

## Guiding Principles 47 and 48: Obligations to Respect, Protect, and Fulfil the Right to Education in the Context of Private Involvement<sup>1</sup>

International human rights law walks the fine line between the reinforcement of the positive elements of private education and of parental control on the one hand, and the need to limit its potentially negative implications on the other. This delicate balance is charted in Guiding Principles 47 and 48.

Guiding Principle 47 addresses the nature and scope of the rights of parents and of private operators vis-à-vis the rights of children and state interests. It guarantees the protection of parental rights and the existence of private educational institutions but also empowers states to regulate private education.

Guiding Principle 48 specifies the circumstances in which these rights may be limited by states, outlines the scope of states' power in the field of education and provides examples for its legitimate exercise. It complements the framing of child-parent-state educational relationship by setting clear rules for this regulation. Sanctioning state intervention in private education is essential to guarantee the realisation of the students' right to education and of legitimate state interests.

### Guiding Principle 47: The Liberty of Parents

**States must respect the liberty of parents or legal guardians to choose for their children an educational institution other than a public educational institution, and the liberty of individuals and bodies to establish and direct private educational institutions, subject always to the requirement that such private educational institutions conform to standards established by the State in accordance with its obligations under international human rights law.**

General Principle 47 (GP47) addresses two sets of educational rights. One concerns the rights of parents and legal guardians to control the education of their children; the other, the corresponding rights of private actors to establish and direct private educational institutions – not only for children – that offer alternatives to public education. In its last part, GP47 clarifies the limits on the scope of these rights, adding that private educational institutions must conform with state educational standards.

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<sup>1</sup> Roman Zinigrad is an Assistant Professor of Law at the American University of Paris.

The rights of parents and legal guardians (for brevity, 'parents' includes 'legal guardians') in education consist of two main prerogatives: (1) choosing to opt a child out of the public education system in favour of a private educational institution; and (2) ensuring that the child's religious and moral education conforms with their own convictions.<sup>2</sup> The first prerogative concerns the *institution* where a child's education will take place and is complemented by the corresponding right to establish and run private institutions. The second prerogative regards the *substance* of the education a child will receive in whatever institution she attends. Consequently, the parents' right to ensure a child's education in conformity with their convictions extends to both private and public institutions.<sup>3</sup>

Both prerogatives are guaranteed as distinct entitlements in the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 13(3) and in UNESCO's Convention against Discrimination in Education (CADE), Article 5(1)(b), as well as in regional human rights instruments, such as the African Charter on the Rights and Welfare of the Child (ACRWC), Article 11(4). Other instruments, like the International Covenant on Civil and Political Rights (ICCPR), Article 18(4) or the European Convention on Human Rights (ECHR), Article P1-2, stipulate explicitly only the second prerogative without referring to the choice of a school but they have been interpreted as incorporating the first prerogative. Thus, the right to ensure education conforms with parental values also grants them 'the right to avail themselves of the educational institutions existing at a given time' and guarantees 'the right to start and run a private school'.<sup>4</sup>

Parental educational rights are limited in scope and save for exceptional circumstances, do not cast financial obligations on states. They are also subject to substantive limitations in accordance with domestic and international human rights law. Among the traditional liberal justifications for the recognition of these rights are the (rebuttable) presumption that parents act in the best interests of their children, the general social interests in diverse educational opportunities and in restraining the power of the state from attaining oppressive monopoly in education, and to a limited extent also the interest of the parents themselves to pass their values and beliefs unto their offspring in virtue of the care and love they bestow upon them.<sup>5</sup>

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<sup>2</sup> Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 13: The Right to Education' (1999) UN Doc E/C.12/1999/10 [28], [29].

<sup>3</sup> The provision of religious instruction in public education is however limited by the principle of neutrality and equality unless alternatives provided to accommodate parents; *ibid* 13.

<sup>4</sup> *Jordebo v Sweden* (1987) 51 DR 125. See also *Lernen v Austria* (1995) Application No 23419/94 (European Court of Human Rights); *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 (European Court of Human Rights); Manfred Nowak, *UN Covenant on Civil and Political Rights: Commentary* (2<sup>nd</sup> ed, NP Engel 2005) 433.

<sup>5</sup> Yoram Rabin, 'The Many Faces of the Right to Education' in Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2008) 275–76. For accounts contesting the need or even the desirability of the institution of parental rights see Roman Zinigrad, 'Parental Rights in Education under International Law: Nature and Scope' in Frank Adamson 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 2021).

The obligation to *respect* the liberties of parents and private operators stipulated in GP47 imposes on states, at the very least, the negative duty ‘to avoid measures that hinder or prevent the enjoyment’ of these liberties.<sup>6</sup> Prohibiting or obstructing the opening or operation of private schools that meet the minimum educational standards set by the state violates not only the right of private operators to do so but also the parental right to choose private education. What is more, a ban applying specifically to private religious education constitutes an additional violation of the parental right to ensure education in conformity with parental convictions.

The requirement to guarantee the educational rights of parents has, furthermore, been read to include some positive elements. In *Campbell v UK*, which established that the administration of corporal punishment to children in Scottish state schools against the will of their parents violates the ECHR requirement to ‘respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions’, the European Court of Human Rights stated that *respect* means ‘more than “acknowledge” or “taken into account”’. The Court ruled that in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State’ and rejected the UK government’s claim that its ‘policy to move gradually towards the abolition of corporal punishment [is] in itself sufficient to comply with this duty’.<sup>7</sup>

That being said, the positive obligations on states in GP47 do not include providing financial or other material support or active assistance to parents if they choose to pursue private education options, save for limited exceptions.<sup>8</sup> States therefore may choose to fund private educational institutions but are not required to do so under international law (for state obligations in relation to funding private institutions, see GP65 and GP73).<sup>9</sup> The rights to choose a private educational institution as well as to establish and operate them do not amount to a claim to establish or subsidise non-state schools. The use of the term *liberty* instead of *right* to frame the rights of parents and of private actors in GP47 further underscores the negative aspect of these rights in what concerns material assistance. This choice follows the deliberate decision of the drafters of Article 13(3) of ICESCR to use the term *liberty* for the same purpose.<sup>10</sup> The ECHR, although referring to parental prerogatives as a *right*, also ‘does not require a State to take any positive actions such

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<sup>6</sup> CESCR, ‘General Comment No 13’ (n 2) [47].

<sup>7</sup> *Campbell v UK* 4 EHRR 293 [37] (European Court of Human Rights); *O’Keeffe v Ireland* [2014] ECHR 96 [147] (European Court of Human Rights).

<sup>8</sup> Zinigrad (n 5); Sandra Fredman, ‘State Funding of Private Education: The Role of Human Rights’ in Frank Adamson 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 2021).

<sup>9</sup> ‘Guiding Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education (The Abidjan Principles)’ (2019) 8 International Human Rights Law Review 117, 140–41, 143–44.

<sup>10</sup> UNGA, ‘Draft International Covenants on Human Rights, Report of the Third Committee’ (1957) UN Doc A/3764 [46].

as establishing or formally recognizing any particular category of [private] schools or education'.<sup>11</sup>

This general rule, that states are not obligated to secure funding for private educational institutions, does however suffer two notable exceptions. First, several international instruments and bodies suggest that members of protected minority groups, especially those belonging to Indigenous communities, are entitled to receive public funds for the operation of private schools if their needs are not or cannot be realised within the framework of state education. Most expressly, Article 27(3) of the Indigenous and Tribal Peoples Convention (No 169) states that 'governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose'.<sup>12</sup>

In the same vein, the Committee on Economic, Social and Cultural Rights (CESCR), being concerned about the lack of possibility for the Korean minority in Japan to receive education in their mother-tongue and about their culture via the public school system, has recommended the Japanese government to 'officially recognize minority schools, in particular Korean schools, when they comply with the national education curriculum, and consequently make available to them subsidies and other financial assistance, and also recognize their school leaving certificates as university entrance examination qualifications'.<sup>13</sup>

The second exception stems from the principle of non-discrimination. While generally not obligated to fund private education, if a state does choose to do so, it must not discriminate in financial assistance between private educational institutions. For instance, the Human Rights Committee found in *Waldman v Canada* that a Canadian constitutional provision mandating to grant full funding for the schools of one specific religious group but prohibiting to do the same for all others constitutes discrimination on religious grounds and infringes the equal protection requirement in Article 26 of ICCPR.<sup>14</sup>

In fact, the duty of equal treatment and the obligation to fund certain private minority schools are interrelated in that both aim to ensure that the educational needs of linguistic, cultural, and religious minorities are met on par with everyone else. Martin Scheinin has demonstrated this link in *Waldman*. According to Scheinin, when stating that if a minority

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<sup>11</sup> *Jordebo v Sweden* (n 4) [4.2]; *Belgian Linguistic Case* (n 4) [3].

<sup>12</sup> ILO, 'Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries' (1989) (adopted 7 June 1989, entry into force 5 September 1989) 1650 UNTS 383.; Human Rights Committee (HRC), 'General Comment No 23 on the Rights of Minorities' (1994) UN Doc CCPR/C/21/Rev.1/Add.5; CESCR, 'Concluding Observations: Japan' (2001) UN Doc E/C.12/1/Add.67; Zinigrad (n 5) 84–88.

<sup>13</sup> CESCR, 'Concluding Observations: Japan' (n 12) [60]; 'Advisory Committee on the Framework Convention for the Protection of National Minorities' (2002) UN Doc ACFC/INF/OP/I(2002)009' [60]; Zinigrad (n 5).

<sup>14</sup> *Waldman v Canada* (1999) CCPR/C/67/D/694/1996 [10.4]-[10.6] (HRC).

group demands a private religious school to accommodate its legitimate educational requirements and if 'there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system of education' then a state's decision 'not to establish a public minority school or not to provide comparable public funding to a private minority school' would amount to discrimination.<sup>15</sup>

Finally, the parental right to choose an alternative educational institution for their child does not seem to extend to home education. ICESCR does not refer to home-schooling in Article 13 explicitly but the EctHR and the (former) European Commission of Human Rights are of the opinion that prohibition of home-schooling falls within the margin of appreciation of the ECHR member states and is compatible with Art P1-2 of the Convention.<sup>16</sup> In *Konrad v Germany*, the EctHR stated that the 'general interest of society in avoiding the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society' justifies a refusal to exempt children from compulsory primary school attendance notwithstanding the incompatibility of school education with the religious convictions of their parents.<sup>17</sup> On the other hand, international law does not prohibit the practice of home education, which means that states are free to authorise it even if it is not included in the scope of the parental right, as long as they ensure it conforms with minimum educational standards.

The rights to establish and choose private educational institutions are complemented by the parental right to 'ensure the religious and moral education of their children in conformity with their own convictions'.<sup>18</sup> This right reinforces the parental entitlement to pick for their child a private religious school but extends also to the system of public education and entitles parents to a certain degree of influence and control over the contents and structure of education in both public and private schools. Owing to this entitlement states may even be allowed – but not required – to establish and manage optional *separate* educational systems or institutions that would entertain the religious or linguistic wishes of parents. Such separate systems are not considered to constitute discrimination under international law in virtue of the obligation to respect parental rights, granted that they are neither 'contributing to "reverse" discrimination or intolerance', nor 'run in such a way as to prevent minority groups from understanding the language, culture and religious beliefs of the majority'.<sup>19</sup>

On the other hand, the right to ensure the child's religious or moral education does not authorise parents to present any specific demands to adapt the public-school curriculum

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<sup>15</sup> *ibid* individual Opinion by Member Martin Scheinin (Concurring) [5].

<sup>16</sup> *Konrad v Germany* (2006) Application No 35504/03 (European Court of Human Rights); *Leuffen v Germany* (1992) Application No 19844/92 (European Court of Human Rights).

<sup>17</sup> *Konrad v Germany* (n 16).

<sup>18</sup> Article 13(3) of International Covenant on Economic, Social and Cultural Rights (adopted 16 December, entry into force 3 January 1976) 993 UNTS 3.

<sup>19</sup> Article 2(b) of Convention against Discrimination in Education (adopted 14 December 1960, entry into force 22 May 1962) 429 UNTS 93; 'UN Special Rapporteur of the Commission of Human Rights on Religious Intolerance, 'Racial Discrimination, Religious Intolerance and Education' (2001) UN Doc A/CONF.189/PC.2/22 [106].

to their wishes. States therefore may but are not required to add to the program of instruction any contents desired by parents, nor eliminate any contents they might personally find objectionable. Instead, the obligation to *ensure* the accommodation of parental beliefs must be realised at the very least by one of the two following alternatives.

The first option entails that the state 'must take care that information or knowledge included in the [public-school] curriculum is conveyed in an objective, critical and pluralistic manner' and 'is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions'.<sup>20</sup> As an example, sex education that does not advocate 'a specific kind of sexual behaviour', 'does not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible' and 'does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions', does not violate the parents' educational rights.<sup>21</sup>

The second option implies exemption from attendance. Insofar as the state enforces the requirements of objectivity and pluralistic instruction in public schools, parents are not entitled to exempt their children from classes they may find offensive to their convictions (but may still exercise their right to opt for private education that better suits their values). If, however, some public-school classes fail to fulfil these criteria then the state is obligated to guarantee the parental rights within the system of public education by ensuring that parents may exempt their children from those parts of the curriculum. The EctHR has accordingly ruled that parents belonging to the Alevi religious minority in Turkey have the right to exempt their child from religion and ethics classes in a state school because the program of study gave 'greater priority to knowledge of Islam than they do to that of other religions and philosophies'.<sup>22</sup> The obligation to account for parents' religious or moral convictions does not however include accommodation of extreme ideological positions, such as fascism or anti-Semitism.<sup>23</sup>

The right to establish and direct private educational institutions extends to all individuals, including non-nationals, as well as to bodies, i.e., legal persons or entities and allows 'to

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<sup>20</sup> *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 [53] (European Court of Human Rights). CESCR 'General Comment No 13' (n 2) [28]; HRC, General Comment No 22: The Right to Freedom of Thought, Conscience and Religion' (1994) UN Doc CCPR/C/21/Rev.1/Add.4 [6]; 'The Abidjan Principles' (n 9) GP 31.

<sup>21</sup> *Kjeldsen v Denmark* (n 20) [54]; *Erkki Hartikainen v Finland* (1984) UN Doc CCPR/C/OP/1 [10.4] (Human Rights Committee); Zinigrad (n 5).

<sup>22</sup> *Hasam and Eylem Zengin v Turkey* [2007] ECHR 787 [63] (European Court of Human Rights).

<sup>23</sup> Office for Democratic Institutions and Human Rights, 'Guidelines for Review of Legislation Pertaining to Religion or Belief' (2004) 14 <<https://www.osce.org/files/f/documents/d/b/13993.pdf>> accessed 27 February 2023.

establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education'.<sup>24</sup>

The scope of this right is limited by international human right law – e.g., by the obligation to guarantee that ‘the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities’<sup>25</sup> – and is subject to educational standards set by the state, as shown below.

States have the authority to regulate private education. The regulatory measures undertaken by states include the imposition on private educational institutions of minimum standards that may concern the admission, curricula, recognition of certificates, and other procedural or substantive elements of their management.<sup>26</sup> GP47 recognises the general regulatory power of states to introduce such standards. This power is part discretionary and part mandatory.

The *mandatory* regulatory prerogatives arise from the states’ obligation to ensure the realisation of the right to education in private institutions and are outlined in detail in General Principles 51-57 (GPs51-53 prescribe the regulatory framework states must employ and GPs54-57 set a comprehensive list of minimum standards that must be enforced by states in private education).<sup>27</sup> In parallel, states also have a *discretionary* regulatory prerogative to impose on private institutions educational standards that are *higher* than those mandated by international human rights law.<sup>28</sup> This power allows states to seek better protection of the right to education or advance educational ends in the public interest, for example by requiring that private non-minority schools – on par with state-funded institutions – accept an intake of 25% children belonging to disadvantaged groups even if they receive no financial aid from the government;<sup>29</sup> or that private schools comply with a minimum ‘core curriculum’ that acquires students a set of basic skills and knowledge appropriate for the nature and level of their studies.<sup>30</sup>

The power of states to impose educational standards on private educational institutions or otherwise regulate private education is restricted by international human rights law. Among these restrictions are the principles of proportionality and non-discrimination, and the prohibition to equalise the regulation of public and private education (see below).<sup>31</sup> A comprehensive framework outlining the limits of state authority in respect of private education is developed in General Principle 48. This framework is set to guarantee two

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<sup>24</sup> CESCR, ‘General Comment No 13’ (n 2) [30].

<sup>25</sup> Section 2(c) of Convention Against Discrimination in Education (n 19).

<sup>26</sup> CESCR, ‘General Comment No 13’ (n 2) [29].

<sup>27</sup> ‘The Abidjan Principles’ (n 9) 51-57.

<sup>28</sup> Zinigrad (n 5) 98–100; ‘The Abidjan Principles’ (n 9) GP 54 and 54.

<sup>29</sup> *Society for Unaided Private Schools of Rajasthan v Union of India and Another* (2012) 6 SCC [10] (Indian Supreme Court).

<sup>30</sup> Irish Department of Education and Science, ‘Guidelines on the Assessment of Education in Places Other Than Recognised Schools’ (2003) 18–20 <<https://assets.gov.ie/24935/21e41a99ad5e476997fccec34d36bf5.pdf>> accessed 23 February 2023.

<sup>31</sup> HRC, ‘General Comment No 22’ (n 20) [8].

interrelated aims: that states protect the rights of children to education against their parents; and do not violate the parents' rights in education by pursuing state interests.

### **Guiding Principle 48: Limiting the Liberties of Parents**

**The respect for these liberties is subject to limitations determined by law only in so far as those limitations are compatible with the nature of these liberties and solely for the purpose of promoting the general welfare in a democratic society and the realisation of any other human rights. These limitations are justifiable if they seek to ensure:**

- a. that private educational institutions do not supplant or replace public education, but supplement it in a way conducive to the realisation of the right to education for all, with due regard for cultural diversity;**
- b. that the right of children to express their views freely is respected, and that they are given due weight in the exercise of parental choice, in accordance with the age and maturity of the child, and their best interests;**
- c. that the exercise of these liberties does not create any adverse systemic impact on the right to education, including by:**
  - i. leading to or maintaining disparities of educational opportunity or outcomes for some groups in society which nullify or impair the enjoyment of the rights to equality and non-discrimination, such as a segregated education system;**
  - ii. adversely affecting or creating a foreseeable risk of adversely affecting the capacity of the State to realise the right to free, quality, public education;**
  - iii. undermining any of the aims of education guaranteed under international human rights law, such as through the commercialisation of education;**
  - iv. adversely affecting transparency, the rule of law, public accountability, or full and effective participation in education; or**



**v. nullifying or impairing the enjoyment of any other human rights, in particular the rights of the staff working in educational institutions.**

Guiding Principle 48 (GP48) is a *limitation clause* specifying the circumstances under which it is justifiable to limit the rights of parents and of the operators of private educational institutions. The imposition of educational standards on private institutions inherently limits the rights set in GP47 and yet is necessary to establish the right balance between them and between the right to education, other human rights, and legitimate educational interests of the state. To guarantee this balance, the power of states to impose educational standards on and regulate private education is itself limited in scope. GP48 outlines the scope of this power and provides examples for its legitimate application.

Private educational institutions provide parents and children with vital alternatives to public education when the state fails to satisfy their educational vision and needs; they may serve as powerful engines of cultural diversity, plurality of opinions and experimentation with new approaches to education; and serve as the main warrants of democratic values and human rights in authoritarian regimes. But some private institutions are also notorious for increasing socio-economic inequality, marginalising disadvantaged groups, and compromising the capacity of the public education system to guarantee free, quality education for all. Similarly, the parental right to ensure that the religious and moral education of their child conforms with their convictions may serve as an effective protection against state suppression of minorities' culture and traditions but at the same time suppress the child's own wishes and preferences.

The limitation clause in GP48 concerns primarily the establishment and management of private educational institutions, but also includes the rights of parents to ensure the conformity of the religious and moral education of their children with their convictions in *public* schools.<sup>32</sup>

The wording of the first part of GP48 draws on Art 4 ICESCR. It constitutes a limitation clause, typical to international human rights law instruments, which defines the general circumstances that may justify state intervention in the rights cited in GP47. The clause consists of several cumulative requirements.<sup>33</sup>

First, the 'determined by law' definition implies that limitations of the rights of parents and of private operators are subject to the substantive principle of rule of law. It requires the limitations to be 'non-retrospective, not arbitrary or discriminatory, accessible and foreseeable [sic], and subject to effective remedies.'<sup>34</sup> However, the prescription to

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<sup>32</sup> Zinigrad (n 5) 89–95.

<sup>33</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 223–24.

<sup>34</sup> Ben Saul and others, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014) 248; 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) [49]-[51] <<https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural>> accessed 27 February 2023.

determine the limitations 'by law' does not necessarily require that the limitations are ratified in primary legislation. It seems sufficient for this purpose to point to the existence of an administrative or common law prescriptions, or even of an international or regional law norm that sanctions the limitation.<sup>35</sup>

Second, GP48 reiterates the general principle that limitations upon human rights must not undermine these rights' 'nature'. One way to understand this provision is that states are prohibited to infringe upon the core content of the educational rights of parents and of operators of private educational institutions, or, as the Limburg Principles put it, 'a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned.'<sup>36</sup> The principle of proportionality, which I discuss below, reinforces this reading, because 'no matter how significant the public interest, the destruction of core rights cannot easily be viewed as proportionate, and certainly not if core individual human dignity is accorded sufficient weight.'<sup>37</sup>

Alternatively, the obligation to preserve the rights' 'nature' may also be read as a manifestation of the principle of good faith, in its objective sense.<sup>38</sup> According to this interpretation, no limitation of the rights mentioned in GP47 may be devised or implemented in a manner that would undermine their rationale or render parental educational choice meaningless. As opposed to the interpretation provided by the Limburg Principles above, the principle of good faith is not restricted to the core elements of these rights and applies to all its aspects.

The most vivid example of state regulations that are not compatible with the nature of the rights of parents and of private operators is equalising educational requirements for public and private education. Subjecting private education to the same level of control entertained over public schools empties the rights stipulated in GP47 of meaning and constitutes an abuse of state power. Standards imposed on private educational institutions must therefore be limited by a 'regulatory ceiling.' They may not frustrate the institutions' ability to provide students and their parents with a range of distinct ideological, cultural, religious, didactic, or pedagogical alternatives to public education.

Although GP47 provides that states have a discretionary power to impose on private institutions higher requirements than the minimum mandatory standards elaborated in Guiding Principles 54-57,<sup>39</sup> this power is nevertheless restricted to setting '*minimal* standards, respecting the specific mission of the school'.<sup>40</sup> States may only 'require that

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<sup>35</sup> 'Limburg Principles' (n 34) [48].

<sup>36</sup> *ibid* [56]; HRC, 'General Comment No 22' (n 20) [8].

<sup>37</sup> Saul and others (n 34) 258.

<sup>38</sup> Robert Kolb, 'Principles as Sources of International Law (with Special Reference to Good Faith)' (2006) 53 *Netherlands International Law Review* 1, 34.

<sup>39</sup> See Section 2.1.

<sup>40</sup> Jan De Groof, 'Legal Framework for Freedom of Education' in Charles Leslie Glenn and Jan De Groof (eds), *Balancing Freedom, Autonomy and Accountability in Education* (Wolf Legal Publishers 2012) 45.

private education be broadly equivalent to state education. They may assure that private education meets essential educational goals, but must leave the determination of content and methods largely to private schools themselves.<sup>41</sup> Granted that the operators of private institutions fulfil minimal mandatory requirements and their responsibilities under international human rights law, they are therefore ‘free to develop, for example, their own curricula, to apply specific admissibility criteria (even if these would be considered discriminatory in public schools), and teaching methods.’<sup>42</sup>

Third, limitations of the rights in GP47 may only be cast for a proper purpose, or, in the term used by the ECtHR, they must pursue a ‘legitimate aim.’<sup>43</sup> According to Aharon Barak, ‘[t]he purposes that justify limitations on human rights are derived from the values on which [a democratic] society is founded.’<sup>44</sup> GP48 states that to qualify as a proper purpose the limitation must be promoting either ‘the general welfare in a democratic society’ or the ‘realisation of any other human right’.

The term ‘general welfare’ may be alternatively read in this context as ‘general interest’, ‘public interest’ or ‘public good.’<sup>45</sup> Reminiscent of its use in the general limitation clauses in Article 4 of ICESCR and Article 29(2) of the Universal Declaration of Human Rights (UDHR), ‘general welfare’ serves as an umbrella term encompassing such general interests as national security, public order, public health or public morals.<sup>46</sup> However, the promotion of these interests would be considered a proper purpose and justify limitation of rights only if it is consistent with the values of a democratic society.

Fundamental democratic values that constitute a ‘democratic society’ as per GP48 may change from time to time and from one society to another. The Limburg Principles suggest a very general definition for this term, stating that ‘[w]hile there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the UN Charter and the UDHR may be viewed as meeting this definition.’<sup>47</sup>

A more substantive definition is offered by Saul *et al* who conclude that ‘democratic society’ comprises ‘both subjective and objective elements. The subjective element refers to what a particular democracy believes is necessary in the context of that society, its values, and its people. The objective element involves a supervening consideration of what restrictions a hypothetical ‘reasonable’ democracy would accept, including if it were

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<sup>41</sup> Klaus Dieter Beiter, *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers 2006) 562.

<sup>42</sup> Manfred Nowak, ‘The Right to Education’ in Asbjorn Eide and others (eds), *Economic Social and Cultural Rights* (2<sup>nd</sup> ed, Martinus Nijhoff Publishers 2001) 264.

<sup>43</sup> See *Handyside v United Kingdom* [1976] ECHR 5 [47] (European Court of Human Rights); Barak (n 33) Chapter 9.

<sup>44</sup> Barak (n 33) 245–46.

<sup>45</sup> William A Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (CUP 2013) 1069; Barak (n 33) 253.

<sup>46</sup> Saul and others (n 34) 250; Schabas (n 45) 1903–05, 2482, 2757, 2762, 2765, 2767–68, 2772; ‘Limburg Principles’ (n 34) [52].

<sup>47</sup> ‘Limburg Principles’ (n 34) [54], [55].

to place itself in the shoes of those it occupies, and thus better understand and weight the value of the rights of those subject to occupation.<sup>48</sup>

The notion of ‘democratic society’ in some state constitutions may also serve as an inspiration. Consider the opinion of Chief Justice Dickson of the Supreme Court of Canada in *R v Oakes*:

*[T]he values and principles essential to a free and democratic society [...] I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.*<sup>49</sup>

Presidents Shamgar and Barak of the Israel Supreme Court in the *United Mizrahi Bank*, view the concept of a proper purpose from a similar angle:

*A positive purpose from the point of view of human rights and society’s values, including that of establishing a reasonable and fair balance between the rights of different people with inconsistent interests. A proper purpose is one that creates a foundation for living together, even if it entails a compromise in the area of granting optimal rights to each and every individual, or if it serves interests that are essential to the preservation of the state and society.*<sup>50</sup> *The purpose is proper if it is intended to fulfill important social goals for the fulfillment of a social framework that recognizes the constitutional importance of human rights and the need to protect them.*<sup>51</sup>

While very broad, the restriction of limitations upon rights to purposes compatible with a ‘democratic society’ does entail that states do not undermine the very institution of human rights or the firmness of democratic rule. Another element of the ‘democratic society’ component is that limitations upon rights must be proportionate to their purpose. The proportionality requirement is addressed below.

Finally, the realisation of the rights of others also qualifies as a proper purpose for GP48.<sup>52</sup> Limitations upon the rights stipulated in GP47 may be introduced not only for the purpose of ‘promoting the general welfare in a democratic society’ but also to establish an appropriate horizontal balance between the rights of parents and of private operators,

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<sup>48</sup> Saul and others (n 34) 257.

<sup>49</sup> *R v Oakes* [1986] 1 SCR 103 [64] (Canadian Supreme Court).

<sup>50</sup> *United Mizrahi Bank Ltd v Migdal Cooperative Village* [1995] IsrLR 1, 128 (Israeli Supreme Court).

<sup>51</sup> *ibid* 141.

<sup>52</sup> Barak (n 33) 255; Pieter van Dijk and others (eds), *Theory and Practice of the European Convention of Human Rights* (Martinus Nijhoff 1998) 81.

and between the rights of other individuals. The second part of GP48 provides several more specific examples of proper purposes in the context of education, as I describe further below.

The limitations on the rights of parents and of private operators in education must be proportionate to the proper purpose (or the legitimate aims) pursued by the state. The proportionality requirement is a general principle of international law. In the context of GP48 it derives from the requirement for the limitations to be compatible with the values of a 'democratic society'.<sup>53</sup> HRC's General Comment No 22 reiterates the same by asserting that limitations on 'the liberty of parents and guardians to ensure religious and moral education [...] may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.'<sup>54</sup>

The proportionality test has been used in the jurisprudence of the ECtHR, the ECJ and widely exercised in multiple domestic jurisdictions – in all Central and Eastern Europe countries, as well as in Western Europe, Asia, Latin America, Canada, South Africa, Australia and others.<sup>55</sup> It is subject to different interpretations by various courts and continues to evolve and acquire more elaborate characteristics even in the jurisprudence of the ECtHR itself.<sup>56</sup> Yet, in the context of the right to education guaranteed in Art P1-2 ECHR, the Strasbourg Court has stated clearly that 'a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'<sup>57</sup> Furthermore, the ECtHR has applied the proportionality principle in circumstances immediately related to GPs47-48, in *Wunderlich v Germany*, which involved a conflict between the interests of children and their parents. In that case the Court ruled that the parents' refusal to send their children to school may justify 'the withdrawal of some parts of the parents' authority and the temporary removal of the children from their family home.' The withdrawal was said to have 'struck a proportionate balance between the best interests of the children and those of the' parents.<sup>58</sup>

The second part of GP48 (subsections (a)-(h)) provides several examples of what constitutes a proper purpose and hence may justify state limitations of the rights in GP47. It is important to note that, as mentioned above, the proper purpose requirement does not in itself sanction infringement upon the rights of parents and of private operators. Therefore, even if states limit these rights on behalf of one or more of the legitimate aims listed in GP48(a)-(h), these limitations would be lawful only if they *also* fulfil the other requirements – rule of law, prohibition of abuse of rights, and proportionality – set in GP48.

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<sup>53</sup> Saul and others (n 34) 254–55.

<sup>54</sup> HRC, 'General Comment No 22' (n 20) [8].

<sup>55</sup> Barak (n 33) 182.

<sup>56</sup> Eva Brems and Laurens Lavrysen, "'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139.

<sup>57</sup> *Leyla Şahin v Turkey* [2005] ECHR 819 [154] (European Court of Human Rights); (Brems and Lavrysen (n 56) 140).

<sup>58</sup> *Wunderlich v Germany* [2019] ECHR 12 [57] (European Court of Human Rights).

The first proper purpose mentioned in GP48 that may justify limitations upon private education is guaranteeing ‘that private educational institutions do not supplant or replace public education, but supplement it in a way conducive to the realisation of the right to education for all, with due regard for cultural diversity’.<sup>59</sup> The provision of public education is an essential factor in the realisation of the right to education.<sup>60</sup> Yet, the ability of states to establish and manage public educational institutions is ‘being increasingly challenged [...] while the involvement of private actors in education continues to grow’ at the expense of the public system.<sup>61</sup> Addressing this matter, the Preamble to the Abidjan Principles, together with GP17, GP19, GP29, GP34, and GP37, emphasise the importance of prioritising the provision of public education, reinforcing the public education systems and guaranteeing that they are not impaired by the proliferation of private educational institutions.

The former UN Special Rapporteur on the Right to Education has argued in the same vein: ‘The State remains primarily responsible for education on account of international legal obligations and cannot divest itself of its core public service functions. [...] Yet, instead of controlling the growth of privatized, for-profit education, Governments often support private providers through subsidies and tax incentives, thus divesting themselves of their primary public function. As a result, rather than supplementing government efforts, private providers are supplanting public education and commercializing education in the process’.<sup>62</sup> Accordingly, ‘[w]hile preserving public interest in education, effective sanctions in case of abusive practices by private schools are necessary’.<sup>63</sup>

States may therefore legitimately aim to ensure that private educational institutions do not threaten to effectively annihilate public schools, and instead continue to operate along and in addition to them, for instance to guarantee the specific cultural needs of groups that cannot be satisfied within the public system. Facilitating the capacity of states to fulfil their obligations to provide public education and guaranteeing the right to education for all constitutes a proper purpose under GP48.<sup>64</sup>

Another proper purpose that could justify the restriction of parental and private operators’ rights is concern for the child’s autonomy. The state is authorised to seek ‘that the right

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<sup>59</sup> ‘The Abidjan Principles’ (n 9) [48(a)].

<sup>60</sup> Jacqueline Mowbray, ‘Is There a Right to Public Education?’ in Frank Adamson 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 2021).

<sup>61</sup> ‘The Abidjan Principles’ (n 9) [121].

<sup>62</sup> UN Special Rapporteur on the right to education, ‘Protecting the Right to Education against Commercialization: Report of the Special Rapporteur on the Right to Education (Kishore Singh)’ (10 June 2015) UN Doc A/HRC/29/30 [54]-[55].

<sup>63</sup> Kishore Singh, ‘Right to Education and Equality of Educational Opportunities’ (2014) 16 *Journal of International Cooperation in Education* 5, 17.

<sup>64</sup> It has also been recently suggested that international human rights law includes the right to receive *public* education, Mowbray (n 60).

of children to express their views freely is respected, and that they are given due weight in the exercise of parental choice, in accordance with the age and maturity of the child, and their best interests'.<sup>65</sup> The child's autonomy interests are guaranteed by the CRC, which recognises the child's procedural right to be heard (Article 12(1)), imposes an obligation to protect the child's best interests (Article 3(2)), and, most importantly, asserts that the rights of parents should be respected only 'in a manner consistent with the evolving capacities of the child' (Article 5). As children develop, their opinions and choices are to be increasingly taken into account, including for the purpose of deciding what stands in their best interests.

The share of parental involvement in the education of their children is therefore inversely proportional to the child's maturity and capacities: 'By recognizing that the child's capacity properly to understand and exercise his or her rights will evolve as he or she increases in age, Article 5 seeks to reflect the fact that, while parents will have a leading role to play when the child is very young, it will lessen as the child grows older'.<sup>66</sup> The obligation to respect the children's views applies to both public and private institutions, and is implemented also in other GPs.<sup>67</sup> Ensuring consideration of the rights of children to be heard in matters concerning their education constitutes therefore a 'proper purpose' under GP48.<sup>68</sup>

Ensuring that the rights of parents and of private operators do not raise systemic obstacles to the realisation of the right to education is another proper purpose that may justify limitations upon private education.<sup>69</sup> Indeed, the duty of states in GP52 to impose public service obligations on private actors involved in education, aims to warrant, among others, that 'at the systemic level, there are no adverse effects of private educational institutions on the enjoyment of the right to education'.<sup>70</sup> An adverse impact on an educational system may be manifested by sparking or aggravating systemic wrongs such as discrimination, degradation of public education, and incapacity to guarantee the mandatory aims of education, fundamental democratic values or human rights.<sup>71</sup> These examples feature in items GP48(d)-(h) and provide a non-exhaustive list of adverse systemic effects that the state may legitimately attempt to eliminate.

For instance, states may seek to prevent 'disparities of educational opportunity or outcomes for some groups in society which nullify or impair the enjoyment of the rights to

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<sup>65</sup> 'The Abidjan Principles' (n 9) [48(b)].

<sup>66</sup> Philip Alston, 'The Legal Framework of the Convention on the Rights of the Child' (1992) 91 United Nations Bulletin of Human Rights 1, 13.

<sup>67</sup> 'The Abidjan Principles' (n 9) GP21(b), GP32, GP54, GP55(a)(iii), GP66(b)(i), GP69, and GP86(b).

<sup>68</sup> 'Report of the Working Group on a Draft Convention on the Rights of the Child (1981) UN Doc E/CN.4/L.1575 [73]–[74], [76].

<sup>69</sup> 'The Abidjan Principles' (n 9) [48(c)].

<sup>70</sup> 'The Abidjan Principles' (n 9) GP52(b).

<sup>71</sup> Evelyne Huber and others, 'Private Education and Inequality in the Knowledge Economy' (2020) 39 Policy and Society 171, 184; Katie Malouf Bous and Jason Farr, 'False Promises: How Delivering Education through Private Schools and Public-Private Partnerships Risks Fueling Inequality Instead of Achieving Quality Education for All' (2019) Oxfam <<https://policy-practice.oxfam.org/resources/false-promises-how-delivering-education-through-private-schools-and-public-priv-620720/>> accessed 27 February 2023.

equality and non-discrimination, such as a segregated education system'.<sup>72</sup> The CESCR Committee has characterised *systemic* violations of the right to equality as 'discrimination against [...] groups [that] is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups'.<sup>73</sup> Furthermore, systemic discrimination of certain groups in private educational institutions, for instance by means of segregation, must be eliminated by states on a par with all other cases of such violations.<sup>74</sup> The process of rectification involves adopting 'an active [...] comprehensive approach with a range of laws, policies and programmes, including temporary special measures', and 'using incentives to encourage [...] private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance'.<sup>75</sup> Limiting the rights of parents or of private operators to fulfil this duty qualifies as a proper purpose under GP48.

Other legitimate aims listed in GP48 include casting limitations on private education to eliminate negative systemic impact on the state's capacity to provide public education, on its ability to realise the aims of education in private schools, on the guarantee of democratic principles such as the rule of law or on public accountability, and on the guarantee of the rights of other individuals directly or indirectly engaged in public or private education.

The Abidjan Principles take a decisively critical approach towards the commercialisation of education and assign primary responsibility to realise the children's right to receive education for the public education system. Yet, the Principles also recognise the important role of private education in sustaining cultural diversity, in enabling minority groups and individual parents to pass their beliefs and lifestyle on to the next generations, and in restraining the state from abusing its overwhelming educational prerogatives.

The ensuing educational framework pushes states to prioritise public education over private alternatives while preserving parental discretion in some educational choices. To ensure that children's right to education is protected regardless of other interests, the Abidjan Principles require states to guarantee that public and private educational institutions under their jurisdiction comply with minimum educational standards. The scope of parental rights is limited accordingly: the Abidjan Principles hold that the rights of parents and of private educational operators do not include any actions that may put at risk the states' capacity to maintain an adequate system of public education or infringe

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<sup>72</sup> 'The Abidjan Principles' (n 9) [84(d)].

<sup>73</sup> CESCR, 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights' (2009) UN Doc E/C.12/GC/20 [12].

<sup>74</sup> 'The Abidjan Principles' (n 9) GP21(e), GP23(d), GP25

<sup>75</sup> CESCR, 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights' (2009) UN Doc E/C.12/GC/20 [39].



upon the rights of children to education. Within this scope, however, parents have broad discretion in choosing the type of school their child attends and some control over the moral and religious contents to which their child is exposed even in the public education system. States are prohibited from demanding that private schools meet the standards of public education and can restrict the rights of parents only when it is necessary in the interest of children, public education, or other fundamental democratic values.

The international law framework set up by the Abidjan Principles goes a long way towards the realisation of educational rights in the face of neoliberal commodification of essential public services. Its implementation by states is likely to increase the quality of public education and provide parents with better educational alternatives, but it also deserves a caution. Privatisation is perhaps the most recent but by far not the only challenge involved in the guarantee of universal free access to good education. International human rights law must not overlook other aspects of private schooling and parental prerogatives that hinder the children's rights to receive education. I have already hinted at one of these problems above and elsewhere:<sup>76</sup> the lack of a general state obligation to fund certain core-curriculum aspects of private education risks depriving children sent to a private school by their parents from minimum quality education. Another, more general, issue that is not fully addressed in the Abidjan Principles is the need to develop substantive minimum educational standards that apply to all types of education, public and private. Ensuring that private education does not compromise public education infrastructure is not a guarantee that the education provided in either of these institutions is adequate. The Abidjan Principles acknowledge the need of imposing substantive educational requirements upon states,<sup>77</sup> and reference the basic aims of education listed in ICESCR but focuses primarily on the institutional aspect of education.<sup>78</sup> Future interpretive efforts of international human rights law must complement the Principles' vital contribution to the guarantee of the right to education with a detailed list of substantive educational standards.

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<sup>76</sup> Zinigrad (n 5).

<sup>77</sup> 'The Abidjan Principles' (n 9) GP30.

<sup>78</sup> 'The Abidjan Principles' (n 9) GP8.