.3		45.5		
Other developing countries	83.1	61.1		0.6		

Source: Wodon (2020a).

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Digital Connectivity, COVID-19 crisis, and catholic schools:

Part 2 – case study for benin

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Abstract

As discussed in the first part of this paper on the global effects of the COVID-19 crisis, the pandemic is likely to have led to a substantial increase in learning poverty, defined as the share of 10-year old children who cannot read and understand a simple age-appropriate text. Students in Catholic schools are likely to have been affected as is the case for students in public schools. Ensuring that all children have access to distance learning options not only during the current crisis but also in the future is essential to protect learning. Unfortunately, lack of digital connectivity is making this difficult especially in sub-Saharan Africa. To complement the first part of this paper which remained at a fairly general level because of the global scope of the analysis, this second part of the paper relies on data for Benin to provide a more detailed assessment of access to potential distance learning media and the implications of the relative lack of access. The paper also discusses the potential impact of the crisis on students, and the measures taken by the government to strengthen the resilience of the county's education system to future shocks. The types of interventions put in place in

Benin by the Government are illustrative of measures undertaken by other countries in the region, and thereby of the types of interventions that can strengthen education systems, both public and Catholic.

Keywords: Digital connectivity, COVID-19, Catholic Schools, Distance Learning, Benin, sub-Saharan Africa.

Introduction

The COVID-19 crisis has demonstrated how school closures may affect children's ability to learn, especially in countries with limited infrastructure for distance learning. Estimates suggest that at the peak of the crisis, 1.6 billion children were out of school globally. In addition, the economic recession generated by the crisis has affected livelihoods, leading to higher rates of poverty and food insecurity, with potentially devastating effects for children (United Nations, 2020). In low income countries and especially in sub-Saharan Africa where enrollment in Catholic schools is high, due to the severity of the economic crisis (World Bank, 2020a), many student may not return to school when they reopen. Even the children who remain in school are likely to suffer substantial losses in learning, compounding a learning crisis that was already severe before the pandemic (World Bank, 2018, 2019, 2020b). Ensuring

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ing that all children have access to distance learning will be essential for protecting learning today and in the future.

Part I of this paper provided a global analysis of the challenges posed by the current pandemic, and the role of digital connectivity to enable children to continue to learn during school closures. The analysis was conducted at the regional level and by country income groups. As a complement to that broad overview, Part II of the paper provides a more detailed account of digital connectivity (or the lack thereof) and its implications for learning losses due to the pandemic in Benin. The discussion relies on data from several national surveys to measure access to various distance learning media in the country, considering students overall as well as students in Catholic schools to the extent permitted by the available data. Measures implemented in the country to mitigate the impact of the current and potential future crisis are also discussed.

The choice of Benin as a case study for Part 2 of this paper is not related to any particular feature of the country, but simply to the fact that the authors had to prepare a presentation on access to various distance learning options in the country for an international conference organized at the end of October 2020 by the Government of Benin together with UNICEF. But Benin is also one of the countries that benefited from a recent World Bank project to mitigate the impact of the crisis on the education system, which is useful to illustrate the type of policy responses put in place by Governments to respond to this type of crisis. These responses are also valid for private schools, including for the network of schools managed by the Catholic Church. According to data from the latest available statistical yearbook of the Catholic Church

(Secretaria Status, 2020), there were 236 primary Catholic schools in Benin in 2018 with a total of 49,328 students. In addition, there were 113 secondary schools with 31,873 students. While the Catholic school network remains relatively small in comparison to total enrollment in primary and secondary education in the country, the network has grown rapidly. Back in 2020, the Catholic Church had only 25 primary schools and 18 secondary schools with a much smaller student population according to the statistical yearbook for that year. As a result, enrollment in 2018 was more than five times the levels observed in 2000. The impact of the crisis on Catholic schools thus matters.

As noted in Wodon (2020c; see also Wodon, 2020a, 2020b), given limited access to distance learning media in sub-Saharan Africa, a reliance on a single distance learning medium is likely to be sub-optimal, whether one considers public or Catholic schools. Instead, a multi-modal approach is recommended. Guidance on how to implement such approaches has been made available by multiple organizations in recent months. The World Bank (2020c, 2020d) for example suggests a dozen action steps for planning a multi-faceted remote learning model: (1) Developing short- and long-term remote learning plans; (2) Creating an inventory of existing and ideally free content to be deployed; (3) Organizing available content to align with existing curricula; (4) Creating a virtual helpdesk to support parents, teachers, and students; (5) Promoting offline learning; (6) Using educational radio and television programs; (7) Increasing access to digital resources through improved connectivity; (8) Providing one-stop access online materials; (9) Making content available through a variety of devices; (10) Supporting the use of low bandwidth solutions; (11) Providing assis-

tance to teachers, parents and students; and (12) Using multimedia to share information about remote and online learning.

More specific guidance is also available by type of media (e.g., World Bank, 2020e, on television and Education Development Center, 2020, on radio; see also World Bank, 2020f, on more than 30 experiences of distance learning and a description of national platforms, and World Bank, 2020g, on a broader set of policy responses in the education sector to the COVID-19 crisis). Finally, on the role of EdTech more generally in strengthening education systems, guidance in terms of general principles to follow is also available (World Bank, 2020h).

One of the requirements to plan distance learning responses during school closures is to assess household connectivity to the various types of media that can be used for distance learning. This is one of the main purposes of this Part 2 paper for Benin as an illustrative case. Different types of data can be used to provide an assessment of digital connectivity in a country. National level and occasionally urban/rural data are available from the International Telecommunications Union on access to key information and communications technology (ICT). For example, these data suggest that the share of the population covered by a mobile cellular network is high globally, including in Africa (including North Africa) where nine in ten individuals live in geographic areas with coverage. Penetration of mobile cellular telephone subscriptions is also high in Africa with 80 subscriptions per 100 inhabitants, although many of those may not be smart phones. On the other hand, penetration rates for active mobile broadband subscriptions are lower, at 34 per 100 inhabitants, and only one in ten households have a computer at home.

Finally, but this matters, only slightly more than a quarter of adults use the internet at home or elsewhere. In Benin, that proportion was 20.0 percent in 2019. In practice, use of the internet is a better indicator of digital connectivity for learning than mobile telephony.

However, a key limitation with the data from the International Telecommunications Union is that they cannot be used to assess access rates for different types of households, for example according to their quintile of wealth or their level of poverty. In this Part 2 paper on the role of digital connectivity in mitigating the impact of the COVID-19 crisis on learning outcomes, we rely instead on household and other survey data to measure access to potential distance learning media. While some data sources are a few years old, the various data sources are nevertheless very useful to provide a basic profile of digital connectivity according to various characteristics.

The fact that different types of surveys are available in Benin as in many other countries is especially useful to triangulate findings, and assess the level of consistency in the findings observed across surveys. In practice, in this paper, three different surveys are used to measure access to potential distance learning media in Benin: (1) the latest Demographic and Health Survey (DHS) which was implemented in 2017; (2) the Harmonized Household Living Conditions Survey (*Enquête harmonisée sur les conditions de vie des ménages* or EHCVM) which was implemented for Benin and other WAEMU surveys in 2018-19; and (3) the student assessment data from PASEC (*Programme d'Analyse of Education Systems*) which was implemented in 2014 (data from the latest round of PASEC in 2019 have been collected but are not yet

available). While the first two sources of data are nationally representative, data from PASEC are representative only of the universe of households with children enrolled in primary school. In other words, children who are out of school are not included.

Apart from providing estimates of access rates to potential distance learning media and the potential negative effect of the pandemic on learning outcomes in Benin, we summarize some of the key features of the governmental COVID-19 education response in Benin based on the recently approved operation that the World Bank is implementing in partnership with the Government with financial support from the Global Partnership for Education (World Bank, 2020i). The types of interventions put in place in Benin are fairly illustrative of similar measures undertaken by other countries in the region, and thereby indicative of the types of interventions that can be used to alleviate some of the negative effects of the current crisis.

In addition, in both parts of this paper – the global analysis in Part I and the more detailed analysis for Benin in this Part II, an effort is made to draw implications of the findings for students in Catholic schools. This analysis is conducted in part as background material for the forthcoming Global Catholic Education Report 2021 on learning poverty and education pluralism. This analysis remains however somewhat tentative since data on the impacts of the crisis specifically for students in Catholic schools are not available. Still, stylized facts can nevertheless be outlined and are hopefully useful for Catholic educators to be aware of both challenges and opportunities related to the current pandemic and potential policy responses.

The paper is structured as follows. The first three sections are devoted to an analysis of the level of access of students to distance learning media using the three different data sources mentioned above. Thereafter, simulations of the potential effect of the crisis for students are provided using a simulation tool created by the World Bank staff. The next section provides background on Catholic education in Benin and discusses the level of exposure of students in Catholic schools to the negative effects of the crisis. Finally, the policy responses put in place by the Government to mitigate the impact of this and future crises are discussed. A brief conclusion follows.

Access to Distance Learning Media According to the Demographic and Health Survey

It is clear that access to distance learning options is critical for countries to be able to mitigate the negative effects of school closures due to the pandemic on student learning. To what extent have children in Benin access to different distance learning media? To provide in a simple way data on connectivity for Benin and other African countries, we computed access rates to different distance learning media from multiple country surveys and created several visualization tools whereby the user can select a country of interest and see the data. For each type of survey, a specific visualization tool is available with statistics presented through graphs for various potential target groups. Consider first data from DHS surveys. For those surveys, we provide in the visualization tool estimates of access to various distance learning media across countries in sub-Saharan Africa for the following groups: (1) households with children 6-12 years old; (2) households

with children 13-18 year olds; (3) all households; (4) households with children in primary school; (5) households with children in secondary school; and (6) households with individuals in tertiary education institutions. Drop down menus in the tool enable users to select their country of interest as well as the specific group for which to display statistics.

Access or connectivity rates are measured through household ownership of various assets, such as a radio, a computer, a phone, or a television. These estimates have limitations, but are nevertheless revealing. Access rates differ between the various groups for which they are computed. For example, households with individuals in tertiary education institutions tend to have higher access rates than other groups. Likewise, children enrolled in primary or secondary schools tend to have higher access rates than all children of the relevant age groups, since the children who are not in school tend to come on average from poorer households who do not have the level of assets and access to potential distance learning.

Key results for Benin are provided in Figure 1 for the sample of households with children aged 6 to 12 (only parts of the visualization available in the tool are reproduced here). Information is provided on household assets that can be used by school networks to provide distance learning (radio, television, computer, and mobile phone) as well as whether the household has access to the internet. In the left panel data are provided nationally as well as for urban and rural areas. In the right panel, information is provided by quintiles of wealth, from the poorest quintile to the richest, and again nationally. Comparisons are made between Benin and the average for all sub-Saharan Africa countries included in the tool. The Africa-wide average is not weighted

by the countries' population (i.e., all countries are weighted equally in this average value).

The statistics in Figure 1 are self-explanatory, but a few general findings are worth noting. In Benin as in many other sub-Saharan African countries, access rates to computers and the internet at home are very low. Less than one in 30 households has access in Benin and access is concentrated in urban areas and the top quintile of wealth. By contrast, access to mobile phones is widespread, with close to nine in ten households having a mobile phone. Even if only a minority of these phones are smart phones, using phones to provide access to at least some distance learning materials or guidance – for example through texts, is an important option. In addition, ownership of a radio and to a lower extent television is substantial since in Benin, about three in ten households own a television, and more than half own a radio. These media also provide substantial opportunities for distance learning.

Figure 1: Access to Alternative Media for Distance Learning, Demographic and Health Survey, 6-12 years old (%)





Source: Authors' estimation.

Access to Distance Learning Media According to the Household Living Condition Survey

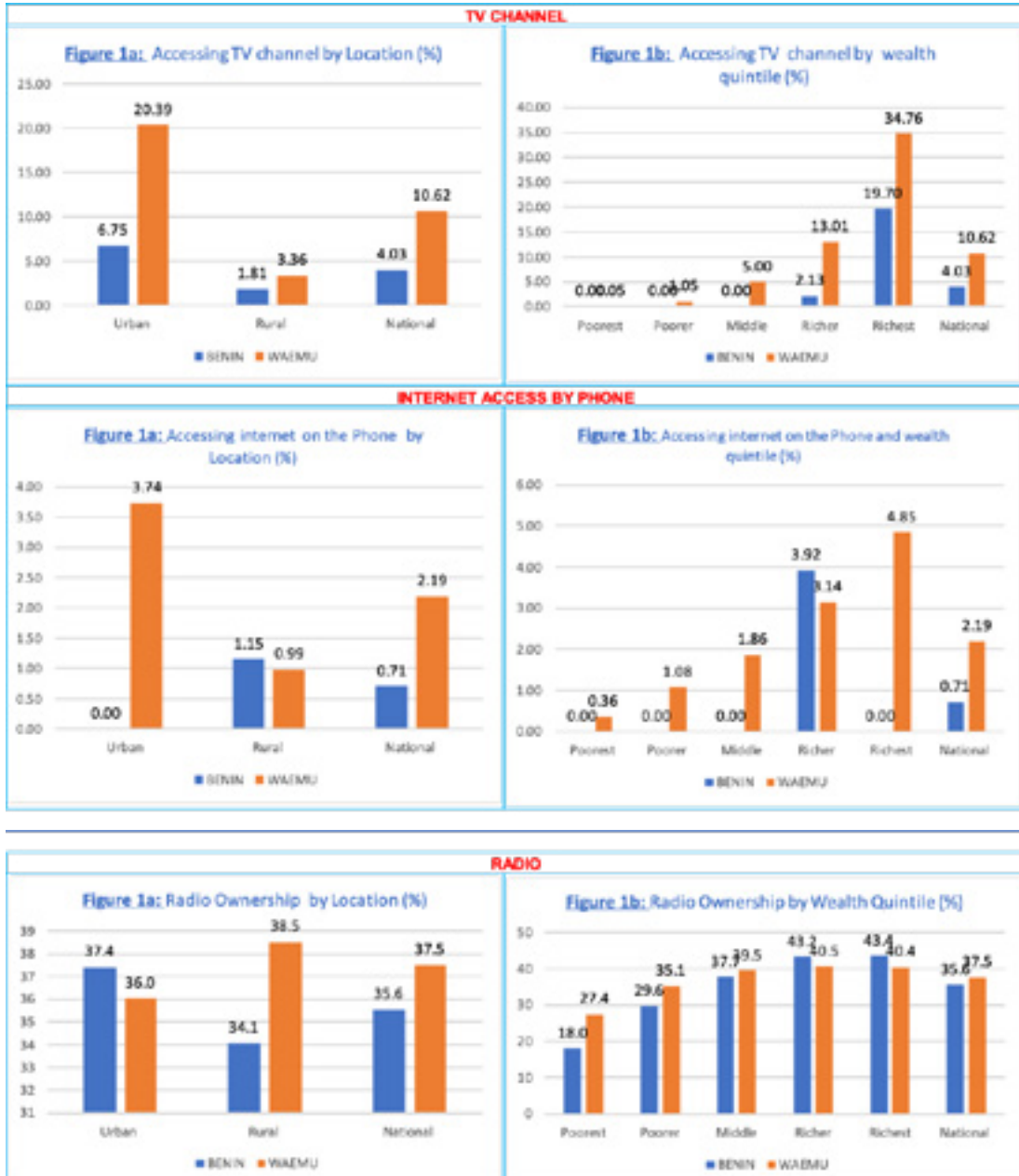
Figure 2 provides similar estimates for the Harmonized Household Living Conditions Survey implemented in 2018-19. The questions asked in the survey are slightly different, but the approach used for the visualization of the data is the same. Statistics have been computed for the following groups: (1) households with adult men aged 18 and over; (2) households with women aged 18 and over; (3) all households; (4) households with boys in primary school; (5) households with boys in secondary school; (6) households with men in tertiary education institutions; (7) households with boys in primary

school; (8) households with boys in secondary school; (9) households with men in tertiary education institutions.

Access rates are again measured through data on household ownership, although for usage of the internet, are asked individually, so statistics can be computed by gender. Drop down menus in the visualization tool again enable users to select the country of interest as well as specific groups for which to display statistics. The results are provided in Figure 2 for the sample of households with boys in primary school as an illustration. As for estimates based on the DHS, data are provided nationally as well as for urban and rural areas in the left panel, while information is provided by quintiles of wealth in the

right panel. Comparisons are made between Benin and the average for all the countries that implemented the WAEMU survey (all countries are weighted equally in the average values for WAEMU).

Figure 2: Access to Alternative Media for Distance Learning, Living Conditions Survey, Primary School Boys (%)







Source: Authors' estimation.

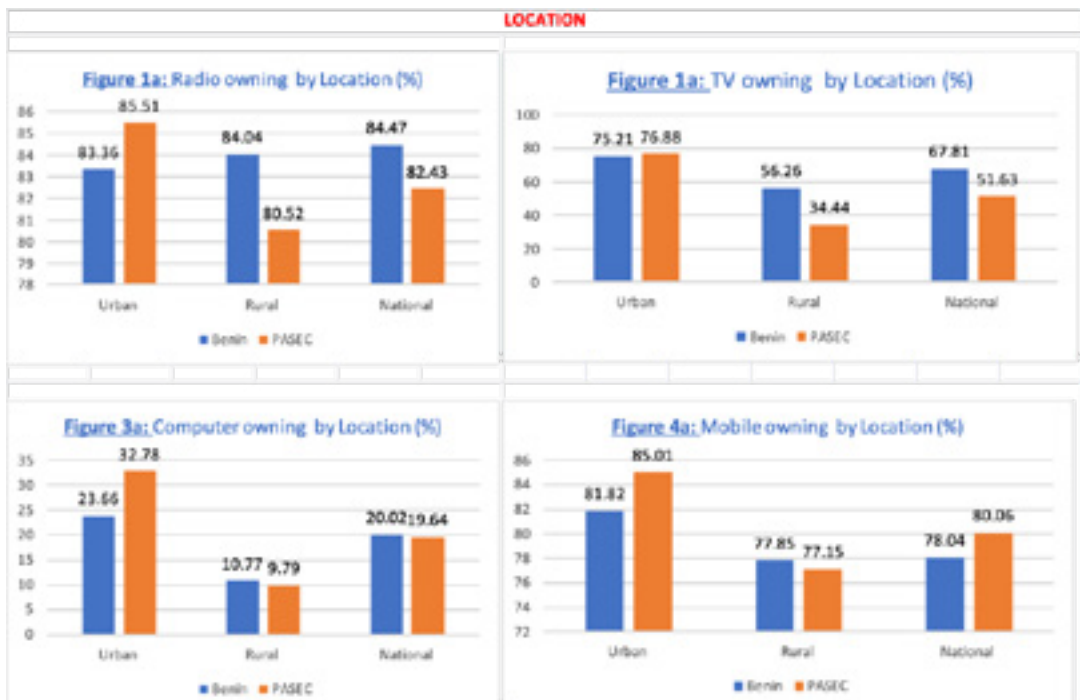
Estimates in Figure 2 are of a similar order of magnitude to those in Figure 1, suggesting robustness in the results. Access is again very low for computers (one in 50 households) and access to the internet at home (one in 100 households). By contrast, access to mobile phones is even higher than in the DHS survey with more than nine in ten households for with a boy in primary school having a mobile phone. In addition, just over one in three households own a radio, a lower rate than in the DHS, and one in four own a television, a rate similar to the proportion in the DHS. Data are also available on TV channel subscriptions and tablets, but access rates for those types of media tend to be low.

Access to Distance Learning Media According to the PASEC Student Assessment

The last dataset used for access and asset ownership statistics is the student assessment data from the 2014 round of PASEC. In the tool, estimates are still based on household assets owned, but they are presented in the Figures slightly differently, considering not only location and quintiles of wealth, but also the type of school attended by children, although only the panels for location and wealth are shown below. Note that information is available only for children who are in schools for the assessment. In addition, only

schools recognized by the Government as consisting of the formal school system are included. By contrast, Koranic schools are not included. This implies that the children surveyed are in schools that are formally recognized, leading to a sample that is better off economically than the overall population.

Figure 3: Access to Alternative Media for Distance Learning, PASEC Student Assessment (%)





Source: Authors' estimation.

The fact that the children included in the PASEC sample are better off economically appears clearly in some of the estimates since the shares of households who own various assets are typically higher with this dataset than in the two previous surveys. This is the case for televisions, radios, as well as computers, with access rates in the PASEC sample higher than estimates based on the DHS and EHCVM surveys. On the other hand, the share of households with a mobile phone is lower, but this may be due to timing. The PASEC assessment was implemented in 2014, while the DHS and EHCVM surveys were implemented in 2017 and in 2018-19. As the penetration of mobile telephony in the population is progressively increasing, even a few years can make a difference in access rates. Note finally that the comparator countries

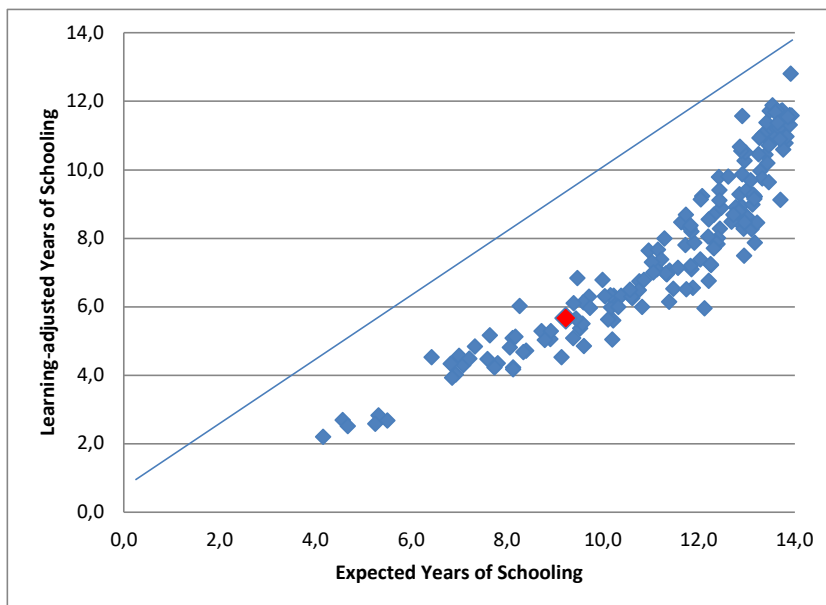
are different, since these are the countries that participated in the PASEC assessment.

Learning Losses and Exposure of Students in Catholic Schools in Benin

The access rates for children to various potential distance learning media have implications for the impact of the current pandemic on learning outcomes. Many education systems were already experiencing a learning crisis before the pandemic (World Bank, 2018, see also Bashir et al., 2018 for sub-Saharan Africa). In Part I of the paper, the World Bank's (2019) learning-adjusted years of schooling metrics was introduced. The idea is to account for the fact that many children are not learning enough in school to adjust the average number of years of

schooling that children are expected to complete for what they actually learn in school. In Figure 4, which was used in Part I of the paper, Benin is represented by the red diamond. As is the case for most countries, the expected learning-adjusted years of schooling for Benin on the vertical axis, at 5.7 years, is substantially lower than the years of schooling that children complete on average, at 9.2 years. Implicitly, almost two fifths (38 percent) of the years of schooling that children completed are “lost” due to lack of sufficient learning in school (since $5.7/9.2=0.62$).

Figure 4: Learning-adjusted Years of Schooling in Benin and Other Countries, 2020



Source: Author based on World Bank Human Capital Index data for 2020.

The school closures that resulted from the COVID-19 pandemic have exacerbated the learning crisis. As noted in Part I of the paper, Azevedo et al. (2020) have conducted various simulations to assess the potential effect of the crisis on learning outcomes. Their methodology is summarized in Part I of the paper, but in a nutshell, the idea is to look at both

losses in learning and the risk that some children may drop out of school due to school closures. One of the key parameters for the simulation is the effectiveness of the mitigation measures implemented by governments to reduce the negative impacts of the crisis on learning outcomes. This effectiveness in turn depends on three parameters: whether

governments are implementing remote learning measures, the level of access of students to these measures, and the effectiveness of these measures. Taking into account the length of school closures in a country as well as these parameters provides a rough idea of what the magnitude of learning losses may be.

Azevedo et al. (2020) consider three scenarios in their global simulations. In the optimistic scenario, schools are closed for three months and governments are able to implement highly effective mitigation measures to provide distance learning options. In the intermediate scenario, schools are closed for five months and mitigation measures have

a middle level of effectiveness. In the pessimistic scenario, schools are closed for seven months, and mitigation measures have low levels of effectiveness. For simplicity, the same scenarios are used here for Benin. As shown in Table 1, under these scenarios, the loss in learning-adjusted years of schooling for Benin is estimated at 5.3 percent from the baseline value in the optimistic scenario, 10.5 percent in the intermediate scenario, and 14.0 percent in the pessimistic scenario. Because of the lack of access to distance learning options mentioned in the earlier discussion, the pessimistic scenario is probably closer to the reality than the intermediate or optimistic scenarios.

Table 1: Potential Effect of the Crisis on Learning-Adjusted Years of Schooling in Benin

	Baseline	Optimistic	Intermediate	Pessimistic
Expected Years of Schooling (EYRS)	9.2	9.0	8.8	8.6
Harmonized Test Scores (HLO)	384	375	366	358
Learning-Adjusted Years of Schooling (LAYS)	5.7	5.4	5.1	4.9
Expected Years of Schooling (EYRS)	-	2.2%	4.3%	6.5%
Harmonized Test Scores (HLO)	-	2.3%	4.7%	6.8%
Learning-Adjusted Years of Schooling (LAYS)	-	5.3%	10.5%	14.0%

Source: Authors, based on World Bank simulation tool.

Note: the harmonized test score is based on a calibration of international student assessment data (PASEC in the case of Benin) whereby a value of 500 corresponds to the global average performance.

Are students in Catholic schools likely to be affected in the same way as a typical student at the national level across all schools systems? In some respect they may be because the size of the Catholic school network has increased rapidly in the country, so that the population served is now probably at least slightly more similar to that of students enrolled in public schools than it may have been in the past. At the same time, despite rapid growth (enrollment in primary and secondary Catholic schools in 2018 was more than five times the level reported in 2000), Catholic schools in Benin continue to serve a relatively well of population. This is because lack of government funding leads to higher out-of-pocket costs for parents to send their children to the schools, which in turn reduces the affordability of the schools for the poor despite efforts made by the schools to provide access to all.

Data from the Harmonized Household Living Conditions Survey implemented in 2018-19 provide an idea of whom different types of schools reach in the population. The survey questionnaire identifies different types of schools that have been grouped into three categories in Table 2: public schools, non-religious private schools, and religious private schools (information on the denomination or faith affiliation of religious schools is not available). Multiple religions coexist in Benin, with estimates suggesting that about a quarter of the population consists of Muslims, another quarter of Roman Catholics, with the rest including adherents to Protestantism Voodoo, and other religious practices. This means that the category of religious schools includes other religiously affiliated schools apart from Catholic schools. Still, Catholic schools are likely to account for a large share of that category.

Table 2: Share of Students by Quintile of Wealth in Various Types of School (%)

	Poorest quintile	Second Quintile	Third Quintile	Fourth Quintile	Richest Quintile	All
Primary schools						
Public	17.5	24.6	28.5	20.2	9.2	100
Non-religious private	0.9	3.2	10.1	29.5	56.2	100
Religious private	0.3	4.0	15.6	25.8	54.3	100
Total	14.2	20.3	25.1	21.9	18.6	100
Secondary schools						
Public	9.1	16.6	21.6	25.7	27.0	100
Non-religious private	0.4	1.9	6.5	15.9	75.4	100
Religious private	0.0	5.2	1.5	23.5	69.8	100
Total	7.3	13.9	18.4	24.2	36.2	100

Source: Authors, based on EHCVM survey.

Table 2 provides estimates of the shares of students in different types of schools according to the quintile of wealth of their households, from the poorest quintile to the richest. For all types of schools, children in the bottom quintile tend to be underserved as many are not enrolled in school. But the distribution is particularly skewed for private schools, whether religiously affiliated or not, with more than half of the students in those schools coming from the top quintile of wealth. This also means that those students have better access to distance learning option than a typical student in public schools. At the same time, given the analysis provided earlier on the types of access to distance learning options, even students in the top quintile have limited access to the internet, especially at home. In other words, even for children in religiously affiliated schools, distance learning options during school closures are limited.

Policy Responses: The COVID-19 Education Project

The estimates from the previous sections suggest that in part because of low household connectivity to different types of media that can be used for distance learning, the potential impact of the COVID-9 crisis on learning outcomes in Benin may be severe. The data on household connectivity to various media suggest that a multi-modal approach to distance learning is needed. This fact is well recognized by the Government. As noted in World Bank (2000i), following school closures, the Government created a task force to mitigate the impacts of the pandemic, and better prepare the country for being able to respond in the future in case of renewed school closures whether due to a resurgence of the current pandemic or other

factors. Activities planned by the Government include investments in distance learning through radio, TV, and online digital learning solutions. To support the Government in those efforts, the World Bank is implementing in partnership with Education Ministries an operation (US\$7 million) funded by a grant from the Global Partnership for Education under its COVID-19 accelerated funding window (World Bank. 2020i).

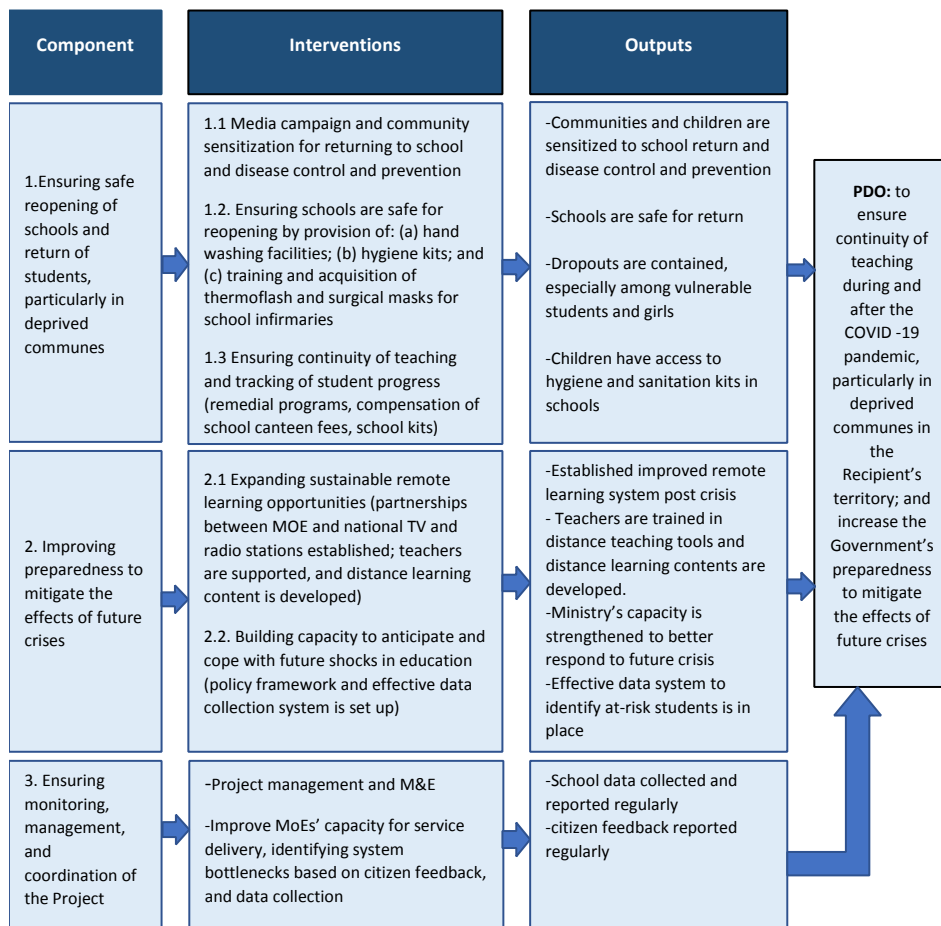
The objectives of the project are: (a) to ensure continuity of teaching during and after the COVID -19 pandemic, particularly in deprived communes in the Recipient's territory; and (b) to increase the Government's preparedness to mitigate the effects of future crises. Six indicators will be used to monitor progress: (i) Children previously enrolled in schools who return to school once the school system is re-opened (total number and percent, disaggregated by girls and deprived communes—percent); (ii) Students benefiting from direct interventions to enhance learning in the 20 targeted communes (total number disaggregated by primary and lower secondary schools); (iii) Girl students benefiting from direct interventions to enhance learning in the 20 targeted communes (total number of girls disaggregated by primary and lower secondary schools); (iv) Schools equipped with minimum hygiene standards for prevention of COVID-19 (total number of schools and percentage of targeted schools); (v) Schools offering remediation programs in deprived communes once the school system is re-opened (Total number and percentage, disaggregated by primary and lower secondary schools); and (vi) National strategy for continuity of learning for all children developed and disseminated.

To achieve these objectives, the project has three components. The first component

aims to ensure safe reopening of schools and return of students, particularly in deprived communes (US\$5.74 million). It includes three sub-components: (i) Media campaign and community sensitization for returning to school and disease control and prevention; (ii) Ensuring schools are safe for re-opening mostly through WASH interventions to be implemented by UNICEF; and (iii) Ensuring continuity of teaching and tracking of student progress, including through remedial education for students, compensation of part of incidental costs paid for school canteens in deprived communes, and the provision of school kits for deprived communes and children with disabilities. The second compo-

nent aims to improving preparedness to mitigate the effects of future crises (US\$0.72 million). A first sub-component is to expanding sustainable remote learning opportunities by setting up an enabling environment for distance learning, providing teacher training for distance learning, and developing distance learning program contents. A second sub-component aims to build system capacity at the Ministries of Education to anticipate and cope with future shocks in education. Finally the last component aims to ensure monitoring, management, and coordination of the project (US\$0.39 million). More details on the various components and sub-components and their logic are provided in Figure 5.

Figure 5: Results Chain for the COVID-19 education Project in Benin



Source: World Bank (2020). Note: PDO = Project Development Objective.

Conclusion

One of the key challenges for ensuring learning during school closures following a pandemic or another crisis in many countries in sub-Saharan Africa is that options for distance learning are limited. School closures have forced schools and education systems to transition to distance learning at scale quickly. This would be a very difficult task even under the best circumstances. But when the existing digital infrastructure has limited coverage, the task is even more challenging. As a result, multi-modal approaches relying on alternative options for distance learning are likely to be required.

This paper has provided estimates of access to potential distance learning media in Benin using three different surveys. Access rates to computers and the internet at home are very low. In the case of the DHS for example, less than one in 30 households having access. By contrast, about nine in ten households have a mobile phone, three in ten own a television, and more than half own a radio. Mobile phones (even if they are not smart phones), television, and radio thus provide multi-modal distance learning opportunities. Estimates with the EHCVM survey and the PASEC student assessment data are broadly coherent with the estimates obtained from the DHS survey. In part because of these low levels of digital connectivity for households, simulations of the potential impact of the crisis on learning outcomes suggest that learning losses could be substantial, especially under the more likely pessimistic scenario that was considered. By and large, students in Catholic schools are likely to have been affected as are those in public schools.

In addition, we also summarized in this paper the main features of a recently approved pro-

ject funded by the Global Partnership for Education and implemented by the World Bank and the Government of Benin to mitigate the impact of the COVID-19 crisis on the education sector and prepare for future crises. This project is illustrative of the types of measures that can be put in place to respond to pandemics, not only today but also in the future, not only by public school systems, but also by those in charge of managing Catholic school networks.

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