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**Volume 17  
Number 2**

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**Litigating the  
Right to  
Education in  
Africa**

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**The International  
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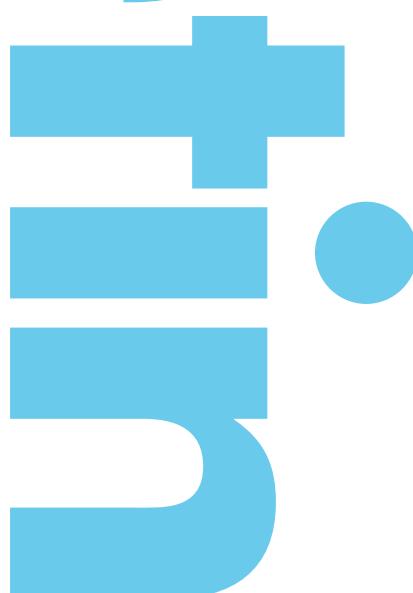
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# Litigating the Right to Education in Africa: Editorial

Susie Talbot and Solomon Sacco

The right to education, while a crucially important foundational human right, has been under-litigated across Africa. This is not because of an absence of violations; in fact enjoyment of the right faces serious challenges across the continent. While each country and community has different problems, the major challenges are around lack of resources, unavailability of schools and resources, and discrimination and inequality in access and resource allocation. Although there have been marked improvements in access to primary school across the region, completion rates are still low and impediments, such as child labour, early marriages and the exclusion of girl children, continue to limit access and enjoyment of the right. Problems with the quality of education have arisen in countries where universal primary education (UPE) was suddenly introduced without sufficient attention to facilities and resources. Inevitably the poorest have suffered the most in these circumstances as schools designated as universal primary education schools have had the least resources allocated to them. Despite numerous problems however, human rights lawyers and civil society organisations have been slow in taking cases to court or even to claim education as a right. And even where cases have been brought, the courts and judges have been slow in providing remedies.

However, there has been an increasing interest on litigating the right to education and INTERIGHTS has been working over the last five years in assisting domestic lawyers and NGOs litigating the issue in Africa. The Bulletin is published against the background of three years of litigation surgeries held for the purpose of

identifying key issues and providing substantive support to cases on the right to education that could be pursued before domestic or international forums. The Bulletin attempts to reflect the varied issues and challenges facing lawyers and civil society organisations across the region who are trying to enforce the right to education through the law.

We hope that the Bulletin will offer an overview of current education issues in different African countries and regions, as well as litigation strategies applied to combat such issues (both within Africa and regarding similar issues experienced in other countries), within the context of national, regional and international mechanisms. We have aimed at giving a broad brush view of the issues across Africa and the articles discuss different litigation strategies (i.e. basing claims on educational provisions and/or other constitutional provisions), litigation at different levels, the importance of a wider advocacy strategy, use of international and comparative law, and effective implementation. This is particularly interesting as several case studies demonstrate different results for similar issues.

The first section of the Bulletin gives both an overview of the relevant international legal and enforcement mechanisms as well as a comparative example of a successful litigation strategy from South America. Malcolm Langford and Rebecca Brown outline the current state of socio-economic rights jurisprudence and the variety of complaints mechanisms across Africa, as a basis for discussing the value to African states in ratifying the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, particularly in the context of

the right to education. Iain Byrne considers the challenges and opportunities in litigating in connection with the issue of free and compulsory UPE. Whilst there are binding commitments regarding the obligation to provide UPE, in reality the lack of access to UPE remains a huge problem especially in the global south. Iain examines some of the key challenges and prospects for using strategic litigation to secure improved access and higher quality UPE for pupils, presenting a range of case studies from around the world. Esteban Hoyos-Ceballos and Camilo Castillo-Sánchez discuss the struggle toward recognition of the right to free education in Colombia, where the legal landscape has moved from a 2010 Colombian Constitutional Court decision ruling that all public primary schools in the nation must cease charging students tuition fees, to litigation strategies focused on addressing the issue as to whether the Government can charge for indirect costs of education, such as books and uniforms.

In the second section, articles look at specific challenges to accessing UPE even where the law is clear in its protection of the right. Discussing a case that recently came before a South Africa High Court involving an application for the eviction of a rural farm school from private property, Dmitri Holtzman considers the obligations of the State in such situations, including expropriation as a means to protect the right to basic education. The need to balance the rights to property and to a basic education (read together with other fundamental rights including the right to dignity, equality and the rights of the child), must be understood and determined in a State where the

majority of black learners coming from poor communities still attend inadequately managed schools with dilapidated infrastructure, a lack of learning and teaching support materials, overcrowded classrooms and teachers who are often ill-equipped to implement the curriculum under very difficult circumstances. Ruchi Parekh's article focuses the general discussion of UPE on an example of its application in practice, as considered by the Swaziland Supreme Court. The Court's deferential ruling, in essentially reading in a 'progressive realisation' element to an unqualified obligation, highlights the difficulties of reconciling law and practice in the context of judicial protection of the right to education, as well as the further obstacles that arise when the judicial system fails to hold governments accountable to their human rights obligations.

Strategic litigation is a highly intensive and drawn out process and three of the articles look at the practical development of cases. Hellen Mutellah discusses non-fee barriers to primary education in Kenya against the State's policy of free and compulsory primary education and EACRight's research around possible litigation strategies to deal with the problem. Solomon Sacco looks at the expulsion of pregnant girls in some African countries and discusses the research and litigation that INTERIGHTS is working on with partners to hold states accountable for such violations and to ensure that pregnant girls remain in school and to complete their education. Meanwhile, in her discussion of the treatment of children with albinism in Kenya and the barriers that exist in their access to and enjoyment of education, Gertrude Angote explores the benefits of alternative and complementary strategies towards realising the right to education. Where litigation has not been as successful as hoped, engaging in activities which encourage an empathic response can be powerful in creating positive change.

Discrimination in access to education will continue to be one of the most litigated issues in the region, but it remains an often difficult issue for courts to understand. Included in this Bulletin are two articles on the specific issue of religious freedom in schools. These reveal both the successes and failures of litigation as a strategy. Bellinda Chinowawa examines the issue of exclusion from primary school on the basis of expression of one's personal faith and beliefs, in this case where a child in Zimbabwe, as a practising Rastafarian, had a 'dreadlock' hair style which was not in conformity with the relevant school rules. The applicants were successful in drawing the Court's attention to relevant constitutional provisions (freedom of religion and non-discrimination), as read together with the applicable education legislative protection. By contrast, the Kenyan High Court recently upheld a challenge to the wearing of the hijab (Muslim headscarf) in high school, as set out by Charlotte Leslie, who discusses possible reasons for the difference in approach and notes that, unlike the case in Zimbabwe, the Court chose not to closely scrutinise the reasons for, and impact of, such a policy.

Karabo Ngidi reviews two recent cases decided by the High Court of South Africa which – although arising from different factual situations – both touch upon the issue of constraints on access to education as a result of decisions made by school governing boards. The cases illustrate the importance of applying sound legal analysis to determine how existing obligations and powers – of these boards and the South African education authorities – can and should be balanced in order to fulfil the constitutional right to education.

An issue that often arises with the litigation of human rights, and particularly of economic and social rights, is the availability of remedies and forums for enforcement. Often domestic law does not provide

sufficient protection and litigants have to rely on supra-national bodies. While the African Commission on Human and Peoples' Rights remains the premier human rights body in Africa, new opportunities are available through the sub-regional economic community courts and the African Committee on the Rights and Welfare of the Child. An example of litigation using a regional mechanism (ECOWAS) is discussed by Adetokunbo Mumuni and Chinyere Nwafor, in a case arising from allegations of massive corruption in Nigeria's education sector, particularly in the distribution of federal funds to states to fund UPE. The Court noted that up to 5 million children were not accessing basic education and made an order that funds be made available to ensure the realisation of their right. However, as it was unable to find a causal link between the acts of corruption and the denial of education, the Court ruled that the Federal Government does not have to do anything more than allocate funds for education in order to fulfil the right to education. This failure to hold the State accountable to a higher degree has led to implementation problems despite a positive outcome. Charlotte Leslie reports on the opportunities available for enforcement of the right to education through the African Committee on the Rights and Welfare of the Child.

Litigation of the right to education will usually only be part of a wider advocacy strategy involving, as appropriate, community mobilisation, public education, media involvement and political lobbying. Indeed, litigation should generally be the last resort. However, strategic cases can have a benefit for a wide range of people, can open up public space for discussion about the issue and can act as a trigger point for societal change. It is therefore hoped that there will be more discussion and consideration of litigation as a strategy for realising the right to education in Africa and we hope that this Bulletin will increase this.

# Africa and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Malcolm Langford and  
Rebecca Brown

## Introduction

The adoption by the United Nations General Assembly of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (the Optional Protocol)<sup>1</sup> has opened up a new legal chapter in human rights. The international recognition that economic, social and cultural (ESC) rights can be legally justiciable places them more firmly on the same footing as other human rights. The Optional Protocol provides for the right of individuals and groups to complain about violations of the rights contained in the substantive covenant, including the right to education.<sup>2</sup> Adjudicative authority to decide on the complaint is vested in the Committee on Economic, Social and Cultural Rights (the Committee), on the proviso that a complainant meets various admissibility criteria such as the exhaustion of domestic remedies. In addition, the Committee can launch an inquiry into grave or systematic violations if a state selects this option upon ratification. With the tenth ratification on 5 February 2013, the Optional Protocol will enter into force on 5 May 2013. The ratifying states are Argentina, Spain, Ecuador, Mongolia, Bolivia, Bosnia & Herzegovina; Slovakia, El Salvador, Portugal and Uruguay.

In the UN negotiations, African states were at the forefront of efforts to secure this protocol. In 2006, they formed a solid continental bloc behind the proposal. They insisted that any protocol must enhance rather than detract from the justiciable protection of ESC rights already contained in the African Charter on Human and Peoples' Rights (the African Charter).<sup>3</sup> Moreover, in 2009, they dominated the first wave of signatures. Curiously though, no African state has yet

ratified the Optional Protocol. Individuals under their jurisdiction cannot yet avail themselves of the procedure nor can the Committee conduct inquiries.

The reasons behind the gap between signature and ratification are likely to be diverse. For any state, it may be the slow domestic wheels of the ratification process or substantive concerns over the content of the Optional Protocol or further international supervision. In this article, we concentrate on the latter. We ask what would be the value to African states in ratifying the Optional Protocol, particularly in the context of the right to education.

The article begins by sketching the current state of socio-economic rights adjudication across Africa before sifting through the various arguments concerning the Optional Protocol.

## Economic, Social and Cultural Rights Litigation in Africa

Africa presents a mixed picture. On one hand, it is home to a range of emerging national experiences. The jurisprudence of the South Africa Constitutional Court has been influential in establishing a framework for justicability of ESC rights. The Court has articulated a reasonableness test for positive obligations, entrenched strong protections against discrimination in the field of ESC rights and guarded against the erosion of ESC rights, particularly housing.<sup>4</sup>

Elsewhere, under authoritarian regimes in Nigeria and Kenya, tactical litigation was used to advance ESC rights by seeking to forestall violations or create spaces for dialogue with governments and corporations. Even before the Arab Spring, Egyptian NGOs and trade unions were

successful in securing orders on affordable medicines and a minimum wage from the Court of Administrative Justice.<sup>5</sup> Over the last decade, an ongoing process of democratic, constitutional and judicial reform from Tanzania to Tunisia has further opened up the space for litigation. Kenya is a notable example: in 2010 a wide range of ESC rights were included in the constitution and its courts have subsequently reflected South African jurisprudence in a number of strong decisions on forced evictions.

At the regional level, in *SERAC v Nigeria*,<sup>6</sup> the African Commission on Human and Peoples' Rights (the Commission) set out what it considered to be the minimum obligations of African states concerning ESC rights, particularly respect and fulfil.<sup>7</sup> The Commission found that oil extraction activities violated rights to health, housing, food and a healthy environment and, while the decision remains only partially implemented, it has provided key guiding standards for the continent. Indeed, recent decisions in Egypt drew on the African Charter.

In a subsequent case concerning access to medicines, the Commission noted that states possessed positive obligations to realise various ESC rights, although within their maximum available resources.<sup>8</sup> Other decisions have covered forced evictions in the Darfur region<sup>9</sup> and the land, resource and cultural rights of the indigenous Endorois in Kenya.<sup>10</sup>

Further, in 2010, one of its working groups developed guidelines for implementation of ESC rights under the African Charter<sup>11</sup> while the Maputo Protocol on Women's Rights in Africa<sup>12</sup> and the African Charter on the Rights and Welfare of the Child<sup>13</sup>

further define and expand relevant rights and obligations.

As to the right to education, there have been several important cases across the continent. In *SERAP v Nigeria*,<sup>14</sup> the ECOWAS Court of Justice for West Africa affirmed that universal primary education (UPE) must be provided in Nigeria. It found that the Government could not rely on a defence of a lack of available funds when that situation was caused by corruption. Even while the State sought the return of the stolen funds, it must procure resources from elsewhere to ensure basic education for all children. In the *Endorois* case decided by the African Commission, the lack of access by Endorois children to Kenya's programme of free primary education was part of the broader violation of the right to development.<sup>15</sup> In *Free Legal Assistance Group v Zaire*,<sup>16</sup> the Commission found that closing of secondary schools and universities (including in the context of internal conflict) as well as the diversion of funds from the provision of adequate education was a violation of the African Charter. This decision was also key in the Commission establishing its approach toward ESC rights as interdependent and indivisible with civil and political rights.

In June 2011, the African Committee of Experts on the Rights and Welfare of The Child issued its first decision in a case against Kenya, finding that there were multiple violations of the rights of Nubian children in Kibera, including the right to education.<sup>17</sup> There have also been several cases on the right to education at the national level including the Mud schools<sup>18</sup> and *Mikro*<sup>19</sup> cases in South Africa and the *Garissa*<sup>20</sup> decision in Kenya.

On the other hand, despite these critical advancements in the recognition and justiciability of ESC rights in Africa, the space for effective litigation is clearly nascent and fragile. Even in countries with seemingly a rich legal opportunity structure, such as South Africa, there has been disappointment over jurisprudence on

positive obligations, occasionally high deference to the legislature and the lack of effective access procedures.<sup>21</sup> In countries with new bills of rights in their constitutions, there are questions of how to chart a strategic path forward in developing a robust jurisprudence. In countries with few justiciable ESC rights, advocates face the challenge of trying to entice courts to derive them from civil and political rights or directive principles, something which has been more common in South Asia than Africa so far. In many jurisdictions, there are significant challenges in navigating a non-transparent legal system dominated by conservative or executive-aligned judges while civil society organisations possess only limited resources.<sup>22</sup> Enforcement of decisions across all human rights, whether from domestic courts or regional bodies, remains a central challenge for those using litigation as a strategy, although one should be careful about overlooking positive impacts and varying levels of implementation.<sup>23</sup>

#### The Potential of the Optional Protocol

In this context, what would be the value of African states ratifying the recently adopted Optional Protocol to the ICESCR? A number of sceptical responses are foreseeable. Regional procedures cover most of the ESC rights in the Optional Protocol and it is uncertain whether such a mechanism will address the concrete challenges for many litigants and advocates described above. Some African governments have noted that insufficient resources exist for realising ESC rights – and that realisation of these rights is aspirational and a complaints procedure will force unrealistic choices on states.<sup>24</sup>

The current backlash by African governments against some international institutions raises a further complication. Due to several prosecutions in the International Criminal Court, some African countries have been looking more closely at their commitments to international legal regimes. Many

governments in the region fear that the continent is being targeted unfairly by Northern governments through international tribunals and bodies.<sup>25</sup> This backlash is not contained to the international sphere: regional institutions have not been immune from the trend. The jurisdiction of the South African Development Community's tribunal to hear individual cases was removed in 2010 after it ruled against Zimbabwe in its first case concerning human rights.<sup>26</sup>

Despite these concerns, various arguments can be advanced for ratification. The first is symbolic. The Optional Protocol was heralded as ending the international debate on the indivisibility of human rights. The UN High Commissioner for Human Rights, Navanethem Pillay, greeted the Optional Protocol by saying that it 'is of singular importance...closing a historic gap in human rights protection under the international system'.<sup>27</sup> African states have been at the vanguard of demands that ESC rights be treated no differently than civil and political rights. The Optional Protocol would appear to embody this very demand: it has been widely recognised as a retrieval and renewal of the unified and balanced vision of rights that was embedded in the Universal Declaration of Human Rights.<sup>28</sup> As noted, the African group swung its support behind the drafting of an optional protocol at a very early stage in the process and almost a third of countries that have formally signed the Optional Protocol (a step before ratification) are African: Burkina Faso, Cape Verde, Congo, Democratic Republic of Congo, Gabon, Ghana, Guinea-Bissau, Madagascar, Mali, Senegal and Togo.

The second argument is constitutional. Although Africa has long been a thought leader in arguing for the fundamental value of ESC rights and their indivisibility and interdependence with civil and political rights, this position is not reflected in domestic constitutions across the continent. ESC rights are not

recognised as fully justiciable in a significant number of national constitutions. At the time of constitution writing at least, it reflected a sentiment that ESC rights are programmatic and not appropriate for judicial review. The Optional Protocol provides therefore a stimulus to consider the possibility of constitutional reform. One important effect of international human rights regimes has been the encouragement of the domestic incorporation of rights.<sup>29</sup> This also ensures that national courts first deal with rights litigation before it reaches international or regional bodies. Ratification of the Optional Protocol would therefore encourage the 48 African states which have ratified the ICESCR to fully domesticate it.

The third argument is jurisprudential. The Optional Protocol provides an important venue for the development of international jurisprudence of ESC rights. Whereas the litigated issues will differ from country to country, individual complaints and inquiries have helped international tribunals develop more concrete findings that give a fuller expression to universally applicable principles. A particular advantage would be further clarifying and concretising the positive fulfilment-oriented duties in the ICESCR.<sup>30</sup> This includes the more limited steps that can be taken by poorer states. Moreover, the Committee's decisions would be translated into multiple languages which would make it more accessible for many African courts in contrast to comparative jurisprudence from other national courts.

It is important to note that this jurisprudence will need to respect the terms of the ICESCR, which provides for the progressive realisation of rights within maximum available resources. In addition, the Optional Protocol provides in Article 8(4) significant space for states in their decisions over relevant policy options: 'the Committee shall consider the reasonableness of the steps taken by the State Party' and 'shall bear in mind

that the State Party may adopt a range of possible policy measures for the implementation of the rights'. And in order to alleviate state concerns over possible decisions that would be unaffordable or too intrusive, the Committee, during the drafting of the Optional Protocol, issued a statement affirming it would meet these jurisprudential parameters. It repeated its earlier standards (particularly on the immediate obligation to ensure a minimum essential level of the rights and avoid retrogressive measures unless there were extenuating circumstances) as well as mentioning that states need to adopt 'reasonable' measures.<sup>31</sup> Furthermore, the Optional Protocol encourages international cooperation and a technical fund is to be established to support poor states in meeting their obligations under the ICESCR.<sup>32</sup>

The fourth argument is accountability for implementation of ESC rights. The Optional Protocol gives birth to a forum in which progress of states can be subjected to a deeper investigation, critique and defence. A complaint-based system can act as a systematic warning device. It allows individuals to raise issues with policies and practices that may not receive any or adequate attention in other participatory forums such as the media or parliament, particularly for fundamental issues like malnutrition, debilitating diseases and access to education. As Gauri and Brinks put it, 'courts serve an information-gathering function that facilitates the accountability of various parts of the state (or even private providers) to each other, using formal rights and judicial gloss as their yardsticks'.<sup>33</sup> Moreover, adjudication can play a role in highlighting unfilled commitments by the state in its law, and sometimes policy, bringing 'lower-level or state bureaucracies in line with stated national policy'.<sup>34</sup>

There may be a number of other accountability effects. The Optional Protocol may allow greater probing of the scope of directive principles on ESC rights which are present in several

constitutions.<sup>35</sup> Although potentially limited by the one-year time frame for submission of a communication following a domestic decision, it could provide a space to seek enforcement of a positive national decision where the state is taking no steps to do so (on the grounds that domestic remedies have not been effective). Perhaps most importantly, the Optional Protocol could create an additional platform for affected groups, social movements and civil society to mobilise and raise awareness on certain ESC rights and issues.<sup>36</sup>

Obviously, the regional system offers many of these potential accountability effects but the Optional Protocol provides a clear complement. The African Charter provides only partial coverage of ESC rights – it is not as expansive as the ICESCR. More critically, there are significant delays at the Commission in processing complaints: this is partly due to under-resourcing of the Commission but also because members have chosen to prioritise thematic activities over case work. In situations requiring urgent attention, the Optional Protocol may be a more effective and speedier route in gaining an international decision.

### Conclusion

As of December 2012, no African state had ratified the Optional Protocol. This is a surprising situation given the strong support African countries have provided to the process. Opening up the decision-making of states to international review, particularly when local decisions are grounded in highly democratic processes, can raise questions of legitimacy<sup>37</sup> and concerns over effectiveness.

However, the Optional Protocol contains built-in protections for states, reaffirms the indivisibility of human rights and offers the opportunity of stimulating constitutional reform, establishing jurisprudence on neglected areas and ultimately providing a complementary forum for accountability that is relatively accessible and currently unburdened

by delays.

The implementation of ESC rights are arguably central in making human rights meaningful for affected groups in Africa: the Optional Protocol provides a mechanism that helps advance this agenda while ensuring the legitimacy of the claims cannot be undermined by charges that the decisions and even the rights themselves are just a product of Western interference.<sup>38</sup>

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<sup>1</sup> GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/17 (2008). For official records of the plenary session, see Official Records, 66th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008, 4:30pm.

<sup>2</sup> G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/63/6 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

<sup>3</sup> Chenwi, L., (2009) *African Arguments for Ratification of the OP-ICESCR*, NGO Coalition for the OP-ICESCR, On file with authors.

<sup>4</sup> Liebenberg, S., (2010) *Socio-Economic Rights: Adjudication Under a Transformative Constitution*, Juta, Claremont.

<sup>5</sup> See respectively Case No 2457/64 and 'Court: Egypt Govt obliged to set minimum wage', Egypt.com News, 31 March 2010.

<sup>6</sup> (2000) AHRLR 18 (ACHPR 1997, Comm. No. 159/96), paras. 15-17. See also Amnesty International v Zambia (2000) AHRLR 325 (ACHPR 1999, Comm. No. 212/98).

<sup>7</sup> Danwood Mzikenge Chirwa, 'African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights' in Malcolm Langford (Ed.) (2008) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 323-338, 338.

<sup>8</sup> Purohit and Moore v The Gambia (African Commission on Human and Peoples' Rights, Comm. No. 241/2001, 2003).

<sup>9</sup> COHRE v Sudan (African Commission on Human and Peoples' Rights, Comm. No. 296/2005, 29 July 2010).

<sup>10</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (African Commission on Human and Peoples' Rights, Comm. No. 276/2003, 4 February 2010).

<sup>11</sup> Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights, available at

<<http://www.escr-net.org/docs/i/1599552>>.

<sup>12</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, 13 September 2000; entered into force 25 November 2005; reprinted in 1 Afr. Hum. Rts. L.J. 40.

<sup>13</sup> OAU Doc. CAB/LEG/24-9/49 (1990), entered into force 29 November 1999.

<sup>14</sup> *Socio-Economic Rights and Accountability Project v Nigeria* (ECOWAS Community Court of Justice, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10, 30 November 2010).

<sup>15</sup> *Supra* note 9.

<sup>16</sup> *Free Legal Assistance Group & Ors v Zaire* (African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93, 1995).

<sup>17</sup> *Decision on the Communication submitted by The Institute for Human Rights and Development in Africa and The Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) against the Government of Kenya*, Decision: No 002/Com/002/2009, 22 March 2011.

<sup>18</sup> *Centre for Child Law & Ors v Government of the Eastern Cape & Ors*, Eastern Cape High Court at Bhisho Case No. 504/10, 4 February 2011.

<sup>19</sup> *Governing Body of Mikro Primary School & Anor v Western Cape Minister of Education & Ors* (South African Supreme Court of Appeal, Case No. 140/05, 27 June 2005).

<sup>20</sup> Constitutional Petition No. 2 of 2011.

<sup>21</sup> See the analysis of different authors in Langford, M., Cousins, B., Dugard, J. and Madlingozi, T. (eds) (2013) *Socio-Economic Rights Strategies in South Africa: Symbols or Substance?*, Cambridge University Press, Cambridge.

<sup>22</sup> See discussion of court systems in Alston, P., 'The Challenges of Responding to Extrajudicial Executions: Interview with Philip Alston' *Journal of Human Rights Practice* 2, 2010, p.355.

<sup>23</sup> For a critique see Mbazira, C., (2008) *You are the "weakest link" in realising socio-economic rights: Goodbye - Strategies for effective implementation of court orders in South Africa*, Research Series 3, Community Law Centre, University of the Western Cape, Cape Town.

<sup>24</sup> R. Brown, Based on discussions with participants during the East African Sub-regional Strategy Meeting on building a sub-regional campaign in support of OP-ICESCR ratification, ESCR-Net, the Economic and Social Rights Center - Hakijamii and the Centre for Human Rights and Policy Studies, Kenya (Nairobi, Kenya, 24-25 September 2012). For an in-depth analysis of the impact of socio-economic rights strategies (litigious and non-litigious) in South Africa, see Langford, M., Cousins, B., Dugard, J. and Madlingozi, T., *Symbols or Substance? The Role and Impact of Socio-Economic Rights Strategies in South Africa*, Cambridge University Press, 2013.

<sup>25</sup> *Ibid.*

<sup>26</sup> Fritz, N., (September 2012) *Up In Smoke: The SADC Tribunal and Rule of Law in the Region*, SAFPI Policy Brief No 11 South African Foreign Policy Initiative, available at <[http://www.safpi.org/sites/default/files/publications/SAFPI\\_Policy\\_Brief\\_n\\_0.pdf](http://www.safpi.org/sites/default/files/publications/SAFPI_Policy_Brief_n_0.pdf)>.

<sup>27</sup> Statement by the High Commissioner for Human Rights, Ms Navanethem Pillay, Official Records, 65th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008, 3pm.

<sup>28</sup> See discussion in Porter, B., 'The Reasonableness of Article 8(4) - Adjudicating Claims from the Margins' *Nordic Journal of Human Rights* 27, 2009, p.39.

<sup>29</sup> Simmons, B., (2009) *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press, New York.

<sup>30</sup> Even in those few states in which the Bill of Rights encompasses the full range of ESC rights, the Optional Protocol will create an opportunity to clarify what the

state obligations related to ESC rights mean in those specific contexts, particularly in terms of resource-availability and positive obligations.

<sup>31</sup> An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol, Statement, UN Doc. E/C.12/2007/1 (2007).

<sup>32</sup> Article 14(3) states: A trust fund shall be established in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, with a view to providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol. More generally, see also the article by Iain Byrne in this edition of the Bulletin concerning the Committee's General Comment No. 13 on the Right to Education.

<sup>33</sup> Gauri, V. and Brinks, D., (2008) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, p.346.

<sup>34</sup> *Ibid.*, pp.346-347.

<sup>35</sup> Viljoen, F., (2007) *International Human Rights Law in Africa*, Oxford University Press, pp.568-585.

<sup>36</sup> Simmons, B., 'Should States Ratify? Process and Consequences of the Optional Protocol to the ICESCR' *Nordic Journal of Human Rights* 27, 2009, p.64.

<sup>37</sup> Buchanan, A. and Keohane, R., 'The Legitimacy of Global Governance Institutions', in Wolfrum, R. and Röben V. (eds) (2008) *Legitimacy in International Law*, Springer, Berlin.

<sup>38</sup> This point emerged in discussions among participants during an East and Southern Africa sub-regional strategy meeting, *supra* note 24.

# Litigating the Right to Universal Primary Education: Challenges and Prospects

Iain Byrne

## A Binding Commitment but a Global Problem

*From the Universal Declaration of Human Rights in 1948 to the (Revised) European Social Charter of 1996, the requirement for education to be free and compulsory never wavered.<sup>1</sup>*

A cursory examination of the obligation to provide free and compulsory universal primary education (UPE) for all reveals no shortage of binding commitments. Indeed, the obligation dates back over 60 years to Article 26 of the Universal Declaration of Human Rights<sup>2</sup> which states that 'education shall be free, at least in the elementary and fundamental stages' and that '[e]lementary education shall be compulsory'. Subsequent binding international treaty guarantees include Article 4(a) of the UNESCO Convention against Discrimination in Education,<sup>3</sup> Article 13(2)(a) and (b) of the International Covenant on Social, Economic and Cultural Rights (ICESCR) and Article 28(1)(a) of the Convention on the Rights of the Child (CRC) – the latter two having been ratified by 160 and 193 states respectively.<sup>4</sup> In addition there are a range of regional obligations in Africa,<sup>5</sup> the Americas<sup>6</sup> and Europe.<sup>7</sup>

In respect of Article 13(2), the Committee on Economic, Social and Cultural Rights (CESCR) requires states to prioritise the introduction of compulsory, free primary education reflecting the fact that it is an immediate duty of all states parties.<sup>8</sup> The significance of this cannot be overestimated given that most of the obligations in respect of substantive rights under the ICESCR are subject to progressive realisation.<sup>9</sup>

Beyond these legal obligations states have committed to achieving UPE as

part of some major intergovernmental initiatives. Goal 2 of the Millennium Development Goals (MDGs) is to achieve UPE with targets of ensuring by '2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling'.<sup>10</sup> The importance of UPE in promoting gender equality and empowering women under Goal 3 is also emphasised through Target 3.A, which aims at eliminating gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015. A linked, and arguably even more significant initiative in the context of specific UPE outcomes, is the Dakar Framework for Action which emerged from the 2000 World Education Forum.<sup>11</sup>

However, it is not just at the international level that states have committed to implement UPE. Dating back to the nineteenth century in Europe many countries have provided for compulsory and/or free primary education in their domestic law,<sup>12</sup> through constitutional protection<sup>13</sup> and/or legislation.<sup>14</sup> Indeed in some cases they have been reinforced by action plans and strategies,<sup>15</sup> as required by Article 13 of the ICESCR (see below).

Yet despite all these commitments and initiatives the lack of actual access to UPE remains a huge problem, especially in the global south. CESCR has estimated that in developing countries 130 million school age children are without access to primary education, of whom approximately two-thirds are girls.<sup>16</sup> UNESCO enrolment statistics from 2004 indicated that 77 million children were not enrolled in school<sup>17</sup> and it is likely that this is a conservative estimate.<sup>18</sup>

The reasons for lack of access tend to

be grouped around (a) states' continued failure to make the necessary resources and infrastructure (schools, teachers, materials, transport) available; (b) financial barriers both direct and indirect; and (c) child labour.<sup>19</sup> Undoubtedly, as Katarina Tomasveski has highlighted, ensuring UPE for all is expensive and requires considerable investment by states, but it will bring long term benefits for both the individual and society.<sup>20</sup> At the same time it is frequently parents who have to bear much of the cost.<sup>21</sup>

In addition to the core positive duties – the provision of sufficient schools, teachers and facilities, and transport services to ensure pupils can access schools – UNESCO has highlighted that the state obligation to realise UPE encompasses a range of concrete and interconnected duties – both positive and negative – including: (a) measures to encourage regular attendance and reduce drop-out rates; (b) providing education on the basis of equal opportunity; (c) ensuring respect for the right to education without discrimination of any kind on any grounds; (d) ensuring an inclusive education system; (e) providing reasonable accommodation and support measures to ensure that children with disabilities have effective access to and receive education in a manner conducive to achieving the fullest possible social integration; (f) ensuring an adequate standard of living for physical, mental, spiritual, moral and social development; (g) providing protection and assistance to ensure respect for the rights of children who are refugees or seeking asylum; and (h) providing protection from economic exploitation and work that interferes with education.<sup>22</sup>

However, even if access is secured this still leaves the question of adequacy. States are not just obliged to ensure that all children have access to UPE, but also that it will be of sufficient quality such that they can derive the appropriate benefit from it. Although, as UNESCO makes clear, there is no single definition of 'quality', two key elements can be identified based in part on the aims of education as set out in the CRC. Firstly, the cognitive development of the pupil and secondly, the promotion of creative and emotional development, supporting the objectives of peace, citizenship and security, fostering equality and passing global and local cultural values down to future generations.<sup>23</sup> How effective the education system will be in delivering these goals will be dependent on a range of factors many of which have significant resource implications including the content of the curriculum,<sup>24</sup> the capacity and ability of the teaching staff and the overall learning environment, which in turn is dependent on key elements such as reducing pupil-teacher ratios, teacher training, employing more female teachers to increase girls enrolment and retention, providing more and better teaching materials and textbooks, increasing teachers' real wages to enhance recruitment and retention, and providing instruction in a range of languages to meet different pupils' needs.<sup>25</sup>

Where states fail in their obligation to deliver quality education the impact on pupils can be devastating, as demonstrated by test data from a number of countries showing that a majority of primary school leavers achieve well below their countries' minimum performance standards, with results in some cases being 'only marginally better than for children who have not completed school'.<sup>26</sup>

It is in light of this context that the remainder of this article examines some of the key challenges and prospects for using strategic litigation to secure improved access and higher quality UPE for pupils.

### **Litigating UPE: Challenges and Prospects**

Litigation can play an important role in holding states to account, documenting violations and providing a forum for victims and their families to tell their stories and, hopefully, gain effective redress. However, there are different challenges involved in litigating each of the various elements of UPE, in terms of evidence gathering and argumentation, quite apart from the problems inherent in securing implementation of judgments. Above all, the question of how far courts are prepared to go in adjudicating matters with significant resource and policy implications is crucial. Applicants will need to think about the type of remedies they want, particularly in terms of guaranteeing non-repetition, and this will mean not just legislation but also appropriate administrative, financial and educational measures.

### **Common Elements: The 4As**

The content of primary education includes the same elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.<sup>27</sup> In terms of availability states are required to provide the necessary resources to ensure that school infrastructure is provided and maintained. This would include safe drinking water, sanitation facilities, classrooms, desks and chairs for its learners, textbooks, blackboards and stationery, together with the provision of qualified teachers. Some commentators have stated that these are core obligations and that without them the right to basic education loses its significance as a human right.<sup>28</sup> Beyond that CESCR's General Comment 14 goes on to list 'facilities such as a library, computer facilities and information technology' but it would be extremely contentious, at least in many developing countries, to maintain that they are also core elements.

Consequently, whilst it might appear straightforward to make the case when litigating that some or all of these core

elements should be provided as a priority and a matter of urgency, where the resources do not exist to begin with courts may not be mindful to order immediate implementation (see the recent decisions from the Swaziland courts outlined below). As one moves higher up the 'wish list' we begin to enter the realm of progressive realisation and resource availability, and the court will need more convincing. In addition this may well require detailed budgetary analysis (see further below).

Accessibility underpinned by the principle of non-discrimination (an immediate obligation not subject to progressive realisation) encompasses both physical and economic accessibility. Clearly, the latter in the context of the obligation in relation to delivering free UPE is highly significant (see further below). In this context states are required to actively identify individual children or groups of children who are experiencing discrimination and, in line with affirmative action, prioritise marginalised and disadvantaged groups. This will clearly include children who, because of their economic status, are unable to access school because of an inability to pay fees or other costs. The more problematic aspects of access come when it has potentially significant resource implications, e.g. the requirement of 'reasonable accommodation' to ensure that, for example, children with disability can receive an inclusive education, leaving aside the general absence of school facilities where none existed before.

From a litigation point of view the use of statistics in proving discrimination, particularly where it is indirect, will be important.<sup>29</sup> Yet having access to up-to-date, reliable statistics – and certainly data that is disaggregated – may not always be possible (see further below in respect of the discussion on indicators).

With respect to acceptability, the form and substance of education, including curricula and teaching methods, have

to be relevant, culturally appropriate and of good quality to students and, in appropriate cases, parents, subject to the educational objectives required by Article 13(1) and such minimum educational standards as may be approved by the state (see Article 13(3) and (4)). Adaptability requires education to be flexible enough so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.<sup>30</sup>

Generally acceptability<sup>31</sup> and adaptability will be more challenging to litigate than availability and accessibility due to the greater qualitative elements under consideration (although note that where the issue of quality is inextricably linked to lack of availability/access, e.g. the failure to provide textbooks, courts should be more receptive to priority arguments). Consequently, there may well be a need for expert testimony to support the case requiring litigants and their representatives to engage with pedagogues and the education policy community.

#### ***UPE's Distinct Elements: Free and Compulsory***

*Problems in guaranteeing free and compulsory education to all children revolve around funding.<sup>32</sup>*

The two key aspects of UPE are that it should be free and compulsory and this is emphasised by the CESCR when it lists one specific example of violation of Article 13 as 'the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all'.<sup>33</sup> According to one leading expert on the right to education, free, compulsory primary education represents the minimum core of the right to education arguing that it is so essential for the development of a person's abilities that it can be 'rightfully defined as a minimum claim',<sup>34</sup> hence the immediate obligation on states to realise the right. In this respect the CESCR does 'take account of resource

constraints applying within the country concerned' in assessing whether or not a state has discharged its minimum core obligations, although it must still meet the burden of proving that this is for reasons beyond its control and it had been unable to secure the assistance of the international community.<sup>35</sup> Furthermore, even where resources are limited the status of UPE requires its prioritisation. The core minimum also entails that schools are prohibited from discriminating against learners in any way for not being able to afford the charges related to schooling.

#### ***Fees and Other Direct Costs***

The CESCR has defined the nature of the 'free of charge' requirement as being unequivocal. The right [to primary education] 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,<sup>36</sup> constitute disincentives to the enjoyment of the right and may jeopardise its realisation. They are also often highly regressive in effect.

Yet fees in primary education are still common in many developing countries with estimates that they represent perhaps 20 per cent of all education spending and as much as 30 per cent in Africa.<sup>37</sup> Studies have shown that there is a clear correlation between charging fees and lowered enrolment rates.<sup>38</sup>

Most significantly, international evidence indicates that the burden of fees falls most heavily on the poorest communities.<sup>39</sup>

In assessing liability for direct costs it should be noted that these can include not just the imposition of fees but also charges for taking exams, textbooks, learning materials and all basic school equipment. Both the CESCR and the CRC Committee have stated that all these direct costs, including maintenance of school buildings, must be provided free of charge by the

state.<sup>40</sup> Indeed, abolishing school fees and other charges without implementing other necessary reforms and increases in resources may actually have a detrimental effect. There is a danger that the immediate increase in enrolment could lead to a reduction in quality due to a failure to address long-standing issues such as overcrowding and lack of textbooks and adequately trained teachers. Consequently, within a short space of time enrolment can again fall and drop-out rates increase, particularly amongst poorer children. Therefore simply abolishing fees without considering whether, and how, they should be replaced by an alternative source of income, particularly where the income from fees makes a significant contribution to the operational effectiveness of the education system,<sup>41</sup> means potential regression in the longer term. Such repercussions need to be borne in mind when litigating and deciding on the type of remedy to seek: frame it too narrowly and it may not have the desired effect.

Indeed, as a nationwide study in India showed, making primary education completely free will not necessarily result in a 100 per cent attendance rate but will require the government to incur additional expenditure to defray those other direct costs which discourage attendance.<sup>42</sup> Other adjustment interventions may need to include direct targeted cash transfers to poorer families in order to reimburse them for the potential loss of earnings for a former child worker.<sup>43</sup> There is strong evidence of the effectiveness of such initiatives, together with schemes such as food for education.<sup>44</sup>

#### ***Addressing Indirect Costs***

Indirect costs are costs that are not directly related to the provision of education but arise from the educational service and can include transport, school meals, school uniforms and sporting equipment. They can also extend to levies on parents, which are sometimes

portrayed as being voluntary when in fact they are often compulsory, therefore arguably amounting to direct costs.

Whilst the imposition of direct costs should be relatively straightforward to litigate both in terms of gathering the evidence and making the argument (subject to any relevant resource implications), this may not be the case with respect to indirect costs. This is all the more important given the fact that, even if direct costs are met, a range of indirect costs can act as a significant deterrent to children accessing UPE. In this respect the CRC Committee has highlighted that where school uniform (frequently one of the most costly items) is mandatory, the state should provide them at least for poor children so that no child is excluded on this ground.<sup>45</sup> Another significant cost is transport, leading the CRC Committee to state that the obligation to provide free primary education includes subsidising transport for those who cannot afford it.<sup>46</sup>

The critical element in any litigation will be being able to demonstrate that the imposition of a particular indirect cost is effectively preventing a student from attending school to the extent that it is placing an unreasonable burden on them. The failure of the state to take suitable ameliorating measures to exempt/subsidise based on inability to pay will clearly strengthen the applicant's hand.

#### ***Budgetary Allocation***

*The worlds of human rights and fiscal allocations are separated by an abyss at the global or domestic level.*<sup>47</sup>

A related but complex aspect is the amount of money budgeted for by the state to spend on UPE. In relation to education more generally this has frequently been the subject of consideration by the CRC Committee. In its reporting guidelines the Committee requests states to furnish information on both the proportion of the overall budget devoted to children and that allocated to the various levels of education, including primary, and,

in its concluding observations, has often expressed concern about insufficient allocations of resources to education. International law has made clear that a decrease in an education budget would amount to a retrogressive measure which would amount to a violation unless it can be fully justified by reference to the totality of the rights provided and in the context of the full use of the maximum available resources.<sup>48</sup> In this context states would have the burden of proving that they have not just exhausted their own resources but those available internationally as well.

Tomasveski notes that, contrary to their obligations under international human rights law, funding for education tends to be treated as discretionary by states, and that few countries have effective constitutional guarantees mandating the government to allocate to education a determined proportion of its budget.<sup>49</sup> Moreover, countries with very similar gross domestic products often allocate very different levels of investment in education.<sup>50</sup>

A human rights based approach to budgetary analysis, both in terms of outcomes (progressive realisation v retrogression) and process (participation, transparency and accountability), can provide an appropriate normative framework for assessing the sufficiency of fiscal transfers.<sup>51</sup> However, litigating budgetary allocation measures is extremely problematic. Even if one is able to collect and analyse the data rigorously, the challenge remains in persuading a court (as opposed to an international monitoring body) that it can adjudicate on such matters (i.e. that it does not breach separation of powers) and determine whether the outcomes amount to a violation, particularly in terms of where the threshold should be on sufficient funding for primary education regardless of education more generally. It is likely that cases that focus more on process (i.e. how the decisions were arrived at) than actual outcomes will

have a greater chance of success.

In any event it is important to reiterate that budgetary analysis, whilst important, only tells half the story. Even maintaining or increasing a budget will not necessarily be sufficient to guarantee that, at any level, a child receives an adequate education particularly in terms of quality and acceptability.<sup>52</sup>

#### ***Compulsion***

The unique element of compulsion in UPE requires all those with responsibilities towards the child – the state, its agents and parents or guardians – to ensure that s/he accesses primary education, subject to the state meeting the necessary adequacy requirements in relation to quality and relevance. Given the barriers faced by girls in accessing UPE, the prohibition of gender discrimination is particularly relevant.

Fulfilling the compulsion obligation clearly requires states to have effective monitoring and follow-up procedures in place. A more problematic issue is how to sanction parents who are seen to be failing in their responsibility to ensure the attendance of their children. For example, parents in South Africa may be fined or even imprisoned if they fail to fulfil their legal obligation. However, this begs the question of whether, in applying the sanction, the actual reasons for the child's absence (including costs – both direct and indirect) are taken into account. Furthermore enforcement, whether against parents or even children themselves, can, of itself, raise significant human rights issues. On this point the CRC offers no guidance since, beyond requiring states to encourage school attendance, it does not discuss enforcement.<sup>53</sup>

#### ***Adoption of a Plan of Action***

Article 14 of the ICESCR requires each state party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years,<sup>54</sup> 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 primary education free of charge for all. This obligation is a continuing one and states are not absolved from the obligation as a result of their past failure to act within the two-year limit.<sup>55</sup> The plan must cover all of the actions which are necessary in order to secure each of the requisite component parts of the right and must be sufficiently detailed so as to ensure the comprehensive realisation of the right with a series of targeted implementation dates for each stage of the progressive implementation of the plan. Again, a state party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available. Yet, in spite of these obligations, many states parties have neither drafted nor implemented a plan of action for free and compulsory primary education.

The challenge of strategically litigating to get the state to produce a plan of action is two-fold. Firstly, the court will need to be convinced that this is an area that it can review, as opposed to simply providing remedies for individual victims, and secondly, even if it this is the case, there is the question of whether the court will simply be satisfied to focus on obligations of conduct, as opposed to result. In other words, will the court merely require the state to produce a plan (hopefully within a certain time period) whilst not scrutinising its content to see that it meets the Article 14 requirements? Such a deferential approach, particularly if not backed up by periodic monitoring, may encourage more cooperation from state actors whilst allowing courts to believe that they are acting within their powers, but may fail ultimately to deliver effective change.

#### **Tackling Discrimination – the Value of Using Indicators**

Indicators are clearly a very useful tool for monitoring compliance with state obligations and in that respect provide important evidence for strategic litigation. However, the data collected

on children's education is usually quite limited to a few key indicators – enrolment, attendance and formal attainment – with few indicators developed to monitor the broader dimensions of a rights-based approach to education.

The Right to Education Project has identified a series of indicators for assessing implementation of UPE, split by a number of differentiated criteria including gender, region, rural/urban, minority and by income. These include enrolment, survival, drop out and completion rates; repetition (i.e. the numbers of children having to repeat classes); transition rate from primary to secondary school; and pupil/(trained) teacher ratio. In respect of economic accessibility, relevant indicators include tuition fees; the availability of subsidies for early childcare and education available for low-income groups; provision of free meals; and the per cent of household expenditure on primary education. In terms of accountability, is there a monitoring body evaluating both the direct and indirect costs of primary education and a complaint mechanism?

However, the ability to collect and analyse the necessary data to measure these indicators will often present significant challenges. Many states simply do not keep a record of such information, a failure of their obligations in its own right, leaving victims and their representatives to either seek to collect the data themselves or seek out others (academic institutions, intergovernmental bodies) who might.

Even where they do exist, statistics may provide an incomplete picture due to an overly narrow analytical approach. For example, commonly used statistics on enrolments tell us the number of children who are in school (or at least who registered at the beginning of school year) but not how many should be in school. Large, but unknown, numbers of children are precluded from schooling because they live in remote areas or are displaced, or are

children of illegal aliens or migrant workers, street children, domestic servants etc. The problem of tackling discrimination is further compounded by the fact that there is no internationally collected data on access to education by race, ethnicity or religion.

#### **Litigation in Practice: Some Incremental Gains But Still a Long Way To Go**

Despite the many challenges discussed above, as the following brief and non-exhaustive survey demonstrates, UPE litigation is taking place. Although the results may often be mixed, the fact that victims are seeking to hold states to account for their failure to implement can often provide an important foundation for wider political advocacy.

#### **South Africa**

Section 29(1) of the Constitution obliges the Government to make education available and accessible to everyone, with s 29(1)(a) entitling everyone to a basic education.<sup>56</sup> To date there have been two significant decisions by the Constitutional Court (the Court) in interpreting s 29(1)(a). In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*,<sup>57</sup> the Court held that the right to basic education is not merely a negative right that requires the State not to obstruct access but also creates a positive obligation on the State to ensure that everybody is entitled to exercise that right.

In *Juma Musjid Primary School*,<sup>58</sup> the Court, in ensuring that children were not left without alternative placements when their public school was evicted from private property, went on to confirm that the right to basic education is not subject to progressive realisation but should be immediately implemented, holding: 'The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is reasonable and justifiable in an open and democratic society based

on human dignity, equality and freedom.<sup>59</sup> As one commentator notes, the Court's rejection of the reasonableness review in this case sets a potential precedent not just in relation to UPE but also regarding how it will assess state compliance of other unqualified socio-economic rights in the future.<sup>60</sup> However, the Court, not being required to do so, did not provide a detailed elaboration on the content of the right in terms of what else is required to deliver adequate UPE apart from ensuring it is available in sufficient quantity.

The question therefore remains: if and when the Court is asked to determine whether the state is succeeding in its obligation to provide adequate UPE, will it at least be forced to define the core content of the right to education – something which the Court has been reluctant to do in respect of other rights such as housing (as opposed to the approach taken by the CESCR)? In this respect it has been argued that a distinction can be made between the right to basic education and a right such as housing on the basis that the requirements for the enjoyment of the former are the same for all learners. That is, although learners may come from different socio-economic backgrounds, they are equal bearers of the constitutional right to basic education for all and are therefore entitled to the same type of education.<sup>61</sup>

Similarly, it is unclear what position the Constitutional Court would take in adjudicating on the constitutionality of user fees. Some argue that the Court would find it much easier to declare a violation of s 29(1)(a) in respect of those who cannot afford to pay as opposed to extending it to everybody in principle based on both the Court's previous jurisprudence in areas such as housing and the social and economic context of the country.<sup>62</sup> This view is reinforced by the country's flawed exemption system which continues to fail many poor families in the absence of effective resource transfers.<sup>63</sup>

### **Swaziland**

Recent litigation in Swaziland demonstrates the challenge of securing timely implementation even when courts might initially make declaratory orders affirming the right to UPE. In 2009 the High Court upheld a suit brought by the Swaziland National Ex-Miners Workers Union (SNEWA),<sup>64</sup> in response to the King's parliamentary address in which he stated that free education was not a feasible undertaking, requiring the Government to honor its constitutional duty to provide free primary education.<sup>65</sup> To the argument by Government lawyers that free education was already made available by the Government in the form of Government-purchased textbooks and the payment of tuition fees for orphans and vulnerable children, the judge responded that the language in the Constitution was clear enough and therefore did not warrant interpretation. She noted, '[i]t seems to me that the respondents are seeking to have the court give the words 'free education' an interpretation which will only do violence to the language, will at best be artificial and in reality be absurd'.

However, within less than a year, the weakness of the initial declaration became clear when the same High Court dismissed a subsequent case brought by SNEWA to speed up implementation of free primary school education according to the State's 2009 Implementation Plan.<sup>66</sup> The decision was upheld by the Supreme Court.

### **Latin America<sup>67</sup>**

In Costa Rica, the Constitutional Court has declared that school fees or charges of any kind, whether direct or indirect, are unconstitutional. This interpretation of the Constitution as guaranteeing state-sponsored free education occurred following the filing of a petition by parents against a state educational institution for refusing to enrol their son after they could not afford to pay the 'voluntary contributions' that the school required

for enrolment. Specifically, the Court declared that fees imposed by educational institutions violate Article 78, which states that: 'Preschool and general basic education are obligatory. These and diversified education in the public system are free and supported by the Nation.'<sup>68</sup> The Court reasoned that '[c]onditioning school attendance on the payment of a sum of money, no matter what it is called, is to ignore what the Constitution provides', in violation of the fundamental right to education.

Similarly, Chilean courts have upheld the right to free education as a constitutionally guaranteed fundamental right. The San Miguel Court of Appeals ruled that expelling or publicly humiliating students whose parents failed to pay school fees is unconstitutional,<sup>69</sup> thereby upholding the fundamental right to education over any alleged right to collect the debts of the parents in the form of voluntary or other school fees.

### **India**

Recent constitutional and statutory affirmation of UPE as a fundamental right, combined with some progressive decisions of the Indian Supreme Court (the Court), has certainly given greater legal underpinning to the issue. However, in a country where an estimated 45 million children are engaged in child labour, the practical impact has yet to be felt.

In *Unnikrishnan J.P. v State of Andhra Pradesh*<sup>70</sup> the Court ruled that governmental authorities have an obligation to make primary education available to children. At the time of the ruling, education was not accorded the status of a fundamental rights but a Directive Principle of State Policy. Since the country's independence, however, free and compulsory education had not been implemented in India, leading the Court to conclude that:

*If Article 45 were to remain a pious wish and a fond hope, what good of it having regard to the importance of primary education...Does not the*

passage of 44 years – more than four times the period stipulated in Article 45 convert the obligation created by the article into an enforceable right? ... We hold that a child (citizen) has a fundamental right to free education up to the age of 14 years.<sup>71</sup>

In another case, *Mohini Jain*,<sup>72</sup> the Court held that the right to education was implicit in the fundamental right to life. This broad interpretation, based on viewing the importance of education as a fundamental right for living a life in dignity, led to a constitutional amendment in 2002, making the right to free and compulsory education for children aged between six and 14 a fundamental right under Chapter III of the Constitution. This was given statutory force through the Right to Education Act 2009 (the Act).

In April 2012 the Supreme Court upheld the constitutional legitimacy of the Act in ordering elite primary schools nationwide to reserve 25 per cent of spaces for low-income pupils.<sup>73</sup> However, whilst noting the symbolic importance of the decision in recognising the fundamental nature of the right to UPE, some commentators have noted that the effective implementation of the decision will be difficult due to the fact that the admission requirement only extends to the school's local neighbourhoods which, by their very nature, are often located some distance from poorer communities.

### The United Kingdom

The difficulty of litigating UPE in the absence of an entrenched right is illustrated by a case from the UK. Although the UK has neither incorporated the ICESCR or the CRC into its domestic law, domestic legislation dating from 1944 obliges the local education authority to provide 'sufficient' primary school places for children. In *R v Inner London Education Authority, ex parte Ali and Murshid*<sup>74</sup> the House of Lords considered a case concerning 300 children of compulsory school age who were unable to attend school due to a

shortage of teachers. In the view of the House of Lords, the Act did not entail an obligation on the part of the local authority to place all children in schools and it was not possible to derive from the law an individual right of access to school that was justiciable and enforceable.<sup>75</sup>

### Conclusions

Although we might like to believe that in the twenty-first century no child should be denied access to free primary education, and indeed progress has been made in many countries since the right was first elaborated in international law, the reality for millions of children is very different. Litigation can go some of the way to redressing the balance but its impact to date remains limited. In some cases litigation may even have unintended consequences unless the remedies on offer are capable of addressing a range of systemic problems that are impeding access rather than just focusing on one 'low hanging fruit'. Even the minimum core elements of the right will often have significant resource implications which courts may be unwilling to contemplate as falling within their competency. The lack of disaggregated data, and the millions of marginalised children who fall under the radar and are not statistically recorded, compounds the problem of ensuring that states are able to take the affirmative action measures necessary to fulfil their positive obligations in relation to extending UPE to the most vulnerable.

Yet litigation's greatest contribution can often be to highlight an issue as part of a broader advocacy initiative which, in turn, can increase political pressure. At the same time, litigation provides the opportunity to apply a human rights normative framework to the delivery of UPE, enabling it to move beyond being an aspiration to being a fundamental right for all.

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<sup>1</sup> Tomaseski, K., 'Free and compulsory education for all children: the gap between promise and performance', *Right to Education Primers* No. 2, 2001, p. 11.

<sup>2</sup> Although the Universal Declaration of Human Rights is not a binding treaty there is a strong case that some if not all of its provisions now enjoy the status of customary international law.

<sup>3</sup> Article 4(a) requires state parties 'to promote equality of opportunity and treatment in the matter of education and in particular [t]o make primary education compulsory and free'. It is ratified by 99 states (<<http://www.unesco.org/eri/la/convention.asp?KO=12949&language=E&order=alpha>> accessed 13 September 2012).

<sup>4</sup> As of 3 August 2012 (<<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>> accessed 3 August 2012). Other international treaty provisions include Article 24(2)(a) of the Convention on the Rights of Persons with Disabilities, which requires states parties to ensure that '[p]ersons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education'.

<sup>5</sup> Article 11(3)(a) of the African Charter on the Rights and Welfare of the Child obliges states parties '...to take all appropriate measures with a view to achieving the full realization of this right and shall in particular provide free and compulsory basic education'.

<sup>6</sup> Article 13(3)(a) of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) requires that primary education be 'compulsory and accessible to all without cost'; Article 49 of the Charter of the Organization of American States obliges member states to take steps to 'ensure the effective exercise of the right to education' by providing compulsory primary education that 'shall be without charge' when provided by the state.

<sup>7</sup> Article 7(3) of the (Revised) European Social Charter provides that '...persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education whilst Article 17 requires states parties "...either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools'. Article 14(2) of the EU Charter of Fundamental Rights stipulates that the right to education includes 'the possibility to receive free compulsory education'.

<sup>8</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education* (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, para. 51.

<sup>9</sup> See Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

<sup>10</sup> The main indicators are (i) net enrolment ratio in primary education; (ii) proportion of pupils starting grade 1 who reach last grade of primary; and (iii) literacy rate of 15-24 year-olds split by gender.

<sup>11</sup> The Education for All goals were established at Jomtien (Thailand) in 1990 and reaffirmed at the 2000 World Education Forum. In 'A World Fit for Children', the outcome document from the United Nations

General Assembly Special Session on Children in 2002, governments reaffirmed these commitments and agreed to a range of strategies and actions to achieve them. At Dakar 1,100 participants reaffirmed their commitment to achieving MDG 2 in terms of Education for All by the year 2015. Four out of six of the Dakar Goals apply to UPE: (i) expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children; (ii) ensuring that by 2015 all children, particularly girls, children in difficult circumstances and those belonging to ethnic minorities, have access to and complete free and compulsory primary education of good quality;...](v) eliminating gender disparities in primary and secondary education by 2005, and achieving gender equality in education by 2015, with a focus on ensuring girls' full and equal access to and achievement in basic education of good quality; (vi) improving all aspects of the quality of education and ensuring excellence of all so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.

<sup>12</sup> See Tomasveski, K., (2003) *Education Denied: Costs and Remedies*, Zed Books, London, pp. 44-48.

<sup>13</sup> The constitutions and national legislation of nearly all Latin American countries incorporate their international and regional legal obligations to guarantee free primary education. See also some African countries such as Kenya, Malawi, Swaziland and South Africa (see <http://www.right-to-education.org>).

<sup>14</sup> See, for example, Argentina's Comprehensive Protection of the Rights of Children and Adolescents (Law 26.061), which guarantees the right to free education at all levels of education, and Article 39 of the Federal Education Act, which mandates budget allocations in education in order to effectively implement the right. The India National Act 2009 makes education a fundamental right.

<sup>15</sup> The Sarva Shiksha Abhiyan (SSA) was adopted by India in 2000-01 and aims to provide quality elementary education for all children in the 6-14 age group by 2010. The South African Education Department published the national Plan of Action: Improving access to free and quality basic education for all in 2003, in which it declares that it is 'well on the way to attaining ... the provision of basic education that is compulsory for all children of school-going age, that is of good quality and in which financial capacity is not a barrier for any child ... before 2015'.

<sup>16</sup> See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, E/1992/23, para. 3.

<sup>17</sup> United Nations Educational, Scientific and Cultural Organization, *EFA Global Monitoring Report 2007: Strong foundations — Early childhood care and education*, UNESCO, Paris, 2006.

<sup>18</sup> According to UNICEF sources this figure may be as high as 90 million children for 2005-2006 in terms of school attendance figures from household surveys (United Nations Children's Fund, *Progress for Children: A World Fit for Children statistical review*, UNICEF, New York, 2007).

<sup>19</sup> One estimate is that the effective implementation of compulsory schooling in India would result in a in a 70 per cent reduction in the number of child labourers (Burra, N., (1995) *Born to Work*, Oxford University Press, New Delhi).

<sup>20</sup> Tomasveski, *supra* note 1, p.19.

<sup>21</sup> It has been estimated that at least 20 per cent and often as much as 90 per cent of the financial cost of primary education is borne by the parents and/or families of children (see Bray, M., *Counting the Full Cost: Parental and Community Financing of Education in East Asia*, A collaborative report by the World Bank and UNICEF, Directions in Development, The World Bank, 1996).

<sup>22</sup> UNESCO (2007), *A Human Rights Based Approach to Education for All*, UNESCO, p.29.

<sup>23</sup> *Ibid.*, pp. 32-33.

<sup>24</sup> The Committee on the Rights of the Child stipulates that the curriculum 'must be of direct relevance to the child's social, cultural, environmental and economic context, and to his or her present and future needs and take full account of the child's evolving capacities' (Committee on the Rights of the Child, *General Comment No. 1: The aims of education, article 29* (1) (2001), CRC/GC/2001/1, 2001, para. 9).

<sup>25</sup> Matz, P., (2003) *Costs and benefits of education to replace child labour*, ILO.

<sup>26</sup> See Watkins, K., (2000) *The Oxfam Education Report*, Oxfam GB, London, p. 105. Countries studied included Bangladesh and Zambia.

<sup>27</sup> CESCR, *General Comment No. 13*, *supra* note 8, para. 8.

<sup>28</sup> See Arendse, L., 'The Obligation to Provide Free Basic Education in South Africa: An International Law Perspective' PER / PELJ (14)6, 2011.

<sup>29</sup> See the European Court of Human Rights judgment in *DH v Czech Republic* (Appl. No. 57325/00, 13 November 2007), which approved the use of statistics in proving indirect discrimination.

<sup>30</sup> CESCR, *General Comment No. 13*, *supra* note 8, para. 6.

<sup>31</sup> Although note that acceptability may on occasion be easier to litigate where it results in discrimination by, for example, unfairly excluding equal access for disadvantaged children.

<sup>32</sup> Tomasveski, *supra* note 1, p. 10.

<sup>33</sup> CESCR, *General Comment No. 13*, *supra* note 8, para. 59.

<sup>34</sup> Coomans, F., 'Clarifying the Core Elements of the Right to Education', in Coomans, F. and Van Hoof, F. (eds) (1995) *The Right to Complain about Economic, Social and Cultural Rights*, SIM, Utrecht, p. 7.

<sup>35</sup> See Eide, A., 'Economic, Social and Cultural Rights as Human Rights', in Eide, A., Krause, C. and Rosa, A. (eds) (2001) *Economic, Social and Cultural Rights*, 2nd edn, Martinus Nijhoff, Dordrecht, p. 27.

<sup>36</sup> Examples of direct costs are those directly produced by the educational service, including teacher salaries, provision of schools and their maintenance, and the management of the education system. Other direct costs include costs without which education could not be delivered, namely text and other books, learning materials, basic school equipment (stationery such as pens, pencils, rulers, etc.) and fees for examinations.

<sup>37</sup> World Bank, 'School Fees: A roadblock to Education for All', *Education Notes*, World Bank, Washington, D.C., August 2004, p. 2.

<sup>38</sup> For example, an Oxfam study in Tanzania, Ghana and Zambia found that the practice of charging fees reduces enrolments in primary school education (Oxfam Briefing Paper, *Education Charges: A Tax on Human Development* (2001).

<sup>39</sup> See Reddy, S. and Vandemoortele, J., *User Financing of Basic Social Services: A Review of Theoretical Arguments and Empirical Evidence* (1996).

<sup>40</sup> See Sloth Nielsen, J. and Mezmuur, B., (2007) *Free Education is a Right for Me: A Report on Free and Compulsory Education*, Save the Children Sweden, p.16.

<sup>41</sup> A World Bank study gives the positive example of Uganda, which within three years increased the recurrent budget for primary education from nine per cent of total education spending in 1996 to 19 per cent by 1999 to adjust for the abolition of fees (see Kattan, R.B. and Burnett, N. (2004) *User Fees In Primary Education*, World Bank, Washington, D.C., pp. 23, 29).

<sup>42</sup> See Chandrasekhar, S. and Mukhopadhyay, A., (2006) *Primary Education as a Fundamental Right: Cost Implications*, IGIDR – the authors found that abolishing fees resulted in an 89 per cent attendance rate.

<sup>43</sup> World Bank, *supra* note 37, pp. 45-54.

<sup>44</sup> The Food for Education programme of the Government of Bangladesh, for example, has significantly increased enrolment and attendance and reduced drop-out rates for primary-school age children.

Unconditional cash transfers have been applied with considerable effect in South and southern Africa. Conditional cash transfers, where payment is linked to attendance at school, have been shown to lead to positive outcomes for children in Latin America but have been less popular in Africa, perhaps because the quality of education is so poor that the benefits of the imposition of such conditions are doubtful (see UNESCO, *supra* note 22, p. 64).

<sup>45</sup> *Supra* note 40.

<sup>46</sup> *Ibid.*

<sup>47</sup> Tomasveski, *supra* note 1, p. 10.

<sup>48</sup> UN CESCR, *General Comment 3: The nature of States parties obligations (Art. 2, par.1)* (14/12/1990), para. 9.

<sup>49</sup> Tomasveski, *supra* note 1, p. 10, in which she cites a rare example: the 1947 Constitution of Taiwan which specifies: 'Expenditures of educational programmes shall not be, in respect of the central government, less than fifteen percent of the total national budget, in respect of each province no less than twenty-five percent of the total provincial budget, and in respect of each municipality, no less than thirty-five percent of the total municipal budget.'

<sup>50</sup> Tomasveski argues that an optimal level of public expenditure for education tends to converge at about 5-7 per cent. See Tomasveski, *supra* note 1, Table on Public Expenditure on Education in Relation to GNP, p. 24.

<sup>51</sup> UNESCO, *supra* note 22, p.45.

<sup>52</sup> A rare example of using the courts to scrutinise budgetary allocation, a case from the Philippines in 1991, only seeks to highlight some of the challenges. Based on the fact that the Constitution of the Philippines obliges the government to assign the highest budgetary priority to education, a group of senators challenged the constitutionality of the budgetary allocation of P86 billion for debt servicing compared to only P27 billion for education. The Supreme Court held that although education had been the highest budgetary priority, debt servicing was necessary to safeguard the creditworthiness of the country and thus the survival of the overall economy (*Guingona, Jr. v Carague* (G.R. No. 94571, 22 April 1991).

<sup>53</sup> Note that Article 5(d) of the European Convention on Human Rights provides for detention of a minor by lawful order for the purpose of educational supervision.

<sup>54</sup> I.e. within two years of the Covenant's entry into force of the state concerned, or within two years of a subsequent change in circumstances, which has led to the non-observance of the relevant obligation.

<sup>55</sup> It is interesting to note the potential tension here between the immediacy of the minimum core obligation to produce a plan and the two year timetable allowed to deliver a reasonable version.

<sup>56</sup> Note that South Africa has ratified the CRC but not the ICESCR, although it has recently announced its intention to do so (see <http://www.ngopulse.org/press-release/south-africa-ratify-international-socio-economic-rights-covenant>).

<sup>57</sup> 1996 (4) BCLR 537; 1996 (3) SA 165 (4 April 1996), para. 9 (in respect of s32(a) which subsequently became s 29(1)(a)).

<sup>58</sup> 2011 (8) BCLR 761 (CC) (11 April 2011). The case concerned the plight of learners enrolled at a public school that was located on private property. The Juma Musjid Trust, the owner of the private property, obtained an eviction order against the state in the High Court and effectively against the learners situated at the school.

# Toward Recognition of the Right to Free Education in Colombia

Esteban Hoyos-Ceballos and Camilo Castillo-Sánchez

Until 2011, Colombia was the only Latin American country permitting local governments to charge for primary education in public schools. These domestic laws contradicted international human rights law on the subject, thereby violating Colombia's international legal obligations. Academics, activists, human rights organisations and members of the international community, including the UN Special Rapporteur on the right to education, widely denounced the country's violation of the right to education.

In recent years, an international network led by member organisations of the Colombian Coalition for the Right to Education decided to challenge the constitutionality of a particular section of the Colombian general education law that allowed the Government to charge for primary education in public institutions. The Cornell Law School's International Human Rights Clinic provided pro bono legal assistance to the Coalition, which is part of the Latin American Campaign for the Right to Education (CLADE), in this constitutional challenge.

After much discussion, the Coalition decided to present an *acción pública de inconstitucionalidad* (public action of unconstitutionality). This judicial mechanism allows petitioners to request the Colombian Constitutional Court's judicial review of any law to determine whether the law is constitutional or unconstitutional. This process is possible without having to prove standing or any other particular interest in the case.

Three arguments were presented before the Court. First, the petitioners argued that the law violated international human rights law on the

right to free education. Specifically, the Coalition alleged the violation of Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 13 of the Protocol of San Salvador<sup>1</sup> and Article 28 of the Convention on the Rights of the Child (CRC). Colombia has signed and ratified each of these international instruments, which have constitutional value at the domestic level. These international norms enumerate the immediate obligation of states parties to provide free primary education to all.

A second argument addressed the need to harmonise the jurisprudence of the Court with the general education law regarding the right to free education. Specifically, the Court had previously recognised a right to free education in public institutions in specific cases where families could prove that they did not have the resources to pay for education.<sup>2</sup>

However, the Court had not made a general statement of free public education that benefited all Colombian families who sent their children to public institutions. The petitioners therefore asked the Court to interpret the general education law in line with its previous rulings recognising the right to free education in Colombia's public schools.

Finally, the petitioners argued that the Colombian Constitution authors' intent was that primary education was to be free. The Coalition submitted to the Court a summary of the main discussions supporting this claim from the Constitutional National Assembly in 1991. These documents were key, as some interpreters of Article 67 of the Colombian Constitution suggested that charges for education were allowed at every level, including at the

primary education level.<sup>3</sup>

On 31 May 2010, the Court announced its decision<sup>4</sup> that all public primary schools in the nation must cease charging students tuition fees. In the ruling, the Court cited heavily to the Coalition's petition, the international instruments ratified by Colombia and its own jurisprudence on individual cases. Additionally, the Court reiterated Colombia's obligation to provide free education progressively even in secondary and higher education. Unfortunately, the Court did not address the issue as to whether the Government could charge for indirect costs of education, such as books and uniforms.

In the months following the Court's decision, some local authorities began to comply with the judgment. However, they did so to varying degrees. While some cities specifically excluded charges for both primary and pre-school education, a few took a more comprehensive approach by additionally addressing the indirect costs associated with education.<sup>5</sup> Finally, in December 2011, the Colombian national Government issued National Decree 4807/2011 establishing that education shall be free in public institutions at the primary and secondary levels. Article 2 of the decree stated that free education should be understood as not charging for fees or for complimentary services in public institutions.

With the judgment and the decree begins a new struggle for the full recognition of the right to free education in Colombia. On one hand, the international experience shows that the legal recognition of the right to free education (or any other right) does not necessarily mean that the right will be respected.

On the other hand, neither the Court nor the Government addressed the issue of indirect education costs, which have a significant impact on families who send their children to public schools. The challenge remaining for social organisations is not only to fully implement the judgment and Decree 4807/2011, but also to promote a national discussion on the issue of indirect costs in education.

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<sup>1</sup> Additional protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.

<sup>2</sup> Colombian Constitutional Court. Decision T-550/2005. Petitioner: Ramiro Ulabarez. Justice: Jaime Aratijo Rentería; (ii) Colombian Constitutional Court. Decision T-550/2007. Petitioner: Juan Evangelista Martínez. Justice: Jaime Aratijo Rentería.

<sup>3</sup> UN Economic and Social Council, *Report of the Special Rapporteur on the Right to Education*, Katarina Tomaševski, Mission to Colombia (1-10 October 2003), available at <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.45.Add.2.En?OpenDocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.45.Add.2.En?OpenDocument)> [accessed 25 January 2013].

<sup>4</sup> Colombian Constitutional Court. Decision C-376/2010. Petitioners: Camilo Castillo-Sánchez and Esteban Hoyos Ceballos. Justice: Luis Ernesto Vargas Silva.

<sup>5</sup> Getgen-Kestenbaum, J., Hoyos-Ceballos, E. and del Aguilá Talvadkar, M.C., 'Catalysts for change: A proposed framework for human rights clinical teaching and advocacy', *Clinical Law Review* 18(2), 2012, p. 459.

*Endnotes continued from page 63*

<sup>59</sup> *Ibid.*, para. 37. This is given further effect by s 3(1) of the South African Schools Act which makes school attendance compulsory for learners from the age of seven years until the age of 15 years or until the learner reaches the ninth grade, whichever occurs first. Section 3(3) of the Act enjoins the provincial education authority to ensure that there are enough school places so that every child who lives in his or her province attends school. For the Court, '[t]hese statutory provisions which make school attendance compulsory for learners from ages seven to 15, read together with the entrenched right to basic education in the Constitution signify the importance of the right to basic education for the transformation of our society' (para. 38).

<sup>60</sup> Arendse, *supra* note 28, p.117.

<sup>61</sup> *Ibid.*, p. 119. Arendse notes that this approach is endorsed by the South African Human Rights Commission and is cited with approval by leading commentators on the right to education. The Department of Education, through the adoption of its National Plan of Action and other policies, has borrowed from the 4A Scheme to give content to s 29(1)(a).

<sup>62</sup> See in particular the Education Rights Project in assessing the likelihood of successful litigation in this area (<<http://www.erp.org.za>>).

<sup>63</sup> A rare example of a user's fee case is a class action brought by the Centre for Applied Legal Studies of the University of Witwatersrand, together with two mothers from a poor community, against a public secondary school after it had started legal proceedings against parents to recover outstanding school fees. In an order, the Durban High Court forced the school to stop legal action against parents for recovering outstanding school fees and to comply with its obligations under the SASA. In addition, the school had to inform parents about the criteria for total and partial exemptions from the payment of school fees. Finally, the Court instructed the school to inform parents of previous learners of the school who still had arrears in the payment of fees that they may have been eligible for an exemption of fees (Centre for Applied Legal Studies & Ors v Hunt Road Secondary School & Ors (10091/2006) [2007] ZAKZHC 6 (15 June 2007)).

<sup>64</sup> *Swaziland National Ex-Miners Workers Association & Anor v The Minister of Education & Ors Civil Case No. 335/2009*.

<sup>65</sup> Section 29(6) of the Swaziland Constitution of 2005 states that 'every Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade'.

<sup>66</sup> The Court ruled that while the Constitution required free primary education, it did not set down a timetable. Noting the failure to make sufficient resources – new schools and equipment, additional teachers or even a budget – available, the Court accepted that free primary education would have to be implemented grade by grade and 'be staggered': 'It is clear that the implementation of the right to free primary education cannot be finalised overnight. A lot of funds are needed to make this right realisable ... The political will to implement the right on its own without the availability of resources is not enough.' In particular the Court noted that the steps taken by government were in the circumstances reasonable and satisfactory in view of the limited resources at its disposal and that the Union had not shown on the balance of probabilities a lack of political will.

<sup>67</sup> The landmark decision of C-376/10 (Colombia) is not analysed here as it is explored in greater detail in another article in this Bulletin.

<sup>68</sup> Constitutional Chamber of the Supreme Court of Justice of Costa Rica, Decision 10/5/2000, No. 2000-03954 of 14:55 of 10 May 2000.

<sup>69</sup> *Elgueta Olivares con Rubio Catalán (Director de Colegio Cancura), writ of protection, San Miguel Court of Appeals, No. 8531-2001*.

<sup>70</sup> 1993 AIR 217; 1993 SCR (1) 594.

<sup>71</sup> *Ibid.*, para. 656.

<sup>72</sup> 1992 AIR 1858.

<sup>73</sup> *Society for UN-Aided P. School of Raj v U.O.I & Anor* [2012] INSC 248.

<sup>74</sup> [1990] 2 All ER 822.

<sup>75</sup> The obligation of the local authority was merely a 'target duty' that was not owed to particular persons but to the public at large and was not justiciable. Therefore, the law did not provide for an entitlement to access to education. It merely contained programmatic obligations, the implementation of which was dependent upon the availability of resources and which could consequently only be effective over time.

*Endnotes continued from page 96*

<sup>35</sup> Akwiri, J., 'Kenyan court overturns ban on separatist group', Reuters (25 July 2012), available at <<http://www.reuters.com/article/2012/07/25/us-kenya-coast-idUSBRE86O1E20120725>>.

<sup>36</sup> *Republic v Kenya High School*, *supra* note 1, p. 16.

<sup>37</sup> *Ibid.*, p. 4.

<sup>38</sup> *Dahlab v Switzerland*, *supra* note 26, p. 9.

<sup>39</sup> *Leyla Sahin v Turkey*, *supra* note 27, at [47].

<sup>40</sup> Borelli, S., 'Towards a Less Secular Europe? The Decision of the Grand Chamber of the European Court of Human Rights in Lautsi v. Italy', *Insights* 15(12), 2011, p. 4.

<sup>41</sup> *Ibid.*, p. 5.

<sup>42</sup> Rao, B., 'The Variant Meanings of Secularism in India: Notes Toward Conceptual Clarifications' (2006) 48(1) *Journal of Church and State* 47.

<sup>43</sup> Morini, C., 'Secularism and Freedom of Religion: The Approach of The European Court of Human Rights' [2010] 43 *Israel Law Review* 61.

<sup>44</sup> *Lautsi v Italy* (Appl. No. 30814/06, 18 March 2011).

# Expropriation as a Means to Protect the Right to Basic Education: The Case of a Farm School on Private Property Facing Eviction

Dmitri Holtzman

*Du Plessis Botha N.O. & Ors v Member of the Executive Council for Education, Western Cape & Ors (Case No. 24611/11)*

## Introduction

A recent case has come before the High Court in South Africa, involving an application for the eviction of a rural farm (public) school from private property.<sup>1</sup> The school has been in its current location for the past 81 years. The farm owner brought the eviction application against the State (the Western Cape (provincial) Education Department (the WCED)), the school in its own name and the School Governing Body (the SGB). The proceedings were also joined by two NGOs, one as *amicus curiae* and another as *curator ad litem*, on behalf of the learners at the school.<sup>2</sup> The case raised important questions about the obligations of the State towards protecting schools against eviction, especially where this involves poor and vulnerable communities. The eviction of a rural school is almost always likely to have a far reaching impact on the learners and the community.

The WCED was cited as the first respondent; however it did not oppose the application. Instead, the department tendered a 'notice of intention to abide' together with an explanatory affidavit. The affidavit, deposed by a department official, described its efforts to negotiate with the farm owners around continued rental on behalf of the schools, but it also detailed arrangements which were being made and planned for the learners at an alternative location some distance away. The SGB and the school itself were the second and third respondents and both defended the application for eviction.

A successful application to evict the school would have direct consequences for the learners and teachers at the school. The school, which is attended by over 100 primary school learners from the surrounding community, would have to be relocated or merged with another school – which is likely to impact on the education of the learners.

Furthermore, in this case the school is of historic significance to the community for which it is also a multifunctional space. Thus, the impact and disruption likely to be caused by the school's eviction would extend beyond teaching and learning in the classrooms – it would affect a whole community's ability to carry out cultural and other activities.

At the centre of the dispute is a conflict between the individual property rights of a farm owner and the right to basic education enjoyed by the learners at the school. These rights will have to be balanced in resolving the litigation. The eviction of a public school from private property is a matter which has already been considered by the Constitutional Court in another case (discussed below).

The case under discussion here raises further important questions about the constitutional obligations of the State in protecting the tenure of a public school on private property when such a school is facing an eviction. This article explores the power of the State to expropriate private property when it is in the public interest and for a public purpose and where the option of expropriation is possibly the most effective means to protect the right to education of a group of learners and the community to which they belong.

## Grootkraal UCC Primary School: A School at the Centre of a Community Facing Eviction From Private Property After 81 Years

The Grootkraal UCC Primary School (the school) is situated in a rural area of the Western Cape Province of South Africa. The school was established in 1931. It also serves as a community church, a community centre, a clinic and voting station. The school and the space which it occupies is of great significance to the surrounding community of poor (mostly) farmworkers who live and work in the surrounding areas. The area of land occupied by the school for the last 81 years has always been located on the same private property. The school and the community insist that they have always enjoyed a good relationship with the (now previous) land owner who provided some support to the school, and indeed the previous land owner charged a minimal (arguably symbolic) rental to the State for its use of the property, in terms of an agreement contemplated by s 14 of the Schools Act. This lease agreement was renewed on an annual basis.

In 2010 ownership of the farm was transferred to a business trust (the applicant seeking an eviction), which at the time was fully aware of the school's occupation of the land. In the applicant's pleadings, it is admitted that it was the intention of the business trust, at the time of purchasing the property, to eventually convert the property into a game reserve with a guest house.

The business trust initially extended the lease agreement with the State for the first year after having acquired ownership, but in the following year (2011) it significantly increased its rental asking price. Negotiations were

entered into between the business trust and the State, but the parties could not reach an agreement. The State maintained that it could not afford the new rental price demanded by the trust. The business trust then indicated its intention not to renew the lease agreement and that it would be seeking an eviction order against the WCED and the school. The WCED immediately began making plans to move the school to another location, some 17km away from its current location to a piece of state-owned land where there is already another school. For one of the youngest learners attending the school, who already has to travel long distances to get to school, it would mean having to travel 42km to the new school every day. The school and the SGB then sought an interdict from the High Court preventing the relocation of the school. The High Court granted an interdict preventing the relocation of the school during the 2011 school year, directing the parties (the State, the school and the business trust) to enter into further consultations to renegotiate a lease agreement. The interdict also provided that if it was still decided that the school would have to move, then the WCED would have to ensure that certain conditions were met when relocating the school, in order to ensure that the educational needs of the learners and staff involved remained similar to those being catered for at the school's current location.<sup>3</sup>

Towards the end of 2011, a fresh eviction application was instituted by the business trust against the WCED, the school and the SGB. The application for eviction was brought after further negotiations around a lease had failed. In the main, and on the basis of their right to property, the applicants argued that they were entitled to deal with the property as they deemed fit, including by evicting the school. The school and the SGB sought to defend the application for eviction, while the WCED chose not to defend the proceedings. The WCED's position was that since it could not

reach agreement with the landowners it was forced to close or relocate the school. The school and the SGB's arguments were that the property rights of the trust (including the right to apply to for an eviction order) must be balanced with the right to basic education and the rights of children in coming to the decision. The arguments were not however clear on what exact remedy the court should grant other than for it to ensure judicial oversight of the ejectment and relocation process. The school and SGB did concur with the arguments of the *amicus curiae* around expropriation of the property. It is the latter which is the focus of this paper.

### **The Right to Property and the Right to Basic Education**

The right to property is protected by s 25 of the Constitution, known as the property clause. It protects owners of property from arbitrary deprivation of their property, but it also specifically provides for the expropriation of private property by the State. However, expropriation is only legitimate if it is in terms of a law of general application, if it is for a public purpose or in the public interest and if compensation is provided. The Constitutional Court has recently noted that: 'Traditionally, because of a clear distinction between private law and public law, a private owner could evict a tenant provided that the requirements of *rei vindicio* were satisfied.'<sup>4</sup> In the same case, which also involved an application for an eviction of a public school from private property, the court held that there is a negative obligation on the property owner not to infringe on the right to basic education, but that this did not preclude a trust (property owner) from applying for the eviction of a school from its property. Thus, where an eviction relates to a public school occupying private land it is necessary to consider the implications of the right to basic education and the State's concomitant positive responsibilities towards protecting that right, as well as a private actor's negative responsibilities toward the right.

In this aforementioned case, the Constitutional Court elaborated on the nature of the right to education.<sup>5</sup> Importantly, it noted that the right to basic education is different to other socio-economic rights contained in the Bill of Rights. The Court stated that: 'There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures".'<sup>6</sup> The South African Schools Act<sup>7</sup> (the Schools Act) is one of the primary statutes governing the provision of education in the country. It outlines, *inter alia*, the positive obligations of the State towards the provision of education. The Schools Act creates specific obligations for the MEC<sup>8</sup> for education to ensure that there are enough school places in the province so that every child in the province of compulsory school-going age has a place to go to school<sup>9</sup> and to provide for education in the province out of funds appropriated for this purpose by the provincial legislature. These positive obligations are of course to be considered in light of the constitutional right to a basic education as described above.

### **The Plight of Farm Schools in South Africa: Poor Facilities, Insecurity of Tenure and Vulnerable Communities**

The state of schooling (primary and secondary) in South Africa has become a prominent feature of public debates. Many would say that the education system is in a state of crisis and has been since before the advent of democracy. It is widely accepted that the provision of education in the biggest economy in Africa is marked by massive inequality and poor educational outcomes across the system. There have undoubtedly been some significant improvements to schooling through state-lead initiatives, programmes and policies, but the majority of black learners coming from poor communities still attend poorly managed schools with dilapidated infrastructure, poor access to learning and teaching support materials (including textbooks,

stationary and libraries), overcrowded classrooms and teachers who are often ill-equipped to implement the curriculum, amongst many other problems. The same public education system simultaneously includes a small group of well-resourced, well-managed schools with experienced teachers, which are attended primarily by learners coming from more privileged backgrounds and better-resourced communities.<sup>10</sup> Situated in arguably the most vulnerable position within this system are the learners in poor rural communities who attend 'farm schools' (public schools situated on privately owned farmlands).

The schools historically attended by black learners coming from extremely poor and working-class communities in township and rural areas continue to suffer the severe and deep-seated effects of apartheid education policies. However, rural farm schools are not only amongst the poorest in the country,<sup>11</sup> but have also suffered additional vulnerability through their insecurity of tenure. Under apartheid, the Bantu Education Act<sup>12</sup> allowed for the establishment of state-subsidised schools on private farms to accommodate the children of farmworkers. Under this Act, the tenure of the school was entirely dependent on the particular farm owner. Schools could be set up or closed at the behest of the farm owner, without any protection or security of tenure afforded to the schools and the learners attending them. The promulgation of the Schools Act<sup>13</sup> sought to, *inter alia*, address the historical insecurity of tenure of farm schools (and other public schools on private property). Section 14 of the Schools Act provides that:

*(i) Subject to the Constitution and an expropriation in terms of section 58 of the land or a real right to use the property on which the public school is situated, a public school may be provided on private property only in terms of an agreement between the Member of the Executive Council and the owner of the private property.*

*(2) An agreement contemplated in subsection (i) must be consistent with this act and in particular must provide for...(d security of occupation and use of the property by the school. [author emphasis]*

Section 14 provides further requirements which all such lease agreements must meet,<sup>14</sup> and the Schools Act also provides that these lease agreements were to be secured within six months of the promulgation of the Schools Act – in 1996.<sup>15</sup> Importantly, and as was argued by the *amicus curiae* in the case at hand, s 14 of the Schools Act must be read together with s 58, which empowers the MEC to expropriate land where it is in the public interest and for purposes relating to the provision of education in a province. The *amicus curiae* argued that the obligations of the MEC to respect, protect, promote and fulfil the right to basic education<sup>16</sup> requires that s 14 (lease agreements) and s 58 (the MEC's power to expropriate private property) of the Schools Act be read together. It was argued that where the threat of expropriation of the private property did not exist MEC would be powerless in securing lease agreements in terms of s 14 of the Act and that landowners would simply be able to refuse to enter into s 14 (lease) agreements with the MEC or be given an unfair and unrivalled power in negotiating the terms of the lease agreement. Indeed this understanding of the relationship between the State's need to secure s 14 lease agreements and the effective use of powers to expropriate land was confirmed by a Human Rights Watch report published in 2004.<sup>17</sup> The report noted that during their investigations in 2003, the majority of farm schools were not operating under s 14 agreements and recommended that:

*Greater efforts need to be made to secure the tenure of farm schools and thereby protect the right to education, in particular by ensuring the speedy conclusion of agreements with the landowners of schools that are not yet covered by this process. The*

*government should – in line with the Schools Act and the South African constitution, develop guidelines for the expropriation of land in the public interest in instances where agreement cannot be reached and measures to resolve the matter have been exhausted.<sup>18</sup> [author emphasis]*

While public schools operating on private property immediately raise potential conflicts between the right to basic education and the right to private property (among other rights),<sup>19</sup> the Schools Act provides a clear means to balance these competing rights through s 14 and s 58. It has already been shown above that the property clause envisages the possibility of the State expropriating private property under certain conditions and requirements provided for in the same section. Thus, the Constitution and the Schools Act provide an MEC with an explicit way within which to reconcile the potential conflict between property rights and the right to basic education. The limitation of property rights, through exercising expropriation powers, is clearly compliant with the Constitution in this context. However, the question which is raised by this case is whether in failing to consider and/or utilise the power to expropriate, when the circumstances may render it necessary to do so, falls foul of the MEC's constitutional obligations to respect, protect, promote and fulfil the right to a basic education.

#### **What are the State's Obligations in Protecting a Farm School From Eviction?**

In the *Juma Musjid Primary School* matter referred to above,<sup>20</sup> the Constitutional Court dealt with another matter involving the eviction of a public school on private property. In that matter the court held that property owners have a negative constitutional obligation to respect the right to basic education of learners attending a school situated on their property.

The court also noted that this does not mean it would be unreasonable for a property owner to approach the court

for the eviction of a school from its property.<sup>21</sup> In that case the property owner was found to have acted reasonably in seeking an eviction order against the school, after it had made numerous and reasonable efforts to enter into a s 14 (lease) agreement with the State, but the latter failed to respond positively. However, the court found that it would only be just and equitable to grant an eviction order once adequate alternative arrangements for the learners at the school had been made. The court provisionally set aside an eviction order granted by a lower court, in order to 'enable the MEC, the Trustees and the SGB to engage meaningfully with one another, consider various options regarding the conclusion of an agreement in terms of s 14(i) of the Act and take steps to secure alternative placement for the learners in accordance with their right to a basic education'.<sup>22</sup> The court eventually granted an eviction order, once further negotiations had failed to reach agreement and only once the court had been satisfied that the MEC could demonstrate that reasonable alternative arrangements had been made to accommodate the learners. In that matter the issue of expropriation had not been raised and was thus not considered by the court.

The matter of Grootkraal CC Primary raises questions around the MEC's constitutional obligations in protecting the right to basic education of the learners at the school, by protecting the security of tenure of the school.

More specifically, the *amicus curiae* raised the question around whether the MEC is required to, at the very least, consider the expropriation of land on which a public school is situated where the security of tenure of a school is under threat. The *amicus* asserted that the conditions (and the possible closure or relocation) surrounding the school in question, including: its long history and inextricable connection to its community; the long distances some of the young learners would have to

travel to get to the alternative school being proposed by the WCED; the fact that the physical conditions at the alternative school would be at a level below that currently available to the learners; and the fact that the property owner had monumentally increased the rental asking price, all meant that there was a duty on the MEC to properly consider expropriating the property in terms of s 58 of the School Act, before choosing to close or relocate the school. It would thus be unreasonable, and falling short of the State's constitutional obligations, if the MEC did not properly consider all powers at his disposal, including expropriation, before deciding to close or relocate the school.

The State, despite indicating its notice of intention to abide, argued during the hearings that it had in fact considered expropriation of the property but that it was too expensive and the MEC had thus decided to relocate the school. This was disputed by the *amicus curiae*, given that expropriation had not featured in any of the arguments or pleadings of the other parties, until such time as they were raised by the *amicus curiae* during its intervention. The WCED had not tendered any evidence of the fact that it expropriation had indeed been considered in its explanatory note submitted together with its notice of intention to abide by the court's decision.

This is a matter the court will have to pronounce on, but it nevertheless has drawn attention to the option of expropriation as one of the means available to the State in protecting the security of tenure of a school, and thereby protecting the right to basic education. Judgment in this case is still pending, and thus no assertions can be made as to the correct interpretation of the reasonableness of the State's (through the MEC) conduct in protecting the security of tenure of the school under these circumstances, and by implication its actions in protecting the right to basic education and the rights of the child.

## Conclusion

Despite there still being many public farm schools operating on private property without s 14 lease agreements, expropriation of private property, in the public interest and for the purpose of providing education, is a power yet to be used in democratic South Africa.<sup>23</sup> This case may have gone some way in giving greater certainty as to the State's obligations towards protecting the security of tenure of farm schools through the use of powers to expropriate private property. The matter of farm schools situated on private property immediately raises the competing rights and the need to balance the property rights of private landowners on the one hand, and the right to basic education on the other hand. However, the Schools Act already sets out the way in which these rights are to be balanced through the inclusion of ss 14 and 58. It appears that the purpose of s 14 of the Schools Act is to address the insecurity of tenure of schools on private property and in a way that does not diminish the property rights of the land owner in any meaningful way. Securing a s 14 agreement is arguably the ideal way to balance the property rights of the land-owner on the one hand, and the rights of the child and the right to basic education on the other. However, where that situation is unattainable for whatever reason, there is surely a need for the MEC to fully consider all options available to him or her, including expropriation of the private property, in order to protect the interests of the children and their right to basic education when confronted with the threat of an eviction. Where expropriation is overlooked in favour of other options like closing or relocating a school, especially where the other options would entail greater difficulty in accessing school for the learners in question, it surely undermines the Schools Act's attempt at addressing the historical vulnerability of these farm schools. An MEC for education is primarily concerned with the provision of education and the positive actions

required to achieve that, while he or she merely has a negative obligation toward the property rights of land owners. This should guide the consideration of all powers available to the MEC in discharging the positive obligations imposed by the Constitution.

The powers of expropriation available to the MEC are a key difference between the situation of farm schools under apartheid and their position under South Africa's constitutional democracy based on the protection of fundamental human rights. Today the State is enjoined to take positive measures to respect, protect, promote and fulfil the fundamental rights of everyone. This obligation is most critical towards poor and vulnerable communities which have been historically disadvantaged and who are most in need of State protection. Where an MEC fails to properly consider exercising powers to expropriate private property for the sake of providing for schooling, and where the alternative options available are less accessible to the learners, teachers and community in question, it would seem that such a failure would in fact perpetuate the vulnerability of these farm schools. The status of the security of tenure of these schools, and by implication the right to basic education of the learners at those schools, would then still be subjected only to the mercy of the landowners. The constitutional obligations of the state surely require greater positive action, including the proper consideration and use of powers of expropriation, to protect schools facing evictions from private property. The case of Grootkraal Primary School provided a good opportunity to highlight the extent of these obligations. However, almost a year since the initial hearings there is yet to be a judgment from the court on this matter. In fact it appears that the court case, and possibly the likelihood that an eviction order would not be granted as easily as expected, forced the applicants into renegotiating a lease agreement with the State and the

school. At the time of publishing this article judgment was still pending. Whether or not this particular matter will be resolved through a judgment or through an out of court settlement, this is surely not the last time the matter of school evictions from private property will raise conflicts, which may need to be decided by the courts. Nevertheless, it seems certain that the possibility of expropriating private property in order to protect the tenure of schools and indeed the right to basic education of learners at those schools will and should feature more prominently in future matters of a similar nature to that of Grootkraal Primary.

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<sup>1</sup> *Du Plessis Botha N.O. & two others v Member of the Executive Council for Education, Western Cape and two others* (Case No. 24611/11).

<sup>2</sup> The *amicus curiae* in the case is a community-based organisation called Equal Education which works for the advancement of quality and equality in the education system in South Africa. The *curator ad litem* is the Centre for Child Law which was initially asked by the Judge in the matter, after court hearings had completed, to investigate and report on the potential impact an eviction would have on the learners involved. After having conducted interviews with all the parties involved and with community members and the learners themselves, the Centre for Child Law applied to be admitted as a *curator ad litem* to represent the interest of the learners.

<sup>3</sup> In its application to the court, the school had argued that the conditions at the new location being proposed by the State were unsuitable for the relocation of the school and that the relocation would have the effect of diminishing the rights of the learners. It was argued that the classrooms being provided at the new location were temporary classrooms, that there was not a computer centre being provided at the new location (while the school currently has a computer centre) and that there would not be enough space to accommodate more than 100 new learners at the school.

<sup>4</sup> *Governing Body of Juma Musjid Primary School and others v Essay NO and others* 201 (8) BCLR 761 (CC) at para 55.

<sup>5</sup> *Ibid.*, at para 37.

<sup>6</sup> *Ibid.*

<sup>7</sup> Act 84 of 1996.

<sup>8</sup> Member of the Executive Council – the provincial political head of education in a province.

<sup>9</sup> Section 3(3) of the South African Schools Act, *supra* note 7. Section 3(1) provides that: 'Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend school from the first school day of the year in which such a learner reaches the age of seven years until

the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.'

<sup>10</sup> The majority of these schools are what are termed 'former model C' schools – referring to public schools previously reserved for whites only and which were disproportionately resourced under apartheid education policies.

<sup>11</sup> In 2005, a report by the Ministerial Committee on Rural Education described the conditions at farm schools in the following way: 'Not only are farm school amongst the poorest in the country, in physical infrastructure, the provision of facilities and services and teaching resources but also retention rates are significantly lower at farm schools than at other schools [at paragraph 1]. Data indicates that the conditions at approximately one in five schools are neither safe nor secure. The majority of schools in a poor or very poor condition, having poor sanitation, and without water, are farm schools [para 7].' The report is available at <<http://www.education.gov.za/LinkClick.aspx?fileticket=mrpyBzHC3M%3d&tabid=358&mid=1301>>.

<sup>12</sup> Act 47 of 1953.

<sup>13</sup> Schools Act, *supra* note 7.

<sup>14</sup> Section 14(2) provides that: 'An agreement contemplated in subsection (1) must be consistent with this Act and in particular must provide for– (a) the provision of education and the performance of the normal functions of a public school; (b) governance of the school, including the relationship between the governing body of the school and the owner; (c) access by all interested parties to the property on which the school stands; (d) security of occupation and use of the property by the school; (e) maintenance and improvement of the school buildings and the property on which the school stands and the supply of necessary services; (f) protection of the owner's rights in respect of the property occupied, affected or used by the school.'

<sup>15</sup> Section 56 of the South African Schools Act, *supra* note 7, provides that: 'If an agreement contemplated in section 14 does not exist at the commencement of this Act in respect of a school, standing on private property and which is deemed to be a public school in terms of section 52(1), the Member of the Executive Council must take reasonable measures to conclude such an agreement within six months of the commencement of this Act.'

<sup>16</sup> Section 7(2) of the Constitution provides that: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

<sup>17</sup> Human Rights Watch, 'Forgotten Schools, Right to basic education in South Africa for farm schools', Vol. 16 No. 7 (A) (May 2004), available at <<http://www.hrw.org/sites/default/files/reports/southafrica0504.pdf>>.

<sup>18</sup> *Ibid.* at p.3.

<sup>19</sup> Section 28 of the Constitution provides that the rights of the child are paramount in any matter relating to the child.

<sup>20</sup> *Juma Musjid Primary School case*, *supra* note 4.

<sup>21</sup> *Ibid.*, at paras. 61-65.

<sup>22</sup> *Ibid.* at para. 76.

<sup>23</sup> The author is not aware and was not able to find evidence of any property having been expropriated for the purposes of providing education in a province.

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## European Court of Human Rights

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Krasovskaya v Belarus

## Abbreviations

### ACHR

American Convention on Human Rights

### ECHR

European Convention on Human Rights

### ECtHR

European Court of Human Rights

### CAT

Convention Against Torture

### CFR

Charter of Fundamental Rights of the European Union

### HRC

United Nations Human Rights Committee

### IACPPT

Inter-American Convention to Prevent and Punish Torture

### IACtHR

Inter-American Court of Human Rights

### IACmHR

Inter-American Commission on Human Rights

### ICCPR

International Covenant on Civil and Political Rights

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## EQUALITY, DISABILITY, HATE CRIMES; POSITIVE OBLIGATIONS, DUTY TO INVESTIGATE AND PROSECUTE

Violation of Article 3 – prohibition of torture or inhuman or degrading treatment, Article 8 – right to respect for private and family life and Article 13 – right to an effective remedy – of the ECHR

### Dordevic v Croatia

Application no. 41526/10, Judgment of the ECtHR, 24 July 2012

The applicants, DD and his mother RD, were Croatian nationals of Serbian origin. DD suffered from severe mental and physical disabilities and was cared for by RD. They lived in a ground floor apartment in Spansko, a part of Zagreb. Between July 2008 and February 2011, DD and RD were harassed by a group of students from the nearby primary school in their neighbourhood. The students, all minors aged 10 to 14, frequently harassed DD because of his disabilities and both applicants because of their Serbian origin. The children came to the applicants' building on a daily basis and, amongst other things, shouted obscenities, called them names, wrote insulting remarks on the pavement in front of their building and threw things at their windows. They also harassed DD by physically attacking him, including spitting on him, hitting him, pushing him into an iron fence, burning his hands with cigarettes and hitting him with a ball.

RD regularly reported these incidents, either personally or through her attorney, to the police, the local school authorities, the Susedgrad Social Welfare Centre, the Ombudswoman for Persons with Disabilities and the state attorney's office. Despite her efforts, the harassment continued. While the police followed up on RD's complaints with interviews of some of the children involved, they declined to take further action because the perpetrators were below the age of criminal responsibility. Similarly, the Zagreb Municipality State Attorney's Office informed RD that because of their age the perpetrators could not be prosecuted, and advised RD that her only option was to bring a civil claim for

damages against the children and their parents. The local school authorities sent a letter to all parents explaining that DD had been victimised and asking parents to warn their children of the consequences of such behaviour; however, when the behaviour continued the authorities indicated that they had done everything possible to prevent it and did not take further action.

Various medical reports about DD indicated that he sustained physical and psychological injury on account of the repeated attacks by the children. He suffered from anxiety and feelings of persecution, and became uncommunicative and distant after the attacks.

The applicants argued that the State authorities had not afforded them adequate protection from harassment, in violation of Articles 2, 3 and 8 of the ECHR. The applicants also argued that the acts of abuse against them and the response of the relevant authorities were discriminatory, on the basis of their national origin and DD's disability, in violation of Article 14. The applicants also argued that they had no effective legal remedy in respect of their rights under the ECHR, in violation of Article 13.

The Government submitted that the applicants had not exhausted domestic remedies, as they had not pursued any of the civil remedies available to them against the children, parents, school or other authorities, nor had they instituted an action under the Prevention of Discrimination Act. The applicants countered that the domestic legal system did not provide any remedies affording redress in respect of disability hate crime and that the available civil remedies were inadequate or ineffective.

The Government further argued that Articles 2 and 3 were not applicable to this case because the applicants' lives had not been put at risk and the requisite level of severity for Article 3 had not been reached, given that the harassment had been mostly verbal and the injuries sustained by DD were relatively minor.

INTERIGHTS acted in this case as advisors to counsel, Zagreb-based lawyer Ms Ines Bojić. The European Disability Forum submitted a third-party intervention.

*The Court held that:* (i) the applicants' claims under Articles 3 and 8 are admissible because the abuse directed at DD, causing him physical injuries and feelings of fear and helplessness, was sufficiently serious

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to engage Article 3, and the harassment of RD and her son had a sufficiently serious adverse effect on RD's private and family life under Article 8; (2) the Government failed to establish inadmissibility of the complaints under Articles 3 and 8 based on the applicants not exhausting domestic remedies because those domestic remedies were incapable of providing an immediate response to the harassment suffered by applicants, which continued for years while the national authorities were aware of it; (3) the Government violated Article 3 because it was aware of the harassment of DD but failed to take all reasonable steps to prevent further harassment, despite the fact that the continuing risk was real and foreseeable; (4) the Government violated Article 8 with respect to RD because it failed to adopt adequate measures to prevent further harassment of RD's son and provide adequate protection for RD herself; (5) the claim under Article 14 is inadmissible because the applicants could have brought a claim under the Prevention of Discrimination Act and therefore they did not exhaust available domestic remedies; (6) the claim under Article 13 is admissible with respect to Articles 3 and 8, as it is linked to those admissible claims, but not with respect to the inadmissible claim under Article 14; (7) the Government violated Article 13 because none of the remedies it cited could have addressed the applicants' complaints under Articles 3 and 8; (8) the Government must pay the applicants €11,500 in respect of non-pecuniary damages and €4,706 in respect of costs and expenses (less €850 already received by way of legal aid from the Council of Europe), plus applicable tax and interest.

## **EXTRATERRITORIAL JURISDICTION; EDUCATION; EQUALITY, DISCRIMINATION, FAMILY LIFE; PRIVATE LIFE; REMEDIES**

Violation of Article 2 of Protocol No 1 – right to education – of the ECHR by Russia

No violation of Article 2 of Protocol No 1 – right to education – of the ECHR by Moldova

No examination of Article 8 – right to respect for private and family life – and Article 14 – prohibition of discrimination – of the ECHR

### **Catan & Ors v Moldova and Russia**

*Application nos. 43370/04, 8252/05 and 18454/06, Judgment of the ECtHR, 19 October 2012*

The applicants were comprised of students attending three schools in the Moldovan Republic of Transdniestria ('MRT'), their parents and teachers at the school. MRT is a breakaway territory in eastern Moldova that declared independence in 1990, but is still regarded in international law as part of Moldova.

Moldovan is written using Latin script. The MRT administration introduced a law in 1994 banning and criminalising the use of Latin script in schools in Transdniestria and imposing a requirement that the Moldovan language be written in the Cyrillic script. Following the introduction of this law a number of schools were opened in order to teach children of Moldovan ethnicity using the Latin script, in defiance of this law. In July 2004 MRT authorities began taking steps to close down all schools in the MRT using the Moldavian language written in the Latin alphabet.

Beginning in 2004, efforts to close down the schools by MRT authorities resulted in the applicants being threatened by MRT police, systematic vandalism of the schools and eventual relocation of the schools into facilities inadequate for their purposes. Enrolment in the schools during this period dropped from 3,143 students in 2002 to 1,415 students in 2008. The applicants brought suit in 2004 against Moldova and the Russian Federation alleging violation of their fundamental right to education under Article 2 of Protocol No 1 of the

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ECHR. They also alleged breaches of their right to a private and family life under Article 8 and to their right not to be discriminated against under Article 14.

The applicants argued that Moldova was responsible for these violations because MRT remains part of Moldova's national territory, and that Russia was responsible because it maintains a strong military, political and economic presence in MRT, thereby exercising control over the territory. The Moldovan Government argued it had fulfilled its positive obligations to the applicants. The Russian Government argued it could not be responsible for citizens in a territory ruled by a *de facto* government that is not controlled by Russia. INTERIGHTS were advisers to counsel in the case.

*The Court held that:* (1) the right to education afforded by Article 2 of Protocol No. 1 must encompass the right to be educated in a national language to be meaningful, thus the rights of the applicants under this Article were engaged; (2) because MRT is recognised under public international law as part of Moldova's territory, the Moldovan Government is obligated to take all reasonable measures to protect the rights of the applicants; (3) because the Moldovan Government took steps to find alternative accommodations for the schools and sought international aid to resolve the conflict, it has complied with its positive obligations under the ECHR; (4) because MRT's existence is dependent on Russian military, economic and political support, the Russian Government is responsible for violations of the applicants' rights under Article 2 of Protocol No. 1; (6) due to the violation of Article 2 of Protocol No. 1 it is unnecessary to examine the applicant's complaints under Articles 8 and 14; (7) Russia must pay EUR 6,000 to each applicant for non-pecuniary damages and EUR 50,000 to all applicants jointly for costs.

## INDIGENOUS PEOPLE; PROPERTY; CULTURE; LIFE; FAIR TRIAL

Violation of Article 21 – right to property including rights of consultation, to indigenous communal property and to cultural identity, Article 4(1) – right to life, Article 5(1) – right to have physical, mental and moral integrity respected, in relation to the obligation to guarantee the right to communal property, Article 8(1) – right to a fair hearing and Article 25 – right to judicial protection – of the ACHR

### Kichwa Indigenous People of Sarayaku v Ecuador

*Judgment of the IACtHR, 27 June 2012*

The ancestral territory of the Kichwa Indigenous People of Sarayaku is in the Amazon region of Ecuador in an area of tropical forest, at different points along the bank of the Bobonaza River. Ecuador granted a permit to a private oil company to carry out oil exploration and exploitation activities in the territory, allegedly without properly consulting the Sarayaku people. The oil company, among other things, introduced and left buried pentolite explosives in several areas of the territory as part of a seismic prospecting programme and allegedly destroyed caves, water sources and underground rivers, set up seven heliports, cut down trees and plants of great environmental and cultural value, which the Sarayaku people used for subsistence, and destroyed part of the territory that was a site of great value in their worldwide. These circumstances created an alleged situation of risk to the Sarayaku people, given that for a time the Sarayaku people were prevented from practicing their traditional subsistence activities and their freedom of movement and cultural expression were affected.

After various proceedings, on 26 April 2010, the IACtHR, in relation to case no. 12.465, filed before the IACtHR a petition against Ecuador requesting the IACtHR to declare Ecuador's international responsibility for violating Article 21 of the ACHR, in relation to Articles 13, 23 and 1(1) thereof, Articles 4, 8 and 25 of the ACHR, in relation to Article 1(1) thereof, Article 22 of the ACHR, in relation to Article 1(1) thereof, Article 5 of the ACHR, in relation to Article 1(1) thereof, and Article 2 of

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the ACHR. The IACmHR also asked the IACtHR to adopt specific measures of reparation.

After the filing of the IACmHR's petition, an IACtHR court proceeding was held in the territory of the Kichwa. This was the first time in the history of the court's judicial practice that a delegation of judges conducted a proceeding at the site of the events of a contentious case submitted to its jurisdiction. The delegation of the IACtHR went on an aerial reconnaissance of the territory, where they saw the places where the events related to the case occurred. The delegation of the IACtHR also heard statements from numerous members of the Sarayaku people, including young people, the elderly and children, who shared experiences, views and expectations about their way of life, their worldwide and their experiences in relations to the facts of the case. After hearing statements from these members, the floor was given to the Secretary of Legal Affairs for the President of Ecuador, who acknowledged Ecuador's responsibility in broad and generic terms. The Secretary, among other things, stated: *'The government considers that the State is responsible for the events that occurred in 2003. I want this to be clearly stated and fully understood. The government recognizes its responsibility. Therefore, all the actions that occurred, the invasive acts, the actions of the armed forces, the acts of destruction of the rivers, are all issues that we as a government condemn, and believe that there is a right to reparations.'* A dispute, however, still remained over the extent of reparations.

*The Court held that:* (1) Ecuador is responsible for violating the rights of consultation, to indigenous communal property and to cultural identity, under the terms of Article 21 of the ACHR, in relation to Articles 1(1) and 2 thereof, to the detriment of the Kichwa Indigenous People of Sarayaku; (2) Ecuador is responsible for having gravely placed at risk the right to life and personal integrity under the terms of Articles 4(1) and 5(1) of the ACHR, in relation to the obligation to guarantee the right to communal property, under the terms of Articles 1(1) and 21 thereof, to the detriment of the members of the Kichwa Indigenous People of Sarayaku; (3) Ecuador is responsible for violating the right to a fair trial (judicial guarantees) and to judicial protection, recognised in Articles 8(1) and 25 of the ACHR, respectively, in relation to Article 1(1) thereof, to the detriment of the Kichwa Indigenous People of Sarayaku; (4) it was inappropriate

to analyse the facts of the case in light of Articles 7, 13, 22, 23 and 26 of the ACHR, or Article 6 of the IACPPT because there was either insufficient evidence or the facts had already been sufficiently analysed; (5) the court's judgment constitutes *per se* a form of reparation; (6) Ecuador shall neutralise, deactivate and, if applicable, remove all pentolite left on the surface and buried in the territory based on a consultation process with the Kichwa Indigenous People of Sarayaku; (7) Ecuador shall consult with the Kichwa Indigenous People of Sarayaku in a prior, adequate and effective manner, and in full compliance with international standards, in the event that any activities or projects for the exploration or extraction of natural resources, or investment, development or other type of plans, were to be carried out that would imply potential damage to their territory; (8) Ecuador shall adopt the legislative, administrative or any other type of measures necessary to give full effect, within a reasonable period, to the right to prior consultation of indigenous peoples, communities and nations and modify those that prevent their free and full exercise, for which purpose it shall insure the participation of the communities themselves; (9) Ecuador shall implement, within a reasonable period and with the respective budgetary provisions, mandatory training programmes or courses consisting of modules on national and international standards on the human rights of indigenous peoples and communities, aimed at military, police, and judicial officials, as well as others whose roles involve relations with indigenous peoples; (10) Ecuador shall carry out a public act of acknowledgement of international responsibility for the facts of the case; (11) Ecuador shall issue various publications of the judgment as described in the judgment; (12) Ecuador shall pay \$90,000 as pecuniary damages, \$1,250,000 as non-pecuniary damages and specified costs and expenses; (13) Ecuador shall, within one year, provide the IACtHR with a report on the measures adopted to comply with the judgment; (14) certain provisional measures ordered in the case are annulled.

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## LIBERTY & SECURITY, EXTRADITION, DETENTION; MOVEMENT; CRUEL, INHUMAN AND DEGRADING TREATMENT, TORTURE

No violation of Article 3 – prohibition of torture or inhuman or degrading treatment – of the ECHR if extradition took place

### **Babar Ahmad & Ors v The United Kingdom**

[Application nos. 24027/07, 11949/08, 36742/08, 6691/09 and 67354/09, Judgment of the European Court of Human Rights, 10 April 2012](#)

Six individuals residing in Britain, four British nationals, one Saudi and one Egyptian, made an application against the United Kingdom relating to terrorism-related extraditions sought by the United States of America. The applicants unsuccessfully resisted the extradition proceedings in the United Kingdom trial court and in an appeal to the High Court. The United Kingdom Supreme Court refused permission to appeal. The applicants had been indicted on various charges of terrorism in three separate sets of criminal proceedings in the United States of America.

The applicants' challenges to extradition focused on Article 3 of the ECHR. Their first argument was that there was a possibility of irremediable life-imprisonment that would violate Article 3 as inhuman and degrading treatment. Their second argument was the possibility of torture or cruel and unusual punishment if the applicants were extradited to the United States, in violation of Article 7 of the ICCPR, Article 3(1) of the CAT and Article 19(2) of the CFR. This argument focused on ADX Florence, a 'supermax' prison in Colorado that included a special security unit for inmates subject to special administrative measures.

INTERIGHTS, with Reprieve, the American Civil Liberties Union and Yale Law School National Litigation Project, jointly submitted a third party intervention in the case which provided a comparative law analysis of the protections afforded under Article 3 of the ECHR and the Eighth Amendment as applied to specific measures that the applicants argued they would be likely to face at ADX

Florence. The intervention argued that the United States legal protections against ill-treatment in prison fall substantially short of those provided under Article 3 and that any protection which the applicants will receive under United States law is speculative at best, due to procedural limitations on their ability to assert their rights to substantive protections.

*The Court held that:* (1) the effect of the Eighth Amendment to the United States Constitution prohibiting 'cruel and unusual punishment' should be considered as it would apply to the special administrative prisoners at ADX Florence, primarily concerning aspects relating to solitary confinement, and noted the repeated rejections of Eighth Amendment challenges to ADX Florence conditions in United States courts; (2) the possibility of detention at ADX Florence does not rise to the level of a violation of Article 3 of the ECHR; (3) the isolation of ADX inmates is only partial and relative; (4) in the extradition context, unless a possible life sentence was grossly or clearly disproportionate, its compatibility with Article 3 cannot be determined in advance of extradition, especially given the serious character of the terrorism offences charged; (5) the applicants had not demonstrated a real risk of treatment reaching the threshold of Article 3 as a result of their possible sentences; (6) the second applicant's schizophrenia creates separate issues regarding possible detention at ADX Florence, and the Court adjourned the examination of the second applicant's complaint for separate consideration.

## PRIVATE LIFE; FAMILY LIFE; MOVEMENT

Violation of Article 8 – right to respect for private and family life – of the ECHR

### **Nada v Switzerland**

[Application no. 10593/08, Judgment of the ECtHR, 12 September 2012](#)

YN resided in Campione d'Italia, an Italian enclave of about 1.6 sq. km that is surrounded by Switzerland. Campione d'Italia cannot be reached without travelling through Switzerland. YN identified as a practicing Muslim and as a prominent businessperson in the areas of banking, foreign trade, industry and real estate. As a

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part of his business, YN held interests in numerous companies, including Bank Al Taqwa.

In 2000, the UN Security Council adopted Resolution 1333 (2000) that among other things called for the UN Sanctions Committee to establish and maintain a list, based on information provided by states, of individuals and entities associated with Usama bin Laden. In April 2001, the Swiss Government implemented Resolution 1333 by amending an existing Taliban ordinance that prohibited entry into and transit through Switzerland for the individuals and entities affected by Resolution 1333. On 16 January 2002, the UN Security Council adopted Resolution 1390 (2002), which introduced an entry and transit ban for individuals and entities included on the UN sanctions list. Switzerland implemented Resolution 1390 on 1 May 2002 by amending the Taliban ordinance. On 10 September 2002, Switzerland became a member of the UN.

On 24 October 2001, the Swiss Government opened an investigation of YN. On 7 November 2001, the President of the United States of America blocked assets of Bank Al Taqwa, and later that month, YN and a number of affiliated organisations were added to the UN Sanctions Committee list.

When visiting London in November 2002, YN was arrested, removed to Italy and his money was seized. On 10 October 2003, YN's special border-crossing permit was revoked and from that point on, the transit ban of Resolution 1390 and the amended Taliban ordinance confined YN to Campione d'Italia. YN made numerous requests and applications to the Swiss Government and to the focal point of the UN Sanctions Committee to secure the right to travel in Switzerland and to have his name removed from the UN Sanctions Committee list and Taliban ordinance. Those requests and applications were denied and rejected, with the exception of two temporary travel ban exemptions granted by Switzerland. On 31 May 2005, the Swiss Government closed its investigation of YN finding that the accusations against YN were unsubstantiated. YN was not removed from the UN Sanctions Committee list until 23 September 2009 and was not removed from the Taliban ordinance until 29 September 2009.

YN argued that the travel ban measures taken by Switzerland were irrelevant to the restrictions imposed by the UN Security Council and constituted violations of

Article 8(1) of the ECHR, which protects the right to respect for private and family life. Switzerland claimed that it was not responsible because the travel ban was implemented based on binding UN Security Council resolutions. Switzerland also argued that any violation of Article 8 was justified under Article 8(2).

*The Court held that:* (1) the application was compatible *ratione personae* with the ECHR because UN Security Council resolutions were implemented at a national level and the alleged violations of the ECHR were therefore attributable to Switzerland; (2) YN can claim to have been a victim of alleged violations under the ECHR even though his name was eventually removed from the UN Sanctions Committee list and Taliban Ordinance because there had not been an acknowledgment or redress for a breach of the ECHR; (3) Switzerland did not meet its burden of showing non-exhaustion of available and sufficient remedies; (4) YN's complaints – that the travel ban prevented him from consulting doctors in Switzerland and Italy and from visiting friends and family – apply to Article 8 of the ECHR, the right to respect for private and family life; (5) Switzerland did interfere with YN's Article 8 rights to respect for private and family life; (6) Switzerland's interference was not justified in accordance with Article 8(2), because it was not proportionate and therefore not necessary in a democratic society because Switzerland should have but did not take all possible measures to adapt the travel restriction to YN's individual situation.

## RELIGION; CONSCIENCE

Violation of Article 18(1) – right to freedom of thought, conscience and religion – of the ICCPR

**Cenk Atasoy and Arda Sarkut v Turkey**

Communication nos. 1853/2008 and 1854/2008,  
Decision of the HRC, 19 June 2012

CA and AS were both Turkish nationals and Jehovah's Witnesses who submitted petitions to the military recruitment office explaining they could not perform military service because of their religious beliefs. Each also explained that they could perform civil service which would not conflict with their religious beliefs. Each subsequently received many letters requiring them to take part in military service and each generally responded that they could not perform military service

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because of their religious beliefs. CA and AS were each prosecuted and a criminal court subsequently found CA and AS guilty of violating Turkey's military penal code. Each was given a prison sentence or sentences which were converted to fines. The process continued after that, with each receiving letters to serve, each refusing, and each being indicted as a result of such refusal to perform military service on the basis of their religious beliefs. In addition, as a result of AS's actions, the military recruitment office sent AS's employer, a university, a letter requesting that AS be dismissed and accusing the university of committing a crime by employing AS, which resulted in AS losing his employment.

The authors complained that their rights under Article 18(1) of the ICCPR were violated.

Turkey argued that Article 18 *per se* does not establish a right to conscientious objection. Turkey further invoked Article 18(3), claiming that some restrictions may be necessary in a democratic society for the protection of public safety and public order. Turkey further argued under Article 8 that, in countries where conscientious objection is recognised, national service by conscientious objectors does not constitute forced or compulsory labour.

*The Committee held that:* (1) with respect to each author, Turkey violated Article 18(1) by prosecuting and sentencing them and infringing their freedom of conscience because the authors' refusal to be drafted for compulsory military service derived from their religious beliefs, which have not been contested and which are generally held, thus reaffirming its view that, although the ICCPR does not explicitly refer to a right of conscientious objection, the right derives from Article 18, in as much as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of conscience; (2) under Article 2(3)(a), Turkey is obligated to provide the authors with an effective remedy, including expunging their criminal records and providing them with adequate compensation; (3) within 180 days, Turkey is to provide information to the HRC about the measures taken to give effect to the HRC's views.

## REMEDIES; LIFE; TORTURE; CRUEL, INHUMAN OR DEGRADING TREATMENT; LIBERTY & SECURITY

Violation of Article 2(3) – right to an effective remedy, in conjunction with Article 6 – right to life and Article 7 – prohibition of torture or cruel, inhuman or degrading treatment or punishment – of the ICCPR

No violation of Article 9 – right to liberty and security of person and Article 10 – right of all persons deprived of their liberty to be treated with humanity – of the ICCPR

### **Krasovskaya v Belarus**

Communication no. 1820/2008, Decision of the HRC, 26 March 2012

IK and her daughter VK submitted their communication on behalf of themselves and on behalf of AK (their husband and father, respectively). During the 1990s, AK was a businessman in Belarus who provided the political opposition with financial and other support. He was a personal friend of VG, a prominent opponent the President of Belarus.

On 19 September 1999, VG was planning to chair an extended session of Parliament to hear the findings of a Special Parliamentary Commission on grave crimes allegedly committed by the President, in order to decide whether to initiate an impeachment procedure. However, while walking on the street on 16 September 1999, VG and AK were approached by several unidentified individuals who forced the two into AK's car and drove to an unknown destination. Traces of blood were later found at the site of their abduction.

In support of their claims that there was a clear political motivation to this disappearance of AK, IK and VK cited a memorandum prepared for the Parliamentary Assembly of the Council of Europe. According to the memorandum, the President of Belarus had at that time developed a reputation for disregarding basic human rights, and in the month preceding the disappearance of AK, the former minister of interior had also disappeared. The memorandum also confirmed the authenticity of a handwritten note by the chief of the criminal police of Belarus, which affirmed that the secretary of the

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Belarussian Security Council had ordered the murder of the former minister of the interior. According to note, the murder was carried out by a high ranking officer using the same weapon that was used on 16 September 1999, when AK and VG disappeared.

On 20 January 2003, the prosecutor decided to close the investigation into AK's disappearance. IK and VK appealed against the decision to close the investigation, and as a result the case was officially reopened. To date the investigation had not yielded any tangible results. Every three months a letter was sent to IK and VK confirming that the investigation was still ongoing, but there was no indication that actual investigatory work was being conducted. There was no other remedy for IK and VK to exhaust and their domestic remedies had been unreasonably prolonged.

On 10 June 2008, IK and VK filed a communication with the HRC, claiming that Belarus has violated Article 6 of the ICCPR, because it is likely that AK was the victim of extrajudicial killing committed by State officials, Article 7, because the enforced disappearance of a person constitutes cruel and degrading treatment of AK and also deprived IK and VK of their rights due to the mental anguish they have suffered, Article 9, because AK's abduction should be considered to be arbitrary and his arrest unlawful, and Article 10, because AK was likely killed while in the hands of State officials.

*The Committee held that:* (1) the examination of AK's case by the Working Group on Enforced or Involuntary Disappearances does not render the present communication inadmissible, because the examination does not constitute an international procedure of investigation or settlement within the meaning of Article 5(2) of the Optional Protocol of the ICCPR; (2) the authors' communication, which was submitted by their counsel, was not submitted by a third party, because it was presented by the victims themselves through their duly designated representatives pursuant to a duly authorised power of attorney; (3) the authors have exhausted their domestic remedies because the State had not furnished any details about the investigation nor demonstrated that the investigation is effective and the domestic remedies have been unreasonably prolonged; (4) the authors' claims are sufficiently substantiated for purposes of admissibility; (5) the submissions by the authors are not sufficient to establish violations of Articles 9 and 10 because they do not contain sufficient

information to clarify the cause of AK's disappearance or presumed death, and therefore do not show a sufficient nexus between the disappearance of AK and any actions by the State itself; (6) the State has violated its obligations under Article 2(3), when read in conjunction with Articles 6 and 7, for failure to properly investigate and take appropriate remedial action regarding AK's disappearance, because the State not only failed to conduct a proper investigation but also failed to explain at what stage the proceedings are, ten years after the disappearance of AK; (7) the State is under an obligation to provide the authors with an effective remedy, which should include a thorough and diligent investigation of the facts, the prosecution and punishment of the perpetrators, adequate information about the results of its inquiries, adequate compensation to the authors and measures taken by the State to ensure that such violations do not occur in the future; (8) the HRC wishes to receive from the State within 180 days information about the measures taken to give effect to the HRC's views and requests that the State publish the present views and have them widely disseminated throughout the State in the Belarusian and Russian languages.

## **TORTURE; CRUEL, INHUMAN OR DEGRADING TREATMENT; LIFE; LIBERTY & SECURITY, DETENTION; FAMILY LIFE**

Violation of Article 7 – prohibition of torture and cruel, inhuman or degrading treatment or punishment (alone and in conjunction with Article 2(3) – right to an effective remedy), Article 23(i) – protection by society and the State of the right to family (alone and in conjunction with Article 2(3) – right to an effective remedy), Article 6 – right to life and Article 14(3)(g) – right to fair trial not to be compelled to testify against self or to confess guilt – of the ICCPR

### **Joyce Nawila Chiti v Zambia**

Communication no. 1303/2004, Decision of the HRC, 28 August 2012

On 28 October 1997, JC (a military officer) was arrested by Zambian police for an attempted *coup d'état*. He was

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severely tortured and charged with treason. While being tortured, he was forced to sign false confessions and to implicate other military officials. Because of the torture, he was hospitalised at various times. On 31 October 1997, JC's wife and five children were forcibly and illegally evicted from their home and almost all of their possessions were taken away and never recovered. JC's wife and children were forcibly and illegally evicted from six different homes between October 1997 and November 1998. JC's wife and three youngest children fled to Namibia and lived in dire conditions from December 1998 to October 1999. JC's children were unable to attend school because they carried their father's name.

In November 1997, JC, represented by a private law firm, sued Zambia. The court ordered Zambia to provide compensation to JC, his wife and their children for the illegal eviction, loss of property and for the torture suffered by JC. There was a dispute about whether Zambia ever paid any compensation, but there was no dispute that no compensation was paid before September 2005.

JC was convicted of treason and sentenced to death, however, due to his poor health his death sentence was cancelled and the President of Zambia pardoned him. JC was released in June 2004 and died on 18 August 2004. From 1997 to 2004, JC was detained in inhuman conditions with inadequate food and inadequate medical attention.

JC's wife filed a communication with the HRC on 26 July 2004 asserting numerous violations of the ICCPR. Zambia challenged this communication on the grounds of non-exhaustion of domestic remedies, denied that the torture suffered by JC contributed to his death and denied that Zambia failed to provide court-ordered compensation.

*The Committee held that:* (1) it is not precluded from considering the communication based on any delay in receiving information from JC's wife; (2) the communication is admissible as to the allegations that JC was arrested, tortured and forced to sign a confession, allegations that the torture and imprisonment contributed to JC's death, and as to allegations of the disruption of JC's wife's family life, anguish, and lack of remedy for the torture, detention, and the death of her husband; (3) Zambia failed to protect the life of JC by

inflicting torture and detaining him in inhuman conditions; (4) the inhuman conditions of JC's detention violated Article 7 and Article 2, Paragraph 3 of the ICCPR; (5) the anguish and distress of JC's wife caused by the eviction from her home and by JC's arrest, torture, and the conditions of his detention violated Article 7 of the ICCPR; (6) Zambia violated Article 14, Paragraph 3(g), of the ICCPR by obtaining a confession under conditions of torture; (7) the illegal eviction and destruction of belongings had a significant impact on JC's wife's family life and infringed her family rights under Article 17 and under Article 23, Paragraph 1 (alone and read in conjunction with Article 2, Paragraph 3) of the ICCPR; (8) there was a violation of Article 6, Article 7 (alone and read in conjunction with Article 2, Paragraph 3), Article 14, Paragraph 3(g), Article 17, Article 23, Paragraph 1 (alone and in conjunction with Article 2, Paragraph 3) of the ICCPR; (9) Zambia is under an obligation to provide an effective remedy to JC, including (i) a thorough and effective investigation into the torture suffered by JC; (ii) communication of the results of the investigation to JC's wife; (iii) prosecuting the persons responsible for the torture; and (iv) appropriate compensation.

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## **WOMEN, VIOLENCE; REMEDIES; CRUEL, INHUMAN AND DEGRADING TREATMENT; PRIVATE LIFE; FAMILY LIFE; POSITIVE OBLIGATIONS, DUTY TO INVESTIGATE AND PROSECUTE**

Violation of Article 3 – prohibition of torture or inhuman or degrading treatment (procedural aspect) and Article 8 – right to respect for private and family life (procedural aspect) – of the ECHR

No separate issues arose under Article 13 – right to an effective remedy – and Article 14 – prohibition of discrimination – of the ECHR

### **DJ v Croatia**

*Application no. 42418/10, Judgment of the ECtHR, 24 July 2012*

On the night of 22 August 2007, while the boat she worked on was berthed in harbour, DJ called the police, telling them that she had been raped by DS in the boat's lounge area. When a police officer arrived, DJ told him she had been raped, while others said that she had been disturbing public order. In a statement given to the police at the scene, DS admitted to digital penetration of DJ.

On 23 August 2007, the police lodged a criminal complaint against DS and he was brought before an investigating judge, SG. Judge SG issued a decision stating that he disagreed with pursuance of the investigation against DS on the basis that reasonable suspicion was not established, noting that DJ was drunk, that she had behaved aggressively and that DS and DJ were not alone at any time.

Thereafter, on 24 August 2007, a three-judge panel of the county court ordered an investigation against DS to be conducted, despite a later objection by DJ, by Judge SG. This investigation included, among other things, interviews of witnesses, a psychiatric report on DJ, medical examinations, further interviews with DJ and an interview of DJ's father by the police relating to her

relationship with her family. On 30 August 2007, DJ gave the skirt that she was wearing on the night to police, but this was never subjected to forensic testing. The case was later dropped for lack of evidence and, on 9 April 2008, the investigating judge terminated DS' criminal proceedings.

On 28 April 2008, DJ took over the prosecution and lodged a bill of indictment against DS in the county court on charges of rape, but those proceedings were eventually terminated because DJ could not obtain legal aid and lacked means to continue.

Separately, on 10 September 2007, DJ lodged a complaint with the police by telephone, complaining about the police officers in connection with the events at issue. Two police officers were eventually fined 10 per cent of one month's salary. Officer FC was found to be responsible for failing to supervise and instruct Officer IZ and for not informing the head of police about errors in the criminal complaint. Officer IZ was found to be responsible for a grave breach of his official duty because whilst at the scene he neither ordered an *in situ* inspection nor conducted a detailed informative interview with DJ, nor did he take the clothes that DJ and DS were wearing for forensic examination.

DJ applied to the ECtHR, arguing that rape reached the level of cruelty necessary for the application of Article 3 of the ECHR and also violated the right to personal integrity protected by Article 8 of the ECHR. Accordingly, she complained that these provisions were breached by the authorities' failure to ensure a thorough, independent and effective investigation and criminal prosecution of the rape committed against her, and also that she was denied an effective remedy in breach of Article 13 of the ECHR.

In addition, DJ complained that the national authorities involved in the investigation of her allegations had discriminated against her on the basis of her gender contrary to Article 14 of the ECHR. DJ pointed to several shortcomings in the investigation, including: the police's failure to conduct an inspection of the crime scene, interview her immediately, send her skirt for forensic testing and follow up on later evidence from witnesses; derisory comments made by the police about her at the scene; the drawing up of a psychiatric report without her involvement and in reliance on psychiatric records from 2001; and the fact that Judge SG was permitted to

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proceed with the investigation despite his evident impartiality, as evidenced by his references to her behaviour and his finding that DS and DJ were never alone together despite DS' own evidence to the contrary.

The Government denied that the investigation was ineffective, arguing that the State bodies involved had taken all possible steps to establish the facts of the case and had adopted correct, lawful and reasoned decisions. The Government asserted that the authorities were correct to conclude that there was insufficient evidence to prosecute DS.

INTERIGHTS intervened as a third party on the issue of secondary victimisation, arguing that rape victims are particularly susceptible to being re-traumatised through interaction with the criminal justice system and thus that a distinct approach should be taken to the interpretation of the State's positive obligations in the context of crimes of sexual violence.

INTERIGHTS argued that states have a duty to prevent secondary victimisation by putting in place specific measures, such as specialised training of law-enforcement personnel, adopting specialist techniques for protection against the traumatising effects of police and court questioning and examination, restrictions on the admissibility of certain evidence, and providing multidisciplinary professional assistance for victims, as well as establishing special victim support centres.

*The Court held that:* (1) there was not an effective investigation into DJ's allegations of rape and therefore the State breached the procedural aspect of both Article 3 and Article 8 of the ECHR; (2) flaws in the investigation included the authorities' failure to conduct a proper inspection of the alleged crime scene, ensure that testimony from relevant witnesses was heard and secure forensic evidence, and also Judge SG's apparent lack of impartiality, caused by his emphasis on DJ's alleged antisocial behaviour, and the authorities' failure to answer DJ's complaints in this regard; (3) no separate issues arise under Article 13 or Article 14 of the ECHR and there is thus no need to examine the complaints under these articles; (4) the Government must pay DJ, within three months of the date on which the judgment becomes final, €12,500 for non-pecuniary damages and €4,000 for costs (less €850 already received by way of legal aid from the Council of Europe), plus chargeable tax and interest.

# Lessons from Litigating Universal Primary Education in Swaziland

Ruchi Parekh

The right to universal, free and compulsory primary education (UPE) has been a crucial component of the broader right to education and features in most major international and regional treaties.<sup>1</sup> Notably, UPE is distinguished from other economic, social and cultural rights in that it is subject to immediate realisation,<sup>2</sup> and is not limited by the progressive realisation element generally associated with socio-economic rights.<sup>3</sup> Nonetheless, UPE remains unrealised in many countries, with limited jurisprudence on how this right should be secured in practice.

The Swaziland Supreme Court recently addressed this issue, but, unlike other regional and national decisions, failed to reflect the more exacting international standards on the right to UPE. The Court adopted a deferential approach, essentially reading in a 'progressive realisation' element, notwithstanding the absolute nature of the constitutional provision on primary education. While disappointing in terms of the universal commitment to UPE, the decision raises important questions about the value of a 'minimum core' in the face of disparate resources. The Swaziland ruling, along with the experience in other jurisdictions, also sheds light more generally on the difficulties of reconciling law and practice in the context of judicial protection of the right to education.

## *Swaziland National Ex-Miners Workers Association v The Minister of Education (2010)<sup>4</sup>*

### *First High Court Decision*

In January 2009, a voluntary association and a parent of a minor child brought an action against the Government of Swaziland, requesting an order from the High Court

requiring the enforcement of the constitutional guarantee to the right to education.<sup>5</sup> The applicants alleged that the Government was in violation of s 29(6) of the 2005 Swaziland Constitution, which reads:

*Every Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade.*

Specifically, the applicants argued that the Government had not made the necessary provisions for UPE within the three year time-frame mandated by s 29(6) of the Constitution.

The Government responded that it had complied with its constitutional obligation. According to the Government, 'free education' referred to 'a consolidated programme aimed at creating an environment characterised by minimum barriers to quality primary education'.<sup>6</sup> Accordingly, the Government had identified orphans and vulnerable children as a group requiring free education and had put into place programmes to address particular shortcomings such as shortage of teachers and inadequate infrastructure.<sup>7</sup> Further, relying on the socio-economic nature of the right to education, generally subject to available resources, the Government had planned for incrementally implementing free education, starting with the first grade.<sup>8</sup>

The Court found that the clear language of the constitutional provision left no ambiguity. The right to free education extended to all children enrolled in primary school – not merely those in first grade – and was to be achieved during the course of the three years following the

commencement of the Constitution.<sup>9</sup> Importantly, the Court refused to read in an element of progressive realisation. It found that such an interpretation was not warranted by the international instruments acceded to or ratified by Swaziland,<sup>10</sup> and would violate the spirit of the Constitution.<sup>11</sup> Thus, the Government's actions to date were not found to be in line with its constitutional obligation.<sup>12</sup>

On this basis, in March 2009, the High Court made a declaratory order that every child in primary school was 'entitled to education free of charge, at no cost and not requiring any contribution from any such child regarding tuition, supply of textbooks, and all inputs that ensure access to education' and that it was the obligation of the Government of Swaziland to make such provisions.<sup>13</sup>

### *Second High Court Decision*

In June 2009, the applicants re-instituted proceedings before the High Court, this time seeking a mandatory order to make free primary education immediately available.<sup>14</sup> The Court dismissed the application, finding that the Government's detailed programme for a staggered approach to free education was 'reasonable and satisfactory in view of the limited resources'.<sup>15</sup> It drew a distinction between declaring the existence of a right and the enforcement of that right, which depended on available resources.<sup>16</sup> Making an order which could not be practically enforceable would lead to, in the Court's opinion, 'anarchy, chaos and confusion'.<sup>17</sup> The Court found that it was not proved that the Government had available resources to implement the right to free primary education in its entirety, which required significant additional

infrastructure, including schools, classrooms and houses for teachers. Thus, in dismissing the application, the court chose to acknowledge 'the gap between theory and practice'.<sup>18</sup>

#### Supreme Court

The applicants' appeal to the Supreme Court was dismissed on similar grounds, centring on the availability of resources.<sup>19</sup> It concluded that the solution could not be discovered by 'resort to legal syllogism and the persuasiveness of judgments and academic writing'.<sup>20</sup> Rather, the Court found that the right to education, as a socio-economic right, could only be progressively realised subject to the available financial and infrastructural resources.<sup>21</sup> While the Supreme Court proclaimed the initial High Court mandatory judgment as a 'beacon that will throw the searchlight on [the Government's] official actions',<sup>22</sup> it essentially echoed the pragmatism of the second High Court decision. It was this latter decision that the Supreme Court believed would 'eventually secure the enforcement of s 29(6)'.<sup>23</sup>

#### Comparative Jurisprudence

While the Supreme Court chose to read a 'progressive realisation' element into an otherwise absolute constitutional right to UPE, other regional and national courts have decided similar cases differently.

In *SERAP v The Federal Republic of Nigeria & Anor* (2010), the Community Court of Justice of ECOWAS (the CCJ) heard allegations of the mismanagement of funds allocated for basic education, leading to the denial of free and compulsory education guaranteed by national and international instruments.<sup>24</sup> The CCJ emphatically upheld the right to UPE, rejecting any excuse of insufficient resources due to corruption:

*Thus, whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the [Government] should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the*

*education programme, lest a section of the people should be denied a right to education.*<sup>25</sup>

More recently, the African Committee of Experts on the Rights and Welfare of The Child (the ACERWC) found Kenya in violation of, *inter alia*, the right to education of children of Nubian descent.<sup>26</sup> This decision was reached notwithstanding the ACERWC's acknowledgement that Kenya had made 'significant progresses' as regards the African Children's Charter more generally.<sup>27</sup>

At the national level, the South African Constitutional Court has also recently considered the scope of the constitutional right to education in the context of conflicting constitutional private property rights in *Governing Body of the Juma Musjid Primary School & Ors v Essay N.O & Ors* (2011).<sup>28</sup> The Court stressed that the legality of an eviction order against the school had to be considered with a view to the significance of basic education. Importantly, the Court stressed that the South African constitutional provision for basic education contained no internal limitation in the form of 'progressive realisation'.<sup>29</sup>

Outside the region, national courts have had to resolve similar questions. The Colombian Constitutional Court, in the context of a challenge to the Government's imposition of fees for primary education, decided that the Government had an obligation to guarantee free primary education for all children.<sup>30</sup> In Brazil, the right to free and compulsory education has been interpreted to include free transportation when necessary.<sup>31</sup>

The robust protection of the right to UPE in these cases, in contrast to the relatively modest approach of the Swaziland Supreme Court, reflects the significance of education as 'central to the full and effective realization' of other rights.<sup>32</sup>

#### International Standards and the 'Minimum Core'

The Committee on Economic, Social

and Cultural Rights ('the Committee') has articulated the standards to which State parties must adhere if they are to comply with the right to education. The Committee has interpreted the Covenant on Economic, Social and Cultural Rights as incorporating a 'minimum core obligation to ensure the satisfaction of, at the very least, minimum levels of each of the rights'.<sup>33</sup> Without such a minimum core, '[the Covenant] would be largely deprived of its *raison d'être*'.<sup>34</sup> In the context of Article 13 (the right to education), the minimum core explicitly mandates universal and free primary education.<sup>35</sup> The Committee also references the progressive realisation of free secondary and higher education, excluding primary education from any such limitations.<sup>36</sup>

While comparative jurisprudence is in line with the Committee's view on primary education, the Swaziland decision threatens to undermine the minimum core of the right to education. In accepting a lower standard and failing to meaningfully flag the significance of UPE, the ruling detracts from the progress made at the international level.

Moreover, the Swaziland decision raises questions about the utility of a universal minimum core. A similar issue was flagged by the South African Constitutional Court, which refused to prescribe a minimum threshold, albeit in the context of access to adequate housing.<sup>37</sup> The Court found that any such minimum obligation would vary based on numerous factors, and 'ultimately depend on the economic and social history and circumstances of a country'.<sup>38</sup>

On this view, it is important to note that while most of the comparative cases presented were dealing with barriers to access to existing schools, in Swaziland the Government had to actually build new schools to realise UPE. Accounting for these genuine infrastructural and financial shortages, it is impractical to expect the Supreme Court to echo the forceful judgment of,

for example, the South African Constitutional Court in *Juma Musjid Primary School*. Accordingly, the Swaziland situation demonstrates that the concept of a universal minimum core – one that is legally enforceable – is rendered otiose when considering the very real differences in resources across countries, even within the same region. Nonetheless, international obligations and regional comparators retain directive value, serving as useful benchmarks. When reiterated by bodies and courts across the world, they strengthen global consensus and shift the onus on outliers to justify non-compliance.

### Law v Practice

More generally, the cases on UPE question the efficacy of judicial enforcement of the right to education. While the Swaziland Supreme Court may not have adequately upheld the right to UPE, the importance it placed on practicality should not be entirely discredited. In Nigeria, for instance, the bold ECOWAS judgment from November 2010 does not yet appear to have eradicated the barriers to UPE in practice. In May 2012, SERAP formally requested the Attorney General to acknowledge and implement the supposedly binding ECOWAS judgment, citing that 'more than 12 million Nigerian children of school age still roam the streets and have no access to primary education.'<sup>39</sup>

When law becomes increasingly divorced from practice there is a risk that judicial pronouncements begin to lose legitimacy, calling into question the suitability of judicial protection of human rights. In such circumstances, a purist approach – in the case of Swaziland, a practically unenforceable mandatory order requiring immediate provision of free education – is not necessarily desirable. There is at least an argument to be made in favour of judicial pragmatism.

That being said, the Swaziland ruling fails to remain within the margins of pragmatism, and, in my view, adopts an excessively deferential stance towards government. The Court could

have done more to capture the spirit of the first High Court decision, without necessarily losing sight of the financial and infrastructural shortcomings. For example, it could have adopted a mandatory order requiring compliance with the Government's own programme of incrementally covering one school grade per year, and introduced appropriate monitoring mechanisms. However, by not making any requirements of the Government whatsoever, the Court failed to take a more active role in ensuring, at the very least, the progressive implementation of UPE. Instead, it appeared to be signalling that merely having a reasonable plan in place is adequate. By adopting this highly deferential approach, the Court missed an important opportunity to raise the benchmark for UPE in Swaziland.

### Conclusion

The judicial enforcement of resource-dependant human rights is undoubtedly complex. Even so, the right to education, recognised as a vital means of empowerment,<sup>40</sup> mandates heightened and rigorous review by the courts. On the contrary, the Swaziland Supreme Court disappointingly adopted a cautious and deferential stance despite the overwhelming international support for the right to education obligations, in general, and UPE, in particular. Although it is too early to tell whether Swaziland will nevertheless be successful in achieving UPE, the Supreme Court's wasted opportunity to hold the Government accountable to its human rights obligations is a regrettable departure from international best practice.

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<sup>1</sup> See for e.g. Universal Declaration of Human Rights, Article 26(i); International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 13(2)(a); Convention on the Rights of the Child, Article 28(i)(a); African Charter on the Rights and Welfare of the Child, Article 13(i)(a); European Social Charter, Article 17(2).

<sup>2</sup> U.N. Committee on Economic, Social and Cultural Rights (UNCESCR), General Comment No. 13: The

Right to Education (art. 13 of the Covenant), at [51], U.N. Doc. E/C.12/1999/10 (8 December 1999).

<sup>3</sup> ICESCR, Article 2(i).

<sup>4</sup> *Swaziland National Ex-Miners Workers Association v The Minister of Education & Ors* Civil Appeal Case No. 2/10 (28 May 2010) (Supreme Court) (hereinafter Swaziland Supreme Court).

<sup>5</sup> *Swaziland National Ex-Miners Workers Association & Anor v The Minister of Education & Ors* Civil Case No. 335/09 (16 March 2009) (High Court).

<sup>6</sup> *Ibid.*, p.8.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p.9.

<sup>9</sup> *Ibid.*, pp.23-26.

<sup>10</sup> *Ibid.*, p.21.

<sup>11</sup> *Ibid.*, p.22.

<sup>12</sup> *Ibid.*, p.22.

<sup>13</sup> *Ibid.*, pp.27-28.

<sup>14</sup> *Swaziland National Ex-Miners Workers Association v The Minister of Education & Ors* Civil Case No. 2168/09 (19 January 2010) (High Court).

<sup>15</sup> *Ibid.*, at [52].

<sup>16</sup> *Ibid.*, at [46].

<sup>17</sup> *Ibid.*, at [43].

<sup>18</sup> *Ibid.* at [46].

<sup>19</sup> *Swaziland Supreme Court, supra* note 4.

<sup>20</sup> *Ibid.*, at [21].

<sup>21</sup> *Ibid.*, at [16]-[18].

<sup>22</sup> *Ibid.*, at [24].

<sup>23</sup> *Ibid.*, at [24].

<sup>24</sup> *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)* (30 November 2010) ECW/CCJ/JUD/07/10 (ECOWAS Community Court of Justice).

<sup>25</sup> *Ibid.*, at [28].

<sup>26</sup> *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v the Government of Kenya* (22 March 2011) Decision: No 002/Com/002/2009 (The ACERWC).

<sup>27</sup> *Ibid.*, at [68].

<sup>28</sup> *Governing Body of the Juma Musjid Primary School & Ors v Essay N.O. & Ors* (CCT 29/10) [2011] ZACC 13 (11 April 2011).

<sup>29</sup> *Ibid.*, at [37].

<sup>30</sup> Decision C-376/2010 (*DeJusticia vs Government of Colombia*), Colombian Constitutional Court (19 May 2010). For translated excerpts see <<http://www.crin.org/Law/instrument.asp?InstID=1586>>.

<sup>31</sup> Tribunal of the State Minas Gerais (TMG) Apelação Civil No. 000.197.843-6/2000. For summary see <<http://www.right-to-education.org/node/686>>.

<sup>32</sup> UNCESCR, General Comment No. 11: Plans of action for primary education (art. 14 of the Covenant), at [2], U.N. Doc. E/C.12/1999/4 ((10 May 1999).

<sup>33</sup> UNCESCR, General Comment No. 3: The Nature of States Parties' Obligations (art. 2, para. 1 of the Covenant), at [10], U.N. Doc. E/1991/23 (Dec. 14, 1990).

<sup>34</sup> *Ibid.*

<sup>35</sup> UNCESCR, General Comment No. 13, *supra* note 2, at [6(b)(iii)].

<sup>36</sup> *Ibid.*, at [6(b)(iii)], [51].

<sup>37</sup> *Government of the Republic of South Africa & Ors v Grootboom & Ors* (CCT11/00) [2000] ZACC 19 (4 October 2000) (Constitutional Court) at [32]-[33].

<sup>38</sup> *Ibid.*, at [32].

<sup>39</sup> <<http://serap-nigeria.org/childrens-day-the-letter-to-fg/>>.

<sup>40</sup> UNCESCR, General Comment No. 13, *supra* note 2, at [1].

# Developing a Litigation Strategy Regarding Non-Fee Barriers to Equal Access to Free and Compulsory Basic Education for Children in Kenya

Hellen Mutellah

## The East African Centre for Human Rights (EACHRights) – Focus on Non-Fee Barriers to the Right to Education

EACHRights has been monitoring the progress that the Kenyan State has been making towards the realisation of economic and social rights in Kenya. It has been undertaking this by analysing the legislative and policy frameworks that the State has put in place; and whether or not they conform with and/or meet international human rights standards and norms with regard to economic and social rights. Among the key economic and social rights that EACHRights has been monitoring is the realisation of the right to free primary education in Kenya.

In this regard, EACHRights picked one of the key challenges to the realisation of the right to education in Kenya to focus on, as identified during its monitoring initiative of the State obligation towards the realisation of the right to free primary education, namely non-fee barriers as a hindrance to the equal access to free and compulsory basic education for children in Kenya.

The following thus presents some of the issues identified in the preliminary enquiry.

## Universal Primary Education in Kenya

The Free Primary Education (FPE) policy was officially launched in Kenya in 2003. All Government schools were therefore required to abolish all fees. This saw a consequential rise in the enrolment of primary school pupils. Indeed, since its introduction, enrolment in primary school has risen from 5.9 million to 9.6 million pupils in 2012.<sup>1</sup> The FPE policy envisaged the provision of education that was free, compulsory and accessible to all children particularly those from low

economic backgrounds.

It is worth noting that FPE was a policy issue passed by presidential decrees as opposed to a concept firmly grounded on the law, therefore rendering implementation of the same a challenge. However, the position has now been reversed with the passage of the Constitution of Kenya, 2010 which now recognises that every child has the right to free and compulsory basic education under Article 53(i)(b).

However, despite the fact that a lot of students were consequently able to enrol in public schools, statistics show that over 1 million children are out of school. The majority of which, are in Arid and Semi Arid Lands (ASALs) areas, pockets of poverty and urban slums.<sup>2</sup> In regard to urban slums, some of the reasons why children are out of school, particularly primary education is the fact that there are some public schools that have been running the free education programme by also charging 'informal charges'<sup>3</sup> and/ or 'hidden costs'<sup>4</sup>. According to report of the Task Force on the Re-Alignment of the Education Sector to the Constitution of Kenya 2010 one of the challenges that faces access to primary education in Kenya is among others, inadequate level of capitation, leading to levies that parents cannot afford and delay in the remittances of grants, forcing school management to impose levies to purchase urgently needed learning materials at the beginning of each year. The report also notes that the high number of children out of school can be partly attributed to the user charges being levied.<sup>5</sup>

These 'illegal levies' or 'hidden costs' include levies for a wide range of activities such as supplementary assessment examination, additional

tuition and development levies,<sup>6</sup> admission costs, fees for meals, tuition fees, Parent Teacher Association (PTA) costs, trip costs, equipment costs, and uniform costs. These 'illegal levies' have been viewed as too high by some poor parents living in these areas thereby occasioning them not to be able to take their children to school. From a survey undertaken by EACHRights' on the levels of understanding economic and social rights among Kenyans<sup>7</sup> the survey revealed that the public was still not satisfied with the Government's performance in regard to the right to education, despite the introduction of Free Primary Education. From one of the Focus Group Discussions, it was noted that these hidden costs are levied by the schools with the consent of parents to so levy them by way of them being part of the PTA, where resolutions to levy some of these fees are passed.<sup>8</sup>

It is worth noting that the State has, among other things, taken cognizance of the fact that with the introduction of FPE in Kenya, public schools have seen an influx of children. It has thus tried to put in place measures that seek to ensure better quality education and that children can assess FPE. In this regard, the State has been implementing the School Feeding Programme under the Ministry of Education in a quest to enhance access to primary education particularly for the poor children. According to Government documents, during 2010/11, the School Feeding Programme was able to provide approximately 1.3 million pre-primary and primary school children in 64 ASAL districts and slums of Nairobi.<sup>9</sup> In addition, the State has also sought to ensure the provision of text books and capitation grants, among other

initiatives.<sup>10</sup> To cater for access to education for orphans, the State kicked off the Cash Transfer Programmes that seek to ensure that orphans can still access their right to education.

However, although some positive strides have been noted on the part of the State in its quest to ensure FPE, the same has been marred by graft and mismanagement<sup>11</sup> with development partners threatening to withdraw and/or suspend funding the FPE programme. In addition, the delayed remittances of the FPE grant, forcing school managements to impose levies,<sup>12</sup> has resulted in some children not being able to access primary education simply because they cannot afford it.

### Conclusion and Strategy

EACHRights therefore seeks to undertake litigation around the fact that whereas primary education is supposed to be free, there are a lot of hidden costs levied by some schools which parents and guardians have to pay for. For those parents and guardians that cannot afford to pay these levies, they have been forced to withdraw their children from school. On the other hand, for those able to pay for a better education, they opt to move their children to private schools, which generally perform better than public schools.

EACHRights has identified non-fee barriers as a hindrance to equal access to free and compulsory education for children in Kenya, particularly from urban slums. Considering the complexities of proving that the State is failing to meet its obligations to realise universal primary education, it shall first undertake a baseline survey in collaboration with INTERIGHTS to establish the current extent to which these barriers hinder equal access to free and compulsory basic education in Kenya, focusing on the urban slum. The findings of this survey will then be used to develop a case on the right to education in Kenya with a view to enhancing the jurisprudence on the right to free and compulsory basic

education for children from vulnerable and marginalised groups in Kenya. The survey will assist in consolidating evidence showing that the State is failing to regulate public schools to ensure that the poorest are able to access education in line with the State's human rights obligations. At this point, it will be necessary also to consider alliances and networks with other civil society organisations to ensure that there is a bigger advocacy strategy around access to universal primary education by children in slums.

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<sup>1</sup> Minister for Education Hon. Mutula Kilonzo, during the National Launch of the Sanitary Towels Programme at KIE on 8 May 2012, available on <<http://www.education.go.ke>ShowPage.aspx?departm ent=i&id=n68>> (accessed on 1 November 2012).

<sup>2</sup> *Ibid.*

<sup>3</sup> DARAJA : Civic Initiatives Forum (2007) *Falling Short : The Right to Free Primary Education*, available at <<https://www.concern.net/sites/www.concern.net/files/resource/2009/04/3584-kenya-fallingshort-the-right-to-free-primary-education.pdf>> (accessed on 1 November 2012).

<sup>4</sup> Community Initiative Action Group – Kenya (CIAG-K) (May 2010) *The Hidden Costs of Kenya's Free Primary Education: The Case of Kisumu Municipality* available at <[http://ciagkenya.org/index.php?option=com\\_docman&task=cat\\_view&gid=3&Itemid=8](http://ciagkenya.org/index.php?option=com_docman&task=cat_view&gid=3&Itemid=8)> (assessed on 1 February 2013).

<sup>5</sup> Ministry of Education (February 2012) *Task Force on the Re-Alignment of the Education Sector to the Constitution of Kenya 2010 : Towards a Globally Competitive Quality Education For Sustainable Development* Report of the Task Force, p.20, accessible at <[http://www.vision2030.go.ke/cms/vds/Task\\_Force\\_Final\\_Report\\_Feb\\_20123.pdf](http://www.vision2030.go.ke/cms/vds/Task_Force_Final_Report_Feb_20123.pdf)>.

<sup>6</sup> *Ibid.*, p.128.

<sup>7</sup> Available at <[http://eachrights.or.ke/pdf/2012/EACH\\_Rights\\_Perception\\_Survey\\_Report.pdf](http://eachrights.or.ke/pdf/2012/EACH_Rights_Perception_Survey_Report.pdf)>.

<sup>8</sup> Participant from Jericho FGD.

<sup>9</sup> Government of Kenya (January 2012) *Education Sector: Medium Term Expenditure Framework 2012/13-2014/15*, p.29.

<sup>10</sup> /C.12/KEN/1, Implementation of the International Covenant on Economic, Social and Cultural Rights : periodic reports submitted by States parties under articles 16 and 17 of the Covenant : Kenya (see <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47343c2e2>>).

<sup>11</sup> *Supra* note 5.

<sup>12</sup> *Ibid.*

### Continued from page 91

The international community could and should provide the Kenyan legal sector and other Government actors with such training. Among the most obvious, transforming a culture is much more difficult than enacting and executing laws. Laws are nothing more than words on paper if they are neither enforced nor followed. Ultimately, the aim of lobbying for the right of persons with albinism to access education is to one day see them rise to decision-making bodies like Parliament and Cabinet, where they would effectively represent their kin.

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<sup>1</sup> Albinism is likely to be classified as a disability, which Article 260 of the Constitution of Kenya, 2010 defines as including 'any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities'.

<sup>2</sup> NOAH (National Organization for Albinism and Hypopigmentation), 'What is Albinism?' fact sheet, at <[http://www.albinism.org/publications/what\\_is\\_albini sm.html](http://www.albinism.org/publications/what_is_albini sm.html)>.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Interview with Mumbi Ngugi, Managing Trustee of the Albinism Foundation of East Africa (2010) *The Equal Rights Review*, Vol. Five, p.81, <<http://www.equalrightstrust.org/ertdocumentbank/Mumbi.pdf>>.

<sup>6</sup> Angote, G.. N. and Nyandieka, A., *A Handbook on Constitutional and Legal Rights of Persons with Albinism*, Albinism Foundation of East Africa, December 2012, p.13.

<sup>7</sup> For example, sun screen with a high sun protection factor (SPF) of 30-50 retails at between KES 1500 to 2000 (approximately GBP 10-15).

<sup>8</sup> Interview with Mumbi Ngugi, Managing Trustee of the Albinism Foundation of East Africa (2010) *The Equal Rights Review*, Vol. Five, pp.80-81, <<http://www.equalrightstrust.org/ertdocumentbank/Mumbi.pdf>>.

<sup>9</sup> Constitution of Kenya, 2010, Article 54(i)(b).

<sup>10</sup> Article 3.

<sup>11</sup> Article 24.

<sup>12</sup> Constitution of Kenya, 2010, Article 22(i).

<sup>13</sup> Article 27 sets out a non-discrimination guarantee, including specifically on the ground of disability.

# Litigating the Expulsion of Pregnant Girls in Africa

Solomon Sacco

The state obligation to provide access to economic and social rights in a non-discriminatory manner is a good starting point for enforcing economic and social rights. Partly this is because the obligation not to discriminate is an immediate one at international law and is not subject to progressive realisation.<sup>1</sup> In addition domestic legal systems may be more used to enforcing non-discrimination laws than positive obligations questions of progressive realisation. In certain circumstances access to economic and social rights may be realised primarily through non-discrimination and equality law.<sup>2</sup> Most importantly though is the fact that equality and discrimination are at the core of the denial, and the realisation, of economic and social rights.<sup>3</sup>

While many strides have been made over the last decade, one of the major barriers to education in Africa remains discrimination against girls.<sup>4</sup> Thus policies that increase and maintain the enrolment of girls can have a large impact on net enrolment rates.<sup>5</sup> There are many reasons why there are fewer girls than boys accessing education (including gender-based violence, early marriages, and gendered patterns of child labour). One area in which the discrimination is prevalent is in the exclusion of school age girls from school when they become pregnant. This is a problem across Africa and has been identified by lawyers and NGOs in a number of countries as an issue for litigation. Litigation is particularly important because these cases engage both the right to non-discrimination and the substantive right to access education. By removing a discriminatory barrier to education states in the region can immediately improve their performance on ensuring access.

While the law on accessing education is often apparently gender neutral, the effect of law and policy is generally that girls who fall pregnant are excluded from school. For example, in Tanzania the law allows head teachers to exclude students where they have, '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' (author's emphasis).<sup>6</sup> The policy is punitive and therefore girls are not allowed to re-enter school after having their babies. While it appears that Tanzanian society would consider premarital sex an offence against morality in Tanzania, children are excluded only when they are found to be pregnant, which means it is only the girls who are excluded.<sup>7</sup> Indeed there is evidence that girls 'drop out' of school to a much greater extent than boys in Tanzania. There is also evidence that there was a marked increase (from 4000 to 8000) in drop outs by pregnant girls following the introduction of the regulations in 2002.<sup>8</sup> An analysis of the exclusion ('drop out') of pregnant girls demonstrates that girls are expelled in Tanzania merely for becoming pregnant. This is discrimination based on gender.<sup>9</sup> The expulsion of pregnant girls is conducted subsequent to what appear to be illegal<sup>10</sup> 'virginity tests' which also constitute discrimination and the violation of the girls' right to physical integrity.

Other countries have similar approaches to pregnant girls in school. In Zimbabwe students at tertiary colleges have had to go to court to prevent their expulsion for getting pregnant.<sup>11</sup> While this case held that even private colleges and universities could not expel pregnant girls, the case

did not determine the question of whether pregnant girls could be excluded from primary or secondary education and the practice continues. Even at the tertiary education level this terrain remains contested. The Ministry of Health continues to exclude student nurses from nursing college on health grounds (even though they are not expelled from equivalent courses at the national university).<sup>12</sup>

In Uganda an Islamic University excluded a pregnant learner on the basis that she was not married and this was a violation of the University rules and the religious tenets of the University. The case was not decided on the rights of the student to access education or to equality but on contractual obligations (she proved that she had been married, apologised and was allowed to graduate).<sup>13</sup> However, it does demonstrate that students and children are still excluded from school and university in Uganda because they have become pregnant. In Malawi, like in Tanzania, pregnant girls are subjected to forced virginity tests and may be excluded from school where they are found to be pregnant.<sup>14</sup>

In South Africa, despite one of the world's most liberal constitutions, children are still excluded from school because of their pregnancies. Litigation related to such exclusion is currently before the South African courts.<sup>15</sup> While the case ultimately concerns the powers of the State to regulate or interfere (depending on which side you take) with decisions of the School Governing Body, the human rights question at its core is whether the school can exclude a pregnant girl in accordance with rules adopted by the School Governing Body. This is against the background of a

general failure by the State to introduce a progressive national policy on the exclusion of pregnant girls.<sup>16</sup> While this case continues other cases are being considered against the exclusion of girls in other schools in the country.

However, some countries in Africa have amended the law and policy in an attempt to protect the rights of girls to access education. In Zambia, for example, the State has a policy that allows and facilitates re-entry of girls after they have had their child.<sup>17</sup> This has allowed a large number of girls to re-enter school after having their babies.<sup>18</sup> While this is not an ideal position and the original exclusion of pregnant girls may continue to be discriminatory (if it is arbitrary and unnecessary) this is an important step towards realising equal access to education in Zambia. Further advocacy, and perhaps litigation, will be needed to ensure that girls are not arbitrarily excluded (particularly if exclusion is conducted as a penalty rather than on, for example, medical grounds)<sup>19</sup> when they become pregnant, that assistance is provided to young mothers to ensure they can continue or return to school, and that parents and schools actively support re-entry.<sup>20</sup>

Uganda has also introduced a policy that prohibits expulsion and allows pregnant girls to continue with their education or to re-enter school.<sup>21</sup> Despite the policy children continue to be expelled and excluded from school.<sup>22</sup> Currently, INTERIGHTS partners are conducting research looking at what the problems are and why there is a disjunction between the Government policy against exclusion of pregnant girls and the practical exclusion of pregnant girls by individual schools.

Considering the extent of the legal and social barriers to education suffered by pregnant girls across Africa, INTERIGHTS is prioritising this issue and is working with a number of lawyers and civil society organisations in the region to research the law and

design litigation strategies. The strategy is to challenge the gender discrimination and denial of access to education so that there is an increase in access to education across the continent as well as jurisprudence from national courts on the justiciability of the right to education. In Tanzania a case has already been filed while in Uganda INTERIGHTS is supporting research into the legal, policy and practical impediments to pregnant girls accessing education. The intention is to develop a litigation strategy in Uganda to ensure that all children have an equal access to education. We have also discussed potential cases in Zimbabwe and South Africa at litigation surgeries and hope that local lawyers and civil society organisations will take these cases forward.

### Solomon Sacco is Africa Lawyer at INTERIGHTS.

<sup>1</sup> See for example paragraph 19 of the African Commission on Human and Peoples' Rights' Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights; and paragraph 7 of the Committee on Economic, Social and Cultural Rights' General Comment 20, 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights').

<sup>2</sup> Nolan, A., Porter, B. and Langford, M., Center for Human rights and Global Justice working Paper 15, 2007, 'The justiciability of Social and Economic Rights: an Updated Appraisal,' p 25 accessed at <<http://www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf>> on 28 January 2012. They note a number of cases where courts have used a substantive equality approach to ensure realisation of economic and social rights, although they also give examples where a more narrow formalistic approach to equality can be damaging.

<sup>3</sup> Nolan, A., Porter, B. and Langford, M., *ibid.*, at p 25, 'The relationship between the right to equality and non-discrimination and social and economic rights is of central importance to the adjudication of social and economic rights. Violations of most social and economic rights are directly linked to systemic inequalities and may, in many cases, be challenged as such.'

<sup>4</sup> Iversen, E., Plan West Africa, 'State of girls' education in Africa: Achievements since 2000, challenges and prospects for the future' April 2012, accessed at <[http://efc.idnet.net/publications/State%20of%20Girls%20Education%20in%20West%20Africa\\_ENG.pdf](http://efc.idnet.net/publications/State%20of%20Girls%20Education%20in%20West%20Africa_ENG.pdf)>. UNESCO, 'On the road to Education for All: progress and challenges Regional overview: sub-Saharan Africa,' p3, accessed at <<http://unesdoc.unesco.org/images/0018/001865/186526E.pdf>> on 28 January 2013.

<sup>5</sup> UNESCO, *ibid.*

<sup>6</sup> Rule 7 (b) of the Education (Expulsion and Exclusion of Pupils from Schools) Regulation, 2002, G.N. No. 295 of 2002 made under s 61(O) of Cap. 353 R.E. 2002. It is

possible that the state also relies on s 7 (b) of the Education Act, which reads, '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.'

<sup>7</sup> See Baker, T. 'Litigating the Right to Education in Tanzania: Legal, Political, and Social Considerations and Potential Applications (Expulsion of Pregnant Girls)', (HakiElimu 2011) p 4, citing also Nkwame, M. 'School pregnancy cases reportedly drops in Arusha.' (2010, May 18; Daily News, Dar es Salaam). Retrieved 10 November 2010, from <<http://www.dailynews.co.tz/home/?n=10025>>.

<sup>8</sup> Baker, T., *ibid.*, pp 2-3. He also notes that the government records expulsion of pregnant girls as 'drop outs' rather than exclusions.

<sup>9</sup> *Brooks v Canada Safeway Ltd* (Supreme Court of Canada) [1989] ISCR 1219

<sup>10</sup> There does not appear to be any statutory power that allows these virginity tests.

<sup>11</sup> *Lloyd Chaduka and Morgenster College v Enita Mandizvidza* (Zimbabwe Supreme Court) Judgment SC 14/2001. See also *Wazara v Belvedere Technical Teachers' College & Anor* 1997 (2) ZLR 508.

<sup>12</sup> Potential case brought by Rebecca Magorokosho to INTERIGHTS surgery on litigating the right to education in Nairobi, Kenya, 12 – 15 March 2012.

<sup>13</sup> Presentation by Harriet Nabankema, her lawyer, at INTERIGHTS' litigation surgery on the right to education in Nairobi in March 2012.

<sup>14</sup> According to Mtendere Gondwe at INTERIGHTS' litigation surgery on the right to education in Nairobi in March 2012. See also, Williams R, 'The struggle to finish school in Malawi,' in the Guardian accessed at <<http://www.guardian.co.uk/education/2012/mar/12/education-school-malawi-girls-millennium>> on 28 January 2013.

<sup>15</sup> *Welkom High School & Anor v Head, Department Of Education, Free State Province & Anor* Case 2011(4) SA 531(FB).

<sup>16</sup> The case is analysed in a separate article in this edition of the Bulletin by Karabo Ngidi.

<sup>17</sup> Southern Africa Gender Protocol Alliance, 'Zambia: Re-entry policy puts girls back in school,' accessible at <<http://www.genderlinks.org.za/article/zambia-re-entry-policy-puts-girls-back-in-school-2011-09-30>>.

<sup>18</sup> *Lusaka Times*, 'Over 12 000 school girls who fell pregnant were readmitted under the school readmission policy,' accessed on 27 January 2013 at <<http://www.lusakatimes.com/2012/09/25/12-000-school-girls-fell-pregnant-readmitted-school-reentry-policy/>>.

<sup>19</sup> It is indeed difficult to imagine circumstances in which exclusion of a pregnant girl would be justifiable.

<sup>20</sup> See for example the decision of the European Court of Human Rights in *Ali v the United Kingdom* (Application no. 40385/06) for considerations relating to whether a child's exclusion from school is reasonable (or proportionate).

<sup>21</sup> Akumu, P., 'Morality versus law: dilemma of pregnant school girls,' in *The Observer*, accessed on 28 January 2013 at <[http://observer.ug/index.php?option=com\\_content&view=article&id=10623%3Amorality-versus-law-dilemma-of-pregnant-school-girls&catid=85%3Aeducation&Itemid=106](http://observer.ug/index.php?option=com_content&view=article&id=10623%3Amorality-versus-law-dilemma-of-pregnant-school-girls&catid=85%3Aeducation&Itemid=106)>.

<sup>22</sup> Uganda Radio Network, 'Expulsion of 13-Year-Old from School Re-ignites Debate on Teen Pregnancy,' <<http://ugandaradiornetwork.com/a/story.php?s=26495>> accessed 27 January 2013.

# Tactics to Secure the Right to Education for Children Living with Albinism in Kenya

Gertrude N Angote

## Introduction

Discrimination or treating people unfairly because of prejudice can make the lives of young people with disabilities very difficult. This is the case of children living with albinism in Kenya, where the physical or social effects of this condition mean they are generally classed as having a disability.<sup>1</sup> Despite having the same hopes and ambitions as non-disabled persons, they encounter barriers that make it much harder for them to succeed and enjoy their human rights. Persons living with albinism experience significant discrimination in areas such as education, health, gender and equality. The types of discrimination they face can be linked to attitudes, the environment, local laws or cultural practices.

Albinism refers to a group of conditions, arising from inherited altered genes, generally affecting pigmentation of the eyes, skin or hair, and involving visual impairment.<sup>2</sup> The conditions develop when the body does not make the required amount of the pigment, melanin.<sup>3</sup> The low levels of melanin can also lead to other serious health problems, such as skin cancer from prolonged exposure to sunlight.<sup>4</sup>

## Children Living With Albinism in Kenya

Lack of societal tolerance and acceptability of children with albinism has increasingly exposed them to exclusion and discrimination since they remain unrecognised and unacknowledged in Kenya. People tend to treat them with curiosity and disdain because of the difference in the colour of their white skin. They are regarded with contempt with brands of 'Mzungu', 'Pesa', and 'albino' and have to go through numerous hardships to gain recognition. All of the issues that

affect children and young people in Kenya, such as access to education, employment, health care and social services, also affect children with albinism, but in a far more complex way. Attitudes and discrimination linked to albinism make it much more difficult for them to go to school, to find work or to participate in local activities. In many communities, both rural and urban, the environment is immensely challenging with physical and communication barriers that make it hard for them to participate in social life. From negative perceptions, abuse, abandonment, and derogatory language used in reference to them, persons with albinism are also severely hindered from active participation in development processes. Policy makers rarely give attention to issues affecting persons with albinism, and neither do they involve them in policy formulation or decision-making, much less to matters which greatly affect or influence their lives.

## Particular Difficulties Faced in the Enjoyment of the Right to Education

In Kenya, access to quality education by children living with albinism is hampered by various factors, including:

- Lack of proper facilities in schools to accommodate the visual problems of children with albinism. Most are forced to study in Braille in schools for the blind, yet it is medically proven that persons with albinism are not blind.<sup>5</sup>
- Lack of provision by Kenya Government of large print material during national examinations.<sup>6</sup>
- High dropout rate among children with albinism due to lack of information on the part of teachers and parents on how to deal with the visual and skin problems associated with

albinism. Further, for most persons with albinism and parents of children with albinism in Kenya, sun screen is an unaffordable luxury. Classified as a luxury item targeted at the expatriate or tourist population, its cost is prohibitive.<sup>7</sup>

- Lack of access to quality education in the 'normal schools' due to lack of facilities to cope with their visual challenges.<sup>8</sup>

The majority of persons with albinism are poorly educated and in most cases unemployed, and fall within the 40 per cent of the Kenyan population living below the poverty line.

## The Relevant Legal Framework

Lack of legal recognition and provision for persons with albinism is manifested in the existing lacunae in various provisions of law in Kenya whose analysis present clear need for law reform to protect their rights as well as consider the prospects presented by the Constitution of Kenya, 2010. Persons with albinism, like every other Kenyan, have the right to education, and the Government is duty-bound to ensure their access to education, free access by all children to primary education, access to affordable secondary education, equal access to education for women and girls, inclusion of (ethnic, linguistic, religious, cultural) minorities, and proximity for easy access to school. In particular, Article 53(1)(b) of the Kenyan Constitution 2010 provides that '[e]very child has the right...to free and compulsory basic education'. This guarantee also exists in various international human rights treaties to which Kenya is a party, including Article 13 of the International Covenant on Economic, Social and Cultural Rights, Article 17(1) of the African Charter on Human and Peoples'

Rights, and Article 11 of the African Charter on the Rights and Welfare of the Child.

They are also guaranteed the right to access information held by the government or by an individual, and which is required for the exercise or protection of a right or fundamental freedom.

It is also possible to frame this issue within the context of protection for persons with disabilities as albinism affects several organs including the eyes and skin. Accordingly, albinism should qualify as a disability under the law. In this regard, the Kenyan Constitution recognises that '[a] person with any disability is entitled...to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person'.<sup>9</sup>

Aside from the direct protection the Bill of Rights affords to persons with disabilities in relation to education, there are also other constitutional provisions designed to promote the well-being of persons with disabilities. For example, Article 56(b) provides that the 'State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups...are provided special opportunities in educational and economic fields'. Such provisions echo efforts made at the international level to address the issue of albinism. For example, the Convention on the Rights of Persons with Disabilities provides, *inter alia*, that disabled persons are entitled to 'full and effective participation and inclusion in society'<sup>10</sup> and that 'States Parties shall ensure an inclusive education system at all levels'.<sup>11</sup>

Under the Constitution's Bill of Rights, the Government has an affirmative duty to protect every person's fundamental rights and freedoms. When the Government fails to discharge its constitutional duties, individuals may take legal action to secure their rights.<sup>12</sup> These

constitutional protections apply equally to persons with disabilities.<sup>13</sup>

### Complementary Tactics to Ensure the Right to Education

However, it is clear that legislation to address the right to education of persons with albinism alone will not ensure that the rights of Kenyans living with albinism will be respected fully. Indeed, laws for their protection already exist, as set out above. What is necessary is that the laws be executed in an effective manner. Moreover, beyond executing the law, the Kenyan Government and non-profit organisations must go about transforming people's beliefs about persons with albinism. Although legal measures certainly have a role to play in ensuring that these persons access adequate education facilities, it is impossible to change the Government's perceptions about albinism exclusively via the legal process. There is a lack of political will to effect change to the existing legislation. Policy makers rarely give attention to issues affecting persons with albinism, neither do they involve them in policy formulation or decision-making much less to matters which greatly affects or influence their lives.

Kituo Cha Sheria is a non-governmental, human rights organisation with the core mandate of enhancing access to justice to the poor and marginalised community members in Kenya. Apart from litigating on human rights issues, the organisation employs advocacy strategies to ensure that pro-poor and pro-marginalised laws and policies are adopted and enacted. The civil process in Kenya demands exhaustion of all other means before litigation. The organisation's effort in lobbying the Government of Kenya to commit itself to providing people with albinism with their rights and services was successful in the past year. The Government, after a Parliamentary Budget Committee Hearing, and after presentations made by Kituo Cha Sheria, allocated KES 100,000,000 to albinism in the current 2011/2012 supplementary budget. The money was placed within

the Ministry of Gender and Children's Affairs and was to be spent within four months. As a result of the lobbying, Kituo Cha Sheria was invited to participate in a newly formed taskforce and a subsequent meeting proposed the funds be used for the following projects: purchase of sun screen lotion; awareness creation on the sun screen program; a baseline survey and census; and a pilot project on the local production of sun screen lotion.

### Conclusion

From the foregoing, lessons can be drawn that advocacy for human rights and the rights of persons with albinism can be used as an effective tool in fighting for their rights. By addressing the problem via the dual approaches of law enforcement and lobbying for better policies at the cabinet and parliamentary level, one might be confident that Kenyans with albinism will eventually enjoy the full rights that fellow citizens enjoy. The Government has the greatest duty to ensure that persons with albinism and, indeed, all disabled persons have equal access to education and participation in economic activity. To this end, both the Government and non-governmental organisations must take affirmative action to change the cultural acceptance of discrimination against persons with albinism.

To date, public education programmes to raise awareness for persons with albinism are rare and there has been no general health campaign targeting people with albinism. The result has been low quality of life and life expectation due to lack of adequate information and health care interventions.

Other options for ensuring that the rights of persons with albinism are adequately addressed would include extensive training to judges and Government officials, both to educate about human rights more generally and to familiarise them with the issues faced by persons with albinism.

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# Dzvova v Minister of Education, Sports and Culture & Ors

Bellinda Chinowawa

(2007) AHRLR 189

(Zimbabwe Supreme Court 2007)

## The Parties

The applicant was the father of a six year-old child, Farai Benjamin Dzvova, while the first respondent was the Government Minister responsible for Education, Sports and Culture (hereinafter 'the Minister'). The second respondent was the primary school in which the child was enrolled (hereinafter 'the school'). The third respondent was the headmaster of the school (hereinafter 'the headmaster').

## Factual Background

At the beginning of March 2006 Farai was enrolled in grade (1) at the school. He comes from a practicing Rastafarian family. One of the tenets of the Rastafarian faith is that believers should not cut their hair. Therefore, his hair had never been cut and he kept what are commonly referred to as dreadlocks. Farai's father was called to the school to discuss the issue of his son's hair and asked to write a letter to explain why he kept long hair in violation of the school rules which provided that all pupils ought to have short brush hair regardless of sex, age, religion or race. The father sent a letter from his church explaining why the child's hair could not be cut, but the school proceeded to exclude Farai from the classroom and to separate him from his classmates. His father approached the High Court for provisional relief to compel the respondents to allow the child to learn without hindrance. The High Court granted the order sought and referred the question of the constitutionality of the respondents' actions to the Supreme Court.

## The Basis of Applicant's Claim and the Court's Finding

The applicant alleged that s 19(1) of the Constitution of Zimbabwe, which protects freedom of religion and of conscience, had been violated. In order to determine whether the respondents' conduct violated s 19, the Court considered the question of whether Rastafarianism was a religion. Reliance was placed on a number of cases, notably *In re Chikweche* 1995 (1) (ZLR) 235 (S) in which the Supreme Court had held that Rastafarianism is a religion. Consideration was also given to s 4 of the Education Act [Cap 25:04] which provides for children's fundamental right to education in Zimbabwe, stating that 'no child in Zimbabwe shall be refused admission to any school; or be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school; on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender.'

The Court found that the attempt by the school to bar the child from the school contravened not only the Constitution, but also this provision of the Education Act. It was further held that while s 69 of the Education Act granted the first respondent wide-ranging discretion to make regulations providing for all matters required or permitted to be prescribed by the Act, a Headmaster did not enjoy the same discretion, and as such the school rules were not made under the force of any law.

The Court made an order compelling the respondents to allow the child to learn at the school and interdicting them from negatively interfering in any way with the child's education.

More importantly, the Court issued a general declarator stating that the expulsion of a Rastafarian from school on the basis of an expression of his religious belief through his hairstyle is a contravention of ss 19 and 23 of the Constitution of Zimbabwe, with the latter guaranteeing protection from discrimination on the basis of race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability.

## Conclusion

Sections 19 and 23 of the Constitution of Zimbabwe have been read together to provide that public schools in Zimbabwe must include reasonable accommodation for religious practices as to do otherwise would be in contravention of the Constitution unless the measures taken are shown to be reasonably justifiable in a democratic society. The Dzvova case is a reaffirmation of the fact that the right to education is a universal entitlement which cannot be denied on the basis of one's personal faith and beliefs.

**Bellinda Chinowawa is a Projects Lawyer with the Zimbabwe Lawyers for Human Rights.**

# Republic v Head Teacher, Kenya High School, ex parte SMY

Charlotte Leslie

The issue confronting the Kenyan High Court in *Republic v Head Teacher, Kenya High School, ex parte SMY*<sup>1</sup> has generated substantial controversy in other cases around the world. Whether Muslim girls should be permitted to wear the hijab (Muslim headscarf) at public educational institutions has challenged courts in Europe and has occupied governments closer to home in South Africa, Mozambique and Nigeria. The issue promises to be of continuing relevance in Kenya as the applicant's claim evidently grew out of wider concern in Kenya's Muslim community over school policies regarding the hijab. In this context, the High Court's lightly reasoned decision is disappointing. The Court upheld Kenya High School's ban on wearing the hijab, but did not closely scrutinise the reasons for, and impact of, such a policy. In particular, the Court accepted justifications about the promotion of school cohesion and harmony without assessing the impact on the applicant's education (as comparison with a differently postured Zimbabwean case, discussed below, makes clear). It also invoked a version of the European Court of Human Rights' concept of secularism without probing its applicability in Kenya. In doing so, the Court missed an opportunity to stake out a uniquely Kenyan vision of inclusive education that is ambitious for the educational achievement of children of all religious beliefs.

## Background

The applicant, SMY, was admitted to Kenya High School, a public girls' boarding secondary school in Nairobi, in 2009. A Muslim, she wished to wear a hijab at the school but was not allowed to do so under the school's uniform policy, which required all students to wear a standardised

uniform that did not include a headscarf.

SMY became aware of a letter from the Permanent Secretary of the Kenyan Ministry of Education, which had been circulated to education authorities and heads of schools in July 2009. The letter responded to a complaint by Muslim associations that schools were refusing to allow students to wear the hijab. The letter stated, in part: 'I direct principals who may have expelled students on the basis of wearing the hijab to admit them immediately'.<sup>2</sup> SMY drew the letter to the attention of her head teacher, but in March 2010 the school decided to endorse its existing uniform policy regardless.

In October 2010 SMY applied to the Kenyan High Court for orders directing Kenya High School to allow her and other Muslim students to wear the hijab. She claimed that the Permanent Secretary's letter required the school to let her wear a hijab or, alternatively, that the uniform policy violated her rights to freedom from discrimination (Article 27) and freedom of religion (Article 32) under the 2010 Kenyan Constitution.

## The Decision of the High Court

The Court concluded that the school's uniform policy was lawful and refused to direct Kenya High School to allow SMY to wear a hijab. The first half of the Court's decision addresses and disposes of SMY's claims that the Permanent Secretary's letter required the school to let her wear the hijab.<sup>3</sup> The second half – which is for our purposes more interesting – considers and ultimately disposes of SMY's claims that the uniform policy violated her rights under Kenya's Constitution.

## No Violation of Constitutional Rights

Justice Githua rejected SMY's claim that she had been subjected to discrimination under Article 27.<sup>4</sup> Her Honour noted that the school had permitted SMY and other Muslim students to worship and practise their religion, and had set aside prayer rooms, taught Islamic religious education and permitted an Islamic preacher to the school once a week for this purpose.<sup>5</sup> The school had also treated all students in the same way when applying its uniform policy.<sup>6</sup>

Justice Githua also rejected SMY's claim that the uniform policy violated her right to freedom of religion.<sup>7</sup> The judge assumed that the uniform policy did interfere with SMY's right to freedom of religion.<sup>8</sup> Nonetheless, it was a permissible limitation on the right to freedom of religion under Article 24(1), which allows limitations on rights made 'by law' that are 'reasonable and justifiable in an open and democratic society'. The uniform policy was formulated 'by law' because it was made according to powers given to the school under the Education Act.<sup>9</sup> The policy was also 'reasonable and justifiable' because it was designed to ensure equality among students, promote harmony, cohesion and discipline and thereby improve academic standards,<sup>10</sup> and additionally because it was consistent with the principle of secularism in Article 8 of the Kenyan Constitution.<sup>11</sup>

## Headscarves, Dreadlocks and the Right to Education

This decision stands in contrast to a Zimbabwean case that also involved a challenge to a standardised school uniform policy. In *Dzvova v Minister of Education, Sports and Culture*<sup>12</sup> the Zimbabwean Supreme Court ordered a primary school to re-admit a pupil it

had excluded because his dreadlock hairstyle contravened the school's uniform policy, which required students to keep their hair cut short. It declared that expelling a student on the basis of a hairstyle that was an expression of his religious beliefs violated his right to freedom of religion under the Zimbabwean Constitution.

### Why the Difference?

In formal terms, the decisions were different because the respective courts reached different conclusions on the legal status of the uniform policies. Both courts assumed that the policies interfered with the pupils' right to freedom of religion: the question was whether they were nonetheless a justified limitation which was sanctioned 'by law'. Unlike the Kenyan court,<sup>13</sup> the Zimbabwean court found that the relevant uniform policy was not sanctioned by law (because the school only had authority to make rules relating to 'discipline').<sup>14</sup> However, the difference could also reflect the courts' different alertness to the impact of the uniform policies on the education of the applicants.

It does not appear from the judgments that either applicant specifically claimed that the uniform policy violated the right to education. Indeed, the Kenyan High Court did not mention 'the right to education' found in Article 43(1)(f) of the Kenyan Constitution, despite exhorting that 'all provisions of the Constitution with a bearing on a specific issue should be considered together as a whole'.<sup>15</sup>

By contrast, a provision specifically embodying a right to education – s 4 of the Education Act (entitled 'Children's fundamental right to education in Zimbabwe') – was referred to extensively in the Zimbabwean court's consideration of whether the uniform policy was sanctioned 'by law'. The provision's formulation is significant. It provides that 'no child ... should be refused admission to any school, or be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school'.<sup>16</sup> Section 4 thus

directed the Zimbabwean court's attention to the effect of onerous school requirements, and specifically identified a refusal to admit a child to school as inconsistent with his or her right to education. It is telling that the Zimbabwean Supreme Court employed the vocabulary of education in concluding that 'the attempt by the school to bar the child from the school contravenes [s 4] of the Education Act'<sup>17</sup> and in interdicting the school 'from in any way negatively interfering with [the applicant's] education'.<sup>18</sup>

Factual differences may also have brought the education of the applicant into sharper focus in the Zimbabwean case. The Kenyan decision does not interrogate the practical impact of the uniform policy on SMY's education, including whether her schooling has been disrupted to date, whether the school will exclude her if she does not comply with the uniform policy, or whether SMY will choose to stop attending if the policy continues to be enforced. It is not clear whether other Muslim girls share SMY's views. The Court also did not consider whether SMY or other Muslim students have alternative schooling options available to them, and if so whether they would be the educational equal of Kenya High School.<sup>19</sup>

By contrast, the impact of the uniform policy on the Zimbabwean student was clear: he was separated from his classmates, detained and his parents were asked to withdraw him from school.<sup>20</sup> We also know he was just six years old in his first year of primary school<sup>21</sup> (SMY was in form two),<sup>22</sup> which suggests that the personal and academic impact of disrupted schooling would be considerable.

The judgment in *Dzvova v Minister of Education* thus perceived the potential of a uniform policy to interfere with a child's education, something that seemingly escaped the attention of the Kenyan High Court. Perhaps certain legislative and factual differences primed the Zimbabwean court to note the uniform policy's impact on schooling in a way that the Kenyan

court did not.

### Secularism in Europe – and in Kenya

The Kenyan High Court's reference to Article 8 of the Kenyan Constitution<sup>23</sup> – which provides that '[t]here shall be no State religion' – is noteworthy given the provision's novelty and consequent uncertain scope. Justice Githua considered that Article 8 meant that 'Kenya is a secular state' and 'that no religion is superior than the other in the eyes of the law'.<sup>24</sup> It thus required upholding a ban on wearing the hijab to avoid 'elevating the applicant and their [sic] religion to a different category from the other students who belong to other religions'.<sup>25</sup> But the invocation of state religious neutrality as a reason why Kenya High School's uniform policy was 'reasonable and justifiable in an open and democratic society' feels disappointingly cursory: the Court asked few questions about the legal significance of secularism in Kenya generally, and what it requires of Kenyan school uniform policies in particular.

The High Court may owe a debt for its reasoning to the freedom of religion jurisprudence of the European Court of Human Rights. The European Court has relied heavily on domestic constitutional principles of secularism to uphold bans on wearing Muslim headscarves in educational institutions in Switzerland,<sup>26</sup> Turkey<sup>27</sup> and France.<sup>28</sup> The following is a typical explanatory statement by the European Court:<sup>29</sup>

*The Court also notes that in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools. The Court reiterates that an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion ... religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the*

### *Convention.*

But the very new (2010) Article 8 in Kenya plainly does not share the longevity or 'founding principle' status that it enjoys in France, Turkey or Switzerland. State secularism in France has its origins in the Declaration of the Rights of Man and of the Citizen of 1789,<sup>30</sup> and in Turkey in the proclamation of the Republic of 1923.<sup>31</sup> In Switzerland, the principle that schools be non-denominational was included in the Federal Constitution of 1874.<sup>32</sup>

Nor does Article 8 embody a national consensus on the place, meaning and value of secularism or state religious neutrality in Kenya. Widespread debate attended the recent constitutional reform process, and an earlier draft which would have explicitly provided for the separation of state and religion was abandoned.<sup>33</sup> The system of parallel Islamic (kadhīs') courts continues to have a constitutional foundation, despite a 2010 High Court judgment purporting to rule them 'inconsistent with the secular nature of the state'.<sup>34</sup> Ongoing secession efforts by Muslim separatist groups in Mombasa<sup>35</sup> (a coastal Kenyan city) also suggest that the idea of a secular state remains politically charged and subject to continuing negotiation.

It is also not clear that Kenya High School's uniform policy was actually motivated by secularist considerations rather than by simple tradition. The decision to enforce a standardised uniform was apparently 'made over a 100 years ago'<sup>36</sup> [sic] when the school was a 'Christian institution'.<sup>37</sup> By contrast, the Swiss rule before the European Court in *Dahlab*<sup>38</sup> was designed to comply with specific constitutional and legislative directions to maintain a non-denominational environment in public schools, while the Turkish rule in *Leyla Sahin*<sup>39</sup> implemented specific legislative and judicial directions that complying with the principle of secularism required avoiding religious attire in universities.

The European Court's headscarf

decisions have assumed that the neutrality required in religious matters 'must mean absolute secularism, in its strictest negative conception requiring the removal of any religious manifestation by the state from the public sphere'.<sup>40</sup> Instead of also assuming that 'secularism is a value to be promoted per se',<sup>41</sup> Kenya's courts should note its complexity and cultural particularity and more actively interrogate what it might require in Kenya. Could secularism point towards religious pluralism and tolerance of diversity in schools (as it does in India),<sup>42</sup> rather than towards a fundamentalist privatisation of all religious beliefs?<sup>43</sup> A recent decision of the Grand Chamber of the European Court<sup>44</sup> upholding the Italian policy of displaying crucifixes in public schools may signal a European move in this direction.

Just as the European Court has carefully considered the backgrounds of the countries whose uniform policies it is assessing, Kenya's unique history, politics and people merit engagement with what Kenyan secularism means for Kenyan schools.

### **Conclusion**

What does the interaction of the right to education and freedom of religion mean for schools in Kenya? To what extent should Kenya ensure that education is accessible to and inclusive of pupils of all religious beliefs? Does the fact that Kenya has 'no state religion' require minority students to refrain from manifesting their religious beliefs in order to access educational facilities? Is it 'reasonable and justifiable in an open and democratic society' to tolerate disrupted schooling for some for the sake of cohesion and harmony for many?

These are questions that the Kenyan High Court could profitably have asked in the Kenya High School case. We hope that in future cases Kenya's courts acknowledge that right to education issues are not always coincident with freedom of religion issues and engage more fully with the

Constitution's possibilities for inclusive education in a diverse modern Kenya.

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<sup>1</sup> *Republic v The Head Teacher, Kenya High School & Anor, ex parte SMY (Suing Through Her Mother and Next Friend A B)* [2012] eKLR; Judicial Review 318 of 2010 (18 September 2012).

<sup>2</sup> *Ibid.*, p. 3.

<sup>3</sup> *Ibid.*, p. 6-9.

<sup>4</sup> *Ibid.*, p. 10.

<sup>5</sup> *Ibid.*, pp. 5, 10.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, p. 14.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, p. 13.

<sup>10</sup> *Ibid.*, pp. 13-14.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Dzvova v Minister of Education, Sports and Culture & Ors* [2007] ZWSC 26; (2007) AHRLR 189 (to October 2007). See also the case note on this case in this edition of the *Bulletin*.

<sup>13</sup> *Republic v Kenya High School*, *supra* note 1, p. 13.

<sup>14</sup> *Dzvova v Minister of Education*, *supra* note 12, at [47]-[57].

<sup>15</sup> *Republic v Kenya High School*, *supra* note 1, p. 10.

<sup>16</sup> *Dzvova v Minister of Education*, *supra* note 12, at [37].

<sup>17</sup> *Ibid.*, at [38].

<sup>18</sup> *Ibid.*, at [58](b).

<sup>19</sup> Cottrell, J., 'Ruling on the Hijab Suit Lacked Depth', *The Star*, 2 October 2012.

<sup>20</sup> *Dzvova v Minister of Education*, *supra* note 12, at [7]-[8].

<sup>21</sup> *Ibid.*, at [1].

<sup>22</sup> *Republic v Kenya High School*, *supra* note 1, p. 2.

<sup>23</sup> *Ibid.*, p. 13.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, p. 14.

<sup>26</sup> *Dahlab v Switzerland* (Appl. No. 42393/98, 15 February 2001).

<sup>27</sup> *Kose & Ors v Turkey* (Appl. No. 26625/02, 24 January 2006); *Leyla Sahin v Turkey* (2005) 41 EHRR 8.

<sup>28</sup> *Dogru v France; Kervanci v France* (2009) 49 EHRR 8.

<sup>29</sup> *Ibid.*, at [72].

<sup>30</sup> *Ibid.*, at [18].

<sup>31</sup> *Leyla Sahin v Turkey*, *supra* note 27, at [30].

<sup>32</sup> *Dahlab v Switzerland*, *supra* note 26, at p. 7.

<sup>33</sup> Vanderpoel, R.S., 'Religious Equality in Kenya: Adjudicating the Constitutionality of Kenya's Kadhis Courts' *Regulating Religion E-Journal* (August 2012), available at <[http://religionanddiversity.ca/media/uploads/projects\\_and\\_results/e-journal/rachel\\_vanderpoel\\_-regulating\\_religion.pdf](http://religionanddiversity.ca/media/uploads/projects_and_results/e-journal/rachel_vanderpoel_-regulating_religion.pdf)>.

<sup>34</sup> *Kamau & Ors v Attorney-General* [2010] eKLR; Miscellaneous Civil Application 890 of 2004 (24 May 2010).

# The Legal Way of Doing Things: The Competing Powers of School Governing Bodies and Education Authorities in South Africa

Karabo Ngidi

## Introduction

International law has set the standards and goals that states need to attain in order to ensure that the right to education is advanced and protected.<sup>1</sup> In South Africa the Constitution<sup>2</sup> provides in s 29(1)(a) that 'everyone has the right to a basic education'. The South African Constitutional Court has made some profound pronouncements in relation to the right to basic education, one of these being that the right is not, within the South African context, subject to progressive realisation as well as the horizontal application of the right to basic education.<sup>3</sup> While cases such as the aforementioned signal an improvement in the path towards the realisation of the right to education in South Africa, there are some aspects concerning the governance of public schools, in particular the power sharing between the State education authorities and school communities, which remain a great challenge and are yet to be overcome.

Earlier litigation in relation to the right to basic education centred around the very issue of power-sharing between the school communities and the education authorities and when and how the education authorities could override the decisions of school communities. This issue is known as the principle of legality, which entails that a public functionary cannot exercise power and perform function other than that which the law allows him/her to exercise or assigns him/her to perform. In terms of the South African Schools Act,<sup>4</sup> the governance of public schools is shared amongst the school governing body (SGB) (comprising teachers, learners, community members and the school principal, with each group having defined powers in relation to certain

matters affecting the school) and the provincial and national education authorities (comprising mainly of the Head of Department, Member of Executive Council and the Minister of Education). Some of the cases that have come before the courts have questioned the powers of SGBs and, in particular, whether they can be overridden by the education authorities.<sup>5</sup> Two recent cases have brought the debate concerning the powers of SGBs back to the fore and highlight the competing interests of those who have authority to govern schools. This article focuses on some aspects of these two new cases and is therefore not a full discussion of the intricate aspects of the principle of legality and its application in the South African education sector.

## Facts

In the first matter, *Welkom High School & Anor v Head of Department of Education, Free State Province & Anor*,<sup>6</sup> two learners were expelled from their respective schools due to their pregnancies. The first learner was expelled while she was still pregnant, whereas in the other matter the learner had attended school during her pregnancy and gave birth during school holidays only to be expelled about three months after this. In both matters the schools expelled the learners under strict application of school learner pregnancy policies that the schools had adopted. These school policies were informed by the National Measures on Learner Pregnancy<sup>7</sup> which had been adopted by the national Department of Education, and were put in place in accordance with the provisions of the South African School Act that provides for the powers of SGBs. The Head of Department of Education (HOD) intervened in both matters, on the request of the parents

of the learners. He directed the schools to allow the learners to continue with their education and argued that the actions of the schools were unconstitutional. The schools refused to accede to the request and instituted court proceedings against the HOD, challenging his instructions on the grounds that the HOD did not adhere to the principle of legality, undermined the autonomy of the applicable SGBs and rendered superfluous the delegation of certain functions to SGBs.<sup>8</sup> The HOD opposed the application and his main argument was that he was fully within his rights and authorised by law to give instructions as he did and that the learner pregnancy policies were in direct conflict with domestic laws as well as international instruments that protect children's and human rights.<sup>9</sup> The Centre for Child Law and the South African Human Rights Commission were admitted as amici curiae and also argued that the learner pregnancy policies infringed several of the learners' constitutional rights and the right to education as provided for in local and international law.<sup>10</sup>

In the other matter, *the Governing Body, Rivonia Primary School & Anor v MEC for Education, Gauteng Province & Ors (Equal Education and another as amici curiae)*<sup>11</sup> the SGB took the Member of Executive Committee (MEC) and the HOD to court in relation to the enrolment capacity of a public school. The question was whether the said capacity is determined by the SGB, having regard to the sectional interests of learners admitted to that school, or by the provincial education department that is under a statutory duty to find sufficient capacity within all the public schools of the province to provide schooling to all school-age learners in

that province. The case arose as a result of the dissatisfaction of a parent whose child was refused admission to the school based on the reason that the school was full in terms of an admission policy adopted by the SGB. The parent approached the HOD for assistance and subsequently the HOD instructed the school to admit the learner. The officials from the education department went as far as physically placing the child in a classroom at the school. The SGB approached the court with an application for an order to set aside (a) the decision of the HOD instructing the school to enrol the learner, declaring that such decision was not in accordance with the admission policy and (b) the decision of the HOD to withdraw the admission function delegated to the principal of the school.<sup>12</sup> The respondents argued, amongst other things, that the question of school capacity is not one that can legitimately be determined by the admission policy drawn up by an individual SGB and is one that has to be determined at a systemic level by the provincial education department.<sup>13</sup> The Centre for Child Law and Equal Education were admitted as *amici curiae* and raised the question whether the SGB is vested with the power to determine the enrolment capacity under its powers in s 5(5) of the South African Schools Act to determine the admission policy of a school, keeping in mind the duty of the MEC under s 3(3) of the South African Schools Act to ensure that the public school system can provide school places to all learners of school-going age.<sup>14</sup>

#### High Court

In the *Welkom* case the High Court found itself constrained by the principle of legality and found that the HOD did not have any authority to instruct the schools to act contrary to their legally-adopted learner pregnancy policies. Further, the court held that the HOD had no outright authority to veto the principal's decision to implement the learner pregnancy policy of the school, regardless of how misguided or invalid such a policy may

be.<sup>15</sup> The parties in this matter were in agreement that despite this, both learners should be allowed to continue with their education and the judge made this part of his order.

The High Court judge in the *Rivonia* matter took a different view on the principle of legality and found that the MEC does have the power to determine the capacity of public schools. According to the High Court the SGB had the power to determine the school's admission policy in terms of s 5(5); however, it found that the said power of the SGB does not extend to the determine of the maximum capacity of a school and also that the admissions policy determined by the SGB does not bind the MEC or the HOD.<sup>16</sup>

#### Supreme Court of Appeal

Both matters were appealed to the Supreme Court of Appeal (SCA). In the *Welkom* matter the HOD appealed the decision of the High Court, while in the *Rivonia* matter the school and the SGB took the MEC to the SCA.

In the *Welkom*<sup>17</sup> matter the SCA found that the HOD had acted unlawfully and contrary to the principle of legality and confirmed the decision of the High Court. According to the SCA, the South African School's Act vested the governance of a public school, including the right to determine the school's code of conduct, in the SGB and the HOD was not empowered to instruct the principal to ignore a pregnancy policy of the SGB even if the SGB was itself not empowered to adopt such a policy and even if the policy is unconstitutional.<sup>18</sup> The HOD's main argument was that he was in an employer and employee relationship with the principals and issued the instructions that they admit the learners back on the premise of this power.<sup>19</sup> The HOD contended further that he had to intervene particularly since the policies in contention or actions of the principals were unlawful and also unconstitutional.<sup>20</sup> The SGB persisted with the same argument as

in the High Court, that the HOD did not have the authority to issue instructions contrary to their adopted policy and thus fell short of the principle of legality.

The SCA's decision on the issues raised can be summarised as follows:

- That while the 'professional management of a public school must be undertaken by the principal under the authority of the HOD, the governance of a public school vested in the hands of the SGB.'<sup>21</sup>
- That the HOD did not have a valid collateral challenge in this matter as the decisions to exclude the learners affected them directly and they should have been the ones to challenge the decisions of the SGBs.<sup>22</sup>

Consequently, the HOD's submission that he was protecting the constitutional rights of the learners to not be excluded from school was not a defence.<sup>23</sup> As there was not collateral challenge or counter-application by the HOD, the court did not have to entertain the issue concerning the constitutionality of the learner pregnancy policies.<sup>24</sup> While the HOD could issue appropriate instructions to a principal in relation to the professional management of a school, he does not have the authority under the South African Schools Act to issue an instruction to a principal to disregard a policy adopted by the SGB in relation to the governance matters at a school.<sup>25</sup> That the HOD was not entitled to instruct the schools to disregard the learner pregnancy policies as the decisions of the SGB to adopt these policies were administrative decisions that were valid until such time they were set aside by the court. The HOD did not adhere to the principle of legality by trying to substitute his own pregnancy policy for that of the respective schools, as he does not have the power in terms of the South African Schools Act to do so. The SCA dismissed the HOD's appeal based on the aforementioned reasons.

The *Rivonia*<sup>26</sup> matter proceeded to the

SCA as a result of the appeal of the school and SGB. The central issue before the court was whether the SGB has the authority to determine school capacity as an incident of admission policy, and if so whether a provincial authority may override this determination. The SCA found that in terms of the provisions of the South African Schools Act, in particular ss 5(5) and 5A, the SGB had the authority to determine the capacity of a school as an incident of its admission policy and that the provincial education authorities may not override the policy.<sup>27</sup> The SCA made, amongst others, the following findings:

- That the admission of public schools is under the control of SGBs, which both devise and implement the admission policies, while the HOD is responsible for the administration of the admission process.<sup>28</sup>
- That the South African Schools Act, s 5A, makes it clear that the Minister may prescribe minimum and uniform norms and standards for the capacity of a school in respect of learners a school may admit, but the determination of capacity is central to the admission to a school and forward planning as well as budget of a particular school and thus a matter for the SGB.<sup>29</sup>
- That the provisions<sup>30</sup> that the education authorities sought to rely on to prove that they had the power to determine the capacity of a school were concerned with the authority that they have to enforce compulsory school attendance and the provision of infrastructure.<sup>31</sup>
- That once a school lawfully adopted its admission policy, the HOD and MEC were bound by it and could only intervene where the SGB exercised its power unreasonably, unconstitutionally or otherwise unlawfully.<sup>32</sup>

The SCA set aside the decision of the High Court, thus finding that the education authorities did not have the power to determine the capacity of a public school.

The respective education authorities in the Welkom and the Rivonia matters are appealing the decisions of the SCA to the Constitutional Court.

### Conclusion

The aforementioned matters may appear very different, but both raise the question of access to basic education. In the Welkom matter one is concerned with the duty not to impede existing access to education, while in the *Rivonia* matter one is faced with making basic education available to children who need to start school.

The decisions of the SCA may be technically correct, subject to what the Constitutional Court will say once these matters are placed before it. However they raise a pertinent issue that needs urgent clarity, and that is the question whether the principle of legality is more important than the constitutional rights of the learners that these matters are concerned with and how these two aspects can be married in the pursuit of access to basic education. When one considers that the SGBs, HODs, MECs and the Minister are supposed to co-operate in order to resolve issues concerning the school, of course depending on the nature of the issue concerned, the question is whether the court route is always the appropriate manner to be used to resolve these matters or should these authorities not try to explore better measures towards resolving the recurring impasses.

In the *Welkom* matter the education authorities were partly to blame for untenable policies that the SGBs had put in place, but it was clear to all that the policies would not pass constitutional muster. Instead of resolving the matter amicably, in the interests of the concerned learners, the matter turned into a power struggle.

The *Rivonia* matter is much more complicated and very important for the education sector as at the heart of the matter there are serious questions such as whether public schools that supplement their own resources

should be allowed to have a smaller number of learners, while some schools may have to take more children even when their teacher-learner ratio is already high. The SGB in this matter may have the powers to determine the admission policy of a school and in turn, as found by the SCA, the capacity of the school, but another question is whether these powers could be used to exclude other learners and thus deny them access to basic education. Most of the public schools that are able to supplement their own resources would then determine their learner capacity, which they would keep low, while learners struggle to get admission to other already full public schools. The issue of the principle of the legality, where the intervention of the school authorities is concerned, cannot be resolved in abstract and will certainly have to be considered within each case that arises taking into account the applicable provisions of the South African Schools Act. However one cannot help but consider the reliance on this principle an impediment to access to education in so far as the SGBs and the education authorities do not attempt to resolve matters amicably, particularly in a matter such as *Rivonia* where there is an indication, on the basis of the High Court judgment, that the correct interpretation of the South African Schools Act on the issue of admissions and capacity of schools is that this is a competency shared by both the SGBs and the education authorities.<sup>33</sup> The Constitutional Court<sup>34</sup> has for long urged these authorities to try and resolve matters in a manner that protects the constitutional rights of those concerned. It is now for the Constitutional Court to have another look at the reliance on the principle of legality by SGBs in so far as this is used to violate the Constitution, which the SGBs are also bound by, and provide direction.

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# The ECOWAS Decision on the Right to Education in *SERAP v Nigeria*

Adetokunbo Mumuni and  
Chinyere Nwafor

## Introduction

In the case of *The Registered Trustees of the Socio-Economic Rights Accountability Project v the Federal Republic of Nigeria*,<sup>1</sup> the Community Court of Justice ('the Court') of the Economic Community of West African States (ECOWAS) gave a decision with resounding positive implications for the litigation of socio-economic rights and the right to education in Nigeria.

The case arose from allegations of massive corruption in the education sector, particularly in the implementation of the Universal Basic Education Commission (UBEC), under which federal funds are distributed to states to fund universal basic education. The Socio-Economic Rights Accountability Project (SERAP) initially sent a petition to the Independent Corrupt Practices and Other Related Offences Commission (ICPC) complaining of the corruption. The ICPC conducted investigations and confirmed that there was massive corruption and mismanagement of the UBEC funds. When the Nigerian Government did nothing to rectify the situation, SERAP then took the case forward to the Court complaining that the corruption was leading to a violation of the right to education for up to five million children in Nigeria. The Court confirmed that the right to education was justiciable and made an order that the Federal State provide funds to properly implement UBEC while attempts were made to recover stolen funds. However, it insisted on both proof of corruption and causation between corruption and the violation of the right to education. The Court refused to hold that the violation of the right to education was caused by corruption or to order criminal prosecution and recovery of the funds stolen.

## The Decision

The main thrust of the decision was that every Nigerian child has the right to free, compulsory basic education and that the right is a legally enforceable one. The Court also noted that up to five million children were not accessing basic education and ordered that funds be made available to ensure that their rights were realised. The decision is important therefore in recognising both the judicial enforceability of the right to education and the obligation to provide funds to realise that right.

## A Review of Some of the Negative Implications of the Decision

However, the Court appeared to be very cautious in granting the reliefs prayed for. It particularly refused to hold that specific allegations of corruption (involving the theft of 3.5 billion naira) had violated the right to education in Nigeria. It decided this because there had been no judicial determination that the funds had indeed been diverted through corrupt means and it could not be shown that this had had a direct impact on the enjoyment of the right to education.<sup>2</sup> The Court refused to uphold that there had been a denial of the right to education based on two facts; first that the Federal Government had allocated funds for education and second that there was no clear link between the acts of corruption and a denial of the right to education. In considering what amounts to a denial of the right to education, the Court held as follows:

*And coming to the crux of the matter, granting that the ICPC report has made conclusive findings of corruption that per se will not amount to a denial of the right to education. Admittedly, embezzling, stealing or even mismanagement of funds meant*

*for the education sector will have a negative impact on education since it reduces the amount of money made available to provide education to the people. Yet it does not amount to a denial of the right to education without more.*<sup>3</sup> (emphasis added)

The Court further held:

*The reason is not far to seek. The Federal Government of Nigeria has established institutions, including the 2nd defendant to take care of the basic education needs of the people of Nigeria. It has allocated funds to these institutions to carry out their mandate. We believe these are all geared towards fulfilling the right to education.*<sup>4</sup>

One implication of the Court's reasoning for the scope of the right to education is that the Federal Government does not have to do anything more than allocate funds for education in order to fulfill the right in question. In other words, once the Federal Government allocates the funds to the institutions set up by it, it cannot be held responsible for denial of the right. This is despite the fact that when the funds meant for basic education are embezzled, all the efforts made by the Federal Government to fulfill the right in question may very well be hampered. The question is how the right to free basic education will be realised and fulfilled where the funds meant for that purpose have been embezzled. Another issue was that the Court appeared to want proof of strict causation between the acts of corruption and the failure by the State to provide free and compulsory primary education.

## The Aftermath of the Case

There are still grave problems with the disbursement and access of UBEC funds meant for education by states in

Nigeria. Most of the problems are due to a lack of transparency and accountability in the system. As at 28 May 2012, almost all 36 states in the Federation had not accessed about N33bn meant for education. Some of the difficulty explained by the Executive Secretary of UBEC, Mr Ahmed Mohammed Modibbo, is due to the 'weak legislative framework or Act establishing [the UBEC Agency]'.<sup>5</sup> It appears that there is a confrontation between State and Federal Governments with an attempt to abolish UBEC and fund states directly. This is controversial because under the current system states need to demonstrate that funds accessed through UBEC are not misappropriated, which they would not have to do if it were abolished.<sup>6</sup> Unfortunately the states have resorted to abandoning the UBEC funds for education which have amounted to about N56billion.<sup>7</sup>

### Conclusion

Although one high point of the ECOWAS case is that it granted an order against the Federal Government to ensure a smooth implementation of

the UBEC programme, there still seems to be a deadlock between Federal and State Governments as to the implementation and access of the funds. The ECOWAS Court in its decision seemed to absolve the Federal Government completely from its obligation to fulfil the right to free basic education. Perhaps if the ECOWAS Court had acknowledged a clear and substantial link between the acts of corruption and embezzlement and the denial of the right to education, this may have positively affected the discourse on the right to education and other socio-economic rights. This would have gone a long way in affecting the way the Federal Government responds to its duties and obligations to fulfilling the right. The disbursement of funds for education is not enough reason to absolve the Federal Government from its obligation. The Federal Government through its agency should not be totally absolved but should be held responsible and accountable for the way that its agencies apply the funds allocated and disbursed by it for the purposes of education.

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<sup>1</sup> Suit No. ECW/CCJ/APP/0808 delivered on 27/10/2009 (unreported)

<sup>2</sup> Despite the Court holding that there had been no proof of the theft, it appears to have implicitly accepted that the theft occurred as it ordered that the State provide extra funds pending the recovery of the stolen funds.

<sup>3</sup> SERAP v Nigeria, *supra* note 1, at para. 19.

<sup>4</sup> *Ibid.*

<sup>5</sup> Ashamu, A., 'States yet to access N33b UBEC fund, says Modibbo', *Total Education*, 28 May 2012, available at <<http://www.totaleducation.com.ng/index.php/news/678-states-yet-to-access-n33b-ubec-fund-says-modibbo>>.

<sup>6</sup> *Ibid.*

<sup>7</sup> Noboh, S.H., 'Senators, minister disagree over UBEC', *Blueprint*, 6 July 2012, available at <<http://blueprintng.com/2012/07/senators-minister-disagree-over-ubec/>>.

### Continued from page 98

The education authorities have to an extent grown wary of the issues concerning the powers of the SGBs and have in fact indicated that should they find no solution from the Constitutional Court, they will look to amend the South African Schools Act and reduce some of the powers of the SGBs.<sup>35</sup>

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<sup>1</sup>The International Convention on Economic, Social and Cultural Rights; the Universal Declaration on Human Rights; World Declaration of Education for All; the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are some of the instruments that provide for the right to education.

<sup>2</sup> Act 108 of 1996.

<sup>3</sup> *The Governing Body of the Juma Musjid Primary School & Ors v Essay NO & Ors* 2011 (8) BCLR 761 (CC) at para. [37].

<sup>4</sup> Act 84 of 1996.

<sup>5</sup> *Head of Department: Mpumalanga Department of Education & Anor v Hoërskool Ermelo & Anor* 2010 (3) BCLR 177 (CC); *Minister of Education, Western Cape & Ors v Governing Body Mikro Primary School & Ors* 2006 (i) SA 1.

<sup>6</sup> 2011(4) SA 531 (FB).

<sup>7</sup> These measures had provisions that stated, amongst others, that pregnant learners may not return to school for up to a period of two years after giving birth.

<sup>8</sup> Para. [35].

<sup>9</sup> Paras. [24] and [25].

<sup>10</sup> Para. [56].

<sup>11</sup> 2012 (i) All SA 576 (GSJ).

<sup>12</sup> Paras. [1] and [2].

<sup>13</sup> Para. [16].

<sup>14</sup> Para. [3].

<sup>15</sup> Paras. [33], [45] and [46].

<sup>16</sup> Paras. [66] and [82].

<sup>17</sup> *The Head of Department: Department of Education, Free State Province v Welkom High School & Anor; The Head of Department: Department of Education: Free State Province v Harmony High School & Anor* 2012(6) SA 525 (SCA)

<sup>18</sup> Para [24].

<sup>19</sup> Para [16].

<sup>20</sup> Para [16].

<sup>21</sup> Para [1].

<sup>22</sup> Para [16].

<sup>23</sup> Para [16].

<sup>24</sup> Para [20].

<sup>25</sup> Para [13].

<sup>26</sup> [2012] ZASCA 194 (30/11/2012) not yet reported.

<sup>27</sup> Para [36].

<sup>28</sup> Para [33].

<sup>29</sup> Para. [37].

<sup>30</sup> Section 3 of the South African Schools Act.

<sup>31</sup> Paras. [40] to [45].

<sup>32</sup> Para. [50].

<sup>33</sup> *Governing Body, Rivonia Primary School & Anor v MEC for Education, Gauteng Province & Ors (Equal Education and another as amici curiae)* 2012 (i) All SA 576 (GSJ) paras. [56] to [82].

<sup>34</sup> *Head of Department: Mpumalanga Department of Education & Anor v Hoërskool Ermelo & Anor* 2010 (3) BCLR 177 (CC) paras. [56]-[61] and [80]-[81].

<sup>35</sup> See <<http://www.beeld.com/Suid-Afrika/Nius/Angie-geskap-oor-klassyfers20130110>> accessed on 29 January 2013.

# Advancing the Right to Education Through the Communication Procedure in the African Committee of Experts on the Rights and Welfare of the Child

Charlotte Leslie

## Introduction

Since its adoption in 1990 and entry into force in 1999, the African Charter on the Rights and Welfare of the Child (the African Children's Charter)<sup>1</sup> has gained recognition as the principal instrument for promoting and protecting children's rights in the African regional human rights system. A total of 48 African states have now ratified the African Children's Charter, whose noteworthy provisions include a strong, detailed and unmistakeably African right to education in Article 11. The African Committee of Experts on the Rights and Welfare of the Child (the Committee) is a group of 11 children's rights experts with the ambitious task of monitoring, reporting on and promoting the implementation of the African Children's Charter. But while the African Children's Charter is increasingly well-known, the Committee – and in particular its procedure for hearing individual communications alleging violations of the Charter – are regrettably less so. This is evident from the modest number of communications received by the Committee since its establishment in 2001 (three). Yet the Committee is one of only a few international treaty bodies that can hear individual communications relating to the right to education in Africa.<sup>2</sup> This article therefore aims to alert practitioners to the possibilities that the Committee and its communication procedure offer for highlighting, protecting and advancing the right to education in Africa.

## What is the African Committee of Experts on the Rights and Welfare of the Child?

The Committee's mandate is set out in general terms in Article 42 of the African Children's Charter. Its

functions include: promoting and protecting the rights in the African Children's Charter,<sup>3</sup> monitoring the implementation of the Charter and interpreting its provisions. The Committee also has several more specific functions. Most significantly for our purposes, it is responsible for receiving and considering 'communications' alleging violations of the African Children's Charter,<sup>4</sup> discussed further below. It also receives and considers state reports on their compliance with the Charter,<sup>5</sup> and undertakes investigative missions into non-compliance with the Charter.<sup>6</sup>

## What is the Committee's Communication Procedure?

Article 44 of the African Children's Charter gives the Committee the power to consider individual communications 'from any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by [the] Charter'.<sup>7</sup> The Committee has elaborated on Article 44 in guidelines that set out rules relating to a communication's content and form. A 'communication' is 'any correspondence or any complaint from a State, individual or NGO denouncing acts that are prejudicial to a right or rights of the child'.<sup>8</sup> A communication must relate to a state that has either signed or ratified the African Children's Charter,<sup>9</sup> although an exception may be made 'in the overall best interest of the child'.<sup>10</sup> It must be written and must not be anonymous.<sup>11</sup> It must not be exclusively based on information circulated by the media,<sup>12</sup> and the same issue must not have been considered in another investigation, procedure or international regulation.<sup>13</sup> The author of the communication must also have exhausted all

available appeal channels at the national level, and have submitted the communication within a reasonable period afterwards.<sup>14</sup>

There is some flexibility around who may bring, or be the 'author' of, a communication. A communication may be brought by the victimised child or his or her parents or legal representatives, by witnesses, or by a group of individuals or non-governmental organisations recognised by the African Union.<sup>15</sup> A communication may be brought on behalf of a victim without his or her agreement if the action is taken in the 'supreme interest' of the child.<sup>16</sup>

Once a communication is received, the Committee will consider whether it is admissible. If so, the Committee will confidentially bring the communication to the attention of the state concerned and request a written explanation within three months.<sup>17</sup> The Committee may request more information, clarification or observations.<sup>18</sup> The Committee will then deliberate on the validity of the communication in private:<sup>19</sup> neither the communication nor any document or information relating to it will be made public.<sup>20</sup> The Committee will take measures to ensure the effective and meaningful participation of the child or children concerned, and where a child is capable of expressing his or her opinions 'they should be heard by a Committee member'.<sup>21</sup> While the Committee is considering a communication, it can request the state concerned to take provisional measures to prevent harm to the child or children the subject of the communication, or other children that could be victims of similar violations.<sup>22</sup> Once it has reached a decision, the Committee will transmit

it to the state concerned and to the Assembly of Heads of State and Government of the African Union for consideration.<sup>23</sup> The decision will then be published.<sup>24</sup> The Committee will also designate one of its members to be responsible for monitoring the decision.<sup>25</sup>

To date the Committee has received just three communications.<sup>26</sup> The Committee has declared the first communication (relating to the situation of children in northern Uganda) admissible and has delivered its final decision on the second.<sup>27</sup> That decision is discussed further below.

### The Right to Education in the African Children's Charter

The African Children's Charter is a powerful resource for right to education advocates. The critical provision – Article 11, which provides that 'every child shall have the right to an education' – is detailed, comprehensive and favourably expressed.

It requires states parties to take 'all appropriate measures with a view to achieving the full realisation of this right',<sup>28</sup> and in particular to: (a) provide free and compulsory 'basic' education; (b) encourage the development of secondary education and progressively make it free and accessible to all; (c) make higher education accessible to all on the basis of capacity and ability; (d) take measures to encourage regular attendance at school and reduce drop-out rates; and (e) take special measures in respect of female, gifted and disadvantaged children to ensure equal access to education.<sup>29</sup>

Unlike the Convention on the Rights of the Child, the African Children's Charter explicitly requires states to take all appropriate measures to ensure that children subjected to school or parental discipline be treated with humanity and respect,<sup>30</sup> and that children who become pregnant before completing their education have an opportunity to continue with their education.<sup>31</sup>

### The Right to Education Before the Committee

The Committee appears to be alive to the importance of the right to education in the broader context of the African Children's Charter, and has included the right to education as part of its general promotion activities. The Committee chooses the theme of the African Union's annual Day of the African Child, held on 16 June in honour of South African children who lost their lives protesting for quality education under apartheid.<sup>32</sup> It has also remarked in its concept notes on the rights of disabled children<sup>33</sup> and on the need for actions in favour of street children<sup>34</sup> on interferences with the right to education that occur along with the violation of other rights.

### Nubian Children case

Most significantly, however, the Committee has actually issued a decision in relation to a communication alleging a breach of the right to education. *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v the Government of Kenya*<sup>35</sup> was principally concerned with the complaint that children of Nubian descent in Kenya were denied the right to acquire a nationality. The Committee concluded that Kenya's failure to ensure Nubian children the right to Kenyan citizenship at birth was a violation of Article 6 of the African Children's Charter. But the authors of the communication also alleged that the children's inability to acquire a nationality interfered with their access to education and thus violated their right to education in Article 11. The Committee agreed.<sup>36</sup> It concluded:<sup>37</sup>

*The affected children had less access to educational facilities for the fulfilment of their right to free and compulsory primary education than comparable communities who were not comprised of children of Nubian descent. There is de facto inequality in their access to available educational services and resources, and this can be attributed in*

*practice to their lack of confirmed status as nationals of the Republic of Kenya. Their communities have been provided with fewer schools and a disproportionately lower share of available resources in the sphere of education, as the de facto discriminatory system of resource distribution in education has resulted in their educational needs being systematically overlooked over an extended period of time. Their right to education has not been effectively recognised and adequately provided for, even in the context of the resources available for this fulfilment of this right.*

Reaction to the decision in Kenya has been positive. The Kenyan Nubians Council of Elders has popularised the decision among community members and the general public using local media and public meetings. The Council has also been given the opportunity to meet with the Kenyan judiciary and Government officials to discuss the decision and its implementation. Civil society organisations are more interested in the Committee and increasingly attentive to the citizenship issues at the heart of its decision.<sup>38</sup>

In accordance with the Committee's recommendation,<sup>39</sup> in 2012 the Kenyan Government submitted a report indicating some of the measures it has undertaken to comply with the decision. While the problem of statelessness persists, Government efforts to respond to the decision include passing the Kenya Citizenship and Immigration Act 2011 to recognise statelessness among certain ethnic groups and migrants, and the Kenya Citizens and Foreign Nationals Management Service Act 2011 to establish a board to determine citizenship. A further piece of legislation (the National Registration and Identification Bill 2012) is in train, relating to the registration of citizens and the registration of births and deaths.<sup>40</sup>

In January 2013, three Committee members and a member of the

Committee's Secretariat undertook a monitoring mission to Kenya with the co-operation of the Kenyan Government. During this mission, the Committee engaged with various Government ministries, civil society organisations, international non-governmental organisations and the Nubian community. This included meetings with representatives from the Ministry of Education and Education Department of the Nairobi City Council. The Committee will send its observations and recommendations for short term, mid-term and long term action directly to the Kenyan Government.<sup>41</sup>

### Advancing the Right to Education Using the Committee's Communication Procedure

The decision – and subsequent activity – in the *Nubian Children* case demonstrates the latent potential of the Committee's communication procedure to redress right to education violations and to advance the law on the right to education in Africa.

In practical terms, the Committee's generous stance on who may bring a communication means it is highly feasible for organisations to submit complaints, either with or on behalf of affected children (as the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative did in the *Nubian Children* case).

Submitting a communication invites the Committee to sanction publicly the state concerned and action or circumstances complained of, as well as to issue recommendations and subject the state to ongoing monitoring. In the *Nubian Children* case, the Committee articulated and publicised Kenya's violation of the right to education: the position of children of Nubian descent in Kenya is now much more widely known, and their difficulties accessing schooling are more widely understood as a human rights issue. The Committee has also been able to give guidance to Kenya for redressing the violation that is more detailed and specific than what

is provided in the African Children's Charter itself.

The Committee's willingness to consider the authors' collateral allegation involving the right to education indicates that it takes this right seriously. And as the body charged with interpreting provisions of the Charter, it is significant – and helpful for right to education advocates – that the Committee confirmed that discriminatory access to educational services and resources and systematic oversight of educational needs is a breach of Article 11 of the African Children's Charter, even in the context of limited resources. Practitioners should consider what other actions or circumstances might also amount to a violation under Article 11 and could thus be the subject of authoritative comment by the Committee.

### Conclusion

The Committee has received only three communications since its establishment in 2001, of which to the best of our knowledge only one has related to the right to education.<sup>42</sup> There is thus clearly plenty of scope to increase the Committee's right to education-related communication workload. The decision in the *Nubian Children* case hints at the possibilities that this procedure holds for right to education advocates, including publication, recommendation and oversight. Practitioners should not hesitate to make use of this valuable opportunity.

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<sup>1</sup> The African Charter on the Rights and Welfare of the Child (hereafter the African Children's Charter), Article 46.

<sup>2</sup> The United Nations Committee on the Rights of the Child as yet has no procedure to do, and the communication procedure of the Committee on Economic, Social and Cultural Rights is not yet functional. The African Commission on Human and Peoples' Rights can hear communications concerning the right to education in Article 17 of the African Charter of Human and Peoples' Rights, but this provision is more limited in scope than Article 11 of the African Children's Charter.

<sup>3</sup> The African Children's Charter, Article 46(a)(i)-(iii).

<sup>4</sup> The African Children's Charter, Article 44.

<sup>5</sup> The African Children's Charter, Article 43.

<sup>6</sup> The African Children's Charter, Article 45.

<sup>7</sup> The African Children's Charter, Article 44(l).

<sup>8</sup> Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child (African Union) ACERWC/8/4 (the Guidelines), Chapter 1, Article 1.

<sup>9</sup> Guidelines, Chapter 2, Article 1, II., 1.

<sup>10</sup> Guidelines, Chapter 2, Article 1, II, 2.

<sup>11</sup> Guidelines, Chapter 2, Article 1, II., 1.

<sup>12</sup> Guidelines, Chapter 2, Article 1, III., 1(b).

<sup>13</sup> Guidelines, Chapter 2, Article 1, III., 1(c).

<sup>14</sup> Guidelines, Chapter 2, Article 1, III., 1(d) and (e).

<sup>15</sup> Guidelines, Chapter 2, Article 1, I., 1. Communications may also be brought by a member state or by any other institution of the United Nations system.

<sup>16</sup> Guidelines, Chapter 2, Article 1, I. 3.

<sup>17</sup> Guidelines, Chapter 2 Article 2, II, 3-4.

<sup>18</sup> Guidelines, Chapter 2, Article 2, V, 1-3.

<sup>19</sup> Guidelines, Chapter 3, Article 1.

<sup>20</sup> Guidelines, Chapter 3, Article 1.

<sup>21</sup> Guidelines, Chapter 3, Article 3, 1-2.

<sup>22</sup> Guidelines, Chapter 2, Article 2, IV, 1.

<sup>23</sup> Guidelines, Chapter 3, Article 4, 4.

<sup>24</sup> Guidelines, Chapter 3, Article 4, 4.

<sup>25</sup> Guidelines, Chapter 3, Article 4, 1.

<sup>26</sup> Personal communications with Benyam Dawit Mezmur, Chairperson of the African Committee of Experts on the Rights and Welfare of the Child, January 2013, on file with the author and INTERIGHTS.

<sup>27</sup> (22 March 2011) Decision: No 002/Com/002/2009 (The ACERWC).

<sup>28</sup> African Children's Charter, Article 11(3).

<sup>29</sup> African Children's Charter, Article 11(3)(a)-(e).

<sup>30</sup> African Children's Charter, Article 11(5).

<sup>31</sup> African Children's Charter, Article 11(6).

<sup>32</sup> African Committee of Experts on the Rights and Welfare of the Child 'Concept Note on the Commemoration of the Day of the African Child on 16 June 2012 under the theme: The Rights of Children with Disabilities: The Duty to Protect, Respect, Promote And Fulfill', available at <<http://acerwc.org/statement/english-acerwc-concept-note-dac-2012-2/>>.

<sup>33</sup> *Ibid.*

<sup>34</sup> African Committee of Experts on the Rights and Welfare of the Child 'Concept Note on the Commemoration of the Day of the African Child on 16 June 2012 under the theme: All Together for Urgent Actions in Favour of Street Children', available at <<http://www.acerwc.org/wp-content/uploads/2011/05/acerwc-daychild-conceptnote-2011-eng.pdf>>.

<sup>35</sup> (22 March 2011) Decision: No. 002/Com/002/2009.

<sup>36</sup> Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v the Government of Kenya at [69].

<sup>37</sup> *Ibid.*, para [65].

<sup>38</sup> Personal communications with Adam Hussein Adam, Equality and Citizenship Officer, Open Society Initiative for Eastern Africa, February 2013, on file with the author and INTERIGHTS.

<sup>39</sup> *Supra* note 36.

<sup>40</sup> *Supra* note 38.

<sup>41</sup> *Supra* note 26.

<sup>42</sup> It is not known whether the third communication relates to the right to education.

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