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The right to freedom of choice in education in Europe

Report¹

Committee on Culture, Science, Education and Media

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Summary

Council of Europe member States must provide for an education system which ensures equal opportunities and high-quality education for all pupils, to transmit both knowledge and the values nurturing the promotion of fundamental rights and democratic citizenship. They also have to guarantee the fundamental right to freedom of choice in education, according to Article 2 of the additional Protocol to the European Convention on Human Rights. This right, which is intimately linked to the rights to education and freedom of conscience, entails the obligation for the States to respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions.

Therefore, the Committee of Culture, Science, Education and Media highlights the need to uphold the principle of State neutrality and pluralism in the national education system, and to guarantee the viability and quality of the network of public-run schools. It also calls for member States to clearly recognise by law the right to establish and run private schools, and the possibility for these schools to be part of the national education system, subject only to objective and non-discriminatory conditions.

In this framework, pupils attending private schools and their families should be granted the same financial benefits available to public-run school pupils and their families, and the funding of private schools which are part of the national education system should be subject only to objective and non-discriminatory conditions.

1. Reference to committee: [Doc. 12061](#), Reference 3656 of 12 March 2010.

A. Draft resolution²

1. The Parliamentary Assembly points out that the effective enjoyment of the right to education is a necessary precondition to enable each and every individual to fully develop and carry out his or her role in society. In order to guarantee the fundamental right to education, every education system must ensure equal opportunities and provide high-quality education for all pupils, seeking to transmit not only the knowledge required to enable them to find employment and play a full part in society, but also the values nurturing the protection and promotion of fundamental rights, democratic citizenship and social cohesion. In this respect, public authorities (at national, regional and local level) have a fundamental and irreplaceable role which they accomplish in particular through a network of educational institutions that they run (hereafter “public-run schools”).
2. It is on the basis of the right to education as explained above that the right to freedom of choice in education should be understood. This right, which is intimately linked to freedom of conscience, is enshrined in Article 2 of the Additional Protocol to the European Convention on Human Rights (ETS No. 9). It carries with it the obligation for all Council of Europe member States, in the exercise of their functions in the field of education and teaching, to “respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”, insofar as these are compatible with the fundamental values of the Council of Europe.
3. The Assembly welcomes the fact that the right to freedom of choice in education is recognised in the constitutions and laws of most Council of Europe member States. It considers that, within a sound national legal framework, schools which are not run by public authorities (hereafter “private schools”, irrespective of terminology and specific arrangements in different countries) can foster the development of high-quality education and bring the education possibilities available into line with families’ demands.
4. Accordingly, the Assembly recommends that the Council of Europe member States:
 - 4.1. uphold the role of public authorities in the field of education and the availability of public-run schools in all parts of the country, as well as the principle of State neutrality and pluralism in the national education system;
 - 4.2. ensure the viability and quality of the network of public-run schools;
 - 4.3. recognise clearly in law, where this has not already been done:
 - 4.3.1. the right to establish and run private schools, at least at primary and secondary level;
 - 4.3.2. the possibility for these schools to be part of the national education system;
 - 4.3.3. the possibility for their pupils to obtain the same qualifications as those awarded following the successful completion of studies in public-run schools;
 - 4.4. ensure that this recognition is subject only to objective, fair and non-discriminatory conditions;
 - 4.5. guarantee, through these conditions, the standards applicable to private schools and a system of regular inspections, that:
 - 4.5.1. the content of the curricula and the teaching methods are not based on or do not advocate attitudes which conflict with the values of the Council of Europe;
 - 4.5.2. no aspect of the school environment violates the rights of children and in particular their dignity and physical and psychological integrity;
 - 4.5.3. private schools do not encourage, by the messages they deliver or the policy they implement, communitarian segregation;
 - 4.5.4. pupils are provided with suitable and secure premises;
 - 4.5.5. the quality of teaching complies with the standards applied to public-run schools;
 - 4.5.6. the nurturing of critical thinking and cultural openness are an integral part of any educational project.

2. Draft resolution adopted unanimously by the committee on 26 June 2012.

5. The Assembly recommends that the Council of Europe member States, while guaranteeing the viability and quality of the network of public-run schools:
 - 5.1. grant pupils attending private schools and their families the same financial benefits (education allowances or other advantages) available to pupils of public-run schools and their families;
 - 5.2. ensure that the funding of private schools which are part of the national education system is subject only to objective and non-discriminatory conditions, including those that are necessary to make sure that the amounts disbursed benefit the families in question, such as the non-profit making status of the schools concerned and the requirement for them to submit their accounts for audit.
6. Finally, the Assembly recommends that the Council of Europe member States:
 - 6.1. carry out as soon as possible the analyses required to identify the reforms needed to effectively guarantee the right to freedom of choice in education;
 - 6.2. ensure the gradual implementation of these reforms at each level of government concerned (central government, regions and local authorities) in line with the competencies of each level, in order to achieve the desirable systemic improvements within a reasonable time, with due regard for the necessary budgetary implications.

B. Explanatory memorandum by Ms Quintanilla, rapporteur

1. Introduction

1.1. Terms of reference and stages in the preparation of the report

1. On 12 March 2010, a motion for a resolution on “Families’ freedom of choice in education in each member State”, presented by Mr Luca Volontè and others (Doc. 12061), was submitted to the Committee on Culture, Science and Education. Ms Blanca Fernandez-Capel Baños was appointed rapporteur in April 2010. After she left the Assembly, the Committee on Culture, Science, Education and Media appointed me in January 2012.

2. Pierre-Henri Imbert, former Director General of Human Rights at the Council of Europe, agreed to assist the committee in the preparation of this report. I wish to thank him warmly for his input.

3. The committee decided to change the title of the report for the first time in February 2011 and to send the Council of Europe member States a questionnaire to gather information on the protection and implementation of families’ right to freedom of choice in education in their respective legal systems. The questionnaire was sent through the agency of the European Centre for Parliamentary Research and Documentation (ECPRD). Thirty-seven States, including 34 member States sent in replies: the analysis in the report therefore has a sound basis of comparative law. In April 2012, the committee decided to give the report its present title.

1.2. Issue to be addressed and scope of the survey

4. In the motion for resolution, it was pointed out firstly that “the right of every person to be educated implies introducing true freedom of education, so that each family ... may choose its school on the basis of its beliefs.” The motion goes on to note that “Some of the school systems in several member States continue to operate according to a centralised model, whereby the State maintains a monopoly on education to the exclusion of the family as a decision-making force in the educational process”. It is therefore necessary to “accept and sustain real freedom of choice in education to enable genuine pluralism in schooling” but also to bring about an improvement in the education system by encouraging competition between schools. The motion concludes by inviting the Parliamentary Assembly to monitor “compliance of the right to effective and non-discriminatory education and freedom of families and children to choose between State and non-State schools”.

5. This report is mainly focused on this aspect of “freedom of choice in education”. This freedom of choice can also be expressed through the choice of home schooling; however, this other aspect (which raises issues distinct from those related to the right to choose between public and private educational establishments) is not dealt with in this report.

6. Similarly, this report does not look into parents’ other rights in education, which complement the right to freedom of choice in education, namely:

- the right of appeal, which offers parents the possibility of expressing their opposition to certain decisions taken by the school authorities;
- the right to information, especially concerning their children’s progress, the organisation of the education system in general, and that of the school in particular;
- the right of parents to participate in organised formal structures of the education system.

7. To verify “the effective and non-discriminatory respect of the right of families and children to a free choice between public and private schooling”, this analysis will take as its starting point the European legal framework and then go on to consider the national legal systems.

8. As regards the European legal framework, two instruments of the Council of Europe are particularly important: the European Convention on Human Rights (ETS No. 5, “the Convention”) (as interpreted and implemented according to the case law of the European Court of Human Rights (“the Court”)) and the European Social Charter (revised) (ETS No. 163). The European Union’s Charter of Fundamental Rights supplements them. The report studies the relevant provisions contained in these texts. The Charter of Fundamental Rights is only directly applicable to European Union member States, of course, but to my mind it cannot easily be ignored.

9. When it comes to assessing national standards and arrangements, the report looks in particular at whether, and to what extent, member States' legal systems make provision for the following:

- the right for private entities to establish educational establishments which (subject to certain conditions³) are incorporated in the national education system as providing a “public service”. This also means that studies performed in these institutions and, where appropriate, the certificates/diplomas awarded by these establishments are officially recognised;
- the possibility for these establishments to cater to the specific needs of families, while at the same time complying with the terms and conditions governing schools established by the State (public authorities);
- the possibility for the State to provide financial support for these establishments (possibly subject to further conditions, in addition to those that applied to their creation) and/or for families who decide to send their children there.

10. It should be pointed out that families' specific needs are most often couched in terms of religious education; but it may equally be that people wish to send their children to a particular school because of its teaching methods or its focus on a particular area (arts, languages, life sciences, technology, etc.). In other words, one may not consider that freedom to choose a school be simply the freedom to choose a “faith-based” school, although in practice this is the most important aspect.

11. It should further be noted that educational choice can only be exercised fully in a system guaranteeing the right to education, or even the right to quality education for all, without discrimination, which makes it possible to acquire a broad knowledge and prepares for entry into the labour market, but is also aimed at personal development and at preparing children for life as active citizens in a democratic society by instilling basic values in them. For this reason, the issue of State funding (direct or indirect; total or partial) for non-State schools is examined with due regard for the impact that the principle of free compulsory education and non-discrimination might have in this respect.

2. Legal implications of the right to freedom of choice in education in European law

2.1. Reference texts

12. A number of international instruments contain provisions on the right to education. Many of them are universal in scope: Universal Declaration of Human Rights (10 December 1948, Article 26); Convention Against Discrimination in Education (14 December 1960); International Covenant on Economic, Social and Cultural Rights (16 December 1966, Articles 13 and 14); Convention on the Rights of the Child (20 November 1989, Articles 28 and 29). For Council of Europe member States, however, it is clear that the key instrument is the European Convention on Human Rights, and more specifically its first Additional Protocol (ETS No. 9) (20 March 1952), to which may be added the European Social Charter (18 October 1961 (ETS No. 35) and 3 May 1996) and the Charter of Fundamental Rights of the European Union.

2.1.1. *The Additional Protocol to the European Convention on Human Rights*

13. Article 2 of the Additional Protocol to the European Convention on Human Rights reads as follows:

“Article 2. Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

14. From the lively and at times confusing debates to which the drafting of this article gave rise, at least one clear point emerged, which is of direct relevance to the subject that concerns us here: “The duty of the State to establish or to support out of public funds, in whole or in part, schools corresponding to the various trends of opinion in the population ... should be considered as being entirely outside the scope of the Convention or the Protocol” (Report by the Committee on Legal and Administrative Questions, 2 October 1951).

3. For example: compliance with the standards laid down by the education authorities in terms of curricula, number of hours and conditions of instruction; non-discrimination in the selection of pupils for admission; requirement to undergo inspections, etc.

15. This interpretation was endorsed by the Court in one of its first judgments (“the Belgian linguistic case”, 23 July 1968): “The negative formulation [of the first sentence of Article 2] indicates, as is confirmed by the “preparatory work” ..., that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level” (paragraph 3). This finding carries all the more weight because it was not strictly necessary considering the object of the application. To our knowledge, there has been only one case directly related to State funding for a private institution [a Rudolf Steiner school]: the application in *W. and K.L. v. Sweden*, which was declared inadmissible by the Commission (decision of 11 December 1985). Drawing on the aforementioned Court judgment, the Commission held that, with regard to Article 2 of the First Protocol, “States are not obliged to subsidise a particular form of education in order to respect the religious and philosophical convictions of parents: it is sufficient that they respect the said convictions within the existing and developing system of education.”

16. It follows from this case law that States may choose to contribute financially to the running of private educational establishments. But they have no legal obligation to do so under the Convention.

17. However, it should be noted that, despite the negative wording of the first sentence of Article 2 of the Additional Protocol to the Convention (“No person shall be denied the right to education”), in its judgment in “the Belgian linguistic case”, the Court held that this sentence embodies a genuine right (paragraph 3). In its judgment of 7 December 1976 in *Kjeldsen and others v. Denmark*, it confirmed that this sentence “enshrines the right of everyone to education”, and went on to state that “it is on to this fundamental right 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 ...” (paragraph 50).

2.1.2. *The European Social Charter (revised)*

18. The European Social Charter contains several provisions that relate directly or indirectly to education: Articles 9, 10, 15 and in particular Article 17 which has been completely rewritten in the revised version of the Charter. Under this article, “*the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:*

1. *(a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose; ...*
2. *to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.”*

19. The reference to “parents’ rights [and duties]” linked with the obligation to secure to children and adolescents “the education ... which they need” and “free primary and secondary education” could afford a basis for more advanced protection of parents’ right to freedom of choice in education than what is currently offered by the Additional Protocol to the European Convention on Human Rights. However, according to the information that we have been able to gather, the European Committee of Social Rights has not had the opportunity to address the issues discussed in this report.

2.1.3. *The Charter of Fundamental Rights of the European Union*

20. The Charter of Fundamental Rights of the European Union contains the following article:

Article 14 – Right to education

1. *Everyone has the right to education and to have access to vocational and continuing training.*
2. *This right includes the possibility to receive free compulsory education.*
3. *The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.*

21. This provision makes the same basic points as Article 2 of the Protocol to the European Convention on Human Rights but in a more comprehensive and robust form. This is especially true of the positive, rather than negative, wording of the right to education, which is clearly recognised. This change marks an important shift because the negative wording has been used by the European Court of Human Rights as an argument to avoid the obligation to contribute to the funding of private establishments.

22. It will also be noted that the Charter of Fundamental Rights further establishes the principle that compulsory education should be free of charge. In the accompanying “Explanation”, however, it is pointed out that “As it is worded, the latter principle merely implies that as regards compulsory education, each child has the possibility of attending an establishment which offers free education. It does not require all establishments which provide education, in particular private ones, to be free of charge”.

23. The last point to note is that the Charter recognises the freedom to found educational establishments. The Explanation, however, merely states that such freedom “is guaranteed as one of the aspects of freedom to conduct a business”.

2.2. Key principles

24. To round off this survey of the pertinent law as it stands at present, three principles, which are of particular importance here, bear examination: pluralism, non-discrimination and respect for the rights of the child.

2.2.1. Pluralism in education

25. Clearly, having private educational establishments operate alongside State establishments contributes to pluralism. It is important to be aware, however, that this kind of pluralism (arising from the diversity of establishments) is not what the authors of the Convention had in mind, nor indeed what is being referred to by the Court. The basic idea is that democratic systems need to be protected against any totalitarian threat by preventing the indoctrination of young people. Hence, the need to ensure and preserve pluralism within State establishments, in particular by respecting parents’ religious and philosophical convictions.

26. In its judgment in *Kjeldsen and others v. Denmark*, the Court clearly stated that: “The second sentence of Article 2 [of the Additional Protocol] 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. In view of the power of the modern State, it is above all through State teaching that this aim must be realised” (paragraph 50).

27. This assertion prompts a definition of the Court’s position regarding the question of pluralism in education. In line with the concerns of the drafters of Article 2 of the Additional Protocol, the Court chiefly emphasises the need to preserve pluralism in State schools, so as to prevent the indoctrination of youth. But this does not mean that it disregards the importance – for true pluralism – of the existence of private schools. On the contrary, the possibility of their creation is implicit in the State’s respect for the convictions of parents.

2.2.2. Non-discrimination

28. The principle of non-discrimination was bolstered by Protocol No. 12 to the European Convention on Human Rights (ETS No. 177), since it provides for the collective enforcement of a general prohibition (rather than simply of the rights and freedoms enshrined in the Convention) of discrimination. Now it is “the enjoyment of any right set forth by law” that must be secured “without discrimination on any ground”.

29. This principle applies first and foremost to institutions under the control of the State; in particular, the entrance requirements of these institutions must not give rise to any discrimination. Likewise, if a State decides to contribute to the running of private establishments, it cannot choose those establishments in an arbitrary manner but must do so on the basis of general rules that apply without discrimination to all prospective establishments. Does that mean, however, that a State is being discriminatory if it does not help any private establishments at all?

30. In the light of the legal considerations set out above, this question remains open. Ever since the European Union’s Charter of Fundamental Rights set out clear provisions in this regard, States should not be able to oppose the setting up of private establishments (subject of course to certain conditions). But this “freedom to conduct a business” does not in itself imply a right to receive assistance from the State (in a number of sectors, State enterprises often exist alongside private enterprises which receive no subsidies). Conversely,

it could be argued that the right to education which the Court has described as a “fundamental right” is of very special nature and that, through their participation, private establishments help to perform a vital public task, in the same way that State establishments do.

2.2.3. *Respect for the rights of the child*

31. It should finally be mentioned that parents’ freedom of choice in education is to be joined with the rights secured to the child itself, which the State has a duty to safeguard.

32. This aspect does not seem to be directly contemplated by the second sentence of Article 2 of the Additional Protocol to the European Convention on Human Rights, which simply lays down the obligation of the State to respect parents’ religious and philosophical convictions. It can in fact be noted that in the Court’s view, it is the importance of the State’s respect for parents’ convictions which affords them the possibility of placing their children in private schools (see for example the decision of 25 May 2000, *A.J. Alonso and P.J. Merino v. Spain*).

33. Nonetheless, in the Explanation accompanying Article 14 of the Charter of Fundamental Rights, it is stated that “Regarding the right of parents, it must be interpreted in conjunction with the provisions of Article 24”. This article deals with “The rights of the child”. Paragraph 2 provides that: “In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.”⁴ States are called upon to ensure effective protection of these best interests of the child, at the same time as being required to respect the responsibility, right and duty of parents to provide direction to their children.⁵

3. Recognition and actuation of the right to freedom of choice in education in the legal systems of the Council of Europe States

34. The analysis of comparative law in this chapter relies essentially on the replies to the questionnaire from 34 member States, namely: Albania, Andorra, Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Lithuania, Republic of Moldova, Montenegro, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey, United Kingdom (England), Ukraine. Canada, the United States and Israel also supplied information.

35. For a better understanding of the situation in some countries, I also consulted the national reports of the Eurydice network on education systems⁶, and the national reports on relations between the State and religion published in connection with the XVIIIth International Congress of Comparative Law in Washington (July 2010).⁷ The main information items are presented schematically in a separate document [AS/Cult/Inf (2012) 02 rev⁸] and a commentary on them is given in the following sections.

3.1. *Right to open private schools and recognition of education in them*

3.1.1. *Statutory basis of the right to freedom of choice in education*

36. All countries that replied to the questionnaire in some way recognise the right to freedom of choice in education. In 28 member States of the Council of Europe, this right has a constitutional embodiment. Sometimes recognition is indirect (as is the case in Sweden, through references to the norms of the European Convention on Human Rights) or implicit. In that respect, the mere fact of mentioning the possibility for

4. In its wording, this provision is very close to the one in Article 3 of the Convention on the Rights of the Child: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

5. See Articles 5 and 14 of the Convention on the Rights of the Child.

6. http://eacea.ec.europa.eu/education/eurydice/index_fr.php.

7. Religion and the secular state: interim national reports (published on the occasion of the 18th International Congress of Comparative Law, Washington, D.C. – July 2010) under the editorship of Javier Martinez-Torrón and W. Cole Durham, Jr., General Rapporteurs, The International Center for Law and Religion Studies Brigham Young University – Provo, Utah, 2010.

8. Document available at the following address:

<http://assembly.coe.int/Main.asp?link=/CommitteeDocs/ComDocMenuCultEN.htm>.

individuals or entities governed by private law to found private schools presupposes the possibility for families to place their children in these schools. Everywhere, law determines the conditions and modalities of implementation of the right to establish private educational institutions.

3.1.2. Conditions stipulated for setting up private schools

37. All countries that answered the questionnaire provide the possibility of creating private teaching establishments at all levels of education (primary, secondary and higher). Only Greece prohibits by a constitutional provision the creation of private universities.

38. In a majority of States, an applicant for the opening of a private school must lodge a request for permission with the administration. The granting of such permission is, in almost all cases, subject to one or more of the following conditions:

- Compatibility with the syllabus and/or goals of national education; this requirement presupposes that the course content and the number of teaching hours are not necessarily identical to, but are compatible with, what is laid down in the country's public education system.
- Financial capability and stipulations concerning premises; this concerns conformity to the stipulations made by national legislation and regulations in terms (particularly but not exclusively) of the owners' solvency, suitability of premises, safety and quality of fittings and equipment, etc.
- Teachers' academic and/or professional ability; this condition concerns the specific qualifications or diplomas and/or the professional proficiencies which the staff of the future school must possess.

39. Other conditions are sometimes laid down, such as:

- specific educational provision, that is the need for the school to display specificity as to the content or the form of its teaching: foreign language, religious instruction, particular educational approach, etc;
- obligation not to distinguish between pupils according to the parents' financial circumstances.

40. In three countries (Belgium, France and Italy), prior permission is not required to set up a private school.

3.1.3. Conditions of recognition of the education and diplomas provided by a private school

41. In all the countries that answered the questionnaire, there is a possibility for recognising the education and, if necessary, diplomas provided in private schools, subject to the fulfilment of certain conditions. If these are fulfilled, the school is "recognised" or "accredited" by the State.

42. Accreditation is not a mandatory procedure in all cases. However, unaccredited private schools are rare. Indeed, besides recognising the value of the education undergone in private schools, accreditation is in general a condition *sine qua non* of eligibility for public financial support.

43. In some systems, permission and accreditation constitute one and the same procedure or they are strictly consecutive. These systems are of interest from the procedural standpoint, having the advantage of simplicity in obviating bureaucratic clutter which could have a restrictive effect.

44. In almost all countries, accreditation is granted (logically) after assessment of the teaching syllabus prescribed by the private school; most of the time other conditions are added, resuming or completing those required to create the school. This is the case also in the three countries (Belgium, France, Italy) which do not require permission to be obtained in order to establish a private school. In general, the conditions to be met are identical or equivalent to those applicable to educational institutions founded by the State or public authorities.

45. It should be noted that in most countries, accreditation of higher education establishments is conducted in the same way whether the establishment comes under public or private law. It is founded essentially on an assessment of the quality of the training proposed.

3.2. Practices regarding the funding of private schools and controls applied to them

3.2.1. Public funding of private schools

46. Ten member States (Albania, Andorra, Croatia, Cyprus, Georgia, Greece, Russia, Serbia, “the former Yugoslav Republic of Macedonia”, Ukraine) provide for no public funding of private schools. In the others, the assistance which private schools may receive takes very diverse forms. The administration may provide:

- general grants (freely allocated by the recipient to its different items of expenditure) often determined according to a standard cost per pupil and the number of pupils enrolled in the school;
- specific grants (to be allocated to the items of expenditure prescribed by the regulations);
- tax relief.

47. The State may also directly defray certain expenditure (and directly pay the private school’s “creditors” the sums owing). This is the solution chosen in France for the remuneration of the teachers and certain other operating costs.

48. It can be noted that in various countries the cost that the State accepts to pay for the pupils of a private school is equivalent or virtually equivalent to that borne for State school pupils, in accordance with the principle of non-discrimination.

49. For example, in Finland, authorised private schools are funded by central and local government on the same basis as State schools. In Sweden, local authorities fund the independent schools by applying the same criteria as for the funding of municipal schools (mainly, a certain amount per student). In Spain, private schools that fulfil all normative standards and which offer free education can receive public funding. In these cases, an agreement is signed with the competent education authority: these private schools thus enter the public education service system and are funded by the budgets of the State or the autonomous communities on the same basis as State schools. In the Slovak Republic, State financial support is provided for infrastructures (since January 2007) as well as the operation of private or denominational schools; the funding system has as an objective, among others, to introduce a standardised system of funding per student and to support equality between the various schools’ founders.

50. In other countries, the public funding which private schools receive per pupil nears, or takes account of, the financial cost of a pupil attending a State school. In Germany, the *Länder* provide minimum financial support to private educational institutions. These grants generally cover operating costs (staff, equipment) and sometimes other costs (construction, free school supplies for students); overall public funding received by these institutions per student is equivalent to the financial cost of a student attending a State school. In Belgium, the accreditation of the institution automatically gives right to specific grants for a given expenditure position: personnel, equipment, and construction; in addition to these grants, accredited institutions can benefit from certain services and facilities, which the public educational establishments have a right to (such as canteens and swimming pools). In Denmark, the annual financing (calculated on the basis of the number of students) covers operating costs and it corresponds, in principle, to the cost covered for students in municipal schools minus registration fees paid by families. Indeed, schools must in part be self-financing.

51. Nevertheless, it should be noted that in many member States of the Council of Europe, the funding of private institutions is either non-existent or remains at a low level.

3.2.2. Conditions of eligibility for public funding

52. In a majority of the countries that provide for financial support to private schools, accreditation qualifies them to receive it. Among the other conditions (additional or alternative to accreditation), the following should be mentioned:

- the non profit-making nature of the school;
- the absence of discriminatory selection criteria;
- the satisfaction of a specific need;
- a minimum size (of enrolment).

53. For example, in Austria accreditation is not stipulated in order to obtain public funding, but the private school must be non profit-making, meet a specific demand of the population and not impose selection criteria for pupils' admission. In Spain, where the principle of non-discrimination is mentioned explicitly among the basic principles of the education system, private schools must provide free education in order to sign an agreement with the education authorities. In Denmark, among other requirements, schools must be non-profit and of a minimum size to be eligible for public funding.

54. In some countries, even where all conditions are fulfilled, public funding is not necessarily granted because there is a discretionary power of the administration in the matter (Norway, for example).

55. In Montenegro, the law provides for a positive obligation to fund a private institution if the required conditions are met, but the mutual rights and obligations of the State and of the institution in question shall be fixed by a contract. The law also provides for the prohibition to finance primary education institutions (and the duty to interrupt an ongoing funding) if the enrolment in this private school endangers the existence of the single public establishment of the area concerned. This last condition, which is an extreme case, deserves to be mentioned, as it is about preserving the role of the State in the field of education.

3.2.3. Direct assistance to families

56. In some countries, there is machinery for direct assistance to families. Some of these contributions are paid irrespective of whether the school attended by the pupil is public or private, while others are only paid to families who send their children to a private school (the corresponding fee is supported directly in the case of students in State schools).

57. For example, the families of pupils attending recognised private schools can obtain, in Germany, reimbursement of their enrolment fees or transport costs; in Italy, partial reimbursement of enrolment fees. In France, a back-to-school allowance is available to all families – subject to means tests – whether they have children in private or State schools. To mention an example from outside Europe, in the United States, some States or municipalities provide for a system of school vouchers for low income families with children in private schools, so that they can pay the enrolment fees.

3.2.4. State system of private school inspection

58. In general, private institutions, in particular those of primary and secondary education, are subject to a system of school inspection and competent authorities carry out controls similar to the checks on State schools.

59. In some countries, the controls applied to private schools are more developed, particularly where “recognised” schools are concerned. For example, in Austria these schools undergo scrutiny for compliance both with the requirements applicable to private schools and with the stipulations relating to State schools. In Belgium, a rigorous system of inspection (financial audit and administrative review, checking of the compatibility of the syllabus) is applied to subsidised private schools. In France, all private schools are subject to inspection, but more extensive control applies to “recognised” (contracted) schools (including the financial accounts, the teachers' proficiency and the compatibility of the teaching syllabus).

4. Conclusions

60. The right to freedom of choice in education cannot assert itself and cannot be understood correctly unless it is placed in the broader context of a system which guarantees the fundamental right to education in an effective manner. The principles that should be the basis of this system should be:

- a quality education for all students, capable of ensuring not only employability but also the transmission of knowledge and values that promote freedom, equality, democratic and responsible citizenship, solidarity and respect for others;
- fairness and equality of opportunity, inclusion and non-discrimination among students.

61. These principles apply fully when it comes to the implementation of the right to freedom of choice in education. This right is closely linked to the right to freedom of conscience and respect for religious and philosophical beliefs. Its establishment, however, cannot justify any diversion by communitarian trends: the possibility to open schools with a specific cultural and religious mark can never exempt these schools or the families involved from the duty to respect the fundamental values advocated by the Council of Europe.

Similarly, a situation where the right to freedom of choice in education becomes a way for a social and economic elite to consolidate its grip on society by reserving the best schools and universities, must be avoided.

62. Parents' rights regarding freedom of choice in education must be construed with due regard to other fundamental rights and freedoms, especially those of children themselves, and States must ensure their effective observance. Thus protection of children's rights in a school setting must be fully secured.

63. In that respect, conditions for the creation and accreditation of private schools and the power/duty of States to supervise compliance with those conditions – and with the law in general – must offer safety nets for averting excesses (practice of corporal punishment, teaching methods that imperil children's psychological integrity, instruction which presents women as inferior to men, or contains incitement to racism or discrimination, etc.). It would be advisable, on that account, to recommend that verification procedures applicable both to State and to private schools be in place to ensure that parents' freedom as to their convictions and their choice in education do not give rise to infringements of children's fundamental rights and especially their dignity and their physical and psychological integrity.

64. In this framework, freedom of choice in education means that parents should be able to have their children schooled in establishments set up by private individuals or entities, and that the State should recognise, where the (non-discriminatory) conditions laid down by law are met, the validity of this schooling as these establishments fulfil a function of public service.

65. Presented in those terms, this freedom seems to be generally recognised in the Council of Europe member states. This is so at least in the States that answered the questionnaire. But the point raised is whether recognition of the freedom to open private schools suffices to make the right to freedom of choice in education fully effective, or whether free choice of education and teaching must not only be recognised but also supported. In other words, one may ask whether States are under an obligation to help the schools concerned so that the families who turn to them bear a financial burden comparable to the one imposed on families whose children are in State schools.

66. As the law and case law of the European Court of Human Rights stand at present, States do not have any legal obligation to contribute financially to the running of private schools under the European Convention on Human Rights. But, as in other cases, an evolution of the case law in this area is possible.

67. Like most provisions of the Convention, Article 2 of the Additional Protocol has had a constantly evolving interpretation. Thus, in its judgment in the case of *Kjeldsen and others v. Denmark*, the Court not only confirmed that the first sentence of this article "enshrines the right of everyone to education" but also established the link between the first and the second sentences by holding that "It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions", and pointed out that "the first sentence does not distinguish, any more than the second, between State and private teaching" (paragraph 50).

68. More recently, in its *Leyla Sahin v. Turkey* judgment of 10 November 2005, the Court relied on an Assembly recommendation to corroborate its approach inclining to a dynamic interpretation of the Convention⁹. This shows the importance attached to a statement of position by the Assembly. This would involve, firstly, highlighting the inadequacies of the present situation due to the lack of a legal obligation for States to contribute to the running of private schools and, secondly, emphasising that the interest at stake is the effectiveness of the right to freedom of choice in education.

69. Moreover, the European Commission of Human Rights, in its decision of 6 September 1995 on Application No. 23419/94 by *Verein Gemeinsam Lernen v. Austria*, while recalling that "there is no positive obligation on the State under Article 2 of Protocol No. 1 to subsidise any particular form of education",

9. The Court held that "it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, the Convention is a living instrument which must be interpreted in the light of present-day conditions ... While the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no watertight division separating higher education from other forms of education. In a number of recently adopted instruments, the Council of Europe has stressed the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy (see, *inter alia*, Recommendation No. R (98) 3 and Recommendation 1353 (1998)" (paragraph 136).

reaffirmed that “Article 2 of Protocol No. 1 to the Convention guarantees the right to start and run a private school (cf. *Jordebo and others v. Sweden*, No. 11533/85, Dec. 6.3.87, D.R. 51, p. 128)” and also indicated that “Article 14 ... requires that any subsidies which are made should not be made in a discriminatory fashion”.

70. In this respect, public funding of private schools meets the need 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 their right to freedom of choice in education should agree to pay the whole of the expenses which the State consents to cover (in full or in part) for State school pupils. Otherwise, the protection of this right is weakened, even withheld in practice from all families without sufficient means, contrary to the principle of non-discrimination.

71. It may be added that in countries where a significant percentage of pupils are registered in recognised private institutions, if, today, these pupils were to be educated in State schools, the burden on the State budget (or local communities) would probably be heavier than what is necessary to provide a fair financial share for the private schools in question.

72. It is of course altogether legitimate for financial participation by the State (or by other public authorities) to be contingent on the beneficiary private school's compliance with the conditions also imposed on State schools and stipulated in order to offer good quality education. Indeed, compliance with these conditions signifies that the private school genuinely aids the mission of public service in the field of education. In this respect, the State must not only have the possibility, but also the obligation of regularly certifying by appropriate control mechanisms that the standards which are imposed by law on all schools to assure pupils of an education and proper conditions of study are met.

73. An observation on “pluralism”: it is clear that the State must guarantee and preserve pluralism in its own system of schools, and this starting with State schools; but a system that includes only State schools cannot fulfil all the requirements of true pluralism. The European Court of Human Rights does not disregard the importance for true pluralism of the existence of private schools (see paragraphs 26 and 27). Having regard to the obligation of impartiality towards the various convictions, and to the principle of secularity, it can be argued that pluralism is guaranteed more easily and therefore more effectively by the State when it permits a network of non-State schools to be part of the national education system.

74. The effective implementation of the right to freedom of choice in education helps to match educational provision with the demand of families. If certain objective and fair conditions, to which the creation and operation of private educational institutions can be subject to, are met, this can promote the development of quality education. For example, certain innovations which are authorised in private institutions can allow parents to compare the merits of various teaching methodologies or alternative contents.

75. In short, effective protection of the right to freedom of choice in education requires:

- recognition by law of the right to open private teaching establishments, at the levels of primary and secondary education;
- the possibility for these establishments to form part of the system of the public education service, and for their pupils to obtain the same diplomas as those conferred on completion of studies in a State school;
- a fair funding system for private educational institutions which receive the authorisation required by law.

76. These three elements should be subject only to compliance with the fair conditions determined by law. The applicable requirements – and the inspection arrangements made to supervise their observance – should be aimed at securing to all pupils working conditions and a quality of education consistent with the standards applied to schools run by the State and/or the other public authorities.

77. Furthermore, it is plain that private schools should be allowed no discriminatory selection (for example the possibility of excluding pupils on the ground of their religious convictions), and that in no case the teaching they offer should promote values and attitudes in conflict with the values on which the Council of Europe is based. Private institutions must also give parents all the necessary information (including information about their courses and opportunities for students to access the next level of studies) in order to permit informed decision making.

78. Finally, the State must safeguard the permanence of public schooling throughout its territory and that is in order to guarantee pluralism; it seems therefore legitimate to refuse the opening of a private establishment, if its creation means the non-viability of the single public establishment existing in the school area concerned

for the corresponding levels of education. Nevertheless, in this case, the State must ensure that the right to freedom of choice in education, as guaranteed by the European Convention on Human Rights, is fully respected in the public institution in question.

79. Two further conditions may be justified (without being indispensable):

- the offer of specific educational provision in response to a demand not met by the State schools in the same locality;
- a minimum size (testifying to the existence of a real need as well as a certain viability).

80. Adequate financial support is indispensable in order to uphold the principle of equal treatment whatever the educational choice of families may be. This does not presuppose that the expenses of private schools should be defrayed in full, but that the expenditure per pupil borne by the State should not vary significantly according to the choice of families, so that the choice does not penalise them.

81. States must retain complete freedom as to the actual funding arrangements: general grants, earmarked subsidies, or others. As an alternative (or complement) to coverage or reimbursement of certain costs, they may also choose to grant families standard reimbursements at an appropriate level.

82. It is also the right, not to say duty, of States to make their financial participation subject to precise conditions. In that respect, the requirements linked with the creation of the schools and the conferment of a status incorporating them into the national education system may be backed by further requirements, particularly the condition of being non profit-oriented, and subjection to auditing of accounts.

83. The importance which this report attaches to the role of private schools should not make us lose sight of the fact that effective protection of the right to freedom of choice in education also calls for quality State education. It is not at all a matter of arguing that the State should relinquish, or even reduce, its role in this crucial area. In fact what is needed is a system in which State and private schools co-exist on an equal footing.

84. Investment in education (State and private) signifies a stake in a country's future. Of course, account must be taken of the difficulties faced by States in the current period of economic crisis and budgetary restrictions. In such a context, it is understandable that States are able to reform their systems (where necessary) only by stages. Nonetheless, the necessary reforms should be put in hand without delay and be completed within a reasonable time – for example within the term of a legislature.