

THE RIGHT TO PRIVATE SCHOOL EDUCATION

ON THE INTERPRETATION OF SECS. 79 AND 82 OF
THE FINNISH FORM OF GOVERNMENT ACT

BY

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1. INTRODUCTION. INTERNATIONAL CONVENTIONS

Finland has ratified the 1966 UN Covenant on Economic, Social and Cultural Rights. The Convention provides, *inter alia*, that the State Parties to the Covenant undertake to have respect for the liberty of parents to choose for their children schools other than those established by the public authorities, provided, however, that those schools conform to such minimum educational standards as may be laid down or approved by the State (Art. 13(3)).

The Covenant here expresses a liberal ideology. By allowing alternative education, a pluralistic society is approved.

For it is obvious that a public school system may function according to a regimentative purpose. There is a certain risk that the educational plans of schools established by public authorities are laid down in accordance with the political views and the educational principles of the group in power. The children are thus raised accordingly.

The ensuing result may easily be a uniform development shaped by the view of the majority or, in an authoritarian society, by the leading group. Minorities and groups in opposition are put in an inferior position when youth is raised in a spirit opposite to their views.

A supplementary private school system, where a minority culture may grow, would counteract such tendencies. Other thoughts and ideas than those adhered to in the public schools can be presented.

When the provisions of the UN Covenant were drafted, particular regard was paid to ethnic minorities and dissenting religious groups. But it is a matter of course that the freedom to establish private schools applies also in other situations. In France, for instance, the underlying motive for accepting private schools is the fact that they may offer religious education not provided in the public schools.

Finland is also bound by the UNESCO Convention of 1968 against discrimination in education. This Convention is particularly directed against maintaining separate school systems within a State for the purpose of discriminating against a particular group of citizens. On the other hand positive discrimination is accepted, viz. the setting up or maintenance, on grounds of religion or language, of separate educational systems or institutions, offering an education according to the wishes of parents or guardians. One condition, however, is that participation in such systems or institutions is made optional. Any

education provided should conform to the minimum standards laid down for education at the respective level.

The UNESCO Convention also expressly states that it is essential to respect the freedom of parents and guardians to choose for their children educational institutions other than those maintained by public authorities.

It is considered important to provide for a religious and moral upbringing of children according to their conviction in a way consistent with the legal system of the country. No individual or group should be subject to religious teaching not conforming to their faith. In particular the importance is stressed of the right of members of ethnic minorities to maintain their own educational activity including independent schools and, depending on the educational policy, the use of, or education in, their own language (Art. 5).^{1,2}

Thus the UN Covenant and the UNESCO Convention are consistent, which of course is to be expected. Nevertheless the UNESCO Convention is more comprehensive, because it expressly touches upon education. Thus only the UNESCO Convention contains a provision granting ethnic minorities the right to educational institutions of their own. It is quite another thing that this provision is applied in practice only in few of the contracting States. Nor is the principle, expressed in the UN Covenant, of the obligation of the State to tolerate alternative schools to the public ones valid except in a minority of the contracting States.³ The matter of funding the private school system is not touched upon, neither in the Covenant nor in the Convention, although it is of central importance in this connection.

The UN Covenant recommends that basic education be made compulsory and free of charge (Art. 13(2)). A corresponding provision is contained in the UNESCO Convention (Art. 4).

These provisions could be so construed that private education should also be free of charge, which presupposes total government funding, or, if private funding other than school fees is available, government funding of the remainder. Under such circumstances the choice between public and private schools would be free for anyone. Nobody would have to refrain from private education for their children for economic reasons. Such an interpretation is undoubt-

¹ See Tore Modeen, "UNESCO-konventionen mot diskriminering inom undervisningen och Ålandsöarna", *FJFT* 1976, pp. 139 ff. See also Modeen, *The International Protection of National Minorities in Europe*, Åbo 1969, pp. 112 ff.

² Cf. also Art. 27 of the UN Covenant on Civil and Political Rights: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

³ See also Tore Modeen, "Finlandssvenskarnas rättigheter", *Statsvetenskaplig tidskrift* 1985, pp. 349 ff.

edly most consistent with the principle of freedom of education as expressed in the Covenant and the Convention.

However, there are reasons against such a generous interpretation. The maintenance of parallel public and private schools raises a number of administrative and financial problems. It is comparatively simple to plan and operate a comprehensive public school system. It is easy to obtain information on the number of children in each district. Within the framework of such a system various programmes of education can be set up in consideration of the differing needs of education as well as the talents of the children. As a matter of course it is attempted at the elementary stage to give all normally gifted children (as well as those more talented) an education which is on the whole uniform, as a basis for later, more differentiated instruction.

If, on top of this, private schools, perhaps of different kinds, operate, the planning is, of course, made more difficult. Reliable information as to how many children will go to the public schools is impossible to obtain. Supervising the standards of the private schools becomes a problem, if teaching is carried out according to different principles than in the public schools. Further, the school system as a whole becomes more expensive if public funding is also made available for private schools, particularly as the number of pupils in each class is likely to decrease; perhaps the total number of children is insufficient for multiple school systems. Also, administration becomes more costly: the same administration cannot be in charge of both private and public schools—the administration must at least be doubled. Furthermore, resources will have to be set aside for the necessary supervision of the private schools.

Finally, the demand for democratic control of the school system can only be realized as far as public schools are concerned. Only in a public school system may the school boards be democratically elected or, as is usually the case, appointed by the the municipal board or some other representative organ. The board of a private school cannot be appointed by the municipal board and at the same time retain its private character. It is rather the private organization maintaining the school which is to decide who should be a governor. A conflict may thus arise between the claim of the state for a democratically appointed or elected school board and the claim of the private principals to decide for themselves in this matter. For this reason the principle of freedom of education is in many countries construed in such a way that private schools must be privately funded. Of necessity this will entail the number of private schools being small, since only a few parents are able or willing to pay the fees for a private school, if public schooling is available free of charge. If the same requirements concerning the standard of education are to apply to private as to public schools, the private schools will be extremely expensive to start and to operate. And since public schools are publicly funded, which means that the

parents contribute to such schools from their taxes, maintaining private schools will mean a double burden on the parents concerned. Thus this interpretation might mean that the principle of freedom of education will be valid on paper only and hence devoid of value.⁴

A mitigatory position is taken by adopting a design which does not impose the full burden of funding private schools on the treasury, but which nevertheless prescribes partial funding of private schools by public means. In this way the preconditions for the operation of a limited, but nevertheless reasonable, number of such private schools are created and not all children will have to go to public schools. However, there are weaknesses in this design. When fees for education are charged, the private schools will tend to cater for those better off, which will lead to a social stratification of the children, and this in many quarters will be regarded as a less desirable development.

All these reasons tend to increase the difficulty of applying the principle of freedom of education.

One may ask whether it is at all possible within the framework of a public school system to adhere to the principle of freedom of education. In other words, could public basic education offer various programmes and options as far as subjects and educational methods are concerned, so that for instance the demands of dissenting religious groups and certain ethnic groups could be met?

Of course, any State is free to build the public school system with a view to fulfilling the needs of various minorities. Such a policy is even highly desirable.

If such a generous policy is adopted, at least some of the reasons for a parallel private educational system cease to apply. Private schools are no longer necessary to provide for needs which the public school system cannot or does not want to admit.

It is a different matter whether such public minority schools or programmes will really satisfy the claims of the minorities for schools for their children. The spirit in a public school tends to be shaped by the government or municipality or, in other words, by the majority. There are thus examples of publicly maintained and funded minority schools which are nothing but instruments for the policy of the majority. Education is given in the minority language, but in such a spirit that the notion of the inferiority of the minority language and culture is transmitted and the children are thus encouraged to adopt the majority language.

The conclusion is thus that the private school option is the only effective

⁴ Nevertheless there are cases, notably Great Britain, where private, extremely expensive "public" (i.e. private) schools continue to exist, in spite of a developed public school system, most likely, it would appear, as a result of the high social status of such schools.

alternative to public schools, if the principle of freedom of education is to be maintained in full. Such schools should receive financial support from public funds in order that school fees, if any, are not higher in such schools than in public schools. This will mean administrative as well as economic problems for the government. These problems must, however, be overcome.

The State has a legitimate interest in ensuring that the level of education in private schools corresponds to that in public schools. But in all other respects private schools should be left to mind their own affairs. The State should not use its economic power to govern the ideological direction of the education given in private schools, as long as these remain loyal to society at large and do not develop into centres for insurrection or separatism.

Should the ideology of the State demand democratically elected school boards, it should be possible to guarantee such democracy even as far as private schools are concerned without turning them into public ones. One possible method is to let the school board be elected at public elections controlled by public authority, where the voters consist of the group supporting the school. Thus for example the members of a congregation maintaining a parochial school would be those who elect the board of that school; or in another case the parents of the children of a school applying a different method of education would be the voters. The composition of the school board would reflect the views of the interested group, although not necessarily the views of the wider community in which the school functions, since representation of this kind would constitute a direct contradiction of the idea behind the school.

2. THE FINNISH CONSTITUTION

The principle of freedom of education was embraced by the fathers of the Finnish Constitution. The clearest evidence of this is the 1907 draft proposal of the Senate (led by Leo Mechelin):

1. The citizens of Finland are free to establish schools and other institutions of education in the Land and in them to provide for education as they see appropriate.

2. The establishment of each particular school is to be notified to the proper department of the senate, which will provide for periodic inspections by competent civil servants. If any teaching is in contravention of law and morals, the right to continue the educational activity is forfeit, unless correction is made following a warning based on a reliable investigation.

3. Any education organized at home may not be made subject to inspection from public authorities. (Sec. 89)⁵

⁵ *Meddelanden från Stiftelsens för Åbo Akademi forskningsinstitut* 3 (1975).

The draft proposal of 1917 (made by a committee chaired by K.J. Ståhlberg—later to be the first President of the republic) contained a considerably shorter provision, which became part of the 1919 Form of Government or Constitution Act (RF). The legislative history of this provision does not contain any detailed grounds:

The right to establish private schools and other private institutions of education and to provide for education in them is subject to legislation.

Education at home must not be subject to inspection from public authorities. (Sec. 82 of the 1919 Act, sec. 76 of Ståhlberg's draft proposal.)⁶

It should be noted that this provision is contained in the 8th chapter of the Form of Government Act with the heading "The Educational System" and not in the 2nd chapter with provisions on the general rights and protections of citizens under the law.

Also in chapter 8 is found sec. 79 which provides that government-funded "or, when necessary, government-subsidized" secondary schools for higher general education are to be maintained.

3. EARLY REGULATION OF PRIVATE SCHOOLS

The private school idea was a topical one in autonomous Finland (i.e. during the Russian period). At the beginning of the 19th century as many as three government committees dealt with the matter of founding such schools. During the 19th century quite a few private schools operated in the towns of Finland. They were made subject to government supervision by a legislative instrument in 1849, and a special legislative instrument of 1856 laid down rules for such supervision. Government subsidies for private schools were given under particular ordinances of 1884 and 1896. At the outset the support was limited to the 5 lowest forms, but from 1907 was also provided for the higher forms, and, in addition, private schools in the country were also made eligible for government subsidies.⁷

Since the 1919 Form of Government Act presupposed that the right to establish and to maintain private schools was to be based on statutory authority, a particular Act was passed (Act of March 5, 1919 (No. 26) on the establishment and maintenance of private schools and institutions of education, hereinafter referred to as the 1919 Private Schools Act).

In a petition of 1908 the Finnish Diet had requested a reform of the

⁶ Committee Report 1917:11. Report of the Constitutional Committee 7.

⁷ See, *inter alia*, K.J. Ståhlberg, *Suomen hallinto-oikeus. Sisäasian hallinto*, Helsinki 1931, pp. 614 ff., 630 ff.

legislation on secondary schools, a matter which had been prepared by a government committee (*betänkande* 1911:7). In referring to the proposal for the new Form of Government Act a Bill was presented containing only 4 sections. The central provision was sec. 1:

Any Finnish citizen has the right to establish a private school or institution of education so long as the purpose of any such school or institution is not contrary to law and morality.⁸

At the same time a Bill was presented concerning the size of the government grants payable to private secondary schools.⁹

According to the 1919 Private Schools Act, the government grant for each school class was FIM 6,000. The grant could be raised by government decision. New legislation on government grants was passed in 1943 and in 1950.

The 1919 Act contained no limitation on the right to establish private schools. As a consequence a considerable number of private secondary schools was set up. However, in 1934 the government thought that the number had grown too large, with the result that too many students graduated without being able to find suitable employment.

The government put the main emphasis on the development of state secondary schools and therefore wished to circumscribe the right to establish private schools.¹⁰ The standing parliamentary Committee for Culture was of the same view.¹¹

No opinion from the Constitutional Committee was solicited. Parliament, following the procedure prescribed for ordinary legislation, passed an Act (1935 No. 145) requiring government authorization for the future establishment of private schools. In order for a permit to be granted the applicant would have to show that the planned secondary school was required in view of the educational need in the specific district and that sufficient financial means were available for its maintenance. Similar proof was to be presented for an existing private school to be enlarged.

Specific rules on the administration of private schools were laid down in several consecutive enactments (1925, 1944, 1951). The internal regulations and curricula of each private secondary school were to be confirmed by the National Board of Education.

⁸ Ld 1917. *Prop.* 33.

⁹ See also the statements of the parliamentary Committee for Culture Ld 1917 II:1 and 2.

¹⁰ *Prop.* 1934:121.

¹¹ "Although the State under the authority given under the Act on state grants to private secondary schools would have the power to influence the direction of such schools when granting funds, it has nevertheless been unable to prevent an unsound increase in the number of such schools." Statement by the parliamentary Committee for Culture 1934:10.

The central question was the authority of any such school to issue publicly valid grades and (leaving) certificates. Such authority could be granted only by the National Board of Education. A higher school certificate (corresponding approximately to the English General Certificate of Education at Advanced Level) could thus be issued by the majority of private secondary schools.¹²

The private secondary schools were thus regarded as instruments of higher general education. They corresponded in most cases to the government-maintained secondary schools, the *lycées*, and existed both as lower secondary schools and as full secondary schools comprising also the higher forms.

4. PRIVATE ELEMENTARY SCHOOLS AND KINDERGARTENS

There were also private elementary schools maintained under government permit and entitled to government grants according to special provisions contained in the Act on Elementary Schools (1957 No. 247, secs. 33–37).

The private elementary schools will not here be discussed in detail. Their number remained very low. There was also a number of private kindergartens, including confessional ones, but these were discontinued during the 1940s.¹³

The municipalization of the kindergartens, or rather, the reformation of the elementary school into a comprehensive school including the lowest forms, was the first step in a series of reforms towards the unification of Finland's school system.

This reform was carried out discreetly; by raising the central authority requirements on the educational programmes, the private schools were put in a position where they had to close down because of inadequate financial resources. Government subsidies were not given to private kindergartens.

The reform was carried out in 1946 in accordance with an amendment of the 1921 Act on Compulsory Education (Act of February 2, 1946 No. 125). The amendment was made as a result of a private bill (Bill 1945:27) which was motivated by the argument that "a child's right to education should not depend on the financial position, birth or social position of the parents" and a demand for the abolition of "any school preparing the children of the well-off for secondary schools. The very separation of such children from the others is anti-social, but the injustice in this form of education is also obvious from the fact that such children complete four

¹² A detailed account of legal regulations concerning secondary schools, also with regard to private schools, is to be found in Ragnar Meinander, *Läroverkens förvaltning*, Helsingfors 1960. Such private school shall be administered by a directorate appointed by the owner of the school. The directorate was also answerable to the National School Board for the operation of the school. Cf. also the former joint school instruction (1872).

¹³ See, *inter alia*, K.J. Ståhlberg, *Grunddragen av Finlands förvaltningsrätt. Inrikesförvaltningen*, Helsingfors 1947, pp. 166 f., Ragnar Meinander, *Folkskolans förvaltning 2*, Helsingfors 1959, pp. 291 ff.

years of primary education in three, although the number of hours taught is considerably less than in public primary schools.”

The parliamentary Committee for Culture in principle accepted the demands for reform, but still proposed that the bill be rejected in order for the matter to be considered by the government. Parliament, however, carried the bill with the motivation given.¹⁴

Whether the reform was compatible with the Constitution was not discussed in this context.

From then on, the first four years of primary school were compulsory for more or less all children. After that a separation was made into one group continuing primary school and another aiming for secondary schooling, be it in the government-maintained *lycéés* or in private secondary schools.

5. THE PRIVATE AND PUBLIC SECONDARY SCHOOLS UP TO THE UNIFIED SCHOOL REFORM

The number of private secondary schools was significant. There were several reasons for this, the most important being the fact that government funds were insufficient to meet the increasing demand for secondary education. The municipalities were not obliged to maintain secondary schools, even if this might be the case as a voluntary undertaking, particularly during the latter years of this period. The government maintained in the traditional educational towns a certain number of *lycéés*, but also subsidized private secondary schools operating both in such towns and elsewhere, mainly where *lycéés* were lacking. Maintaining private secondary schools was less expensive for the state authorities than maintaining the *lycéés*, since a greater part of the costs were covered by fees in the private secondary schools than in the *lycéés*.

An additional reason why so many private schools were set up was the fact that the drive to provide secondary education for the children had grown strong in large segments of the population which were prepared to take on the additional costs.

On the other hand, the private schools were not motivated by any need for providing an alternative education to that offered in the public schools. The educational plans of the private secondary schools corresponded by and large to those of the public ones, which was also a precondition for government permit and subsidies.

In bilingual districts Swedish and Finnish schools were maintained both by

¹⁴ Rd 1950 Handl.V. 1. Lagmot. bet. No. 15. Kulturutskottets betänkande (Statement by the parliamentary Committee for Culture) 1945:8. Riksdagens svar 20.11.1945.
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the government and by private principals. In Finnish-speaking districts, however, the Swedish minority schools were all private.

As far as quality of education was concerned, public and private schools were to be equal. It was, however, obvious that certain of the older public secondary schools, particularly the *lycées normaux*, where the teachers were subject to fairly strict requirements, were able to provide an education better than the average. Such schools were also socially attractive, a property shared with a few "exclusive" private secondary schools, mainly in Helsinki and some other cities in Finland.

It would thus be erroneous to perceive private education in general as socially deviating from public in spite of the higher school fees.

It is also remarkable how the secondary schools appeared to be cast in the same mould, and the lack of originality revealed in the curricula and educational methods of the private schools is also striking. There were, however, schools, both public and private, with an educational structure of their own, e.g. the government-maintained *koelyseo* and the private *Tölö svenska samskola*. The idea of co-education was first carried out in private schools.

Statistics from 1969 (referring to the school year of 1968/69) reveal the following numbers of private and public schools and the numbers of pupils respectively:

Schools		Pupils
<i>Primary education</i>		
Swedish	606	24,556
Finnish	6,391	464,986
<i>Secondary education</i>		
Public Swedish	18	7,956
Public Finnish	132	85,998
Private Swedish	31	8,827
Private Finnish	335	165,983
<i>Municipal lower secondary</i>		
Swedish	8	1,350
Finnish	125	35,326

6. THE UNIFIED SCHOOL REFORM OF 1968

In a draft proposal from a government committee in 1959 the outlines were drawn for a unified school which would replace the then current system of primary school system with its division between primary education and sec-

ondary education.¹⁵ And in 1967 a Bill was introduced in Parliament on the basis for the school system along the lines of a unified school system (Bill 1967 No. 44). The Bill referred to a request from Parliament from 1963 in the matter.

The Bill presented *inter alia* the following views: the comprehensive school was to comprise 9 forms; basic education would in general be carried out by municipal comprehensive schools.

[I]n addition, however, the establishment of classes in private schools corresponding to the lowest forms in the comprehensive school should also be allowed.

Such private schools should, without being part of the municipal school organization, be co-ordinated with it in such a way that they may work as an alternative to municipal comprehensive schools. In this way private ... schools ... would be able to carry out education otherwise provided by municipal comprehensive schools. The principal rule, however, in the view of the government would be to integrate the lower forms of private and public secondary schools with the municipal comprehensive school so that upper secondary education would be provided by government, private and municipal upper secondary schools.

In the *travaux préparatoires* the government stressed as an important factor in the organization of the municipal school system that the municipalities should take over private secondary schools. Any contract between the owner of a private school and the municipality on such a takeover should be submitted to the National Board of Education for approval.¹⁶

It was, however, presupposed in connection with sec. 21 that there should exist "a continued effective use of the private schools and their flexible coordination with the municipal school system as schools providing an alternative to the municipal comprehensive schools and providing such education".

Such schools should be free of charge and offer the same social benefits as the public comprehensive school. Use of a private secondary school for such purposes would be based on a contract between the owner of the school and the municipality. Such a contract should also regulate municipal participation in the financing of the school as well as municipal supervision.

Where a municipality which according to the draft Bill is obliged to organize comprehensive school education is prepared to take over a private secondary school for this purpose, or to make use of it as an alternative to municipal elementary schools, and where the National Board of Education finds such measure warranted and expedient, it cannot be considered necessary for the private secondary school in question to receive public funding for its activities in their present form. It should therefore be possible for the state grant to be discontinued

¹⁵ Report of the School Programme Committee (KB 1959:11).

¹⁶ Such a contract may be regarded as a contract under public law. Disputes shall hence be resolved by administrative courts. Cf. Eero Vilkkonen, *Hallintolainkäytön alasta*, Helsinki 1973, pp. 77 f.

for any such private secondary school whose owner does not consent to such arrangements, and thus forces the municipality to acquire educational facilities elsewhere (sec. 22).

It was also assumed in the Bill that certain private schools would exist which, while not functioning as a substitute for elementary schools, would still correspond to them. Such schools should continue to receive the same government funding as the public comprehensive schools (sec. 27, p. 18).

At the same time a Bill was introduced (1967 No. 45) on government grants for municipal and private secondary schools.

The Constitutional Committee stated in its findings (directed to the parliamentary Committee for Culture) that such agreements between the owner of a private school and the municipality on the takeover of a private school should be regarded as voluntary and that they would not cause any damage to any "outsider". Therefore ordinary legislative technique could be utilized (p. 27).^{16a}

In the draft bill, however, it was presupposed that a private secondary school could be taken over by the municipality or transformed into a substitute comprehensive school according to a decision by the National Board of Education, even without the owner's consent. The sanction was, as mentioned, loss of government grants (p. 27).

The Constitutional Committee did not consider this in conformity with current legislation on government support to private secondary schools.

In this context the Committee also referred to sec. 82 of the Form of Government Act, which, according to the Committee requires

that the right to establish private schools be regulated by law, whereas ... the provision does not require the government to support such schools.

With regard to sec. 79 of the Form of Government Act the Committee was of the opinion that its wording

is phrased in such general terms that no clear obligation is placed upon the government in this respect. Thus, it emerges that rules on government support to private secondary schools and the conditions for such support may be laid down in ordinary legislation.

On the other hand, the Committee thought that the draft proposal might infringe the protection of property according to sec. 6 of the Form of Government Act,

in so far as any attempt is made through this provision to force the owner of a private secondary school to transfer his school together with its assets and liabilities to the municipality.

^{16a} Paaavo Kastari, "The Constitutional Protection of Fundamental Rights in Finland", *Tulane Law Review* 1960, no. 34., pp. 695-710
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To avoid a conflict with the Constitution the Committee proposed an amendment to the proposal so that any such coercion should be removed.

Any owner of such private upper secondary school which is to be included in the educational plan of the municipality should be given opportunity to choose whether he wishes to transfer his school together with its assets and liabilities to the municipality or to use it as a school replacing the municipal comprehensive school.

In this way the continued existence of the school as a private (substitute) would be secured, as the municipality would have to respect the wish of the private school to continue in this form and would thereby also have to meet the costs of running it.

The wording of the draft act was amended according to the Committee's proposal and the Act was subsequently passed in the normal way (Act 1968 No. 467).

Simultaneously the Act on government grants for municipal and private upper secondary schools was passed (1968 No. 468). This Act was motivated by the fact that, at least during a transitional period until the comprehensive school system was complete, there would still be private upper secondary schools supplementing the municipal schools. The government grant for private schools was set at the same level as for the (municipal) comprehensive school, viz. 85 per cent of the actual expenses.¹⁷

The Comprehensive Schools Act (1968 No. 467) also contained rules making possible the continued existence of private schools as "corresponding" schools, without being included in the municipal school system, but retaining government grants. According to the Act (sec. 28, subsec. 6) such an arrangement however would require "extraordinarily weighty reasons".¹⁸ The Comprehensive School Ordinance (1970 No. 443) contained rules on the municipalization of private schools as well as on the continued existence of private schools as substitute comprehensive schools (ch. 20).

7. AN ANALYSIS OF THE 1968 ACT AND THE INTERPRETATION OF THE CONSTITUTIONAL COMMITTEE

The Act on the Basis for the School System in its original wording thus gave certain, albeit limited, possibilities for private secondary schools to continue,

¹⁷ See *Prop.* 1967:47.

¹⁸ See also the Parliamentary Ombudsman's Report (JO) (1973, pp. 102 ff.): "Re application of sec. 28, para. 4, of the Act on the basis for the school system. The condition for granting state support for a private secondary school using a school house owned by a company independent of the owner of the school—that the owner of the school house would undertake not to dispose of the real estate etc. attached to the school and further to transfer the school to the municipality should the operation of the school be discontinued—was deemed unlawful. The Ministry of Education and the National School Board were criticized for acting contrary to the above-mentioned legal provisions."

either as "substitute" comprehensive schools or, in exceptional cases, as "corresponding" comprehensive schools. Also, the *lycées* were for the present to continue either as state or privately owned.

A central provision was contained in sec. 14, according to which

When establishing the municipal school system, the schools operating in the municipality should be utilized whenever possible, and any owner of a private secondary school shall be given the opportunity to choose whether he wishes to transfer his school to the municipality or whether he prefers to use it as a school substituting the municipal comprehensive school.¹⁹

Note on the other hand the wording of sec. 22:

If the National Board of Education when scrutinizing the municipal educational plan has approved the takeover of any private secondary school by the municipality, or the utilization of such a school as a substitute school, and the owner of the private secondary school does not within six months or any longer period fixed by the National Board of Education consent to its inclusion in the municipal educational plan under a duly approved agreement as provided in sec. 19 on the utilization of the school as a substitute school, the government grant shall ... be scaled down and finally discontinued.

In view of this provision (also contained in the Government Bill) it is remarkable that the Committee speaks of voluntary agreements between the owner of a private school and the municipality.

It is also remarkable how little weight the Committee attached to secs. 82 and 79 of the Form of Government Act. According to the Committee it was sufficient that the right to found private schools was provided in ordinary legislation. The State could on the other hand freely decide on government grants. It was nevertheless obviously not constitutional to abolish all public subsidies to private schools.

Only the concern for the right of ownership motivated the amendment of sec. 14 of the Bill which made possible a real choice for private schools. By the wording of the Act as amended according to the Committee's proposal, the municipality had to respect the wish of a private school to remain so, although conforming to the comprehensive school system as a so-called substitute school.²⁰

However, the Comprehensive School Act (1968 No. 467) gave no support to private schools which chose to remain private without conforming to the

¹⁹ The National Board of Education also constituted the appeal authority for municipal educational plans for private secondary schools (cf. HFD 13.6.1983 etc.)

²⁰ This construction is evident from the statement by the Attorney-General (1973, pp. 46 f.): "A private secondary school had without the consent of the owner been left out of the municipal school system when introducing the unified school system. The lawfulness of the decisions of the municipal authorities and the National Board of Education was questioned."

comprehensive school part of the municipal school system. Such schools could only continue to operate with private funding, unless the State in exceptional cases consented to continued state grants.

8. THE STATUTORY AMENDMENT OF 1974

The implementation of the unified school system took several years. In 1974, while the reform was in full progress, the government found the parliamentary drafting of sec. 14 unsatisfactory. As construed by the Attorney-General (JK) this provision gave the owners of private schools, in the view of the government, too wide powers to demand attachment of their schools to the municipal system as alternative schools. Therefore an amendment was proposed with a view to weakening the possibilities of private schools to continue to operate as substitute schools.

The proposal involved amending the wording of sec. 14 as follows:

When establishing the municipal school system, secondary schools operating in the municipality should be utilized whenever possible, provided that the State or any private owner transfers their schools to the municipality. The owner of any private secondary school shall be given the opportunity to choose whether he wishes to transfer his school to the municipality or whether he prefers to use it as a school substituting the municipal comprehensive school.

The objective of the amendment was, however, only made clear in a provision on the application of sec. 14:

If the municipality does not accept the choice made by a private owner in accordance with sec. 14, the owner is not, notwithstanding the promise made in accordance with sec. 28, para. 4, obliged to transfer his school to the municipality when the operation of the school is discontinued.

This provision makes it clear that the option presupposed in sec. 14 is only imaginary. The owner of a private school cannot freely choose between a municipal takeover and continued operation as a substitute school. The municipality may veto his choice to continue as a substitute school and thereby end the maintaining of the school as a private, although substitute, school. After such a veto in fact only the option remains between municipal takeover and closing down.²¹

In the *travaux préparatoires* to the Bill (1974 No. 52) the government maintains that it is important for the implementation of the comprehensive school reform

²¹ *Prop.* 1974:52 on the amendment of sec. 14 of the Act on the Basis of the School System. Cf. also the statements by the Constitutional Committee 1974:3, and by the parliamentary Committee for Culture 1974:15, p. 6.

that all schools offering primary and lower secondary education be owned by the municipality. In view of the planning of education and the administration of the schools it is required that the whole school organization be subject to uniform management.

Under current legislation an owner of a private secondary school may, however, in spite of the desire of the municipality, block the creating of a unified municipal school organisation. For the owner of a private secondary school is, when the unified school system is introduced, entitled to choose whether he wishes to transfer his school to the municipality or use it as a substitute school. The municipality is bound by this choice and cannot usually refuse to utilize the private secondary school as a substitute school in accordance with the wish of the owner.

... Since a takeover of a private secondary school is a more advantageous solution both in school policy and municipally than to use such a school as a substitute school, it does not appear fair that the owner of a private secondary school in this way may decide which option is open to the municipality. Therefore it is proposed that ... the Act ... be so amended that a municipality when organizing its school system shall whenever possible utilize the secondary schools operating within the municipality only if the owner transfers his school to the municipality.

The government also thought it only natural that

the owners of private schools should transfer their schools to the municipality with full title of ownership. This is also motivated by the fact that most of the assets of private secondary schools have been acquired with the support of government funding.

To avoid formally infringing the right of private ownership, the addition quoted above was proposed to the provision on application.

Schools substituting the municipal comprehensive school do not offer an alternative which in terms of curriculum or educational content is wider than the comprehensive schools'. For this reason the substitute schools have no independent significance in view of the development of a pluralistic society or in view of the continuing development of the new school system.

The Bill apparently smacks of distrust of the system of substitute schools and thus also of private schools.²²

While the standing parliamentary Committee for Culture agreed with the view of the government, a minority opposed the proposal with reference to the 1968 statement of the Constitutional Committee: in essence the Act meant an expropriation of the property of private schools, which required legislation in the special order laid down in sec. 67 of the Parliament Act.

However, the majority of the Constitutional Committee did not find that the

²² See also Committee Report 1971:B 67, which expresses a hostile view on the matter of retaining private schools as substitute comprehensive schools (pp. 34 ff.).

Bill would infringe rights protected in the Constitution, since the Comprehensive School Act (1968 No. 468) did not prescribe automatic loss of government grants for a school which the municipality did not, in spite of the owner's wish, accept as a substitute school.

The Committee on the other hand referred to the requirement of the Private Schools Act (1919 No. 26) that in order for a private secondary school to be permitted there must exist a genuine and lasting need of education (in the formulation given in the 1935 amendments). The Committee was aware of the risk that a private school which did not receive status as a substitute comprehensive school would be regarded as superfluous and thus required to close down, as the state grant was discontinued. The Committee stressed that

the government should specifically ensure that ... the amendment did not weaken the possibilities of the department of education to assess independently the possibilities for state grants in each particular instance.

The Committee also thought it reasonable to investigate the possibilities of providing economic compensation for the owner of any private school which had been denied status as a substitute school and had lost state grants.²³

The Act was passed by Parliament following the ordinary legislative procedure (sec. 66 of the Parliament Act).

As a consequence municipalities were given a right of free choice whether to use private schools as substitute schools or not.

Of relevance here is case HFD 1976 II 84 (Supreme Administrative Court of Finland) in which a municipal council when deciding on the educational plan was permitted to decide not to use a private secondary school as a substitute school.

Of particular importance was a provision added to the provisions on the application of the Act:

In the case of any private secondary school for a linguistic minority, sec. 14 of the Act in its wording before the coming into force of the amendments of July 26, 1968 shall apply.

This concerned four Swedish schools in Finnish-speaking districts, where continued operation as substitute schools was thus guaranteed.

Formally the amendment, in view of the applicatory rules, cannot be regarded as contravening sec. 6 of the Form of Government Act. The owner of a private school was allowed to keep his property if the school, despite his having agreed to this, was not given the status of substitute school. It is quite

²³ *Prop.* 1974:52, statement by the parliamentary Committee for Culture 15, statement by the Constitutional Committee 3.

another matter if the amendment can be regarded as being in conformity with secs. 82 and 79 of this Act.

The failure of the Constitutional Committee to discuss the obligations of Finland under international law regarding private school education is remarkable.

It has subsequently become clear that with one exception—the Finnish-speaking sector of the Helsinki school system—no private school has been allowed to continue as a substitute school. It is thus obvious that given this negative municipal policy it could well have happened that no such schools would have been allowed at all. Such a situation would hardly have been compatible with sec. 82 of the Form of Government Act, nor with international law.

9. THE 1976 AMENDMENT

In 1975 school buildings for private secondary schools were still being erected with government support. To regulate this matter the government introduced a Bill (1975 II No. 100) to amend the Act on Government Grants to Private Secondary Schools (1950 No. 493) as well as the Act on Government Grants to Municipal and Private Secondary Schools (1968 No. 468). Here the standing parliamentary Committee for Culture sought the opinion of the Constitutional Committee.

The latter found it “possible to regulate government grants to private schools and the conditions for such grants through ordinary legislation”. This was because sec. 79 of the Form of Government Act, which states that secondary schools for higher general education are to be maintained or supported with government funds, was so generally worded. Only when the owner of a private secondary school was forced to give up his property would there be a case of infringement of constitutional property rights calling for legislation in the way prescribed for constitutional amendments. The Committee construed sec. 82 of the Form of Government Act in such a way that the activities of private schools could be regulated only through ordinary legislation, not by way of (government) ordinances.²⁴

The Bill was carried according to the procedure for ordinary legislation.

One may only comment that the Constitutional Committee has consistently construed secs. 82 and 79 so restrictively that doubts may be entertained as to the appropriateness of this method of interpretation.

²⁴ Statement by the Constitutional Committee 1975 II:2.

10. THE COMPREHENSIVE SCHOOLS ACT 1983. OTHER LEGISLATION IN THE SCHOOL SECTOR

The comprehensive school legislation now in force, as well as other fundamental legislation on school matters, was passed in 1983. The unified educational system reform, launched in 1970, was fully realized throughout Finland in 1977 and the new educational programmes were implemented in all municipalities during the school year 1981–1982. The primary school, the lower secondary school and in the main the upper secondary school no longer exist as separate schools. Only a few private secondary schools still remain, either as substitute schools or, in exceptional cases, as corresponding schools.²⁵

The new legislation on the comprehensive school thus regulates a basically reformed school system. It is supplemented with legislation on upper secondary schools (1983 No. 477), evening upper secondary schools (1983 No. 478), schools for auditorially and visually handicapped children (1983 No. 481) and also with a new Act on municipal school administration (1983 No. 479).

The new school legislation reflects the fact that with the authority given in the legislation of the 1960s and 1970s, with a few exceptions, the private schools have been discontinued, which was the intention.

In the School Bill (1982 No. 30) it is thus noted that there exists “in a few private secondary schools” a school system other than the comprehensive school. The private schools no longer exist as secondary schools, however, but in the new legislation they are called “schools substituting the comprehensive school” or “private *lycéés*”. Today there are no private secondary schools comprising only the forms of the comprehensive school. (p. 34)

The agreements on substitute schools are still valid. After the implementation of the reform, according to the government, new substitute schools should be set up only when changes in linguistic circumstances so warrant. (p. 34)

Thus the Bill awarded special status to minority schools (in practice all Swedish) which in Finnish-speaking districts substitute the comprehensive school. Four such schools are operating today (in Pori-Björneborg, Kotka, Tampere-Tammerfors and Oulu-Uleåborg).

A private school is run by a directorate, which in some respects exercises the authority otherwise vested in the municipal school board. A school substituting the comprehensive school issues certificates giving the same competence for e.g. higher studies as the comprehensive school, and teaching is given in accordance with the comprehensive school curriculum. The provisions on such substitute schools therefore are formed in such a way that they on the whole correspond to the rules laid down for the comprehensive school “however with

²⁵ Cf. Jaakko Numminen, *Koululainsäädännön uudistus*, Helsinki 1982, pp. 9 f.

regard to the character of the school as a private institution". Since a substitute school has no income the community is to pay for any acceptable expenses of such a school.²⁶

The parliamentary Committee for Culture (1982 No. 18) stated specifically with regard to private schools corresponding to the comprehensive school without substituting it that these schools give

teaching at primary school level and also serve some other particular needs, such as teacher training, special teaching, the promotion of religious or philosophical systems, or language teaching. These schools are not tied to any particular municipality but the pupils may be recruited from the whole country. The schools have no particular district, they are not supported by any municipality, nor are they in all cases free of charge (p. 15).

The Committee did not think it warranted to limit the possibilities for maintaining substitute private schools established only for securing the education of a linguistic minority. Other reasons should also be acknowledged (p. 15).

The Bill, which also contained a proposal for a new act on upper secondary schools, stated that it would be possible to set up private upper secondary schools "provided this is warranted by an educational need", which also applied to private evening upper secondary schools. The Constitutional Committee in its statement (1983 No. 13) on the Bill made the following highly interesting comment:

According to the investigation the underlying reason [for the proposed acts] is not to abolish or in practice frustrate the right to set up and maintain private schools and institutions of education. Rather, the 1919 Act on Private Schools still governs the right to set up private schools providing education at any level. The purpose of the proposed regulation is only to reserve the terms comprehensive school, substitute comprehensive school and upper secondary school for such schools as are regulated in the proposed act on comprehensive schools, the proposed act on upper higher secondary schools and the proposed act on evening upper secondary schools. New substitute schools may be set up under the Act on Private Schools in such a way that an agreement is made with the municipality on its function as a substitute school. This right to make an agreement with the municipality is limited according to sec. 77 of the proposed act ... whereby these regulations on their part conform to the requirement of sec. 82 of the Form of Government Act that such matters must be regulated by means of legislation (p. 59).

The Act was passed by Parliament according to the procedure prescribed for ordinary legislation. The Act on Comprehensive Schools contains a chapter on schools substituting comprehensive schools. As a prerequisite for any new agreement on substitute schools is mentioned, apart from "when the agreement is considered necessary in order to guarantee educational opportunities

²⁶ *Prop.* 1982:30 on a comprehensive school act and connected legislation.

for a linguistic minority", also the alternative "any other special reason" (sec. 77, subsec. 2). A substitute school does not receive direct government grants, but the municipality covers the expenses of the school and receives state support (in part) for this purpose. The municipality is also responsible for the social benefits to which the pupils of a substitute private school are entitled, which must correspond to those given in the comprehensive schools. Thus there are no school fees, and free lunch is served. School transport is arranged in the same way as in comprehensive schools, and this also applies to student dormitories, vacation activities and summer camps.

In a private upper secondary school the students are entitled to the same social benefits as in a municipal upper secondary school. School fees are payable according to the decision of the directorate. The municipality may meet such fees.

The details of the regulations on the administration of substitute schools and on private upper secondary schools are contained in an Ordinance (1984 No. 720) from which it is clear that *inter alia* the municipal council has some competence to make decisions which also cover substitute schools, e.g. concerning what foreign languages are to be taught.²⁷

According to available information there are 18 substitute private schools, of which 14 are situated in Helsinki (all Finnish-speaking). Further there are 4 so-called minority upper secondary schools in Finnish-speaking localities (mentioned above). The number of students at the comprehensive school level of those schools is approx. 5,000, to which should be added the 3,500 students in private upper secondary schools, since all of these 18 schools also contain upper-secondary forms. Not included among the 18 are 5 private Finnish-speaking upper secondary schools (2 in Helsinki, 2 in Tampere and 1 in Ylitornio). No private schools without government support exist. There are two private schools corresponding to the comprehensive school: the Jewish School in Helsinki and the school of house-keeping in Aito (a Finnish-speaking boarding school). There are also integrated in a school in Toivonlinna forms corresponding to lower secondary school of a private character. All of these receive government grants.²⁸ Mention should also be made of a private school for handicapped children in Helsinki.

The Act on government support for municipal and government secondary schools was superseded by the 1983 Act (1983 No. 477, sec. 42). The Ordinances on municipal and private secondary schools were superseded by the 1983 Ordinance (1984 No. 719).

²⁷ Cf. also the ordinances concerning remaining kinds of school and the municipal school administration: 1984:718–722.

²⁸ In *Prop.* 1982:30 a provision was contained in the proposal for the comprehensive school act (sec. 83) according to which any private school organized so as to correspond to a comprehensive school and operating when the act comes into force would receive grants for its operation according to special provisions. This provision was however deleted by the parliamentary Committee for Culture.

11. SPECIAL SCHOOLS

A special Act on the Steiner school (1977:417) allows for the maintenance of three such schools of a private character with state support. The schools are operating in Helsinki (Swedish- and Finnish-speaking forms), in Tampere and in Lahti (both Finnish-speaking).²⁹

The Attorney-General (August 25, 1986) has decided on the lawfulness of four government decisions (September 12, 1985) on directions for four new Steiner schools. The government decisions were unfavourable in certain respects. Thus the schools were not allowed to issue certificates nor were they awarded government grants under the Private Schools Act (1919 No. 26) with reference to the fact that the special Steiner school Act applied in these cases. This Act, unless amended, does not allow for the setting up of further Steiner schools with the above-mentioned privileges. The Attorney-General held in accordance with the view of the government.

The government also maintains two foreign language schools, viz. the Finnish-French *lycée* (Act 1977 No. 33) and the Finnish-Russian *lycée* (Act 1976 No. 412); and also supports the Helsinki international school and the English school in Helsinki (Act 1963 No. 373).

12. CURRENT REGULATION OF PRIVATE SCHOOLS

The provisions in the Form of Government Act (secs. 82 and 79) remain unchanged. The 1919 Act on the setting up and maintenance of private schools and educational institutions (the Private Schools Act), which immediately connects with sec. 82 of the Form of Government Act, is also valid today.

The Private Schools Act was supplemented in connection with the 1983 reform with a provision according to which any school set up under the authority of the Act was not to be called comprehensive or substitute comprehensive school (1983 No. 482).

As far as state subsidies are concerned the Act on government partial funding, which also covers private schools, is applicable (1983 No. 480). According to sec. 19(a), the authority to grant government subsidies for any private school corresponding to the comprehensive school is limited to such schools as received support in 1978. Thus, new private schools of this kind cannot receive government support under this Act.³⁰

²⁹ There is also education according to the Steiner method which must be regarded as home education (cf. sec. 82, subsec. 2, of the Form of Government Act). Any student participating in home education must pass exams on the compulsory education set by special examiners. The passing of exams for higher forms is optional.

³⁰ See also *Prop.* 1982:30, p. 53.

The current Act on upper secondary schools (1983 No. 477) authorizes the government to grant any Finnish citizen or association permission to establish a private upper secondary school (sec. 50, subsec. 2), and a corresponding authority is given in the Act on evening upper secondary schools. The Department of Education is the source of decisions on any change in the form of activity of a private school. The Act on government partial funding makes government support possible for any private upper secondary school, provided *inter alia* that there exists a "genuine and lasting need for education" and that the school does not operate with a profit-making motive.

Compulsory schooling for Finnish citizens is laid down in the Comprehensive Schools Act (sec. 32). The obligation may be fulfilled not only in a comprehensive school but also in "another educational institution" with corresponding education, or at home (sec. 33). The comprehensive school has therefore no monopoly on compulsory education.

13. LEGAL WRITING ON FREEDOM OF EDUCATION

It is remarkable how little has been written on freedom of education in Finland. A contributing factor would seem to be that the provisions of the Form of Government Act on freedom of education are not to be found among the other provisions on basic rights and freedoms.³¹

One writer has even expressed the view that a private secondary school "undoubtedly" is "a public institution". Such a statement can hardly be regarded as supporting the private school idea.^{32,33}

It is thus seen that a matter of basic freedoms as a constitutional principle has mainly been handled by the Constitutional Committee alone.

14. DISCUSSION. THE FORM OF GOVERNMENT ACT AND THE FUNDING OF PRIVATE SCHOOLS

The obligations imposed on Finland by the UN Covenant of 1966 and the UNESCO Convention of 1960 require the State to allow the setting up of

³¹ Cf. *inter alia*, Mikael Hidén, "Perusoikeudet Hallitusmuodon II luvassa", *Oikeustiede-Jurisprudentia* I (1971), pp. 16 and 71; Mikael Hidén and Ilkka Saraviita, *Statsförfattningsrätten i huvuddrag*, Helsingfors 1985, p. 256; Mikael Hidén, "Bestand und Bedeutung der Grundrechte im Bildungsbereich in Finnland", *Europäische Grundrechte* 1981, pp. 640 ff. Cf. also Olli Mäenpää, *Hallintolupa*, Helsinki 1985, pp. 105 f.

³² V. Merikoski, *Grunddragen av Finlands offentliga rätt* I, Helsingfors 1971, p. 258.

³³ Ilkka O. Jumppanen, "Yksitysten käyttämä julkinen valta", *Inlägg kring medelbar offentlig förvaltning*, A. Rosas and M. Suksi (eds.), Åbo 1985, pp. 177 ff. Mr Jumppanen was secretary of the Constitutional Committee and is one of the very few experts who have devoted attention to these matters, without, however, expressing his personal opinion. Jumppanen has also written a comprehensive dissertation (for the *licenciée* degree) on the school system of the municipalities and the private secondary school (1985).

private schools. The Form of Government Act, sec. 82, expresses the same requirement, although indirectly.

Although the Constitution does not expressly mention the contents of the Act on private schools, it is self-evident that this Act must not be construed so restrictively that private schools cannot in practice fulfil the requirements it imposes and that in consequence the law becomes valid on paper only. On the contrary it seems more natural to hold that, once the matter has been subject to constitutional regulation, any statutory regulation should be given such a content that private schools may exist together with public schools; certainly under public control but at the same time retaining a certain amount of independence. Otherwise the constitutional provisions would have been pointless.

One should be able to take as a starting point that the fathers of the Finnish Constitution, contrary to the case with certain foreign constitutions, took their task seriously and did not include norms only to adorn the Constitution but also to be applied, and as far as constitutional rights and freedoms are concerned, also to guarantee the validity of such rights and freedoms.

As mentioned before, private schools without public funding would be unrealistic under Finnish conditions. On the contrary such schools, to be able to maintain the same standard as the public schools which are now 100% government-financed, should have most if not all of their running costs paid out of public funds.

Since sec. 79 of the Form of Government Act requires public funding or, where needed, public support for institutions of secondary general education, there are grounds for giving this provision an extensive interpretation. The provision thus presupposes government "funding", or "support-according-to-need" for secondary schools, and this should be construable as an obligation on the State to accept responsibility for the proper functioning of secondary education. Can the provision also be interpreted as obliging the State to provide "funding" or "support" for private schools as well?

Since sec. 82 of the Form of Government Act assumes that private schools operate in the land and since the Private Schools Act (1919 No. 26) requires that any such school in order to be allowed to operate must maintain a standard comparable to that of public schools, then this standard must, in the present author's opinion, be guaranteed by society if private means are insufficient. "Whenever needed", government funding or support according to sec. 79 must therefore be given.

Where such need is present is a matter of discretion. However, when it is obvious that private schools cannot operate without public financial support, such support must be given; otherwise sec. 82, subsec.1, loses its justification.

Therefore, the Constitution must be construed in such a way that a certain

number of private schools is given the opportunity to exist. Legislation as well as treasury expenditure (which in Finland is decided by Parliament) should support private education. Any other policy is in contravention of the Constitution as well as of Finland's obligations under international law.

That private schools should be enabled to operate does not mean that the State should ensure that such schools come into being: this is a matter for private initiative. But it is difficult to imagine a liberal society where a need for alternative schools would not be felt.

15. TAKING STOCK OF THE PRESENT SITUATION

In the light of this interpretation it is to be wondered whether the situation in Finland today is a satisfactory one; does our school legislation conform with the Constitution? Do the facts correspond to the intentions of the fathers of the Constitution?

The Private Schools Act and the Act on government support to such schools were passed in 1919 in connection with the Constitution, and must thus be taken to fulfil the requirements of the Constitution. However, the 1935 Private School Act introduced certain conditions for the setting up of private schools which were to be decided upon by the government. A private school might be set up only if this was warranted by an educational need in the municipality and the presence of sufficient economic means for its maintenance.

The 1919 Act on government support for such schools was passed simultaneously with the 1919 Act on private schools. These Acts formed a whole and were treated as such by Parliament. However, the Act on government support has been rescinded and there remain only a few sections contained in the Act on government contributions (1978 No. 1112), which aims primarily at supporting municipal institutions.

Where the Act on private schools as amended in 1935 refers to the educational need in the municipality, this implies that the legislator had in mind the need for a private school in an area with no public secondary school, provided that the private school was capable of accepting a sufficient number of students. The 1935 amendment is thus not fully compatible with the principle of freedom of education with regard to alternative kinds of school.

The requirement that the financing of a private school be guaranteed is, as already mentioned, in our circumstances linked to the possibility of acquiring public support. It is therefore erroneous, as the Constitutional Committee does, to view the private school idea in isolation from the matter of state support.

16. SOME NOTES ON THE SUBSTITUTE SCHOOLS

Can the system of substitute schools be considered an acceptable safeguard of the continuing existence of private schools? To be sure, the government does not support such schools directly, but since they are fully funded by the municipalities which for this purpose receive considerable state contributions (partial funding), one might say that the private schools are able to operate under satisfactory conditions, guaranteed by the State through legislation and treasury expenditure.

The question could be answered in the affirmative provided that the system of substitute private comprehensive schools may be regarded as satisfactory in terms of the constitutional principle of freedom of education. The provisions of the Act on comprehensive schools in this respect (sec. 77, subsec.2), however, effectively limit freedom of contract where they lay down preconditions for any agreement on the approval of a private school as a substitute school. Such an agreement is valid only if thereby the educational possibilities for an ethnic minority are secured or when other particular reasons so warrant.

It should also be underlined that the municipality is not obliged to conclude an agreement with a private school even when these conditions obtain. Such an obligation certainly existed under the former Act on comprehensive schools (1968 No. 467) as far as ethnic minorities were concerned, but not in any other case.

In consequence the system of substitute schools cannot be regarded as a satisfactory solution to the problem of safeguarding the continued existence of private schools.

Particular criticism is deserved by the amendment of 1974 (1974 No. 572) which meant that the *municipalities* were given excessive powers to decide on the future of the private schools. This is a matter falling under the competence of the State, since it is the government that grants any permit to set up a private school and since the State by way of financial support has made the operation of the private school possible. How then could a municipality be empowered to decide on the future of such a school? Such a *de facto* right to decide whether a private school is to be accepted as a substitute school in fact also implies a right of veto.

17. PRIVATE UPPER SECONDARY SCHOOLS

According to the view of the legislator, local educational needs may as a rule be satisfied by the municipal school, as far as elementary and lower secondary

schools are concerned. There may, however, be room for private initiative at the upper secondary school level.³⁴

The Act on upper secondary schools (1983 No. 477) specifically provides that a private upper secondary school may be set up with government permission (sec. 50). The precondition is that this is warranted by an educational need. Although the requirement of financial guarantees is not mentioned in the 1983 Act, it follows from the 1919 Act.

The 1983 Act contains provisions on municipal financial support for private upper secondary schools; the municipality is under an obligation to give a minimum support, while increased support may be granted voluntarily to the extent municipal competence allows (sec. 51). Such a private school may also be awarded state support for the costs of operation under the conditions earlier discussed regarding the Act on state contributions (Act 1983 No. 480, sec. 6, subsec.1).³⁵ Also of importance are the provisions contained in sec. 51 on the possibilities of attaching comprehensive school forms to a private upper secondary school.

While the establishment and maintenance of private upper secondary schools (with or without attached comprehensive school forms) is thus possible, the decision of the government (and to some extent also of the municipality) is crucial. It is thus hard to speak of a right to set up a private upper secondary school, possibility would seem a more proper word. Nevertheless, the legislation on private upper secondary schools conforms better to the Constitution and the international obligations of Finland than does that on the comprehensive school.

18. THE CONSTITUTIONALITY OF SCHOOL LEGISLATION; CONCLUDING REMARKS

When the Comprehensive Schools Act and the Upper Secondary Schools Act are seen in conjunction, the criticism of unconstitutionality is mitigated. It is obvious that new permits for private corresponding schools at comprehensive level cannot be acquired. It is also very difficult to start new substitute schools. But these obstacles can be circumvented by the possibility open in the Upper Secondary Schools Act of setting up new upper secondary schools and attaching comprehensive school forms to them.

³⁴ *Prop.* 1974:52, p. 1; see also the *travaux préparatoires*, particularly Committee Report 1970: A 11 (The committee for secondary schools). It is presupposed there that the owner of a private secondary school shall have an option whether the school should remain private or be subject to a municipal takeover (pp. 178 f.).

³⁵ See *Prop.* 1982:30, p. 52, 1978:253, p. 3.

The Private Schools Act of 1919 and the Upper Secondary Schools Act of 1983 should be interpreted generously if constitutional requirements are to be upheld. It should be possible to establish new upper secondary schools with attached comprehensive school forms and to receive state and municipal support. The municipalities should also allow new substitute schools. Yet according to available information, there are at present no new initiatives. On the contrary, one of the existing five private upper secondary schools, the Karjalan Yhteiskoulu, has recently closed down.

19. IS THERE A NEED FOR PRIVATE SCHOOLS IN FINLAND?

The attitude of the legislator as expressed in connection with the uniform school system reform is clearly that the public school is on the whole able to meet all educational needs at primary and lower secondary school levels. Private schools are therefore actually unnecessary. Those which are allowed to continue to operate must be regarded as marginal. Within the framework of the public school it is possible to apply alternative educational methods and programmes and thus to guarantee the development of different talents and interests.³⁶

Finland can look back on a long period of private schools, which however revealed little variation. It seems, though, that the private schools are not to blame for this. From their viewpoint, uniformity was seen as an essential precondition for continued existence. The State was presupposed to support only private schools similar to the state *lycées*. It is uncertain whether the private schools, if they had followed their own paths while maintaining the requirement of educational quality, would have been able to gain more respect for their right to exist than was the case when they preferred to follow the model of the state schools. The uniformity typical of the private schools meant that their abolition in connection with the superseding of the state *lycées* by municipal schools took place with little resistance. The reform, after all, hit the state schools and the private schools alike! The private character was on the whole only to be found in the fact that the property of the schools was private, and indeed its protection was extensively discussed by the Constitutional Committee during the various stages of the reform. No particular value was attached to freedom of education, in spite of the protection intended by sec. 82, subsec. 1, of the Form of Government Act.

One may also query why the groups with a particular interest in private schools remained so passive during the school reform.

³⁶ See, *inter alia*, *Prop.* 1974:52, p. 2.

The attitude of the Church of Finland in relation to school matters has over time been characterized by a lack of interest. The Church made no resistance when it lost the strong position in elementary education which it had held until the middle of the 19th century. Also the abolition of confessional kindergartens about a century later was met with little protest. The reason was probably that religious education was also carried out in schools not controlled by the Church. Obviously the Church of Finland is not interested in private confessional schools in today's Finland.

On the other hand a particular Jewish school has won the understanding of the state authorities and is today a "corresponding" school with government support. There is a boarding school (in Pikis) maintained with government support by the Seventh-day Adventists. Also the Steiner schools may be regarded as having a religious base (anthroposophy). The Steiner schools operate under special legislation and with government support. As mentioned above, the Act on Steiner schools is not considered to allow for more such schools, which the present author considers is a case of infringement of freedom of education.

In some countries, concern for national minorities has constituted the basis for private schools. In Finland however the legislator has, because of the bilingual character of the country, prescribed the maintenance of a dual national school system: one Finnish-speaking and one Swedish-speaking, naturally with education in the other national language. Thus in the so-called bilingual municipalities there are parallel schools, plus a smaller number of Swedish-speaking so-called minority schools in certain Finnish-speaking municipalities. Hence private schools are hardly motivated by national minority (primarily Swedish) interests (cf. e.g. Act on comprehensive schools, secs. 8, 25, 30.)

As far as the third domestic national minority language is concerned, i.e. Lappish, an attempt is made to cater for the Lapps' educational needs within the framework of the comprehensive schools in their home municipalities (cf. Act on comprehensive schools, sec. 25).

As to interests other than religious and national, the need for private schools appears to be less acute, particularly as the government has assumed responsibility for two important *lycées* with education partly in foreign languages and intended for marginal needs.

The bottom line thus seems to be that the principle of freedom of education may appear less important to maintain in view of the particular circumstances prevalent in Finland today. It cannot, on the other hand, be correct to view such a freedom only in this perspective. Freedom of education and thereby also the freedom of the school is connected with the liberal state and therefore protected in international law, in the Constitution and under ordinary legisla-

tion. There are no guarantees that the public school system will develop in such a way that freedom of education is guaranteed. Should the efforts to create a good school system which at the same time promotes a pluralistic development of society not succeed, the demand for private schools may increase.

The Finnish State must therefore assume a positive attitude towards freedom of education as required in our Constitution. Economically it cannot be regarded as burdensome to keep open the possibilities for private schools to receive state support. For it seems clear that the interest in setting up such schools is limited, and they are likely to remain marginal.

Generous legislation with regard to private schools will also provide a useful touchstone for public school policy. The potential competition thus guaranteed should tend to increase the quality of the public schools.