

Internationale bescherming van het recht op onderwijs

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SUMMARY

The International Protection of the Right to Education

The subject of this study is the international protection of the right to education. This right belongs to the category of economic, social and cultural human rights that entitle people to an adequate standard of living. The right to education has been laid down in a number of international texts on human rights. The meaning and scope of international norms in respect of economic, social and cultural rights, unlike those of civil and political rights, cannot always be clearly defined. This has consequences for the implementation of these rights in the legal order of states. Upon this basis, the following set of questions were formulated to be answered in this study: What is the content, the meaning and the scope of the right to education?; what obligations do the international texts on the right to education create for states?; and lastly, in what way can international supervision of the implementation of the right to education be improved?

With respect to the right to education, two aspects can be distinguished. On the one hand, realization of the right to education demands an effort on the part of the state to make education available and accessible. This is the social aspect. On the other hand, there is the personal freedom of individuals to choose between state-organized and private education, which can be translated, for example, in parents' and guardians' freedom to ensure their children's moral and religious education according to their own beliefs. From this stems the freedom of natural persons or legal entities to establish their own educational institutions. This is the aspect of freedom. It requires the state to follow a policy of non-interference in private matters.

Chapter 2 focuses on the (legal) character of economic, social and cultural rights. Initially, the prevailing view within the United Nations and in legal literature was that a more or less strict distinction could be made between economic, social and cultural rights, on the one hand, and civil and political rights, on the other. The former rights were thought to have a different legal character than the classic rights, and, consequently, the way in which they were to be implemented differed. One of the arguments for this distinction pertained to the role the state had to play. For securing civil and political rights, a policy of state non-interference was required. The realization of economic, social and cultural rights, however, necessitated an active role for the state. According to the traditional approach, civil and political rights could, as a result, be enforced before a national judicial institution,

whereas this option would not exist in the case of economic, social and cultural rights.

Since the late seventies, as a result of the evolution of legal thinking on the realization of human rights and the shifting of emphases within the United Nations, a more subtle approach has prevailed, which is based on the indivisibility and the interdependence of human rights. A dynamic development can be discerned, in which application and enforcement of both groups of rights have increasingly converged. In keeping with this integrated approach, this study proposes, that the character, meaning and scope of separate rights be analyzed in terms of state obligations and less in terms of enforceability before a judicial institution. This concept may be made more concrete on the basis of a typology of obligations. Characteristic for the realization of economic, social and cultural rights, is its progressive nature and its dependence on available (financial) resources. This idea is reflected, for instance, in Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This study treats the question of what state obligations arise from this core provision of the ICESCR. In this connection, the question emerges as to whether the concept underlying the ICESCR, i.e. an endeavour to achieve progressively higher levels of socioeconomic well-being, can be maintained in times of economic recession. If a state, as a result of a decline in available (financial) resources, wants to reverse the level of realization of certain rights, it must give reasons to justify the necessity of such action. This also implies that, in the policy-making process, obligations arising from international agreements should be explicitly considered.

Chapter 3 contains an analysis of the law on the right to education as found in international conventions and declarations. Both global and regional texts are treated. To gain more insight into the meaning and scope of the right to education, the legal history of the most important international texts is analyzed. The first provision discussed is Article 26 of the Universal Declaration of Human Rights. This provision formed the basis for the formulation of other international texts on the right to education. The drafting of three other important texts, namely Article 2 of the First Protocol ECHR (1952), Article 13 ICESCR and the UNESCO Convention against Discrimination in Education (1960) is comprehensively discussed. The long drafting process of Article 2 of the First Protocol ECHR is proof of the differences of opinion between the organs involved in the drafting, as to the exact legal meaning and scope of this provision. Article 13 ICESCR is the most detailed provision laying down a number of measures aimed at promoting full realization of the right to education. The UNESCO Convention not only seeks to ban all forms of discrimination, but also to promote equal opportunities and equal treatment in education for each individual. Subsequently, more recent international provisions relating to the right to education, such as those incorporated in the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights (Protocol of San Salvador, 1988) and the Convention on the Rights of the Child (1989),

are discussed. The international texts on the right to education contain a number of elements, which almost all, with varying degrees of specificity, feature in the texts discussed in this study. At issue here is, in the first place, the specific task of the state to make education available and accessible in a non-discriminatory way. In performing this task, the state has a degree of discretion within the norms formulated in the provision. Secondly, the state is bound to respect the convictions of parents or guardians with regard to the religious and moral education of their children. In addition, the state is required to allow for the establishment and maintenance of private educational institutions, provided they meet the national minimum standards in this field. Parents or guardians are free to select for their children either a form of state-organized education or a private educational institution. The right to education is a universal right, granted to every person, regardless of age, language, social or ethnic origin or other status. For the benefit of certain vulnerable groups, separate texts have been drafted in international law, in which the right to education is included. In fact, persons belonging to these groups enjoy special protection. This is the case with children, members of minorities and indigenous and tribal peoples.

Chapter 4 discusses the various procedures providing for international supervision of implementation of the right to education. The right of individuals to lodge a complaint as defined in the ECHR, has resulted in a number of cases before the European Commission and the European Court of Human Rights, alleging a violation of the right to education. The most important cases were : the Belgian Linguistic case (1968), the case of Kjelsen, Busk Madsen and Pedersen (1976) and the case of Campbell and Cosans (1982). The Strasbourg organs have used these cases to define the meaning and scope of the right to education. The case law on Article 2 offers an interpretation of the right to education which is evidence of the dynamic development of this right in the Member States of the Council of Europe. In particular, the social changes that have taken place in these states since the sixties are reflected in this case law. This is especially demonstrated in the positive way in which the Commission and the Court have interpreted the obligations of states pursuant to Article 2 and in their broad interpretation of the term "religious and philosophical convictions".

Another method of international supervision is the reporting system. This system is founded on various conventions in which the right to education is laid down. According to this system, states report periodically to an international organ of experts on the progress made in realizing the right to education and the difficulties encountered in achieving such. This chapter treats the international implementation procedures pursuant to the ICESCR and the UNESCO Convention against Discrimination in Education. The main focus is on 24 state reports on the implementation of Article 13 ICESCR. These reports have shown a varying degree of quality, which has not always presented a clear picture of the real situation as far as education is concerned. What did become clear was that Third World countries, in particular, owing to financial-economic problems, are not able to comply with the

international norms as formulated in Article 13 ICESCR, on many points. As a matter of fact, industrialized states are increasingly confronted as well with problems of this nature. The discussion of the state reports pursuant to the ICESCR takes place in the form of a dialogue between the supervisory organ and the representatives of the state in question. The activities of the Sessional Working Group of Governmental Experts (from 1979-1986), operating as the initial supervisory organ of the ICESCR, were characterized by superficiality and a not very critical attitude vis-à-vis the information presented in the state reports. Its successor, the Committee on Economic, Social and Cultural Rights has a more serious approach, shows more thoroughness and looks into the actual situation with respect to the realization of the right to education and the obstacles encountered.

In Chapter 5, the analysis of state obligations pursuant to Article 2, paragraph 1 ICESCR is further developed. The question put forward here concerns the obligations that may arise from Article 13 in conjunction with Article 2, paragraph 1 ICESCR. A dynamic interpretation of Article 13 aimed at an effective protection of the right to education is advocated. The interpretation is worked out in the question about the meaning of the terms 'to recognize' and 'to respect', which designate the character and scope of the obligation in Article 13. On these grounds, it can be stated that the realization of the social aspect of Article 13 is progressive in nature, whereas the aspect of freedom is for immediate application. In addition, Article 13 may be defined in terms of 'obligations of conduct' and 'obligations of result'. This distinction in terms of state responsibility, is useful, because it provides an insight into the meaning and scope of the state obligations in realizing the right to education. The distinction can also be helpful in answering the question as to whether the states in effect meet their obligations. The obligations of states related to the right of education may also be worked out on the basis of the typology of obligations proposed in the second chapter. The measures to be taken by a state in order to realize the right to education can be defined in terms of the obligations 'to respect', 'to protect' and 'to fulfil'.

Narrowly related to the definition of economic, social and cultural rights, in terms of obligations of states, is the question of when an actual violation of such a right occurs. It can be stated, in general, that this problem, for which no clear criteria exist, has been underexposed up to now. Pursuing the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, the present study proposes that violation of a social right be said to exist, if the state intentionally acts in contravention of the international norm, or if it fails to take those measures as required by the international norm. In both cases, the state must be in a position to comply with the international norm, that is to say, not be faced with a situation which is beyond its control and for which it cannot be held responsible (*force majeure*). When applied to the right to education, this criterion must then be interpreted as follows : violation exists if the state does not comply with the minimum core content of that right. The term

'minimum core content of the right to education' implies that the state must respect the free choice of education (especially with respect to religion and conviction). And secondly, that no one shall be denied the right to education and that primary education must be compulsory and free of charge. The issue of violation of the right to education is, for instance, illustrated by the educational situation in the Israeli-occupied Arab territories and in South Africa.

The value of the ICESCR norms in times of economic recession, as discussed in chapter 2, is again taken up. Against this background, the realization of the right to education and in particular the question of the compatibility of the Netherlands Tuition and Course Fees Act with Article 13 in conjunction with Article 2, paragraph 1 ICESCR, is discussed. In 1987, as a result of a reduction in the financial resources available in the national budget, the Dutch Government introduced 'school fees', the parental financial contribution towards the education of 16- and 17-year olds. This study concludes that the Act is in contravention to the letter and the spirit of the ICESCR.

Another important question discussed in chapter 5, is the question of the universal character of the right to education. This question may be approached from different angles. One approach deals with the question of whether the value of education and each individual's claim to education are endorsed by the various political, social and cultural communities. A tentative survey shows that both the value of education and the right to education are universally accepted, but that freedom of education is not recognized and guaranteed in certain political and cultural systems. The author concludes that the right to education has the features of an operational right, that is to say, an instrument with which other rights may be realized. Such characterization strengthens its universal claim.

Chapter 6 treats the possibilities for improvement of international supervision on compliance with the education provisions of the ICESCR and discusses a number of recommendations. In this procedure, the discussion of the periodic state reports by the Committee on Economic, Social and Cultural Rights plays a central role. The reports are drafted according to guidelines established by the Committee. These guidelines serve as an aid for governments and are designed to trace the actual situation with regard to the realization of economic, social and cultural rights. Other actors may also play a role in the discussion of state reports. UNESCO, a specialized agency with expertise in the field of education, should participate actively when state reports are discussed by the Committee. UNESCO can provide up-to-date information on the educational situation in the countries of the reports under discussion. Non-governmental organizations may also be a source from which the Committee may draw information for the benefit of the discussion. The Committee might consult NGOs with consultative status at ECOSOC. Their information could be of important additional value, complementing the information provided by governments in their reports. The

Committee itself should also make a contribution towards improving the international implementation of the right to education. On the basis of a comparison between the state of education in countries whose reports have been discussed by the Committee, and the experience gained through this, the Committee is able to further interpret Article 13 ICESCR and work out its applicability to concrete situations. This could take place in the form of a 'general comment' intended as a policy-making guideline for the States Parties. In addition to this, the Committee, in assessing the reports, should make use of quantitative indicators. These are mostly statistical data that allow an insight into the socioeconomic development of a particular country at a certain point in time or during a particular period. The purpose of indicators is to enable the Committee to measure the progress achieved and the obstacles encountered in the realization of economic, social and cultural rights in a particular state. This implies that international human rights norms need to be coupled to practical and reliable indicators. For the evaluation of the degree of realization of particular elements of the right to education in separate states, this study proposes the following indicators: the percentage of illiterates under or over the age of 15 years, classified according to sex, urban and rural populations, linguistic and ethnic origin; the percentage of pupils of a certain age group enrolled in primary education; per capita government expenditure on education.

Lastly, the international implementation of the right to education should be strengthened by adding an optional protocol to the ICESCR, entitling individuals to lodge a complaint in case of an alleged violation of the right to education. Such alleged violation must be directly attributable to the state in question. Providing the complaint is considered admissible, the Committee on Economic, Social and Cultural Rights should examine the merits of the complaint and subsequently make its views public.