Towards Early Childhood Education as a Social Right: A Historical and Comparative Perspective

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Introduction

Once early childhood education (ECE) had developed beyond the purely charitable and philanthropic initiatives of the first decades of the nineteenth century, a legal-institutional framework was bound to develop. This legal framework then facilitated and constrained the kind of ECE which could further develop; in other words, given the legal framework some ways of offering and organizing ECE then became easier, others more difficult (or even impossible, if the State outlawed some forms of ECE, as Prussia did in with the Froebelian Kindergärten from 1851 to 1860, or as France did in 1904 with the Catholic écoles maternelles). The legal framework can be expected to change if the goals pursued by ECE change (as they appear to have done from the 1960s). It is therefore important to look at the way in which the law deals with ECE. The purpose of this chapter is to analyse different stages of the changing regulation and legal frames of ECE institutions and to build up a kind of periodization with the intention of understanding where we are now, and how commonalities and differences among European countries have evolved over time.

The significance of law for ECE may be understood by examining the four main ways the law relates to ECE. First, what is known as objective law can simply regulate the conditions of the provision of ECE. Thus, law might clarify who is allowed to offer ECE as provider or as staff and how it is supervised. In this sense law might also formulate requirements for the material infrastructures and health and safety conditions, regulate subsidies and financing, determine the qualifications required of the staff and define a curriculum. Second, law can impose certain guidelines, goals and programmatic sentences that impose duties upon the State and prescribe how the State should act, thereby limiting somewhat the range of action of the State. Third, individuals (either the child or a parent) can be entitled to subjective rights to participate in ECE, which affect the access conditions (depending on who
is entitled, whether it is universal or granted only upon certain conditions, how many hours it includes and so on). The fourth possibility is to make participation in ECE a duty. Law can make ECE compulsory, putting up even fines or sanctions in cases of failure to obey the law. This fourth possibility represents the latest trend, with nine European countries embarking upon it in recent years (Eurydice 2014, p. 12).1

This chapter investigates how these different relationships between law and ECE developed since the mid-nineteenth century. It suggests a periodization as a frame for understanding commonalities and differences of institutional change and its characteristics in European countries. In the first section, some clarifications about the concept of a right are set out against a rather loose use of the term ‘right’, covering nearly everything from moral claims to enforceable legal rights. Second, the emerging concepts of social rights and a right to education are discussed further. In the third section, the historical developments and change of legal regulation of ECE in selected European countries are scrutinized since the mid nineteenth century, picking up the examples of some European countries. This is characterized as the first stage, lasting more or less up to the 1960s. Legal change regarding ECE since the 1960s and 1970s is investigated as the second stage, linked to labour market policies, parental rights and gender equality, but also to the enhancement of children’s rights. Fourth, the decades since the 1990s are discussed, guided by the question of whether this constitutes a third stage in the legal establishment of a social right to ECE. Finally, the analysis concludes with a discussion of the findings and a summary of the different ways the law regulated ECE over the three stages.

A right to education – preliminary remarks on claims, social rights and duties

The term ‘right’ is sometimes used quite loosely, covering nearly everything from moral claims to enforceable legal rights. What is a right? A subjective legal right is a claim capable of being invoked by an individual in a court case as a basis of a lawsuit or an appeal. Subjective legal rights have long been central to civil law in regulating relationships between private actors who have mutual rights and duties, but in public law subjective legal rights against the State developed much more gradually. Civil liberties have long been enforced against restrictions and intrusion by the State; but social rights developed only later and entail the right to enjoy certain resources or infrastructures to be guaranteed by the State, typically in the fields of social protection, employment, health, education and housing. In his work on citizenship, the influential sociologist T. H. Marshall (1950) spoke of social rights as making it possible for all members of society to enjoy satisfactory conditions of life; according to him, citizenship has expanded from civil rights (such as a fair trial) in the eighteenth century to political rights (suffrage, for example) in the nineteenth century to social rights (such as