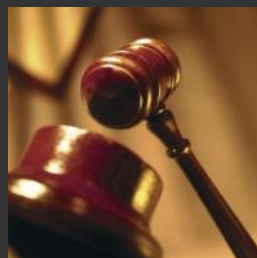




Litigating the Right to Education in Tanzania:

Legal, Political, and Social Considerations
and Potential Applications



February 2011



A man can defend his rights effectively only when he understands what they are, and knows how to use the constitutional machinery which exists for the defence of those rights....

Julius K. Nyerere, "Freedom and Development," 1968

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

First section of General Comment No. 13: The Right to Education
of the Committee on Economic, Social and Cultural Rights, 1999

Welcome to the Right to Education Info Packet! It is the aim of this package to inform you about the right to education, its legal, political, and social considerations, and some examples of its potential uses in litigation. Many of us have heard of the right to education and may even make references to it when speaking with others in our communities, but often the right to education remains merely an abstract idea in our minds of something that entitles us to some form of education. If we were pushed to define the right to education, most of us cannot say more than that it means that children seven years old should be in school.

In reality, the right to education is a very specific, very thoroughly developed set of objectives and obligations that governments around the world have agreed to through global, regional, and domestic accords that have been progressing for more than 60 years. It is the intention of this publication to familiarize you with the details and the depth of the right to education so that it is no longer a vague concept in your mind but a concretely defined vision of what we are all working towards.

However, the following is not a comprehensive, exhaustive discussion of all aspects of the right to education. Rather, the focus is predominantly on its uses, litigation in particular, for it is also the goal of this information packet to accustom you to your role as a citizen within the legal framework. We often think of laws as self-enacting—that once they are passed, then they are implemented. Time and again we celebrate the passage of a new, progressive law, only to look back years later and ask why nothing has changed. This is because we don't recognize and fulfill the roles on our end of the legal system. Laws are not only regulations the government enforces upon the people; they are regulations the people are to enforce upon the government. Laws just do not magically change things; they are tools to be used in court to hold others accountable so as to bring about change. Thus, it is the objective of this publication not to fill your head with heaps of information about a right that you cannot achieve but to enlighten you on tools that exist and how you may use them to attain your rights.

Finally, though this publication contains legal terms and concepts, it was not written by a lawyer and may therefore contain some over-simplifications. In the end, it is hoped that this is ultimately beneficial as legal concepts as written by someone who is not a lawyer may perhaps be more easily absorbed by someone who may also not be lawyer.

Legal, Political, and Social Considerations

“Free” Primary Education

Expulsion of Pregnant Students

Corporal Punishment

Retrogressive PEDP II Resources

Acronyms and References

Legal, Political, and Social Considerations

People across Tanzania are working hard to improve their lives and those of the ones they love. A foundational component of this progress is education. A quality education is a constitutional right of every citizen of Tanzania, but it is not uncommon for this right to be violated. In its strictest sense, a right is a law. When laws are broken, legal measures are often taken. Thus, when rights are violated, there are times when litigation should be entertained as an option.

When looking at the possibility of taking a rights violation to court, several factors must be considered, particularly the legal, political, and social contexts. These factors are important for any litigation but even more so for strategic litigation, which is more specifically the approach being discussed here. Strategic litigation differs from traditional litigation in that it aims to use of the courts to bring about broad social change. While it seeks to uphold individual justice for the client as with traditional legal services, strategic litigation is equally concerned with social justice. It is a tactic of policy change or policy enforcement with the ultimate goal of upholding rights in society as a whole (CRIN, 2009). Thus, more so than with traditional litigation, strategic litigation must consider legal, political, and social factors in its efforts toward sustainable social change.

1.0 Legal Framework

Though political and social environments may ultimately have the most influence on the success of right to education (RTE) litigation, the existing legal framework is nevertheless the first arena to fully explore, for it outlines exactly what is meant by the right to education, states' minimum core obligations to it, and violations of it. This framework comprises global, regional, and domestic laws, charters, and treaties.

1.1 United Nations Treaties

Tanzania became a member of the United Nations in 1961, thus becoming part of the human rights system established by the Universal Declaration of Human Rights (UDHR). Since then Tanzania has signed and ratified a number of international UN treaties, including several which speak directly to member nation-states' obligations to uphold the right to education. In chronological order with the year in which they were ratified by Tanzania, these are the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976), the Convention Against Discrimination in Education (CADE) (1979), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1985), the Convention on Rights of the Child (CRC) (1991), and the Convention on the Rights of Persons with Disabilities (CRPD) (2009). Tanzania has ratified all UN treaties containing aspects of the right to education with the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

A few notes on language to make the following discussion more understandable: In the international treaty system as well as some other legal realms, there is a distinction between 'signing' and 'ratifying.' Signing a treaty is just a symbol of support to it; whereas ratifying it brings into effect the contractual agreements and legal obligations. Though the one usually follows the other, it is not necessary, and there are numerous notorious cases of countries signing but not ratifying certain treaties.¹ Also, 'acceding' to an agreement is more or less synonymous to 'ratifying' it and has the same legal implications.

¹ Such as the United States signing but refusing to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Kyoto Protocol.

Also, at times the subsequent dialogue speaks of ‘adopting’ a treaty, then ‘entering it into force.’ ‘Adoption’ is the act by a body, such as the UN, of establishing the form and content of a resolution—basically agreeing on what exactly is meant by the treaty at hand. At this point, it has no binding force and still needs to be ratified by a certain number of members for it to take effect. ‘Entry into force’ occurs when this set number of members ratifies it, a process that is always defined in the agreement itself. For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulated that it would enter into force three months after the 35th UN member ratified or acceded to it. Only then does the treaty become legally binding to member States that have ratified it and those that may ratify it in the future.

In sum, a treaty is first adopted then opened for member States to sign and ratify it. When enough have ratified it (effectively showing that it is widely accepted as an appropriate UN agreement), it is put into force. At that time it is now an officially binding agreement for any State that ratifies it. As this discourse is only interested in aspects of the right to education to which Tanzania is legally bound, the following only discusses those adopted treaties which Tanzania has signed and ratified/acceded and that have been entered into force.

1.1.1 Universal Declaration of Human Rights

Considered to be the original milestone document on human rights and adopted by the UN in 1948, the Universal Declaration of Human Rights (UDHR) became pertinent to Tanzania when it became a UN member in 1961. Article 26 of the UDHR deals explicitly with the right to education:

Article 26

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- (3) Parents have a prior right to choose the kind of education that shall be given to their children.

(UNGA, 1948)

From its inception, the right to education contains various components as outlined in Article 26 of the UDHR. First, the accessibility and availability of education is addressed. The right to education is for all, and concerning different levels of education, elementary education shall be free and compulsory, vocational education shall be made available, and higher education shall be merit-based. Second, the aim of education is established as full human development with respect for human rights, freedoms, non-discrimination, and peace. And third, the right for parents’ freedom to choose the kind of their children’s education is reserved.

1.1.2 International Covenant on Economic, Social and Cultural Rights

Adopted by the UN in 1966, entered into force in 1976, and acceded to by Tanzania that same year, the International Covenant on Economic, Social and Cultural Rights (ICESCR) commits States to work towards realizing individual economic, social, and cultural rights such as the rights to work, social security, family life, an adequate standard of living, health, education, and participation in

cultural life. To date, 160 countries have ratified the ICESCR while six others have signed but have not yet ratified it.

Concerning the right to education, the ICESCR states:

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

(UNGA, 1966)

As can be seen, the ICESCR lends a further voice to the right to education as established under the UDHR and forms the most basic foundation of what have become the fundamental aspects to the right to education. A number of new elements appear: secondary and higher education are to be provided progressively free; the provision of “fundamental education” is further defined to include those who have gone without all or a portion of primary education; school systems and material conditions for teachers are to be developed and improved; parents’ right to choose their children’s education is extended to legal guardians, and this freedom to choose encompasses issues of freedom of religion; the establishing of private schools is protected; and States which have not achieved free, universal primary education are obligated to create a plan to accomplish such.

1.1.2.1 Core Content

On top of the treaties and covenants themselves, other important areas to consider when examining the legal framework of the right to education established by the UN are the reports of UN committees and the Special Rapporteur on the Right to Education. Committees are established by the UN to monitor the implementation of treaties as well as to provide further interpretations of them. Where a treaty or covenant may only contain a few lines on an issue, the committee will deliberate and report the full meanings and intentions of such text. Special Rapporteurs are individuals mandated by the UN Human Rights Council to conduct general monitoring, investigate violations, and submit recommendations on human rights issues. The reports of the UN Special Rapporteur on the Right to Education, though technically outside the RTE legal framework, have historically been a strong voice in influencing its direction and development.

In 1999, the UN Committee on Economic, Social and Cultural Rights (UNCESCR) convened to extract the full implications of Article 13 and 14 of the ICESCR. It states, “Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human rights law” (UNCESCR, 1999b).

In explicating what is known as the “core content” of the right to education as found in Article 13, the Committee delineates what has become to be called the 4-A scheme of the right to education: availability, accessibility, acceptability, and adaptability. Originally developed by Katarina Tomasevski, the late global expert on the right to education and UN Special Rapporteur on the right to education from 1998 to 2004, the 4 As were enshrined by the Committee and have become the most widely-used framework for understanding the core content of the right to education. Here summarized by Prof. Dr. Fons Coomans, the UNESCO Chair in Human Rights and Peace at the Department of International and European Law at Maastricht University in the Netherlands, the 4 As can be expressed as such:

availability: functioning educational institutions and programs have to be available in sufficient numbers in a country, through a public educational system and allowing private parties to establish non-public schools;

accessibility: educational institutions and programs have to be accessible to everyone, without discrimination on any ground, also including physical and economic accessibility;

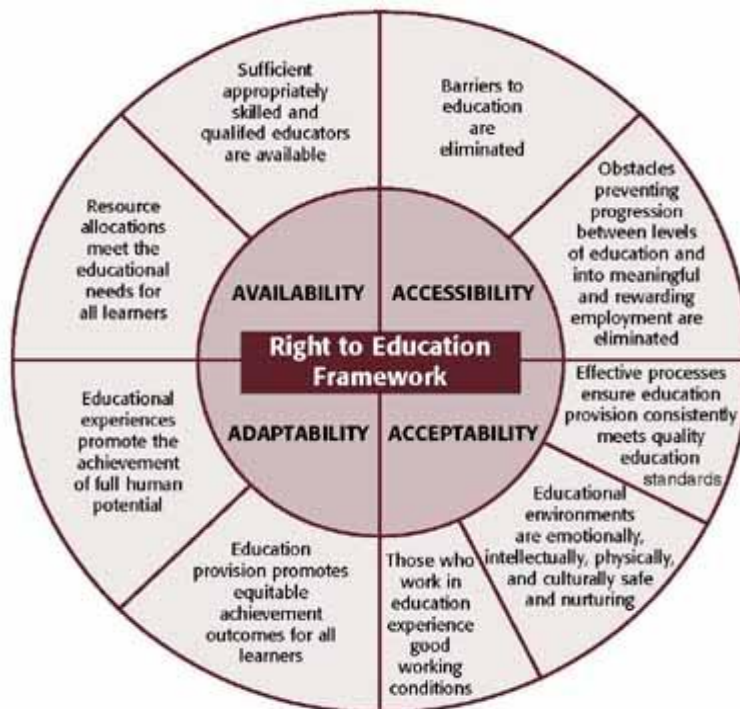
acceptability: the form and substance of education, including curricula and teaching methods, has to be relevant, culturally appropriate and of good quality and in accordance with the best interests of the child; this includes a safe and healthy school environment;

adaptability: education has to be flexible, so that it can adapt to the needs of changing societies and communities, and respond to the needs of students within

their specific social and cultural context, including the evolving capacities of the child.

(Coomans, 2007)

The New Zealand Human Rights Commission, a human rights institution of the New Zealand government, offers this more visual representation:



(Human Rights Commission, 2010)

Not reflected in either of the two synopses above is the three-fold dimension to accessibility that the Committee outlines as consisting of non-discrimination, physical accessibility, and economic accessibility. All economic, social, and cultural rights are to be provided “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (UNGA, 1966, §2(2)). As to physical accessibility, education must be safely within reach, whether that be geographically as in a nearby school or technologically as with online courses. Finally, all levels of education must be economically accessible wherein primary education is free while secondary and higher education are to be progressively free (UNCESCR, 1999b, §6(b)).

The components of the right to education, such as the 4 As, are not mere suggestions or guidelines; rather, they form obligations to all State parties that ratify the ICESCR. The aspects outlined in Articles 13 and 14 concerning the right to education are combined with the Covenant’s Article 2 to impress obligations onto signatory governments:

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

(UNGA, 1966)

This in effect is the essence of the Covenant—that State governments promise to fulfill something, in this case a variety of economic, social, and cultural rights. Comments from the Committee on how Articles 2, 13, and 14 work together follow below.

1.1.2.2 Respect, Protect, Fulfill

The right to education also brings with it another set of State obligations that apply to all human rights: the obligations to respect, protect, and fulfill. Under the obligation to fulfill follows both an obligation to facilitate and an obligation to provide. As stated by the Committee,

The obligation to *respect*: States cannot hinder or prevent the right to education.

The obligation to *protect*: States must intervene to prevent others from interfering with the right to education.

The obligation to *fulfil (facilitate)*: States are required to enable and assist individuals and communities to enjoy the right to education.

The obligation to *fulfil (provide)*: States are obliged to provide the right to education when an individual or group is unable to do so for themselves.

(Adapted from UNCESCR, 1999b, §47)

These obligations combine with the 4-A framework, that is, they are obligations to respect, protect, and fulfill the *availability*, *accessibility*, *acceptability*, and *adaptability* of education. To illustrate, “a State must *respect* the *availability* of education by not closing private schools” (UNCESCR, 1999b, §50, emphasis added). Or, a State must *protect* the *accessibility* of education by making sure girls are not prevented by others from going to school. Likewise, a State must *fulfill (facilitate)* the *acceptability* of education by assuring a culturally-appropriate curriculum and “*fulfill (provide)* the *availability* of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries” (§50, emphasis added).

1.1.2.3 Progressive Realization

Governments agreeing to the ICESCR commit “to take steps,” and in the case of the right to education, this is further qualified by Article 14 which states that a “plan of action” must be adopted “within two years” with a goal realizing free, universal primary education “within a reasonable number of years.” This general ‘taking of steps’ by a government towards the full upholding of rights in Article 2 is termed “progressive realization,” meaning that because some rights are difficult to instantly achieve and because resource constraints may exist, States are not bound to immediately accomplish the aims of the ICESCR but are nonetheless required to continuously move toward them. Or, in the words of the Committee, “Progressive realization means that States parties have a specific and continuing obligation ‘to move as expeditiously and effectively as possible’ towards the full realization of article 13” (UNCESCR, 1999b).

1.1.2.4 Maximum Available Resources

It is also worth noting that this progressive realization as to be carried out by the State “to the maximum of its available resources.” The Committee is careful to clarify that this refers to both a State’s own resources as well as those available through international assistance. In other words, a State government cannot look at its budget and say that only its own internal revenue constitutes ‘maximum available resources’ while not considering international aid funds as part of its resources to employ towards the fulfillment of economic, social, and cultural rights in the country.

1.1.2.5 Non-Discrimination

The Committee does make some exceptions to the above rules, and one is on the question of discrimination. It states that the prohibition against discrimination “is subject to neither progressive

realization nor the availability of resources.” Non-discrimination in education is to be “fully and immediately” effected (UNCESCR, 1999b, §31).

1.1.2.6 Minimum Core Obligations

The duties noted above form part of what is overall given the term of minimum core obligations. These are obligations that, beyond all else, States are bound to satisfy at least to the minimum essential level and can be categorized as follows:

Non-Discriminatory Access: “to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;”

Human Development Aim of Education: “to ensure that education conforms to the objectives set out in article 13 (1);”

Compulsory, Free Primary Education for All: “to provide primary education for all in accordance with article 13 (2) (a);”

National Strategy for Education: “to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education;”

Freedom to Choose: “to ensure free choice of education without interference from the State or third parties, subject to conformity with ‘minimum educational standards’ (art. 13 (3) and (4)).”

(Adapted from UNCESCR, 1999b, §57)

1.1.2.7 Specific Legal Obligations

Finally, the Committee outlines a mix of further government obligations specific to the right to education. Governments are to direct curricula in accordance with the right to education; establish monitoring systems to track the fulfillment of educational objectives; create, uphold, and monitor educational standards and regulations to which all educational institutions must conform; and rid communities and families of child labor (UNCESCR, 1999b, §49-55).

1.1.2.8 Violations

Violations of the right to education stem directly out of States’ obligations to realize the right. A State may either violate the right to education by commission or omission, meaning a State may commit a violation by actively doing something against the right to education or by failing to perform part of its obligations (UNCESCR, 1999b, §58). For example, if, perhaps through legislation, the State discriminates against a group of people in the field of education, such as not allowing them to enroll, this constitutes a violation. Outlawing private schools or failing to introduce universal free, compulsory primary education are also violations a State may commit. All of these violate a State’s minimum core obligations to the right to education.

There is also a unique violation that has to do with progressive realization and maximum available resources, and that is the violation of retrogressive measures. This occurs when a State takes a step away from realizing the right to education rather than moving toward it. In terms of available resources, it means that a State is no longer committing its maximum available resources to education and is perhaps putting its money elsewhere. Though perhaps not technically a violation as a State may prove that it was necessary to do as such, retrogressive measures are generally considered impermissible (UNCESCR, 1999b, §42).

1.1.3 Convention Against Discrimination in Education

Adopted by UNESCO in 1960 and entered into force in 1962, the Convention Against Discrimination in Education (CADE) was ratified by Tanzania in 1979. CADE seeks to further

eliminate segregation and discrimination in the area of education and outlines State obligations of non-discrimination in all educational realms such as administration, admission, and assistance. While protecting the establishment of separate public or private schools for religious or linguistic reasons (UNESCO, 1960, §2), it is careful to prohibit “education of an inferior standard” (§1(b)). On top of non-discrimination, CADE reinforces some of the other core concepts of the ICESCR such as the aim of education as full human development, the freedom of parents and guardians to choose their children’s schools, the availability and accessibility of all levels of education, standards of education, and the outreach to those who have not completed some or all of primary education.

1.1.4 Convention on the Elimination of All Forms of Discrimination against Women

The battle against discrimination in education continues with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that was adopted by the UN in 1979, entered into force in 1981, signed by Tanzania in 1980, and then ratified by Tanzania in 1985. Article 10 of CEDAW gives women equal rights as men in the educational field and assures:

the same conditions of access to all levels of education;
the same curricula and examinations;
the same quality of teaching staff, school premises, and equipment;
the same opportunities for scholarships, grants, continued education programs, and sports/physical education participation.

(Adapted from UNGA, 1979, §10)

It also aims to eliminate the “stereotyped concept of the roles of men and women” in the education system, particularly through revision of textbooks, school programs, and teaching methods (UNGA, 1979, §10(c)) while calling for access to health and family planning information (§10(h)). In 1987, after reviewing reports from 34 States and noting the varying degrees of continued stereotyping of women, the Committee on the Elimination of Discrimination against Women urged States to take up education and public information programs demonstrating the social equality of women (UN CEDAW Committee, 1987).

1.1.5 Convention on the Rights of the Child

The early 1990s saw the onset of formalizing civil, political, economic, social, and cultural rights for children. Adopted in 1989 and entered into force the next year, the Convention on the Rights of the Child (CRC) has been ratified by every member of the UN except Somalia and the United States. Tanzania itself ratified the CRC in 1991.

The CRC is a comprehensive document dealing with a variety of needs and rights of children, defined as human beings below the age of 18 years (UNGA, 1989, §1). The core of the CRC is focused on non-discrimination, the best interest of the child, the right to life, survival and development, and the right to express views and have them taken into account while other provisions include the rights and responsibilities of parents, freedom of expression, freedom of thought, the right to information, the rights of children with disabilities, the right to education for health, the linguistic and cultural rights of children belonging to minority groups, and the right to education (UNCRC Committee, 2001b). The CRC expands on the right to education discussion mostly in qualitative terms, speaking much more to the aims and intentions of education as towards personal development and the realization of human rights. It does so by painting a more specific picture of appropriate learning environments, curricula, and teaching methodology, as below:

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

(UNGA, 1989)

As can be seen from above, Article 28 of the CRC reiterates certain commitments we've already seen: free, compulsory primary education, the further development and introduction of free secondary education, and merit-based higher education. It also contains a few other areas that have not been specifically mentioned until now, namely the monitoring of attendance and drop-out rates, discipline in accordance with "human dignity," and particular attention to literacy, science and technology, and teaching methodology.

Article 29 is where we see the further advancement of qualitative factors. Education is to be directed toward the holistic development of the child in terms of the child's personality and ability; respect for human rights; parental, cultural, social, and national values; and respect for the environment.

The Committee on the Rights of the Child, a panel of 18 independent experts, monitors the implementation of the CRC as well as providing it with further interpretations. It is through the words of the Committee that we again see the depth with which the CRC speaks of education:

An education with its contents firmly rooted in the values of article 29 (1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalization, new technologies and related phenomena. Such challenges include the tensions between, inter alia, the global and the local; the individual and the collective; tradition and modernity; long- and short-term considerations; competition and equality of opportunity; the expansion of knowledge and the capacity to assimilate it; and the spiritual and the material. And yet, in the national and international programmes and policies on education that really count the elements embodied in article 29 (1) seem all too often to be either largely missing or present only as a cosmetic afterthought.

(UNCRC Committee, 2001b)

The Committee speaks at length about further aspects of appropriate education such as child-centered teaching methodology, revision of curricula, and the necessarily peaceful, non-discriminatory natures of school environments, including the prohibition of corporal punishment.

Under the CRC, States are obligated to submit regular reports to the Committee on the implementation of rights as in the CRC. States are to produce such reports two years after ratifying the CRC then every five years thereafter (UNGA, 1989, § 44(1)).

1.1.6 Convention on the Rights of Persons with Disabilities

Finally, adopted in 2006, entered into force in 2008, and ratified by Tanzania in 2009, the Convention on the Rights of Persons with Disabilities (CRPD) extends the right of education of persons with disabilities to a truer sense of accessibility. It speaks of not only non-discrimination and non-exclusion but also more pro-active measures States should take to ensure that persons with disabilities are included in education, including the use of Braille, sign language, and other alternative forms of communication in the classroom as well as the employment of teachers, including those with disabilities, to teach with said forms of communication and train other educators in them.

1.2 African Union Charters

1963 saw the formation of the Organization of African Unity (OAU), of which Tanzania was a founding member. Replaced by the African Union in 2002, this institution initiated two charters pertinent to the right to education: the African Charter on Human and Peoples' Rights (ACHPR) and the African Charter on the Rights and Welfare of the Child (ACRWC), ratified by Tanzania in 1984 and 2003, respectively.

1.2.1 African Charter on Human and Peoples' Rights

Adopted by the OAU in 1981 and ratified by Tanzania in 1984, the African Charter on Human and Peoples' Rights (ACHPR) entered into force in 1986 and has been ratified by every African nation

except Morocco which is not a member of the African Union. The ACHPR is similar to the UDHR in its inclusiveness and brevity. Concerning education, it simply states, “Every individual shall have the right to education” (OAU, 1981, §17).

And similar to how the UN Committee on Economic, Social and Cultural Rights pulls out the further meaning of the ICESCR, the African Commission on Human and Peoples’ Rights has developed but has not yet adopted the Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights in 2009. Though extensive, its section on the right to education is reproduced at length below, for not only is it the aim of this report to potentially serve as a reference for the reader but also because the language and depth of the right to education within the African context should be noted first-hand by the reader as the legal framework discussion moves closer and closer to Tanzania:

55. Every individual shall have the right to education.
56. Education is a fundamental right that affects the growth, development and welfare of human beings, particularly children and youth. As a human right, education is the primary vehicle by which economically and socially marginalized children and adults can lift themselves out of poverty and obtain the means to participate fully in their community. It has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.
57. The rights in article 17 impose, amongst others, the following obligations on States parties:
 - i. To ensure that all children enjoy their right to free and compulsory primary education. No children should be denied this right because of school fees or related costs of education. Special measures may be required to ensure that children belonging to disadvantaged or vulnerable groups receive free primary education. To achieve this objective states are bound to progressively increase the amount of national resources allocated to education.
 - ii. To develop a system of schools at all levels that ensures that education is physically and economically accessible to everyone (including the provision of finance, the building of schools and the provision of educational material), establishing an adequate scholarship and/or fellowship system, ensuring continued education for teachers and instructors including education on human rights, and continuously improving the conditions of service and level of training of teaching staff.
 - iii. To develop policies to eliminate or reduce the costs of attending primary school which include lifting fees, providing stipends conditional on school attendance, provision of free or lifting of uniform requirements where they exist, provision of free textbooks, provision of free, provision of transportation or free school meals to attract poor children to school.
 - iv. To ensure that education systems are directed towards:
 - a) the promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential, without discrimination;
 - b) fostering respect for human rights and fundamental freedoms with reference to those set out in the provisions of various African instruments on human and peoples’ rights and international human rights declarations and conventions;

- c) the preservation and strengthening of positive African morals, traditional values and cultures;
- d) the preparation of the child for responsible life in a free society, in the spirit of understanding, equality, tolerance, dialogue, mutual respect and friendship among all peoples;
- e) the promotion and achievements of African unity and solidarity;
- f) the development of respect for the environment and natural resources; and
- g) the promotion of the child's understanding of primary health care.
- v. To ensure the provision of a programme in psycho-social education for orphans and other vulnerable and disadvantaged children.
- vi. To make secondary education, including technical and vocational secondary education, available and accessible to all by all every appropriate means, and in particular by the progressive introduction of free education.
- vii. To make higher and tertiary education equally accessible to all, on the basis of capacity, by every appropriate means, including by financial and other assistance to students in higher education and by the progressive introduction of free education. University and higher education should be directed towards training and research needed to ensure Africa's scientific and technological independence.
- viii. To ensure that higher and tertiary institutions should have a role in economic, social and cultural development and the protection of freedom and dignity. Higher education institutions and universities should be enabled to contribute to social, economic, cultural, scientific and human development through the training of high-level specialists and the intensification of research.
- ix. To ensure accessible and affordable vocational training and adult education and adult literacy as fundamental aspects of the right to education.
- x. To ensure that adult education programmes are aimed at reducing inequalities within societies and enabling African peoples to better understand the problems of the modern world. These programmes should also take into consideration national priorities and realities. States should further ensure the establishment of institutions for the training of staff for adult education. The use of African national languages is highly recommended in adult education without necessarily abandoning the use of a foreign language. Adult education should be a continuing process, and should not be seen as one-off event.
- xi. The teaching of African national languages should also be introduced at the formal educational level especially in primary schools. States should ensure that radio, television, audio-visual aids, and locally produced materials should be used in this education.
- xii. To ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child.
- xiii. To ensure that all children, including children belonging to vulnerable and disadvantaged groups, enjoy equal access to and progress in the educational system, including addressing the social, economic and cultural barriers that impede girl children's equal enjoyment of the right to education. Where necessary States should introduce special measures to ensure that vulnerable and disadvantaged children attend school.

- xiv. To ensure that girls who become pregnant before completing their education have an opportunity to continue. To ensure that all children that have dropped out receive the opportunity to finish their education.
- xv. To ensure the safety of schoolchildren by taking effective measures to address physical and sexual abuse by other students, teachers, staff or principals; ensuring the safety of schoolchildren on their way to and from school; and adopting and implementing prohibition on the use of corporal punishment.
- xvi. To respect the liberty of parents and guardians to establish and choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State, and to ensure the religious and moral education of their children in conformity with their own convictions.
- xvii. To ensure that education is directed to dignity and the full development of the human personality. Education should strengthen the respect in society for human rights and fundamental freedoms, the participation of all persons in a free society and the promotion of understanding, tolerance and friendship. The education system must expressly include education of human rights.
- xviii. To ensure that all educational programmes are of a high quality and appropriate to the needs of society. Education must equip learners with the requisite skills and values to participate in and contribute to national and international development and employment opportunities. Education and training must be targeted at development based on African realities, and particularly towards the development of science and technology. School curricula should be linked to the labour market and society's demands for technology and self-reliance, whilst taking into consideration the self development of the child.
- xix. To ensure academic freedom in all schools and institutions of higher learning.
- xx. To facilitate the free movement of persons essential for the exchange of ideas and economic integration. To give priority to cooperation in the exchange of professional manpower, especially in education and training, and to put an end to brain drain and to encourage qualified Africans living abroad to return.
- xxi. To ensure the provision of inclusive quality and free primary education to all children with disabilities and access to inclusive quality secondary education on an equal basis with other members of their communities. States must ensure that persons with disabilities receive the support required, within the general education system, to facilitate their effective education. States should ensure that effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.
- xxii. To prohibit and prevent all discrimination in education against children based on their real or perceived HIV status and to take steps to strengthen the ability of extended families to care for HIV/AIDS-affected children and provide them with formal schooling.
- xxiii. To address the interrelationship between education and child labour by simultaneously providing incentives to keep children in school, expanding educational opportunities for working children and making

stronger efforts to remove children from the worst forms of child labour and to ensure their placement in appropriate educational programmes.

- xxiv. To ameliorate the effect of household labour on the education of the child, and to ensure that the girl child is not prevented from acquiring a decent education as a result of such labour.
- xxv. To ensure that prisoners and other persons in detention, especially juveniles, are provided with formal and vocational education to increase their skills and capacities when they are reintegrated into society.

(ACHPR Commission, 2009)

As can be seen, the right to education is no mere concept or suggestion within the African Union; it is a very detailed set of aims and obligations. As perhaps noticed, the full development of the right to education as elucidated by the African Commission on Human and Peoples' Rights is actually a very comprehensive mix of elements from other documents including the ICESCR, General Comments from the UN Committee on Economic, Social and Cultural Rights, the CRC, the ACRWC, the CRPD, and the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa. With additional provisions concerning African languages, culture, and identity, the Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights are in many ways the African embodiment of the UN treaties we have already seen, outlining many of the very same matters such as free and compulsory primary education, progressively free higher education, the 4 As, the holistic aims of education, the prohibition of corporal punishment, and non-discrimination.

This familiarity continues as the Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights outlines member States' obligations to all the human rights discussed within it. Here again we see the 4 As (only this time in terms of availability, adequacy, *affordability*, and acceptability); the obligations to respect, protect, fulfill as well as *promote*; commitment of maximum available resources; progressive realization; minimum core obligations; non-discrimination; and prohibition of retrogressive measures (ACHPR Commission, 2009, Section II: Nature of member states' obligations). Again, in many ways, the ACHPR and the African Commission's Draft Principles and Guidelines on it are the African domestication of the UDHR and the UN Committee's General Comments on the ICESCR, respectively. In fact, the 444 footnotes of the African Commission's Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights are mostly filled with references to the ICESCR and its Committee.

1.2.2 African Charter on the Rights and Welfare of the Child

This regional adoption of global treaties continued in 1999 when the OAU entered into force the African Charter on the Rights and Welfare of the Child (ACRWC). Adopted by the OAU in 1990, the ACRWC was ratified by Tanzania in 2003. Just as the CRC secures the civil, political, economic, social, and cultural rights of children, so does the ACRWC. Its Article 11 on education reads as follows:

Article 11: Education

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
 - (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;

- (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions;
 - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
 - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;
 - (e) the preservation of national independence and territorial integrity;
 - (f) the promotion and achievements of African Unity and Solidarity;
 - (g) the development of respect for the environment and natural resources;
 - (h) the promotion of the child's understanding of primary health care.
3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
 - (a) provide free and compulsory basic education;
 - (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
 - (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
 - (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
 - (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.
 4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.
 5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.
 6. States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.
 7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph I of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the States.

(OAU, 1990)

As can be seen, the ACRWC is the embodiment of the CRC but with the additional emphasis on African identity, culture, and unity. If one compares it with the CRC excerpts above, it can be seen that much of what the ACRWC says about the right to education is taken verbatim from the CRC. New features are present however, most notably the notions of pro-active educational measures to be taken for girls in general and girls who become pregnant in specific.

1.3 African Community Agreements

Moving from the African continent as a whole to the particular regions of East and South Africa, the right to education continues its journey closer to Tanzania. Comprising Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe, the South African Development Community (SADC) was instituted in 1992. Tanzania is also a founding member of the East African Community (EAC) which was officially re-established in 2000 and consists of Burundi, Rwanda, Uganda, Kenya, and Tanzania.

1.3.1 South African Development Community Treaty

The South African Development Community Treaty was adopted in 1992, with Tanzania as one of the founding members, and entered into force the following year. It does not outline any rights specific to education and only speaks generally of “human rights, democracy and the rule of law” (SADC, 2001, §4(c)), without any clear definition or reference to any rights-based documents.

1.3.2 South African Development Community Protocol on Education and Training

Five years after the adoption of the SADC Treaty, the SADC Protocol on Education and Training was developed. The Protocol was signed in 1997 by 12 SADC member countries, including Tanzania, ratified by Tanzania and eight other countries, and put into force in 2000.

The Protocol aims to promote regional harmonization and standardization of the education sector—primary, secondary, tertiary, adult, vocational, etc.—across SADC countries so as to maximize human resource development for sustainable socio-economic growth throughout the region (SADC, 1997). Nonetheless, it provides little concrete contributions to achieving or upholding the right to education. In the words of Karola Hahn and the Namibian Economic Policy Research Unit,

The legal character of the Protocol resembles more a ‘benevolent declaration of intent for cooperation’ or a ‘Memorandum of understanding’, rather than a binding political agenda for governments and higher education institutions. All issues and objectives are packed into soft formulations (‘shall be’, ‘shall become’, ‘shall be realised’, ‘shall function’, ‘shall be reserved’ etc.).

(Hahn, 2005, p. 15)

Because of such language, the Protocol “does not have the formal strength of a ‘regional law,’” and “no concrete, legally strictly binding obligations can be derived from the Protocol” (2005, p. 16). Likewise, “there is no effective instrument of penalty or sanction” in case a member country fails or refuses to implement the directives of the Protocol (2005, p. 16).

1.3.3 East African Community Treaty

The document reviving the EAC, the East African Community Treaty, was adopted in 1999 and entered into force in 2000 with Tanzania as a founding member. Though it does not speak directly to the right to education, it does bind member States to the ACHPR:

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:...

- (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;

(EAC, 2007, §6)

Though this internalizes the ACHPR into a further level—the EAC—remember that what the ACHPR states about the right to education is very limited (“Every individual shall have the right to education” [OAU, 1981, §17]), and most of its fuller meaning may in the future be derived from the African Commission’s Draft Principles and Guidelines on Economic, Social and Cultural Rights in the ACHPR. While EAC member States may be bound to the ACHPR, they may not necessarily be bound by the African Commission’s interpretation of it.

1.4 Tanzanian Domestic Law

Finally we come to the very laws of Tanzania itself. Though the right to education is not as well established domestically as internationally, there are still some aspects to note.

1.4.1 Constitution of the United Republic of Tanzania

A 1984 amendment to the 1977 Constitution of the United Republic of Tanzania provides for the right to education as stated by Article 11:

11. (1) The state authority shall make appropriate provisions for the realisation of a person’s right to work, to access education and social welfare at times of old age, sickness or disability and in other cases of incapacity, without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood.

(2) Every person has the right to access education, and every citizen shall be free to pursue education in a field of his choice up to the highest level according to his merits and ability.

(3) The Government shall endeavor to ensure that there are equal and adequate opportunities to all persons to enable them to acquire education and vocational training at all levels of schools and other institutions of learning.

(URT, 1998, §11)

While this sounds like a good starting point, the right to education in the Tanzanian Constitution unfortunately falls under a section of provisions of the constitution that “are not enforceable by any court” (URT, 1998, §7(2)), rendering the right to education an unenforceable directive.

1.4.2 Education Act

The Education Act, originally established in 1978, amended in 1995 and 2002, and currently under review, is Tanzania’s leading law on education. While dealing mostly with structural and managerial matters, the act does outline some fundamental aspects of the right to education:

35.-(1) It shall be compulsory for every child who has reached the age of seven years to be enrolled for primary education.

(a) Without prejudice to subsection (1), no child of the age of seven or above shall be refused enrolment in a school.

(2) The parent or parents of every child compulsorily enrolled for primary education shall ensure that the child regularly attends the primary school at which he is enrolled until he completes primary education.

(3) Every pupil enrolled at any national school shall regularly attend the school at which he is enrolled until he completes the period of instruction specified in respect of the level of national education for the attainment of which he is enrolled at the school.

(4) The Minister shall make rules, which shall be published in the Gazette, for the better carrying out of the purposes of this section and may, in those rules, prescribe acts or things which shall be done by any person and penalties for the contravention of those rules.

35A. Every child of not less than five years of age shall be eligible for enrolment for pre-primary education for a period of two years.

56. (1) Subject to the national policy on national education and to other national plans and priorities appropriately specified from time to time, every citizen of the United Republic shall be entitled to receive such of category, nature and level of national education as his ability may permit him.

(2) No person may, within the United Republic, be denied opportunity to obtain any category, nature or level of national education for the reason only of his race, religion or political or ideological beliefs: Provided that any school may, in its admission procedures, afford preference to citizens of the United Republic.

(3) Every school shall provide in its curriculum for the provision of religious instruction to its pupils on the premises of the school, but no pupil shall be compelled to attend any particular religious class or worship against his will if he is above the age of eighteen years, or against the will of his parent or parents, if he has not yet attained the age of eighteen years.

(4) Nothing in this section shall be construed as imposing on any school or on any of its teachers, in his official capacity as a teacher, the responsibility for organizing or providing religious education or worship.

57. No fees, subscriptions or contributions shall be charged, levied or collected as a condition of admission into or attendance at any private school except with the approval of the Commissioner.

58. The Minister may, by order in writing, prohibit the use in any school of any book or material for any reason which he may think fit.

(URT, 1978, as amended 2002)

While there are some basic provisions concurrent with the legal framework to the right to education that we have already seen—such as compulsory primary education and attendance—there are a lot of questions surrounding the Education Act that should be discussed or clarified. First, while it calls for primary education to be compulsory, it does not require it to be free. Second, despite having ratified several global and regional instruments—including the ICESCR, CADE, CEDAW, CRC, ACHPR, and ACRWC—that prohibit sexual discrimination, Tanzania’s Education Act is silent on this (and other forms of discrimination) in its discrimination clause (URT, 1978, §56(2)). Third, an odd amount of censorship power is given to the Minister of Education and Vocational Training, who may single-handedly prohibit any book or material almost non-discretionarily—“for any reason which he may think fit” (URT, 1978, §58). Finally, instead of a prohibition on corporal punishment,

a 2002 amendment to the Education Act actually institutionalizes it: “on his hand or on his normally clothed buttocks with a light flexible stick ...” (URT, 2002b, GN 294).

1.4.3 Law of the Child Act

In 2009, Tanzania passed the Law of the Child Act.² While this saw the domestication of many aspects of the CRC such as child protection, custody, foster care, adoption, child-labor prevention as well as the right to education, it fails to carry the same depth and qualitative meaning to education that is found in the CRC. The Law of the Child Act secures education for children, stating that children have a right to education, that parents or guardians have a duty to provide education, that another person cannot deprive a child of this education, that children with disabilities are equally entitled, and much more concerning the maintenance of children in any form of foster care:

8.- (1) It shall be the duty of a parent, guardian or any other person having custody of a child to maintain that child in particular that duty gives the child the right to - ...
(e) education and guidance; ...
(2) A person shall not deprive a child access to education, immunisation, food, clothing, shelter, health and medical care or any other thing required for his development. ...
(6) A child with disabilities shall be entitled to special care, treatment, affordable facilities for his rehabilitation and equal opportunities to education and training wherever possible to develop his maximum potential and be self-reliance.
9.- (1) A child shall have the right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents.

(URT, 2009c)

However, due to its ambiguity, the Law of the Child Act in effect protects the right to education while hardly defining it: “basic education” is defined as “formal education provided to a child to the level that may be prescribed from time to time” (URT, 2009c, §3). While in court one may be able to interpret it as what is currently considered basic/primary education, this definition and the clauses on education mention nothing about cost. Moreover, for an extensive law on child care and protection, it doesn’t abolish corporal punishment.

1.5 Further Legal Considerations

This final domestic framework is the greatest blow to the possibility of litigating the right to education in Tanzania. Similarly to Kenya and Uganda as well as the US and the UK, Tanzania leans towards a dualist legal system, meaning there’s a distinction between national and international law—that distinction basically being that international law doesn’t apply in court. Though they may be used to strengthen a case and even be considered by the court, strictly speaking, international laws are only enforceable when they are domesticated into national law, as is the case with the CRC and the Law of the Child Act. With an unenforceable constitutional right to education, a non-rights-based Education Act, and a child’s rights law that only guarantees children access to some vague form of education, it is doubtful (considering only the legal context) as to whether an RTE case would be met with success in a domestic court other than perhaps a case on discrimination in access to primary education—a case of a pregnant girl getting kicked out of primary school may very well be winnable at the local level.

² The “law-act” redundancy is not a typo. This is indeed the name of the law and has been gazetted as such.

Then there are higher courts. The East African Court of Justice, established by the East African Community Treaty, has jurisdiction over interpretation and application of the EAC Treaty (EAC, 2007, §27(1)) but currently does not hear cases on human rights' violations, though it is envisioned that it will have such jurisdiction in the future. A similar regional body, the SADC Tribunal, though “not a human rights court *per se*...has ruled that it does have jurisdiction to entertain human rights matters as one of the principles of SADC is the observance of human rights, democracy and rule of law” (SADC Tribunal, 2010, p. 3; SADC, 2001, §§16(1), 4(c)). However the undefined principles of “human rights, democracy and the rule of law” as laid out by the SADC Treaty (SADC, 2001, §4(c)) provide little solace as to their applicability in a court of law.

Another forum in the future will be the African Court on Human and Peoples' Rights, which was formed in 2004 (and will be merged into the African Court of Justice and Human Rights). Tanzania itself ratified the protocol to establish the African Court in 2006. In accordance with the protocol that establishes the African Court, each country that wishes to allow direct access by individuals to the African Court must make a declaration allowing such direct access. Tanzania has not yet done so.

For now, this means human rights' cases are best handled by the African Commission on Human and Peoples' Rights. The African Commission hears communications from individuals and civil society organizations on alleged violations of rights protected under the ACHPR, makes recommendations to the relevant states, and will refer the case to the African Court if the relevant state fails to implement the recommendations; the African Court hears and judges them. However, the African Commission only considers such communications after local remedies have been exhausted, meaning the issue has gone through domestic courts first. So, a case on, say, corporal punishment may lose domestically because local policy indeed upholds the practice but then may be submitted to the African Commission and finally taken up in the African Court because it is in clear violation of the Principles and Guidelines on Economic, Social and Cultural Rights in the ACHPR (if adopted) which speak of a “prohibition on the use of corporal punishment” (ACHPR Commission, 2009, §57(xv)). However, in many situations there would be no domestic remedies available for violations of the right to education, which may allow aggrieved parties to take cases directly to the African Commission.

2.0 Political Environment

Though expectations of clear answers and predictability may be carried when thinking of legal structures, the reality is much murkier, no matter in what country one may be living. The intention of the system is for laws and policies to be clear and comprehensive and their application equally so, but it simply isn't that easy. Laws cannot just be stacked and filtered through to determine legal outcomes. Strength of the courts, judicial integrity, State control, litigator competency, personal biases, and other forms of corruption quickly complicate things.

The outcome of lawsuit, especially one against the State which is many times the case with litigating RTE, greatly depends on the strength on the court system itself. Does it feel that it has the strength to rule against the State? If it does, is it well-versed enough in measures to take to ensure the State complies? Within this lie individual integrities of the judges themselves. Do they know the full implications of the right to education to judge effectively? Are they tied to political or personal biases? Are they open to being paid off? What about the State? How does it behave in the judicial system? Does it treat it as an equal and valuable source of rightness and stability or as an obstacle to be bullied through to continue with its own agenda? And the lawyers themselves, are they able to represent such cases? A country that struggles with educational outcomes struggles with them at all levels, even if one is a professor, doctor, or attorney, and Tanzania is no exception. Simply because one is a popular, practicing lawyer doesn't necessarily mean he or she is competent enough to take

on such a case—one on a complex rights issue that may be against the State and may proceed to an international court.

To illustrate how some of these political aspects work in Tanzanian courts, consider this recent case: In 2006, the High Court ruled in favor of a petition asking the court to declare unconstitutional an amendment to the constitution which barred independent, private individuals (those not affiliated with any political party) from running for the presidency or parliamentary office. The State appealed the decision, and the points of contention made by the Deputy Attorney General (AG) were that no court in Tanzania had the power to rule on the constitutionality of the constitution, that the High Court had no power to adjudicate on the constitutional amendment in the first place, and that when it did so, it erred by basing its judgment on international instruments (in this case, the UDHR). The Court of Appeal had to present the Tanzanian constitution to the Deputy AG, even having him read parts aloud, to point out what seemed to be obvious: that the High Court is the exact body to deliberate on constitutional matters, and that it has the mandate to declare any provision unlawful, even one that has become part of the constitution itself (James, 2010). The Deputy AG seemed to be making the argument that if Parliament passes an amendment to the constitution, it cannot be contested because it is now part of the constitution. Clearly, if the system was designed like this, there would be no check on mob rule, and that is the very reason why the High Court was established by the constitution to handle such matters. As to the UDHR, the amendment was in contradiction with enforceable rights laid out in the Tanzanian constitution, and this was cited in the ruling. The court's mention of the UDHR was simply a reference to the deeper issues the case represented.

In terms of political context, this case (which is glimpse of a 16-year legal saga concerning the allowance of independent presidential and parliamentary candidates) is multidimensional. First, as can perhaps be sensed here and in media reports elsewhere, the approach by the State and the Deputy AG seemed to be to bulldoze the court—somewhat presenting an attitude to the court of “you don’t have the power” with the expectation that their complaint be unquestionably accepted solely because it’s from the State. Though these expectations and behavior by themselves testify to some level of a compromised judiciary (i.e., such an approach has possibly worked before if it is being used now), the court didn’t budge and effectively played its role in the system of checks and balances. Also, the far-sighted, public-good-oriented reasons the court cited for its original ruling also give hope to the possibility of domestically winning an RTE case in Tanzania. In this case, the court not only saw the amendments as against certain rights enshrined in Tanzania’s constitution but also more broadly declared them to be “unnecessary and unreasonable restrictions on the fundamental right of citizens” (James, 2010). The court even went further to reflect on the issue in light of the UDHR though strictly speaking it had no legal obligation to consider such international agreements.

The case didn’t end there however. On June 17th, the Court of Appeal read its judgment to indeed suspend the High Court’s decision to allow private candidates in general elections. Chief Justice Augustino Ramadhani declared, “The issue of independent candidates has to be settled by Parliament because it’s a political matter and not a legal one” (Consesa, 2010). The decision to effectively write itself out of the system of checks and balances drew criticism from academics, legal experts, politicians, and human rights activists. “The decision of the court to take back to parliament an issue that needs legal interpretation means that the court has failed to exercise powers conferred to it by the constitution,” Francis Kiwanga, executive director of the Legal and Human Rights Centre, reported (*Citizen Reporters*, 2010). The East African Law Society and the Tanganyika Law Society met with academics, lawyers, members of the judiciary, members of civil society, and registrars of the East African Court of Justice and the African Court of Human and People’s Rights, and the discussion of sending this case to the African Court continues.

This example may be interpreted as a real case study on the integrity of the Tanzanian judiciary, the influence of political pressure, and the capacity for rights, either domestic or international, to be upheld in Tanzanian courts. Such a context must be kept in mind when entertaining the use of litigation to uphold the right to education, and any such litigation should be prepared to be sent to the African Court as the domestic Tanzanian courts may very well consider such a right as “a political matter and not a legal one.”

3.0 Social Context

One of the most powerful responses to the above political distortions to the legal system is citizen pressure. Citizens being aware of such issues and speaking out about them is a necessary component to curbing them in Tanzania. Individual accountability is rare, but gradual systemic change happens. When the citizenry is simply informed and reflects that it is aware, the State does begin to respond, whether that is because it wants to address public priorities or because it knows that it can no longer get away with what it has been doing.

This social awareness is necessary; otherwise the public can just be told falsehoods, as is said to have occurred recently in another rights campaign—the right to information. On April 14th, 2010, during a parliamentary session, two Members of Parliament (MPs) raised questions concerning MPs’ limitations on access to public information held by the State. The Minister of State in the Prime Minister’s Office (Policy, Coordination and Parliamentary Affairs) answered, explaining the rights and limitations of MPs in accessing public information. He then went on to say,

The limitations include the ones I mentioned in my supplementary answer, but let it be remembered that there are huge demands for public information and worldwide, where there is a huge public demand, including parliamentarians wanting to access information from government offices, there are usually processes to ensure this including a law providing greater details. This legislation is normally called the Freedom of Information Act. In our country, for all this time, we have not seen a push or demand for such a law from the general public, parliamentarians or even from the media. This is why we have continued to use the current procedures.

(Mukajanga, 2010)

There has been a campaign for the Right to Information Bill in Tanzania for four years (Baker, 2009a, b). However, because the advocacy tactics of this campaign mostly revolve around direct, high-level State lobbying, the public is mostly unaware, mostly unresponsive, and left vulnerable to be potentially misinformed.

To prevent this, both in parliamentary and judicial proceedings, the citizenry must be aware, attentive, and somewhat responsive. Despite the ominous feeling of endless amounts of work that comes with the notion of citizen mobilization, a little actually goes a long way. When issues are put into the radio waves, newspapers, billboards, publications, and television programs, citizens are informed and perhaps will act, but more immediately, the State becomes aware that the public is now conscious of these issues. If there was a greater public awareness component to the right to information campaign, representatives of the State would no longer say that no one has been pushing for right to information legislation because they would be aware of such a campaign and would know that the public would know that such statements otherwise are not true. In terms of litigating the right to education, an attentive social sector gives the court another consideration—what it perceives as public demand. In the face of pressures from the State the court will have counter-pressure from the citizenry. Even for an uncompromised court that is intent on ensuring the public good, the opinion of the masses will provide some measure of solace to judges if they rule against the State in favor of the people.

As one looks further into potentially litigating the right to education, factors in all three of these areas—legal, political, and social—need to be considered in evaluating the probability of success. The following sections provide short analyses of some possibilities of using strategic litigation to uphold the right to education in Tanzania.

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“Free” Primary Education

There is no question that Tanzania has made great strides over recent years in its endeavor to realize Universal Primary Education (UPE). Due to language that has mostly been dominated by the Millennium Development Goals (MDGs) (the second MDG concerning the achievement of UPE in particular), UPE has become thought of almost exclusively in terms of access and enrollment. Tanzania is popularly praised internationally (DFID, 2005; UNESCO, 2010) for achieving net enrollment rates as high as 96%¹ and was even awarded the MDG award for education in 2010 (MDG Awards Committee, 2010). While this progress has been made, it is often correlated with the abolishment of school fees in 2002 that came with the onset of the Primary Education Development Programme (PEDP): “The Government will abolish school fees and all other mandatory parental contributions from July 2001 so that no child may be denied schooling” (URT, 2003a, p. 7). Thus, the appearance of nearly 100% enrollment and “free” primary school lends Tanzania to be a success story in achieving what may be the most fundamental obligation to the right to education: compulsory, free, universal primary education.

But this is simply not the case. While school fees, as in tuition, have been abolished and increases in enrollment testify to its positive impact, parents and communities have nonetheless continued to be demanded to make contributions in the name of primary education. These additional contributions which effectively make primary education un-free takes two shapes in Tanzania: parental educational expenses and community development contributions.

Ask any parent in Tanzania if primary education is free for his or her child, and the answer is no: uniforms, textbooks, desks, notebooks, extra classes, and exam fees, among other things, must be paid for. These are household costs a parent bears when sending his or her child to primary school, and sometimes these parental educational expenses are enough to keep children out of school.

Alongside these household costs of education, there is the more formalized system of community development contributions. The same program that prohibits mandatory parental contributions also enforces mandatory community contributions: “LGAs (Local Government Authorities) will be required to ensure that contributions should be made by all communities owning the primary school” (URT, 2006b, p. 12). In fact, much of PEDP emphasizes community collaboration and participation and even institutionalizes a community contribution of 20% for the construction of classrooms (URT, 2006b, p. 38).

Though community involvement is indeed an important factor of quality education, it is often conveyed as an obligation and is blamed when the government fails to uphold the right to education. For example, in May 2010, reports of huge shortages in pit latrines came from primary schools in the Mara region. One such school is Kibumaye primary school, which has 2,000 students but only 20 pit latrines, as opposed to the 80-100 pit latrines required for that number of students as specified by PEDP. As a standard seven schoolgirl attending this school petitioned,

¹ Such figures come from schools and the Ministry of Education and Vocational Training (MoEVT) and are typically accepted uncritically both nationally and internationally despite the obvious conflict of interests the government may have in inflating such numbers. A study carried out by the UNESCO Institute for Statistics that compared enrollment numbers provided by the Tanzanian government with those of household surveys found a discrepancy of 25 percentage points, meaning that while schools and MoEVT may report 96% enrollment, it may very well be as low as 71% in reality (Bruneforth study in UNESCO, 2010).

It is like we are going without latrines because most of them are full and some are in a pathetic situation in such a way that they put our lives in danger. We ask the government to build new latrines in our school.

(Mwera, 2010)

However, the government saw this responsibility differently. A ward health officer of that area subsequently threatened that school and three others in his jurisdiction that they would be closed unless the communities built latrines. As reported,

He called on members of the communities surrounding them to accord education due importance by improving the environment of the schools which, he said, belonged to them. He said the communities have the obligation of ensuring their children and teachers were in safe environments.

(*Citizen Reporter*, 2010)

The confusion over the responsibilities of the provision of the right to education also extends to teachers themselves. In the Ilala municipality of Dar es Salaam, 54,000 primary school students sit on the floor due to the shortage of desks. At Mtakuja primary school alone, 600 students in classrooms without desks sit on the floor. The headmistress, Elizabeth Chiwambala, reports, “Most of the pupils here are either orphans or have one parent. Most live below the poverty line and as a result, cannot contribute towards school development” (Agola, 2010). Nevertheless, she attributes the shortage of desks to “lack of commitment from parents to participate in school projects” (Agola, 2010). This situation that absent, single, or poverty-stricken parents create for such children is part of the reason why their education is meant to be government-provided, not parent- or community-provided. Of course, for a headmistress who is a public servant and employee of the government, it is safer to criticize the community than the government, but it is repeated statements such as these that make communities and the government lose sight of their respective responsibilities.

A nationwide public expenditure tracking survey commissioned by the Ministry of Education and Vocational Training (MoEVT) (among others) and released in 2010 found that on average, “Cash and in kind contributions from *parents only* constituted 1.0% of the total contributions to schools and 7.7% of non-wage resources,” or about Tsh 4 billion a year, but that “these figures are underestimated since many schools do not keep full records of such contributions, and in particular for in kind contributions” (Claussen & Assad, 2010, pp. 77-78, emphasis in original).

A two-part study reveals more about the trend of educational costs that parents bear in Tanzania. Research conducted in Old Moshi in 2000 (pre-fee-“abolishment”) and then again in 2006 (post-fee-“abolishment”) discovered that the average annual cost for a standard six student in 2000 was Tsh 13,660 while that of 2006 had risen greatly to Tsh 38,700, “well above the expected increase in costs due to inflation” (Vavrus & Moshi, 2009).

But this isn’t a problem of people simply paying for primary education when the right to education says they shouldn’t; it’s a problem of educational access. Household Budget Surveys carried out in Tanzania show that 11% of respondents cited “expenses” as the reason for not sending their child to primary school in 2001 (pre-“abolishment” of fees) while 5% still give the same reason in 2007

(post-“abolishment”) (NBS, 2008). When parents of schoolchildren do not pay their “contributions,” a mutual understanding with the headmaster may be made, they may be fined, or their children may be sent home, whatever is customary of the area.

In an educational system in which school fees have been abolished but parental contributions are enforced, payments for educational access in effect remain, and students whose parents do not pay are sometimes sent home. At the beginning of the 2011 school year, several media stories highlighted this issue (see Mlacky, 2011; Ibadi, 2011). In one Dar es Salaam primary school, every student was to contribute two bricks; when some students came without bricks, they were turned away. The Deputy Minister for the Prime Minister’s Office - Regional Administration and Local Government stepped in to pronounce that it is prohibited for students to be sent home for not bringing such contributions (Mlacky, 2011). While statements were made that it is the goal of the government for every child to receive an education and that students should not be denied access because of lack of contributions, such pronouncements cannot be confused with ones of prohibiting mandatory contributions. Rather, the perceived problem in this case and others was that of roles and responsibilities—the contribution collection was taking place between students and teachers whereas, as emphasized by the Deputy Minister, that is to be conducted between parents and school committees. Though the message is being sent from various ministers and MPs that children should not be expelled for lack of contributions, school representatives and parents are sometimes left confused as these same contributions are treated as mandatory in many communities.

As part of its Africa Education Watch (AEW), a three-year program (2007-2010) on the management of public funds in the primary education system, Transparency International (TI) conducted a survey of seven African countries. Though Tanzania was not one of the seven, the research findings sound all too familiar:

AEW highlights three corrupt practices that concerned parents: (i) abusive demands for fees that by law have been abolished, (ii) embezzlement of resources, and (iii) abuse of power by teachers or officials. There is confusion, notably among parents, as to which demands for fees are legal. Budget shortfalls sometimes force schools to seek additional funds, but as registration fees are supposed to have been abolished for basic education in all surveyed countries, it is very worrying that an average of 44 percent of parents still report paying them. The average amount that parents report paying is US\$4.16 (Tsh 5,600) per child for one school year.

...

Recent increases in pupil enrolment in Sub-Saharan Africa are often linked to government decisions to abolish school/tuition fees at primary level. Free primary education does not always extend to free textbooks, uniforms and school materials. These costs remain a disincentive to the poorest and have allowed for some confusion over what is or is not provided free by the state.

(Antonowicz, Lesné, Stassen, & Wood, 2010)

And “confusion” is right. What is “free”? How can a “contribution” be demanded? Tanzania is not alone in this illusion of “free”-dom; countries across the world are involved in similar deception while the international community complies. Having been “in the frontline of the battle for the right to education” for six years as the UN Special Rapporteur on the Right to Education

(Tomasevski, 2006), Katarina Tomasevski (mentioned above as the original composer of the 4 As) was sickened by this situation and in 2006 finished her final report *Free or Fee: 2006 Global Report* before her untimely death. For a taste of the contents of the report, and Tomasevski's unique and much-missed passion, consider the opening lines of her website's homepage:

Reading this Report will make you angry. It reveals how ill fares the right to education today. Globally, it is denied despite pretty United Nations' rhetoric on human rights mainstreaming and rights-based development. Its denial is epitomized in levying charges even in primary school, thus pricing it out of the reach of the poor. This bitter reality of economic exclusion from education is evidenced in no less than 22 different types of fees in primary school which should legally be free. Children and young people are silent victims of global bureaucracies, whose creative statistics and evasive vocabulary disguise their failure to translate any of the promises made into reality. The law, which mandates education to be free and compulsory, has been cast aside. Education should be free but it is for-fee. People lucky to live in countries where at least compulsory education is free think that this is the case worldwide. People in poor countries are forced to pay up to a third of their annual income to keep a child at school. Worse, children are forced to work, even at school, to pay the cost of their primary education. None of this can be gleaned from official documents. Read the Report. Get angry. Help expose and oppose economic exclusion from education.

(Tomasevski, 2010)

The report finds that of 45 sub-Saharan countries, only three—Mauritius, Sao Tomé and Príncipe, and Seychelles—provide free primary education. Meanwhile, 19, including Tanzania, have free education written in government policies but in reality levy charges in primary school (Tomasevski, 2006).

Tomasevski is not “confused” by the meaning of free and neither is the legal framework of the right to education. Almost every international, regional, and sub-regional agreement we've seen above speaks of free and compulsory primary education: the UDHR, the ICESCR, the CRC, the CRPD, the ACHPR (in the African Commission's Draft Principles and Guidelines), the ACRWC, and the EAC Treaty (by enforcing the ACHPR).

The notion of free primary education is very clearly defined by the RTE legal framework and does not simply pertain to tuition. The UN Committee on Economic, Social and Cultural Rights terms “free of charge” very comprehensively, even alluding to the fact that governments may attempt to disguise that they don't actually offer a free primary education system:

7. Free of charge. The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed

by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category.

(UNCESCR, 1999a)

This is useful, but there's no need to go all the way to the UN level to find a developed definition of "free" within the right to education. The African Commission, in its Draft Principles and Guidelines on Economic, Social and Cultural Rights in the ACHPR, maintains that States have minimum core obligations, two of which are:

- i. To ensure that all children enjoy their right to free and compulsory primary education. No children should be denied this right because of school fees or related costs of education. Special measures may be required to ensure that children belonging to disadvantaged or vulnerable groups receive free primary education. To achieve this objective states are bound to progressively increase the amount of national resources allocated to education.
- ...
- iii. To implement develop policies to eliminate or reduce the costs of attending primary school which include lifting fees, providing stipends conditional on school attendance, provision of free uniforms or lifting of uniform requirements where they exist, provision of free textbooks, provision of transportation or free school meals to attract poor children to school.

(ACHPR Commission, 2009)

All of this testifies that free primary education means more than simply the abolishing of tuition fees, and bringing a case to address this would require a lot of time and effort. Considering the legal framework, success will most likely only be met with in the African Court using the ACHPR. Though free primary education is in Tanzanian policy, there are no legal guarantees of it to use in the courts. Such a case would most likely be defeated by the State domestically; thus, one should be prepared to exhaust all domestic remedies so as to continue to the African Court.

Politically, this case will meet resistance from the State. First, such a case would tarnish the government's international image. Having won the MDG award for education last year, a case contesting the very fundamentals of UPE in Tanzania would threaten international credibility. Such a case would reveal how the government has perhaps remained silent on or contributed to this confusion of "free"-dom as it has strong incentives to report to the international community that it has successfully implemented UPE. For example, in its MDG Mid-Way Evaluation Report, it writes, "The improvements [in primary school enrollment] are attributed to the abolition of primary school fees, enrollment-related contributions from parents, and the successful implementation of the Primary Education Development Plan (PEDP)" (URT, 2009d, p. 8). But PEDP clearly states, "The Government will abolish school fees and all other mandatory parental contributions" (URT, 2003a, p. 7, emphasis added). How can it be said that PEDP has had a "successful implementation" when only "enrollment-related contributions from parents" have been removed while all others exist? As

mentioned above, PEDP prohibits mandatory parental contributions but then enforces mandatory community contributions (URT, 2006b, p. 12). How is that consistent with UPE or the right to education?

Second, with the budget strained as is, the last thing the government wants is another expenditure. Winning this case would in effect move certain educational costs from parents and communities to the government. With capitation and development grants routinely under-released as is (see “Retrogressive PEDP II Resources” section), increasing them to cover what is currently being provided by parents and communities would require more financial integrity than that which is presently being exhibited by various levels of the Tanzanian government. And even a potentially progressive judiciary would not be able to do much without supportive domestic legislation, especially in the face of political pressure.

Due to the “confusing” nature of the issue, there would be a lot of work to do in the civil arena as well. With the public norm created by the nonstop demand of community contributions, the idea that primary education should be free beyond just tuition may be far from some people’s perceptions. Much advocacy would be required to educate the public of its rights and the full implications of the right to education. At the same time, many communities are tired of being demanded contributions time and again, and a campaign or case to end such contributions may be well received by the public.

However, looking at both the political and social environments, there is potential that the efforts of education activists could complement those of the government. One of the most important messages to avoid sending in such a campaign would be for parents and communities to fully stop contributing—in the voluntary sense of the word—to their schools. The best schools are those in communities in which parents and other residents maintain close relations to the progress of the schools and the students in them. It is desirable for communities to contribute to their schools, but children should not be turned away if their parents have not contributed. This is close to what some members of the government are already advocating; what is lacking that could turn this confusion into a working solution are clear regulations issued to schools stipulating contribution promotion and collection while outlining regulation violations.

If this issue is left ambiguously addressed and if a case concerning contributions and educational exclusion does arise, it will be best taken up by a group of people rather than an individual. The deeper connections between primary school costs, restriction from primary education, and the negative impacts it ultimately has not only on individuals but on a whole community will be necessary to demonstrate. Thus, the exact people to file the case would be those 5% who reported “expenses” as restricting them from primary education in the 2007 Household Budget Survey. Given this proportion, such people may be few and far between. The role of nationwide education networks such as Friends of Education could play an invaluable role in discovering those marginalized and linking them together.

Though all-in-all the likelihood of such a case being brought forth is low, it would nevertheless be negligent for a publication on the right to education to not discuss violations of what may very well be the most fundamental demand of the right to education: free and compulsory primary education.

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Expulsion of Pregnant Students

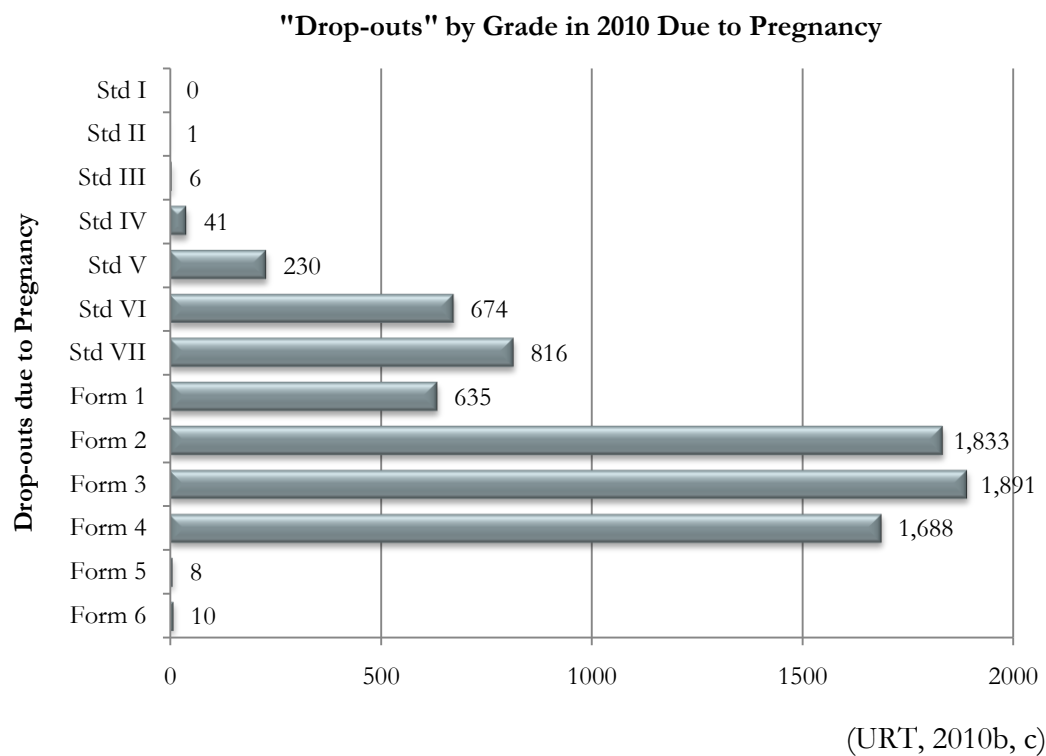
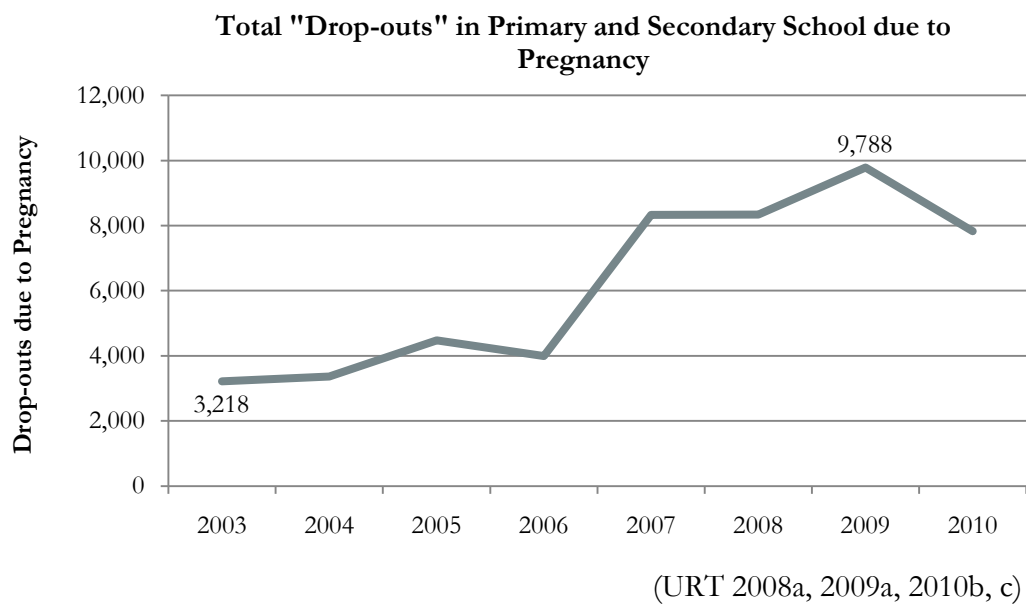
HakiElimu believes that education is the right of every child, including those who become pregnant. Pregnancy does not remove the right to education because despite being pregnant, she is still a child. Pregnant girls need education more than others. That is why HakiElimu advocates that these girls should have the opportunity to receive an education and should be encouraged so that they may continue with their studies after delivery. To expel these children from school is to mistreat them and their newborn children who are innocent. Some children have become pregnant by forced sex or rape. Education is the best way to liberate women and girls in society, particularly those affected by pregnancy. As Mwalimu Nyerere said, “For poor people like us, education should be the instrument of liberation.” The United Nations Convention on Rights of the Child (UNCRC) also emphasizes that all children—including those who become pregnant—have the right to receive an education without discrimination.

(HakiElimu, 2004, p. 16 [author’s translation])

Tanzania is a country on fire with young pregnancies. “Twenty-five percent of Tanzanian women under 18 are already mothers” (Bébien, 2010). The topic dominates media reports, local government concern, and non-governmental organizational efforts. Common questions are often “What is causing the rise in young pregnancies?” and “What can be done about it?”

The concerns are of not only the child-mothers’ general welfare but often specifically their education as many of them are forced out of school. This may very well be a voluntary drop-out—an evaluation of one’s circumstances and new responsibilities and priorities that leads one away from the school-life and solely into the home-life. Many times it is also related to young marriages—a girl may be married young then impregnated, and the new married-/mother-lifestyle diminishes the perceived value of education. This “voluntary” situation turns gray when the decision to continue with education may be voluntary but the circumstances which put girls into these positions are not: such pregnancies are often the result of material coercion or sometimes rape or forced marriages.

What further complicates any of those scenarios of “voluntarily” dropping out is the fact that even if a young pregnant girl wants to stay in school, she’s going to be expelled anyway. Over recent years, Tanzania has seen a sky-rocketing of “drop-outs” due to pregnancy (which may be more appropriately considered “kick-outs” due to the fact that imminent expulsion is quite the incentive to quit anyway). Considering primary and secondary education only, the trend looks like this:



Whereas the total number of such “drop-outs” averaged below 4,000 from 2003 to 2006, currently it has shot up to twice that to be almost 8,000. In all, since 2003, nearly 50,000 girls have been forced out of education due to pregnancy, mostly never to return.

The causes of this situation are difficult to determine. Is it the expulsion policy, or is there an odd, unprecedented surge in young pregnancies? Or did the issue begin to be noticed, and the government began keeping better records of it than before? The secondary school building initiative that began in 2005 translated into a 51% enrollment increase between 2006 and 2007 alone; this clearly relates to the sharp rise in the real numbers of pregnancy drop-outs/expulsions. Nevertheless, pregnancy drop-outs as a percentage of total drop-outs in secondary school has also dramatically increased: whereas it had been between 5-10% before, it shot up to 22% in 2007. If the rise was only part-and-parcel of the rise in overall enrollment, this proportion of pregnancy drop-outs would have been expected to stay more or less constant.

The practice of expelling pregnant students has existed for decades, but many also point at the current expulsion regulation found in the 2002 amendment to the Education Act. Government Notice No. 295 states:

4. The expulsion of a pupil from a school may be ordered where – ...
(b) The pupil has committed a criminal offence such as theft, malicious injury to property, prostitution, drug abuse or an *offence against morality* whether or not the pupil is being or has been prosecuted for that offence;

(URT, 2002b, emphasis added)

This “offence against morality” as grounds for expulsion has been popularly and loosely interpreted. The logic is that if a girl is pregnant, she has had sex out of wedlock, has thus clearly and undeniably committed an “offence against morality,” and therefore should be expelled from school. (And for those who have sex within wedlock, they are expelled anyway due to the following provision 4(c) of the Education Act which stipulates entering into wedlock as grounds for expulsion).

In reality, “offences against morality” is a specific category of crimes as found in the Tanzanian Penal Code. No conversion of pregnancy of any type is listed as an offence against morality. Likewise, if the authors of Tanzania’s expulsion policy meant for pregnancy to be grounds for expulsion, it seems they would have simply added “pregnancy” to the list of offences as found in the expulsion policy above; however, they did not.

Others point at further grounds for expulsion mention by the Education Act:

7. The expulsion of a pupil from a school may be ordered where – ...
(b) The physical or mental health of the pupil is such as to make it undesirable for the pupil to be admitted to the school.

(URT, 2002b)

The practice of excluding pregnant girls is so contrary to the right to education that many agreements speak against it directly. About the African Charter on Human and Peoples' Rights, the African Commission specifically remarks:

57. The rights in article 17 impose, amongst others, the following obligations on States parties: ...
xiv. To ensure that girls who become pregnant before completing their education have an opportunity to continue.

(ACHPR Commission, 2009)

The African Charter on the Rights and Welfare of the Child stipulates:

Article 11: Education

6. State Parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue their education on the basis of their individual ability.

(OAU, 1990)

Tanzania seems to have been doing exactly the opposite of what it has agreed to with the African Union.

In many ways, this issue is more than just one of the right to education, and if it is to be litigated, it would probably fare better as a case of discrimination, something with which the courts are more familiar. It takes two to form a pregnancy, but whereas girls bear 100% proof of the act and are academically punished for it, the boys and men involved often go unreprimed (Nkwame, 2010). The application of section 7(b) above to exclude pregnant girls because of their “undesirable” physical health clearly has discriminatory effects as it is silent on their male counterparts who are equally (or more, in cases of rape/coerced sex) responsible.

A single instance in which a pregnant girl is expelled while her male counterpart is not held accountable is discriminatory in-and-of itself, but discrimination crystallizes even more when

repeated instances form the trend of girls having their academic futures ripped away from them while the opposite sex continues on. This highlights another problematic aspect of the misinterpretation of section 4(b) above: even if it is nondiscriminatorily applied, it will result in a lot of expulsions of both girls and boys, an undesirable effect harmful to livelihoods and the future of the nation.

This discriminatory violation of girls' right to education in Tanzania is summarized in the context of the 4 As (see "Legal, Political, and Social Considerations" section) by the Global Campaign for Education, the Right to Education Project, and Campaña Latinoamericana in a case study entitled "Racism, Racial Discrimination, Xenophobia and Related Intolerance in Education: The Case of Adolescent Girls in Tanzania":

By forcing pregnant girls out of school, the Tanzanian government, in what should be their role as the prime duty bearer to ensure the right to education of all its citizens, becomes directly responsible for gender discrimination and for violating the right to education. It does so by not making it **available** on a basis of equal opportunity, when discriminating against pregnant girls; by not making it **accessible**, when denying access to pregnant girls, thereby punishing victims rather than perpetrators; by not making it **acceptable**, when failing to create girl-friendly schools free from physical and sexual violence; by not making it **adaptable**, when failing to respect, protect and fulfil girls' rights, and in not taking into account their voice and life situation, thereby continuing discriminatory practices in violation of the best interest of the child.

Sexual discrimination is prohibited by the Constitution of Tanzania, the Education Act, the Law of the Child Act, and elsewhere. Beyond domestic legislation, Tanzania is further bound to eliminate discrimination based on sex by the ICESCR, CADE, CEDAW, CRC, ACHPR, and ACRWC. Commenting on a report from Lesotho, the Committee on the Rights of the Child directly combines both the discrimination and right to education angles when discussing this issue:

53. The Committee notes with deep concern that girls who become pregnant whilst still attending school are often excluded from school and that such action is not only discriminatory against girls but also a violation of the right to education.
54. The Committee urges the State party to ensure that pregnant girls are permitted to continue attending school both during and after their pregnancy.

(UNCRC Committee, 2001a)

Though legally this issue may best be dealt with domestically as a discrimination case, it may not come to that as the political context progresses. The Deputy Minister of Education and Vocational

Training has already made several statements about changing the expulsion policy as it was never intended to be used against pregnant girls. Despite UNICEF's touts of an early victory however (MediaGlobal, 2010, March 19, New laws allow teen mothers better access to education in Tanzania; Teen mothers may now go back to class, 2010, March 21, The Citizen), a policy change to allow young mothers re-entry is yet to be seen ('Nothing yet on pregnant pupils back to sch plan,' 2010, April 19).

To be clear, the policy change the Ministry is discussing is not to prohibit the expulsion of pregnant girls but to provide young mothers the opportunity to return to school. Nevertheless, this is a step in the right direction towards complying with AU and UN agreements which the government of Tanzania has signed and ratified. Given the social sensitivities surrounding the issue of pregnant girls in schools, this isn't a bad starting place in the pursuit to ultimately uphold the education rights of all children.

It is because of these social perspectives that one should remain aware of the litigation potentials of this issue, even if the law is changed, for in the end, it is indeed the social environment that poses the biggest threat to child-mothers' right to education. In some parts of Tanzania, education for girls is seen as a luxury, and if one becomes pregnant while still in school, there's often a social consensus that she is to now fulfill her more rightful social role as mother, and that of student is to be left behind. In other words, though girls' education is progressing, the place of the woman is still often seen as at home, and when a girl becomes a mother or wife, her school days are left behind to make way for her return to her more proper place at home. Thus, even with a change in legislation, social barriers will no doubt continue to block young mothers from completing primary education.

Though a regulation to ensure the continued education of young mothers can ultimately affect change on social perceptions and conduct surrounding this issue, this process cannot begin if the current social values are so strong that the new law will not be enforced at the level of implementation, i.e. at schools. The exclusion of child-mothers on more of a historical rather than legal basis is testimony to the strength of this social value, and there's a very real risk that even with a policy change teachers will be reluctant to ensure child-mothers stay in school. Currently in Tanzania, there is a common view held by many educators themselves that pregnant girls and child-mothers do not belong at school. They believe the presence of such girls is a threat to the maintenance of order on school grounds and will lead to social chaos. If pregnant girls or child-mothers are to be allowed at school, other girls will become infected with the notion that such behavior is acceptable and will engage in early sex and pregnancies themselves (Policy Forum, 2007; MediaGlobal, 2010). Despite vulnerability to HIV/AIDS and other sexually transmitted diseases, life-threatening delivery complications, and sometimes rape trauma that come with these early pregnancies, many Tanzanian educators believe that the message that child pregnancy has its consequences can only be sufficiently sent by permanently expelling pregnant girls from school. This current view held by some Tanzanian teachers—who should be the very proponents of

education—only reinforces the perception that education is a luxury to be given or taken, not an undeniable right.

Thus, even with a new protective policy, social values resulting in teachers themselves holding anti-right-to-education viewpoints may end up posing the greatest threat to the continued education of young mothers. Considering the litigation of the right to education of child-mothers, it is precisely this situation that should be watched for—the denial of re-entry of child-mothers despite protection under law. With new domestic policy to be in place shortly, strategic litigation of this issue would focus on ensuring its implementation by winning such cases in domestic courts to demonstrate to the rest of the nation that the new policy must be followed. Given the high level of attention on the issue, the government will likely state the intentions of the change clearly, and the courts would follow suit by upholding the new law in accordance with that intention. A clear and positive ruling would do much for the implementation of the new policy.

With a new law and potential court rulings to ensure young mothers are provided equal educational access, the foundational issue of the expulsion of pregnant girls will receive further opportunities to be addressed as the two matters are often discussed simultaneously. As communities, teachers, and government officials continue to be sensitized to the fuller implications of non-discrimination and the right to education, there may come a day in which more people hold an opinion similar to that of a recent verdict of the Supreme Court of Colombia which found that “the conversion of pregnancy—through school regulations—into a grounds for punishment violates fundamental rights to equality, privacy, free development of personality, and to education” (UNCHR, 2000, §60).

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Corporal Punishment

In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual.

(UNCESCR, 1999b, §41)

The Committee has repeatedly made clear in its concluding observations that the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline.

(UNCRC Committee, 2001b, §8)

To ensure the safety of schoolchildren by...adopting and implementing prohibition on the use of corporal punishment.

(ACHPR Commission, 2009, §57(xv))

States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

(OAU, 1990, §5)

Corporal punishment may be administered for serious breaches of school discipline or for grave offences....

(URT, 2002b)

Caning of stubborn students in primary and secondary schools is mandatory....

(Margaret Sitta, Minister for Education and Vocational Training
in Daily News Reporter, 2006)

Clearly there is a problem here, namely, despite having ratified several global and regional agreements to ensure corporal punishment is not used in schools, Tanzania, both through its laws

and its leaders, actually enforces such punishment. As seen immediately above, while the strict prohibition of corporal punishment is derived from the ICESCR, CRC, ACHPR, and ACRWC, Tanzania's Education Act and the Ministry of Education and Vocational Training have legally institutionalized it and advocate for its use.

Corporal punishment just doesn't incidentally happen in Tanzanian schools; it is a thoroughly developed system. The corporal punishment regulations are found in Government Notice No. 294 of the 2002 amendment to the Education Act. Among other things, it states:

“Corporal punishment” means punishment by striking a pupil on his hand or on his normally clothes buttocks with a light, flexible stick but excludes striking a child with any other instrument or on any other part of the body;

3. (1) Corporal punishment may be administered for serious breaches of school discipline or for grave offences committed whether inside or outside the school which are deemed by the school authority to have brought or are capable of bringing the school into disrepute.

(2) Corporal punishment shall be reasonable having regard to the gravity of offence, age, sex, and health of the pupils and shall not exceed four strokes on any occasion.

4. (1) The head of the school in his discretion may administer corporal punishment or may delegate his authority in writing to a carefully selected member of his teaching staff provided that the authorized member of staff may act only with the approval of the head of the school on each occasion when corporal punishment is administered.

(2) A female pupil may only receive corporal punishment from a female teacher except where there is no female teacher at the school in which case the head of school may himself administer corporal punishment or authorize in writing a male teacher to administer corporal punishment.

4. (1) The head of the school in his discretion may administer corporal punishment or may delegate his authority in writing to a carefully selected member of his teaching staff provided that the authorized member of staff may act only with the approval of the head of the school on each occasion when corporal punishment is administered.

(2) A female pupil may only receive corporal punishment from a female teacher except where there is no female teacher at the school in which case the head of school may himself administer corporal punishment or authorize in writing a male teacher to administer corporal punishment.

5. (1) On every occasion when corporal punishment is administered it shall be recorded in writing in a book kept for this purpose and such record shall state in each instance the name of the pupil, the offence or breach of discipline, the number of strokes and the name of the teacher who administer the punishment.

(2) Every entry in the book shall be made and assigned by the head of the school.

(URT, 2002b)

In summary, the primary points for consideration seem to be that corporal punishment is punishment by striking a student “on his hand or on his normally clothed buttocks with a light, flexible stick.” It is to be administered for “serious breaches” or “grave offences,” to a “reasonable” extent, and “shall not exceed four strokes.” Only headmasters, or other teachers with the headmaster’s written approval, may administer such punishments, and female students may only receive corporal punishment from female teachers, unless none are present. Finally, all incidents of corporal punishment must be recorded.

In reality, these regulations are often broken. Students are beaten for almost any mistake or misbehavior, by any teacher, with a variety of objects, sometimes to severe measures, without any recordkeeping. Typically it is accepted as the norm, but there are times when its unacceptability boils over. In 2004, students of Kahororo Secondary School in Bukoba rioted for five hours, beating up their teachers and prefects and smashing windows, after a Form Two student had been beaten unconscious by a notoriously “brutal” senior prefect (*Guardian Correspondent*, 2004). This had gone on with support from the school’s administration, which had reportedly given the prefect

the authority to administer up to five strokes of the cane. This account demonstrates how laxity can turn a highly regulated form of corporal punishment into a culture of normalized human rights abuses. In this case, a prefect had been illegally given authority to administer corporal punishment to an amount that surpassed the four-stroke limit and had clearly exceeded any limit of reasonableness by beating the student unconscious. Meanwhile, cases nationwide of students receiving excessive punishments typically go unreported as they have become so commonplace.

The allowance of corporal punishment in education seems to be causing the degeneration of disciplinary systems of other sectors—when the nation is “taught” that this is the correct way to discipline then of course it will be used elsewhere. A raucous ensued in 2009 after 19 teachers in three schools again in Bukoba were caned in front of their students upon the orders of the district commissioner in response to the teachers’ lazy, neglectful habits that caused poor exam results. The Tanzania Teachers’ Union (TTU) filed complaints that these teachers had been “humiliated,” and the district commissioner was fired (BBC, 2009). Similarly, in Shinyanga in early 2010 four teachers were publicly caned by the Sungusungu militia for failing to attend a meeting. Again, the TTU complained that the teachers had been “dehumanized” by the punishment.

These types of stories raise many questions, the first being, why is anyone surprised? Schools are socializing institutions that prepare younger generations for productive social integration, teaching them the norms of society at-large. If students are taught that corporal punishment is the appropriate disciplinary measure, then there’s a good chance that they will use it themselves, as students and as adults in whatever social sector they may enter into in the future. For teachers, who are themselves the enforcers of this norm, to be surprised when they are disciplined by beatings shows short-sightedness.

Likewise, the reasons these teachers state for contesting such treatment are in fact the very same that are provided by international instruments in prohibiting corporal punishment. The teachers complain of such punishment (when they are on the receiving end) as being “humiliating” and “dehumanizing.” Indeed this is the same language used in both UN and AU rights agreements when decrying corporal punishment as inconsistent with fundamental principles of “humanity” and “human dignity” (OAU, 1990, §5; UNCESCR, 1999b, §41; UNCRC Committee, 2001b, §8). Do these teachers, who have themselves doled out countless beatings, not view children as belonging to

“humanity” in the most basic of sense? Can quality education really be provided to children by educators who don’t see children as also to be afforded human rights?

In terms of evaluation, the domestic legal framework, though institutionalizing corporal punishment, may prove to be a useful entry point—by providing such clear regulation on corporal punishment, it also provides ample avenues for violations of it, which there are currently plenty in the school system. Politically, social values play a strong role and may compromise legal progress as politicians, policy-makers, and policy-implementers may potentially turn a blind eye to any stipulation prohibiting corporal punishment.

This social context is the greatest obstacle to ending corporal punishment in schools. It seems the vast majority of Tanzanians—from community leaders to parents to teachers—strongly believe that corporal punishment is absolutely necessary when teaching children, whether at home or in schools. Talks of social decay are often accompanied by the complaints that children are not beaten as hard or as often as they used to. People talk of corporal punishment as a necessity of raising an African child, that it is part of African culture to beat children to make them behave. For the most part, teachers themselves cannot imagine how they would maintain order on campus if the power to hit students was taken away from them. Though they raised alarm, the fact that the above public adult beatings were administered in the first place testifies to the level to which corporal punishment is socially normalized. In the one case, there were some parents that protested that the district commissioner should not be fired for he indeed did the right thing by beating the teachers.

A total ban on corporal punishment, in schools and elsewhere, has, however, made its way into Zanzibar’s Draft Children’s Act 2010, and though citizens from all sectors—including education, politics, and religion—are advocating for the change (Yussuf, 2010a), others continue to expound the usual reasons for keeping corporal punishment in use. “Corporal punishments remain important in up-bringing of children and promoting decorum in schools. We should not abolish caning,” said one MP during the June parliamentary session. Another MP supported the continued use of corporal punishment, asserting that it is sanctioned by Koranic teachings, while somehow simultaneously declaring, “only hurting and mistreatments of students must be abolished in schools” (Yusuf, 2010b).

Though a case against excessive battering using domestic legislation may bring temporary, localized results, real policy change (and moreover its enforcement) by holding the government of Tanzania to account in the African Court will be most successful by addressing the above social context. The existing corporal punishment regulation is being violated on a daily basis, and these offenders should be prosecuted. While the current regulation should be enforced, it should not be reinforced—that is, while offenders should be held accountable, advocates should be careful so as to not promote the current legislation as desirable if the ultimate goal is to prohibit corporal punishment. At the same time, a social campaign is needed. The public needs to be educated that despite certain common opinions, research shows that corporal punishment does not bring about the desired changes in children (Kelly & Wesangula, 2010) and that beatings are not an inherent part of African culture but are part of the culture of slavery and colonialism brought to Africa by Westerners (Global Initiative to End All Corporal Punishment of Children, 2010). In their pursuit for behavioral change, teachers need to be exposed to forms of positive reinforcement as well as non-violent forms of negative reinforcement, so when there is talk of abolishing corporal punishment they will not feel that they are having their only tool of control taken away. When they see their colleagues prosecuted for violating the corporal punishment regulation, teachers may be more receptive to alternative forms of reinforcement. If these matters are not addressed, corporal punishment will no doubt continue in many areas through the demand of communities, parents, and teachers despite any policy that may forbid it.

This last scenario is exactly what is happening in Uganda where corporal punishment continues in schools despite a 2006 circular issued by the Ministry of Education and Sports banning it. Similar results have come about in Kenya where corporal punishment in schools remains though the legal provisions permitting it were repealed in 2001 and the new constitution outlaws corporal punishment in all settings. The goal of any litigation concerning this issue is to end corporal punishment, not simply achieve a policy change. Even if corporal punishment is banned, this violation to the right to education will not end in a “spare the rod and spoil the child” society.

Tanzania’s neighbors abolishing corporal punishment are attempting to do so after years of watching children in schools getting beaten to the point of disability, deformation, hospitalization, and even death. Such occurrences are not unheard of in Tanzania as well. How long will Tanzania wait to end them?

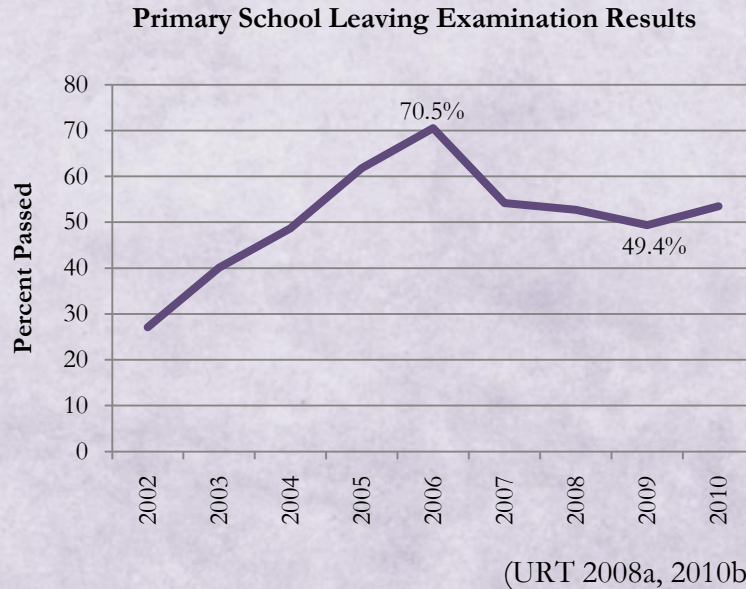
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Retrogressive PEDP II Resources

In 2009, the primary school leaving exam pass rate fell to less than 50%. In other words, half of all the children who made it through seven years of primary schooling were not receiving the expected level of education:

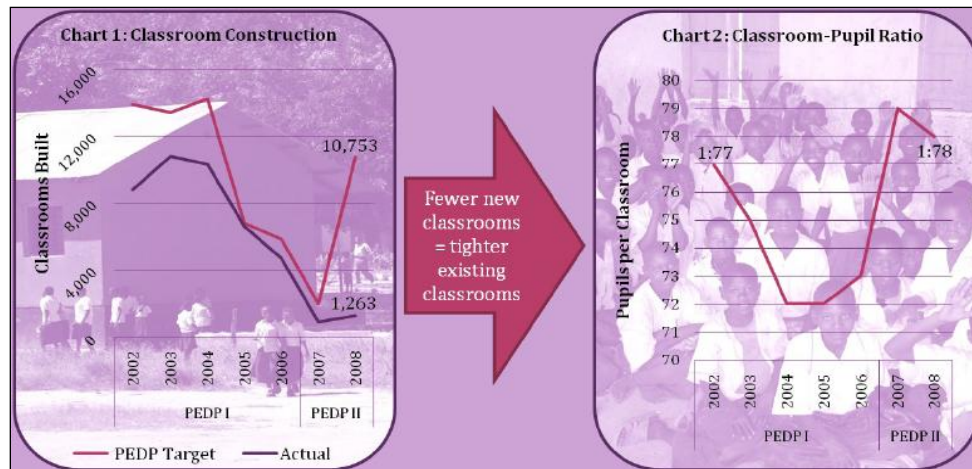


This rise and fall corresponds to the trend of educational inputs over recent years that have been provided by a national government strategy called the Primary Education Development Programme (PEDP). PEDP is the fundamental plan of action for the development of the primary education

sector of Tanzania. It discusses and outlines targets, both in terms of outputs and budget, for enrollment, teacher recruitment, construction of classrooms, teacher houses, and toilets, the procurement of desks, and more. Currently PEDP is in its second phase. PEDP I ran from 2002-2006, and PEDP II is continuing from 2007-2011.

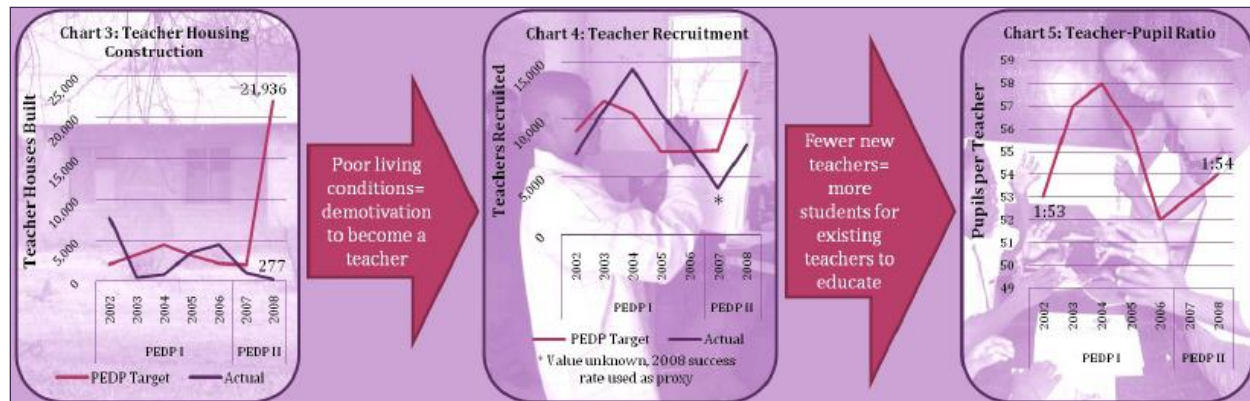
Though they carry the same name and similar objectives, the two phases of PEDP are proving to be radically different. Whereas implementation of PEDP I often saw the meeting and sometimes even the surpassing of targets, PEDP II is universally falling drastically short, with implementation rates often as low as single-digit percentages. For example, in 2003 PEDP I built 10,771 (80%) of the targeted 13,396 new classrooms while in 2008 PEDP II built 1,263 (12%) of 10,753, respectively. Similarly, in 2005 PEDP I constructed 3,528 (111%) of the 3,169 intended teacher houses, but in 2008 PEDP II only constructed 277 (1%) when the plan called for 21,936 (HakiElimu, 2007; URT, 2008b; URT, 2006b).

These material inputs affect educational outcomes. When enrollment continues to rise but new classrooms are not built, classes become more crowded, and the classroom-pupil ratio increases. While classroom construction during PEDP I helped reduce the classroom-pupil ratio to 1:72, the lack of construction has allowed it to rise again to 1:78, a ratio even higher than when PEDP began in the first place. HakiElimu, in its brief “Education in Reverse: Is PEDP II Undoing the Progress of PEDP I?” compared such trends:



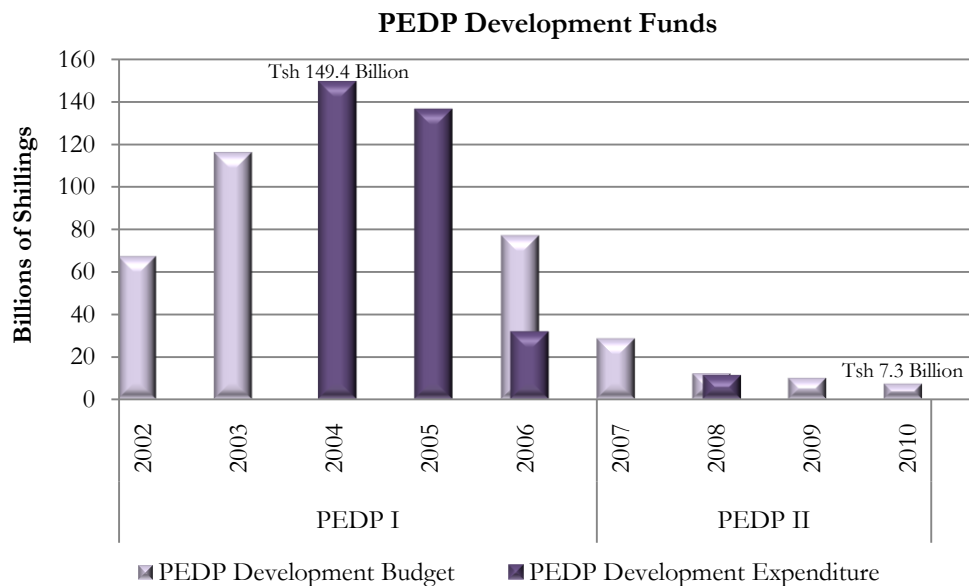
(HakiElimu, 2010)

Likewise, teacher housing is a huge disincentive for teachers who are posted in rural areas. Many times these houses are below the living standards that the teachers are accustomed to, if the houses exist at all. Combined with already low salaries, such neglectful housing further encourages educators to leave the teaching profession or to not enter it at all. This inhibits teacher recruitment which in turn impacts the teacher-pupil ratio. Again, while PEDP I saw recruitment of new teachers as high as 14,423 in 2004, PEDP II recruited half of that, 7,800, in 2008, and now the teacher-pupil ratio is again on the rise:



(HakiElimu, 2010)

The explanation of the huge difference between the two phases of PEDP is budgetary: PEDP I received far more development funds than PEDP II is receiving. On average, PEDP I received Tsh 109.1 billion in development funds per year, while PEDP II has been only receiving Tsh 14.5 billion annually, just 13% of PEDP I's development funds. So, whereas 8,817 classrooms were built in 2002 with Tsh 43.4 billion, only 1,263 were built in 2008 with Tsh 1.8 billion (URT, 2002a, pp. 20 & 40; URT, 2008b, p. 11). The overall trend in PEDP development funds is illustrated on the following page. Due to the availability of budget information, some funds are expressed as their budget allocations, others as their actual expenditures.

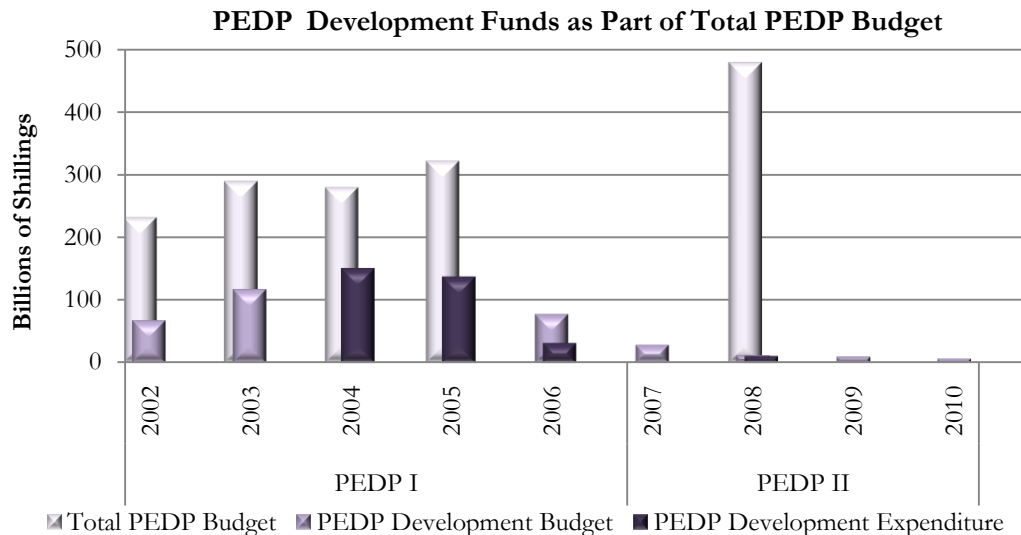


(URT, 2003b, 2004, 2006d, 2007, 2009e)

The above chart hints not only at the vast difference in the development budgets between PEDP I and PEDP II but also at another budgetary issue, that of the sometimes drastic difference between funds allocated at the beginning of the year and actual expenditure by the end of the year. For example, in fiscal year 2005/06, Tsh 76.8 billion was approved by Parliament as the development budget for PEDP but only Tsh 31.9 billion was actually spent. Was this due to donors failing to provide over 40% of their committed education funds until the last quarter of the year, making it

harder for the Tanzanian government to spend it within that year (URT 2006a, c)? Or is this related to the shift in priorities from the development of primary education to that of secondary education that was part of the winning 2005 political campaign platform?

Either way, the overall trends between PEDP I and PEDP II can most safely be concluded to be first and foremost a question of budget allocation priorities. While PEDP continues to receive increasing overall funds year after year, its development budget has nevertheless been shrinking. The chart on the next page puts the development budget of PEDP within its overall budget. Further research and information access is required to fill in the gaps for the years in which the total PEDP budget is unknown, but it is assumed that the total PEDP budget has retained general growth as demonstrated by the 2008 year that is known:



(URT, 2003b, 2004, 2005, 2006d, 2007, 2009e)

While the above bars represent the total PEDP budget and the proportion of which is PEDP development funds, the surplus portions of the PEDP budget are comprised of such expenditures as teacher salaries and benefits, capitation grant, national examinations, and other charges. On the surface, however, the increase in non-development PEDP funds does not reflect the actually increase in these non-development inputs: teaching staff and enrollment have each increased by about 40% since 2002, and capitation grant has actually been lower during some PEDP II years than during PEDP I. Nevertheless, the 2008 PEDP II non-development budget is four times that of the average of PEDP I. Further research is required to know exactly where this money is going, particularly that which is disbursed under the general category of other charges.

The expansion of PEDP II funds into these non-development expenditures raises a red flag. The government has two primary types of expenditure—recurrent and development. Recurrent expenditure is basically money spent to keep the government going as is, while development expenditure furthers government activities and improves infrastructure and service delivery. Recurrent expenditure is necessary for a government to function, but it is also widely criticized as the source of misuse of public funds as it contains such infamous line items as allowances, seminars, foreign travel, and fuel (Sikika, 2010). Such expenditures often manage to rise while development projects get cut. In 2008/09, while overall government development expenditures were cut by 34% when the approved national budget and actual expenditures are compared (URT, 2010a), allowances for government officials actually increased by 20% to reach Tsh 506 billion (Policy Forum, 2009), 50 times PEDP's development budget. In that year, the government spent Tsh 31 billion on foreign travel (Sikika, 2010), three times PEDP's development budget.

This is a major question of government priorities. While PEDP I was under a project funding scheme, meaning donors provided funds specifically earmarked to only go towards PEDP I, PEDP II is funded by General Budget Support (GBS), meaning the government receives donor funding and decides itself how it should be used. Do such drastic reductions in PEDP development expenditures in the context of an ever-increasing PEDP budget suggest that the development of the primary education has been the priority of donors but not that of the government? Or are these the results of avoiding another large loan from the World Bank which made up the largest portion of foreign financing for PEDP I? Or, as others in the sector believe, were PEDP II development funds forgone to facilitate the government's secondary school building initiative that began in 2005?

On top of the questions this raises as to government priorities and use of donor funds, it may very well represent a violation to the right to education. Within both the UN and AU human rights' frameworks is the obligation for member States to progressively realize rights, including the right to

education, by use of “maximum available resources,” that is, States are obligated to use all of the resources available to it, both domestic and foreign, to the fulfilling and upholding of human rights (ACHPR Commission, 2009, §14; UNCESCR, 1999b, §45). Stemming from this is the violation of retrogressive measures—that States cannot move backwards in their efforts in realizing rights (ACHPR Commission, 2009, §21; UNCESCR, 1999b, §45). Typically this is spoken of in terms of the failure of a State to fully employ its maximum available resources toward the fulfillment of human rights.

The African Commission on Human and Peoples’ Rights explains retrogressive measures as such:

Measures that reduce the enjoyment of economic, social and cultural rights by individuals or peoples are *prima facie* in violation of the African Charter. Any measures which reduce the extent to which economic, social and cultural rights are enjoyed or guaranteed must be justified in the light of the totality of the rights provided for in the African Charter and in the context of the full use of the maximum available resources. In this context available resources refers to both resources available to State internally and from international assistance and cooperation.

(ACHPR Commission, 2009, §21)

The African Commission defines further characteristics of retrogressive measures, stating, “the measures will have a sustained impact on the realization of the protected right,” or “the measures have an unreasonable impact on whether an individual or group is deprived of access to the minimum essential level of the protected right” (ACHPR Commission, 2009, §21).

So, do the cuts in PEDP II development funds create “a sustained impact on the realization” of the right to education? If the lack in construction of teacher housing creates a disincentive furthering the existing teacher shortage resulting in less one-to-one teacher-pupil attention and poorer learner outcomes, then yes.

Have the cuts in PEDP II development funds deprived “access to the minimum essential level” of the right to education? When we reflect on the 4 As of the core content of the right to education—availability, accessibility, adaptability, acceptability (see “Legal, Political, and Social Considerations” section)—availability in particular comes to mind when discussing infrastructural development of the education sector. How little availability must be seen before it is below “minimum essential level”? Neglect to build classrooms, causing the classroom-pupil ratio to be almost twice the national target? Schools that have 200 students and one teacher? These clearly seem below anything that may be called a “minimum essential level” and are directly mentioned by the UNCESCR when discussing States’ obligations to fulfill the availability of education “by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials...” (UNCESCR, 1999b, §50). These situations are exacerbated by the reduction in PEDP II development funds and seem to constitute a retrogressive measure, especially when this reduction occurs in the face of an increasing general PEDP II budget.

The primary question for the African Court would be to what level of disaggregation retrogressive measures apply. The total PEDP II budget is increasing, so that is not a retrogressive measure. But the most fundamental component of it has repeatedly received cuts, so does that constitute a retrogressive measure? But if these cuts were made to siphon funds into another sector of upholding the right of education, that of secondary education, is that considered a retrogressive measure?

To make this case less confusing and more concrete, it may be brought forth in terms of the violations to the right to education in which this retrogressive budget results. For example, these development funds directly impact the working and living conditions of teachers. Both the UN and AU speak of the obligations of States to continuously improve teaching conditions:

Article 13

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: ...
 - (e) ...the material conditions of teaching staff shall be continuously improved.

(UNGA, 1966)

57. The rights in article 17 impose, amongst others, the following obligations on States parties: ...
 - ii. To...continuously improving the conditions of service...of teaching staff.

(ACHPR Commission, 2009)

As for the political context of this potential point of RTE litigation, there are primarily two considerations. First, as above, recurrent expenditures are often criticized for their inward-aimed nature. So, if PEDP II development expenditures are decreasing while its recurrent expenditures are increasing, there's a chance that a group of people within the government are unjustly benefiting from this arrangement. With the threat of those benefits being taken away, this group may attempt to manipulate the judicial system, but there are also justice-minded individuals and groups within the government that are interested and vocal about curbing such behavior who would likewise support such a case.

Secondly, governments and political parties have vested interests in delivering services to citizens, but they also have interests in maintaining their public image. When HakiElimu aired a TV/radio spot providing specific data concerning the lack of construction of teacher housing under PEDP II, it received political backlash (Siyame, 2010) and was even viewed as entering into party politics. Advocates of any case so directly discussing government failures should be prepared to be met with heavy government resistance.

Socially speaking, communities are ready to have this issue resolved. As discussed in the “Free’ Primary Education” section, government failure to build classrooms, teacher houses, and pit latrines translates to community pressure for increased payments for schools to do it themselves. Such a court case would quickly gain community support as mostly everyone has witnessed these educational deficiencies and would be eager to truly address them.

The greatest question surrounding this case remains the legality of the level of disaggregation to which retrogressive measures apply. With the majority going toward inputs to improving education, non-development PEDP funds cannot be immediately dismissed as hindering the full realization of the right to education. Nevertheless, due to other difficulties in the education sector’s recurrent-development budget structure, a full analysis of all PEDP expenditures needs to be conducted to determine whether such ongoing cuts in development funds have been absolutely necessary. Only then can it be known if the government of Tanzania has indeed been employing “the full use of the maximum available resources” despite the implementation of a meager PEDP II development budget.

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Acronyms and References

Acronyms

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AEW	Africa Education Watch
AG	Attorney General
AU	African Union
CADE	Convention Against Discrimination in Education
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on Rights of the Child
CRIN	Child Rights Information Network
CRPD	Convention on the Rights of Persons with Disabilities
EAC	East African Community
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

MoEVT	Ministry of Education and Vocational Training
MP	Member of Parliament
NAO	National Audit Office
OAU	Organization of African Unity
PEDP	Primary Education Development Programme
RTE	Right to Education
SADC	South African Development Community
TI	Transparency International
TTU	Tanzania Teachers' Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNCHR	United Nations Commission on Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UPE	Universal Primary Education
URT	United Republic of Tanzania

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This information packet has been developed and written by Tony Baker of HakiElimu's Policy Analysis and Advocacy Unit. It was inspired by a regional consultative meeting that took place in Cape Town, South Africa from March 23-25, 2010. The meeting, organized and hosted by the International Centre for the Legal Protection of Human Rights (INTERIGHTS), a London-based international legal team of human rights lawyers, attracted legal, judicial, and civil society representatives from Tanzania, Kenya, Uganda, Zimbabwe, and South Africa and paired them with some of the said international human rights lawyers as well as Prof. Dr. Fons Coomans, the UNESCO Chair in Human Rights and Peace at the Department of International and European Law at Maastricht University in the Netherlands. This was neither a training nor a seminar; it was a three-day round-table discussion of sixteen experts in various pertinent fields aimed at exploring the potential of strategic litigation to further realize the right to education in any of the represented sub-Saharan African nations.

Analyses within this composition were informed further by a subsequent litigation surgery specific to the right to education held in Dar es Salaam from January 25-28, 2011. The session was co-hosted by HakiElimu and INTERIGHTS and brought together lawyers, advocates, and human rights experts from Tanzania, Kenya, Uganda, Malawi, Zimbabwe, Swaziland, South Africa, Nigeria, Switzerland, and the United Kingdom to discuss existing and potential cases and strategies for litigating the right to education.

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Cover photos:

Students of Gidngwar Primary School, Babati Rural, Manyara (top)

High Court of Tanzania, Dar es Salaam (bottom left)

African Court on Human and Peoples' Rights, Arusha, Tanzania (bottom right)

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