



Human rights considerations to tackle privatization respecting freedom of education.

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In the 80s and 90s, international financial institutions ask developing countries to initiate significant cuts under structural adjustments to their services, including education (SINGH K. , 2014). These financial requirements, together with the poverty and the lack of accountability of these countries were a wake-up call for for-profit educational institutions to make profit at the expenses of the African market especially. Many states have neglected their core obligations to fulfill the right to education. One of the worst examples is what has happened in Liberia, where in January 2016 the government announced its intention to entirely outsource its public primary and pre-primary schools to private actors. (RTE Project, 2017) Since 2005 many civil society actors first, and the UN agencies second, have started to warn the dangers that this trend might have for the right to education. The Special Rapporteur on the right to Education of the United Nations has pointed some of the threats: the exclusion of marginalized groups who are unable to pay, the lack of quality of these schools due to the lack of training of their teachers, the lack of recognition of the academic degrees and the abusive practice of these for-profit schools (SINGH K. , 2014). This phenomenon has been called privatization.

What is privatization?

The special rapporteur Kishore Singh has devoted three reports on this phenomena in two years Protecting the right to Education against commercialization A/HRC/29/30, Report of the Special Rapporteur on the Right to Education on the growth of private education providers A/69/402 and the Report of the Special Rapporteur on the right to education on public-private partnerships in education A/70/342. Nevertheless, it is hard to find a definition of privatization in his reports. Neither the International community has agreed on a consensual definition. There isn't either in the academia an unambiguous and agreed definition of the term privatization. (COOMANS & HALLO DE WOLF, 2005, p. 242)

Some scholars have tried to separate the phenomena of privatization of the phenomena of commercialization. For instance, one popular definition of the phenomena of commercialization of education is *“the process by which education sector is increasingly being opened up to profit-making and trade, and to agenda setting by private, commercial interests that conceptualizes the learner as a consumer and education as a consumer good”* (MACPHERSON,

ROBERTSON, & WALFORD, 2014). Nonetheless, it is complicated to place a clear distinction of these two phenomena.

The international community is facing many problems dealing and understanding the problem of privatization. One good example of this setback is that none Human Rights Resolution on the right to education has mentioned the word privatization. Some resolutions have made reference to the commercialization of education; however in those it does not appear a definition of commercialization. Nevertheless, the international community in its resolutions of 2015, 2016 and 2017 has called for more research and awareness raising activities to better understand the wide-range impact of the commercialization of education on the enjoyment of the right to education. Before these resolutions it is hard to find references to the commercialization of education. It is interesting to observe that even the international community is struggling to understand this phenomena and how to effectively combat it.

The obstacles to tackle privatization

The difficulties on tackling this phenomenon are multiple; nevertheless we would like to identify two main challenges. Firstly, the word privatization may lead to a dangerous and confusing reductionism of the multiple actors in the educational landscape. Secondly, the delegation of State functions to non-governmental institutions does not always lead towards an abandonment of a human rights approach to education.

The epistemological obstacle:

One of the main challenges to tackle the phenomena of privatization is due to the simplification of definitions, actors and situations.

The problem with the term privatization is the lack of agreement with its definition. Indeed, it is hard to cover with a simple word a worldwide situation and to capture all the nuances. The distinction between privatization and commercialization of education is not that clear. Sometimes, commercialization seems one dimension of privatization; sometimes, commercialization and privatization seems different sides of the same coin; and sometimes they seem that we are talking about the same phenomena. An effort must be done by the to clarify the different actors to clarify these concepts to properly tackle them.

Linked with the problem of the definition there is also the problem caused by a simple classification of actors. In public debates certain people have the tendency to divide the actors of the educational landscape in a simple two-category classification: Private and Public. This classification includes in the private category different institutions such as community based-groups, religious institutions, NGOs and philanthropic foundations, enterprises and corporations among others. The inclusion of all these different institutions

under the same broad range category seems unfair as they might have different perspectives of the right to education. Moreover, this kind of classification is not clear when they refer private schools, causing a situation of confusion and almost injustice by treating for instance NGOs and corporations equally.

It might seem that the simplistic treatment of the phenomena of privatization sometimes responded more to an ideological motivation than a real will to tackle this problem. In order to observe the simplicity of the used terminology we will observe the private-public dimension, to show that the epistemological approach took by researchers is not the more suitable to tackle this challenge. On this regard we will show the blurring boundaries between public and private and how important it is to consider the different actors to tackle this problematic.

The private – public dimension in the right to education:

Intuitively, the public-private dimensions intended to be opposed. Private as something from which someone is excluded. While public, is considered in contrast, as something that belongs to everyone, and therefore state-owned. This distinction puts problems in three levels: too simplistic, poorly constructed and omits too many social realities.

Public cannot be understood always as state-owned. Some legal traditions make a clear distinction between public and state-owned, as two categories that do not necessarily go together. Moreover according to the professor of public law Pierre Delvolvé the distinction between something public and private is not that simple. Delvolvé identifies 3 different dimensions where an institution can be private or public: Organic (sector of the activity), functional (nature of the organization and functions) and personal (nature of the applicable law) (DEVOLVÉ, 2006, pp. 107-108). For example, traditionally administrative French law conceive public as something that provides a public service, an example of a public institution that is not state-owned would be a Museum. Also, in the Spanish- speaking tradition we can observe state-owned institutions but which are engaged in non-public activities such as commercial or industrial activities (GORDILLO, 2013). Other juridical traditions understand that public as something that has a social function. For instance, the Constitutional court of Spain (STS 18/1984) pointed that the senior positions of the Saving Banks due to its social implications are public, although they do not belong to the public administration (ARGANDOÑA , MELENDO, OLLERO, & TERMES, 1991, p. 35). In addition, the distinction between public institution and private institution, as well as public law and private law, does not mean their incommunicability. Finally, it is interesting to observe that also public law uses institutions of private nature as the contract, and also the other way around such as the urban law concerning private property (PALOMINO LOZANO, 2014).

From all this, we can conclude that at the national perspective the distinction between public and private are more blurred than what some theorists of privatization suppose. Now, what we have to determine is if the distinction public – private is that clear in the field of education.

To put some perspective to this debate I think it would be interesting to take a look to the document *Rethinking Education: Towards a new paradigm of UNESCO?* This document produced by UNESCO in 2015 aims to be the continuation of the Delors and Faure Reports, updating its content to XXI challenges. This document warns the need to change the approach of education as a public good, towards education as a common good. The document alerts that the concept of education as a public good is obsolete to deal with the challenges of the XXI century, especially considering the educational landscape that we have in front. Coming back to our discussion between the distinction public-private, the document warns that in the educational landscape there is a blurring of boundaries between public and private. On this regard the multiplication of stake holders – including parents associations and teachers unions – and “*civil society organisations, private enterprises and foundations, as well as the diversification of sources of financing*” is dissipating the possibility to make a clear distance public – private in the field of education. The document also underlines the weakening capacity of many nation-states to determine public policies and the emergence of a need to a more global governance that is explaining this blurring of boundaries between public and private (UNESCO, *Rethinking Education: Towards a global common good?*, 2015, p. 76).

In 2015 the international community reformulated the Millenium Development Goals updating them to the new challenges of the XXI Century. To do so, they established the new Sustainable Development Goals, whose goal 4 is: *Quality Education – Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all*. A few months later the UNESCO and the international community produced the Incheon Declaration and the Framework for Action for the implementation of Sustainable Development Goal 4. Although, this document did not take the common good approach used by the UNESCO document *Rethinking Education: Towards a common good?* it warns that “*Education is a public good, of which the state is the duty bearer. Education is a shared social endeavor, which implies an inclusive process of public policy formulation and implementation. Civil society, teachers and educators, the private sector, communities, families, youth and children all have important roles in realizing the right to quality education. The role of the state is essential in setting and regulating standards and forms*” (UNESCO, 2015, p. point 10). Once again we can observe that the participation of non-public actors is desirable to implement education as a public good, which shows the blurring boundaries between public and private in education.

The different actors of the implementation of education as a human right:

We can affirm that according to the international community the presence of non-state actors is essential for the realization of the right to education, blurring also the public-private boundaries. As we have observed the Incheon Declaration and the Framework for Action for the implementation of Sustainable Development Goal 4 recognize the role of the state as the duty bearer - not as the only and exclusive actor. Moreover, that other actors such as the civil society teachers and educators, the private sector, communities, families, youth and children have important roles recognized to realize the right to quality education. The role of the state is essential in setting and regulating standards and forms" (UNESCO, 2015, p. point 10). Later on, in the same document we observe that it establishes that the civil society organizations "need to be engaged and involved at all stages, from planning through to monitoring and evaluation, with their participation institutionalized and guaranteed" (UNESCO, 2015, p. point 80).

This inclusive participation forces us to think about the different categories of actors in the educational landscape. We can observe that in order to protect education as a public good the international community has entrusted with a lot of responsibility the civil society, in all the stages of the elaboration of an educational policy, including provision. The realization of the right to education as a public good requires us to think civil society as something apart from the public sector but also apart from the private sector.

Civil society is usually presented separately from the private sector, also in the UN mechanisms. For instance the UNDP in its document *La bonne gouvernance et le développement humain durable* makes a distinction between the state, the private sector and the civil society. This document includes the private sector as those institutions within the concurrent market whose aim is to make benefits. This document points that the aim of civil society is the protection of the rights of all citizens and it includes a range of different organisations (PNUD, 1997, pp. 9-10). According to the Economic and Social Council points that "Civil society organizations include non-governmental organizations, professional and private sector associations and trade unions. They also include families, churches, neighborhood groups, social groups and work group" (Committee of Experts on Public Administration, 2006). A similar definition is provided by the World Bank "The term civil society refers to the wide array of nongovernmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. Civil Society Organizations (CSOs) therefore refer to a wide array of organizations: community groups, non-governmental organizations (NGOs), labour unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations" (WORLD BANK, 2018).

In the field of Education the Education for All Framework, UNESCO defines civil society as *“all non-governmental and non-profit associations involved in education. This includes groups such as campaign networks, teacher unions and religious organizations, community associations and research networks, parents' associations and professional bodies, student organizations, research institutes, social movements and others”* (UNESCO). This definition is also coherent with the one provided by other international organisms.

According to Education for All the partnership between civil society and the state is essential for the realization of the right to education. They guarantee an alternative educational offer and they guarantee the right to education in those places where the state cannot be present bearing in mind a common/public good perspective. They have played an essential role on this regard in fragile states (POIRIER, 2011). If we certainly want to tackle the problem of privatization we should specify the distinction between non-governmental organizations whose aim is the realization of the right to education for all the citizens and those whose aim is to make a financial profit of it. Not doing so generates a situation of unfairness and unrealism. Furthermore, the acknowledgment of civil societies as something different as private organizations is more coherent with the complex relations between private and public.

What we can conclude taking into consideration all these factors is that a simple classification of public and private actors is not good enough to tackle the phenomena of privatization. We have identified two problems. First, the incoherence of these simple classifications with the nature of a public good in many national administrative laws makes it impossible to correctly tackle this problem. Second, the nature of this classification is incoherent with the mandate of the international community concerning non-state actors, specially the civil society. Civil society needs to be acknowledged separately from the private sector to successfully address the issue of privatization and for the full realization of the right to education.

The state's duties and the existence of the so called “schools, other than those established by the public authorities”

The human rights obligations of the state concerning the right to education has been summarized by the CESCR in the General Comment n° 13 on the right to education: obligation to respect – it prohibits the state to act in contravention of the exercise of this right-, the obligation to protect – this requires the state to take steps to prevent and prohibit the violation of individual rights and freedoms by third persons- and the obligation to fulfill – which implies a financial input which cannot be accomplished by individuals alone (CESCR, 1999, p. point 47).

The state has the duty to ensure the requirements of availability, accessibility, adaptability and acceptability of education. These requirements are also in the

General Comment n°13 (CESCR, 1999, p. point 6 and 50) and have been also used by the previous special rapporteur Tomasevski (TOMASEVSKI, 1999). According to Coomans privatization in essence is “*the transfer of responsibilities in certain areas of education that are under government control to private actors*” (COOMANS & HALLO DE WOLF, 2005, p. 243). This phenomenon *per se* is not always opposite to the right to education, nevertheless when the privatization measures endanger the requirements mentioned previously the state has the duty to intervene (COOMANS & HALLO DE WOLF, 2005, p. 250).

Fons Coomans and Antenor Hallo de Wolf point some situations where privatization is incompatible with a human rights perspective. Concerning the voucher system it could be opposite to the right to education if it leads to the charging of fees by primary schools previously free, or when this voucher does not cover sufficiently the cost of education. The management of public schools through EMOs (Education management organizations) can arise potential problems such as charging fees for primary education or engage in discriminatory practices. Another pointed threat is the question of accountability and availability of adequate remedies, the state has to exercise due diligence to prevent violations of rights by private entities and thus remains ultimately responsible for their conducts; these have not been the case sometimes concerning for-profit charter schools and EMOs. On this regard, these scholars mention that there are a number of functions in the area of education that cannot be privatized as they require a single institution to set uniform standards and monitoring procedures in a neutral and objective way that only can be provided by the state. These functions relate to the recognition of diplomas, the essentials of the curriculum of schools, the recognition on non-governmental schools, determining and supervising the qualifications of teachers, the monitoring and enforcement of compulsory schooling and the inspection of the quality level of education at individual schools (COOMANS & HALLO DE WOLF, 2005, pp. 253-258).

It is important to observe that from Coomans and de Wolf’s perspective, private education only can be understood as privatization under certain circumstances (COOMANS & HALLO DE WOLF, 2005, p. 243). In this respect, it is worth mentioning that the existence of private institutions would be opposite of the right to education when it contravenes the four As. If this was the case the state has the obligation to make respect, protect and fulfill this right.

Moreover, from a human rights perspective the opposition *per se* of state education against non-governmental school seems not coherent with the article 26.3 Universal Declaration of Human Right and neither with the articles 13.3 and 13.4 of the International Covenant on Economic, Social and Cultural Rights which protects the rights of parents to choose the education they want for their children as well as the right of non-state actors to create their own schools.

It is important to mention that in the field of economic, social and cultural rights the state has positive obligations. The ECHR recognizes that the liberty dimension of freedom of education is an essential and indivisible part of the right to education and therefore it implies positive obligation. “84.1(b) *It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching. The second sentence of Article 2 of Protocol No.1 aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the “democratic society” as conceived by the Convention. [...]*”. “84.1(b) [...] *It enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme (see Kjeldsen, Busk Madsen and Pedersen, cited above, p. 25, §51). That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the “functions” assumed by the State. The verb “respect” means more than “acknowledge” or “take into account”. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. [...]*” (Folgero and Others v. Norway)¹ .

It is important to underline on this regard the European Parliament resolution of 12 June 2018 on modernisation of education in the EU (2017/2224(INI)). The

¹ It is interesting to observe how the European Court of Human Right, that did not used to recognize positive obligation, has shifted his position in order to guarantee the effectiveness of the human rights. According to Professor Besson this paradigm has became a meta-rule of interpretation (cf BESSON,2003). The jurisprudence of the ECHR concerning education is ambiguous because although it stated that “*there is not a positive obligation [...] to subsidise any particular form of education*” (Jordebo and Others v. Sweden) it also underlined that “*84.c[...]The verb “respect” means more than “acknowledge” or “take into account”. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The term “conviction”, taken on its own, is not synonymous with the words “opinions” and “ideas”. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see Valsamis, cited above, pp. 2323-24, §§ 25 and 27, and Campbell and Cosans, cited above, pp. 16-17, §§ 36-37).*” (Folgero and Others v. Norway). We see that the nature of this problem is more political than juridic.

Because of this in report “The right to freedom of choice in education in Europe” the Parliamentary Assembly of the Council of Europe (2012) stresses the importance of public funding for private schools to guarantee equal treatment among all pupils and among all families. “*No valid argument seems to justify the idea that families who elect to exercise the right to freedom of choice in education should agree to pay the whole of the expenses which the State consents to cover for State school pupils*”. On this regard according to this report “*adequate financial support is indispensable in to uphold the principle of equal treatment whatever the educational choice of families may be*” (QUINTANILLA, 2012, p. par. 70 and 80).

recomendation 76 of this resolution points *“Encourages, with regard to increasing inclusiveness and ensuring freedom of educational choice, the provision of adequate financial support for schools of all categories and levels, both state schools and not-for-profit private schools, provided the curriculum offered is based on the principles enshrined in the Charter of Fundamental Rights of the European Union and complies with the legal systems and rules and regulations regarding the quality of education and the use of such funds in force in the Member State concerned”*

In addition, concerning the full public funding of non-governmental schools we must acknowledge its beneficial effects. A recent report of the European Commission on good governance points that: *“with regard to inclusiveness, education systems with publicly funded private schools have smaller differences in pupils’ outcomes between public and private schools than systems in which only public schools can receive public funding”* (EUROPEAN COMMISSION, 2017).

The former rapporteur Kishore Singh shared in one of its report the Spanish *conciertos económicos* as a good practices of public funded governmental schools based on an agreed rights and obligations with the state (SINGH K. , 2015, p. 15).

We need to conclude from that the obligations of the state are explicit in the international instruments: respect, protect and fulfill the right to education. On this regard it is true that some practices concerning the outsourcing of certain areas of the education administration can damage the realization of this right. Nevertheless, we cannot affirm that the existence of non-governmental schools is opposite to the right to education. Non-governmental schools can exist and even receive public funding as far as their existence does not entail a threat for the four As of education and therefore requires the intervention of the state.

Conclusion

The aim of this paper is not exhaustive but to shed some light on certain areas of the problem of privatization, especially concerning its terminology and its connections with private schools.

On this text what we observed is that the term privatization can be problematic due to the lack of a consensual definition. In addition, the distinction between what is private and public is not that clear neither at the national level. At the international level it is hard to make a sharp distinction between public and private, as the realization of education as a public good required the participation of non-state actors such as the civil society.

Linked with that the second part of the text focuses on the importance of distinguishing civil society from the private sector due to the different nature of

these two. The fact that civil society aims to accomplish the right to education for all, and that the private sector aims to make a financial aim of it requires different treatment.

Finally, the text has focused on how privatization does not necessarily mean non-governmental schools. On this regard, we have shown which the main obligations of the state are and how these cannot contravene the existence of non-governmental schools to guarantee the freedom of education.

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