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## Contents



# Empowering the Next Generation: Securing the Right to Education in the New Millennium

Does the right to education have a future within the UN? That was the question posed by the late Katarina Tomaševski in a valedictory article written at the end of her six year tenure as Special Rapporteur in 2005 and at a time when the future of the body which had provided her mandate – the UN Commission on Human Rights – remained uncertain.[1] One and a half years later the Commission has been replaced by the Council and Katarina is no longer with us having passed away after a long illness on 4 October 2006. Whether the issues addressed by Tomaševski in her article – the failure of the UN to provide the necessary resources and clarity of purpose to assist experts such as her in fulfilling their mandate – will ultimately be resolved remains to be seen. However, one thing is certain: few individuals have had such an impact on shaping understanding of a particular right as the former Special Rapporteur. Whether it was clarifying the nature and scope of the rights through the innovative 'four As' typology (human rights obligations in, to and through education require availability, accessibility, acceptability, adaptability) which has now been adopted by the UN Economic, Social and Cultural Rights Committee as the standard approach (and which is featured in several of our articles) or examining the realisation of the right to education in incisive country reports as well as countless articles and her inspired teaching, Tomaševski was a passionate advocate for the universal enjoyment of the right to education.

The range of articles presented in this issue of the *Bulletin* demonstrate some of the progress that has been made not only in terms of standard setting, but also in obtaining redress for those whose right to education has been violated. They demonstrate how the right to education can be effectively enforced, how litigation, whilst not a panacea for ensuring human rights in, to and through education, can provide a focal point for broader action and campaigning. The contributions also reflect many of the concerns that Tomaševski highlighted in

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her work: the increasing trend away from the commitment to free education for all towards a market-driven approach the challenges of ensuring access to quality education for marginalised groups, and the need to ensure human rights *in* education as a prerequisite for human rights education.

The story of human rights development during the last six decades has not always been one of steady incremental progress. Setbacks – both in and out of the courts – frequently occur until a critical mass of public opinion and activism strengthens the case for normative entrenchment. One such example is charted by Fernand de Varennes, professor of law at Murdoch University, in his article on the right of a person to be educated in a language of his or her choice. Despite the importance of such a guarantee for maintaining the language, culture and identity of linguistic minorities and indigenous peoples, no explicit recognition of this exists in any binding treaty at the international level. The Council of Europe's Framework Convention for the Protection of Minorities has proven to be a landmark of sorts, but this has still not translated into a universal standard. However, two cases – one from the UN Human Rights Committee and one from the European Court of Human Rights may, as de Varennes posits, constitute the phoenix of linguistic rights in education arising from the ashes of previous vague and half-hearted commitments. In particular the decision of the European Court in *Cyprus v Turkey* appears to modify the longstanding and restrictive judgment in the *Belgian Linguistics* case which for decades defined the scope of linguistic rights under the Convention. Whether that will translate into a binding international norm remains to be seen but there now seems to be some momentum building.

For many children around the world, particularly in the developing world, economic barriers remain the greatest obstacle to accessing education. The need for children and young people to contribute to household income combined with the continued charging policies in place in many state schools makes a mockery of the numerous regional and international conventions requiring free education for all. Drawing on his experience of working with Tomaševski and the insights of her last major work, *The State of the Right to Education Worldwide, Free or Fee: 2006 Global Report*, Duncan Wilson, Economic, Social and Cultural Rights Coordinator at Amnesty International, analyses the major challenges that still need to be overcome if the universal right to free and compulsory education is to become a reality. Most disturbingly, Wilson demonstrates the role that the World Bank has played in reinforcing a market driven approach which conceives of access to education in terms of the economic rationale of supply and demand rather than as a matter of inherent human right. However, legal protection and litigation in a number of jurisdictions combined with innovative policy initiatives in regions such as Latin America present some hope that significant change can occur during the next decade as states increasingly realise that investing in education makes economic as well as human rights sense.

Ensuring equality of opportunity in education is merely one challenge in a society as historically divided as Northern Ireland as Laura Lundy, professor of law at Queen's University in Belfast, outlines in an examination of significant education rights litigation in the province. Although legal challenges have not always succeeded Lundy identifies one positive result as being greater awareness of human rights law, particularly that relating to the European Convention of Human Rights, amongst advocates. It is no coincidence that Northern Ireland is the only part of the United Kingdom to have had its own Human Rights Commission since 1999. She goes on to demonstrate that litigation often has to be placed within the context of wider societal changes. So while legal challenges to funding decisions have been largely unsuccessful many (but not all) of the grievances that gave rise to them have been addressed as part of the peace process. Further funding challenges are unlikely; rather Lundy sees the closure of schools as a source of future disputes with litigants likely to claim breaches of their freedom of religion. Education has not been immune to the broader societal divisions and distrust in Northern Ireland, and on several occasions schools themselves have been the focus for protest and confrontation. In a high profile incident in 2001, the Holy Cross school for girls was at the centre of violent disturbances which resulted in alleged breaches of the European Convention on Human Rights.

As Lundy notes, although the High Court did not find in favour of the complainants, both in terms of alleged breaches of the right to life and not to be subjected to cruel, inhuman treatment as well as the right to education (since the school had made strenuous efforts to continue teaching), it did condemn the protests as "one of the most shameful and disgraceful episodes in the recent history of Northern Ireland." The case (which is still on appeal) reminds us that school children can often be on the frontline of the struggle for human rights, where trying to access education frequently involves significant risk. Lundy's conclusion is that although the record of litigation on the right to education has been mixed international standards, e.g. the UN Convention on the Rights of the Child, have had a profound impact as part of effective campaigning for change.

Although aspects of the right to education, such as legal protection of equal access under the constitution or legislation, are relatively cost-free, it has to be accepted that without sufficient resources good quality universal education will remain no more than an aspiration. What roles courts should or can play in scrutinising budgetary allocations raises questions about the separation of powers and how far the judiciary should become involved in decisions normally reserved for the legislature or executive. In a contribution from the Philippines, Maria Diokno, Executive Director of the Free Legal Assistance Group, analyses the series of interventions made by the Supreme Court to date on education, ranging from free expression and religion in schools to discrimination cases brought by teachers to academic freedom and the obligations of schools towards their students. Arguably the most significant decision which the Court has made to date occurred in 1991 when it was asked to resolve the conflict between payments to service the country's debt burden and the constitutional duty to provide the highest budgetary priority to education. The Court erred on the side of caution stating that, in setting aside a larger amount of money to service the debt which was in the national interest, the legislature had not acted unconstitutionally. Since the decision the gap between the amount of money paid to service the debt and supporting education has widened, with a consequential negative effect on the ability of the state to fulfil its right to education obligations – a fact noted by the UN Committee on Economic, Social and Cultural Rights in its assessment of the Philippines compliance with international obligations. Clearly a challenge to the state's macro economic policy was considered a step too far by the Court and, as a consequence, greater resource allocation is an issue that economic and social rights advocates will continue to struggle for.

Securing the right to education for all in a state suffering from such vast economic and social disparities as Brazil is a daunting task and it is clear that the country's many constitutional guarantees in relation to the provision of education are meaningless without effective implementation. However, as Federal Justice Renata Mesquita Ribeiro highlights in her discussion of the role of Brazilian courts in protecting education rights there have been some notable victories, e.g. ensuring that all primary school children should have access to transport and, in cooperation with the *Ministerio Publico*, that children who have dropped out of school due to involvement in criminality, drug abuse, child prostitution and child labour are returned to school and receive appropriate support including medical treatment. In a country where the drop-out rate is relatively high (8.3% in 2001) such actions might seem a drop in the ocean until underlying issues of poverty and inequality are substantively addressed – it is a sobering thought that there are some fifteen million illiterate people aged over fifteen. However, an innovative scheme called "*bolsa escola*" operates in some regions whereby poor families are provided with a small stipend when their children attend school. In addition, people do have the opportunity to utilise Article 208(2) of the Constitution to secure redress where the state is failing to provide free and compulsory elementary schooling. Of course, as Ribeiro concludes, for such provisions to be truly effective there is a need to raise public awareness about how they can be used to obtain redress for breaches of their rights. Yet the very lack of education which would form the subject of complaint hinders the victim from accessing the justice system, thus requiring a greater role for public interest litigation.

Europe has the highest level of access to education of any region yet certain groups remain conspicuously excluded and discriminated against. Roma children experience widespread stigmatisation and segregation throughout (but not exclusively) central and eastern Europe and yet positive changes are occurring. Constantin Cojocariu, Staff Attorney with the European Roma Rights Centre, focuses on two recent positive decisions from Hungarian and Bulgarian courts that have sought to address racial discrimination against Roma pupils in local schools. Cojocariu, noting how key the enjoyment of right to education is for the Roma in securing the enjoyment of other economic and social rights, highlights a judgment from the Sofia District Court condemning racial segregation. The judgment is not only unusual from the perspective of the particularly strong language used by the Court but also its determination to carry out a thorough review of the situation. However, Cojocariu also notes that both this and another positive decision from Hungary were heavily influenced by EU anti-racism legislation in both jurisdictions which will not be the case with other countries such as Romania and Croatia where the impact of the EU has been much less. Another caveat is the absence of detailed directives handed down by the courts providing effective relief. Cojocariu concludes that litigation cannot provide the long lasting impact that only wider societal change can bring.

Attitudes to persons with a disability have been transformed in many countries during the last two decades culminating in the new UN Convention on Disability Rights which was adopted by the General Assembly on 5 December 2006 (see article by Nikki Naylor). David Ruebain, a British lawyer working on disability rights, charts the progress made in access to education for people with a disability in the UK. The introduction of the Disability Discrimination Act in 1995 (subsequently amended in 2002 to specifically address education), buttressed by specific education legislation and monitored by a Disability Rights Commission (soon to be replaced by an overarching Equality and Human Rights Commission), was a significant step forward. The comprehensive framework outlined by Ruebain focuses much more on adapting to individual needs rather than the crude categorisations which were used in the past. This has been reinforced by a series of cases which, in addition to placing greater obligations on local education authorities, has given

parents stronger rights of appeal against adverse decisions. Hence in delivering education rights (as in other economic and social rights) it is not just a question of improving the substance of the right but also guaranteeing due process and the right to challenge public decision making. An important new reform introduced in December 2006 places local education authorities and schools under a positive obligation to implement a disability equality scheme elaborating how they intend to not just prohibit discrimination and harassment but also promote equality of opportunity which Ruebain concludes could be "a significant lever for change". Although gaps still remain, most notably in relation to higher education, the UK approach demonstrates that a fairly comprehensive protection framework can be developed through a combination of statute and the courts.

Arguably nowhere is the potential conflict between freedom of religion and the right to education more intense than in the field of sex or sexuality education. In a wide-ranging article, taking in decisions from international and regional bodies as well as recent UN policy initiatives, Christina Zampas and Pardiss Kebriaei from the Center for Reproductive Rights analyse how international human rights law has sought to guarantee that young people can receive accurate, objective and comprehensive sexual and reproductive health education free of ideological interference. Failure to do this can not only result in increased discrimination towards certain groups such as lesbian, gay, bisexual and transgendered people but can have a detrimental impact on young people's right to the highest attainable standard of health: here are clear examples of the empowering nature of the right to education on other rights. However, removing prejudicial and stereotypical views from the classroom remains a major challenge in many jurisdictions where the delivery of education is often in the hands of non-state actors. One of the keys identified by the World Health Organisation and others is to begin sexuality education at the earliest possible stage and then to continue this through all levels of formal and informal teaching. This should be combined with ensuring that students are not merely recipients but active participants in the planning and implementing of programmes. It is only by adopting such an integrated and sustainable approach that states can hope to meet the ambitious twenty year programme of the 1994 International Conference on Population and Development.

Endeavouring to deliver education in areas either undergoing conflict or recently emerging from it presents special challenges as Judith Oder outlines in her examination of the situation in northern Uganda where thousands of children have been the subject of gross violations during the last two decades. Mere survival is an achievement in itself when faced with forced abduction, conscription, torture and sexual violence. Yet for many of these children access to quality education offers the best prospect for an improved future. However, even where the school infrastructure remains untouched by the conflict, the capacity of teachers to deal with the psychological trauma suffered by children is doubtful. Applying the 4-As typology, Oder analyses Uganda's record to date in dealing with the crisis and outlines gaps including in respect of welfare protection, resources and access to redress. Whilst to date there have only been some nascent legal challenges, the potential for strategic litigation focusing on intersectional discrimination – e.g. gender and health status – is considerable.

The case notes for this issue are provided by Christian Courtis, the Economic, Social and Cultural Rights Legal Officer for the International Commission of Jurists. His comprehensive note shows the innovative approaches adopted by the Inter-American system in guaranteeing the right to education even in the absence of an explicit guarantee in the American Convention on Rights prior to the coming into force of the San Salvador Protocol. Those familiar with the jurisprudence of the Inter-American Court and Commission on Human Rights will not be surprised by the range of innovative remedies offered to victims, e.g. naming a school after street children killed by the security forces. However, the approach of integrating the right to education with other rights, most notably the rights to life (echoing decisions of the Indian Supreme Court) and personal integrity, demonstrates the impact that human rights bodies can have, particularly on economic and social rights, if they are prepared to adopt a progressive interpretation of existing guarantees. Such approaches not only inspire other jurists to go beyond the formal straitjacket of literal interpretations to secure effective enjoyment of rights, but also crucially further the right to a remedy for victims of all human rights violations, including the right to education. ■

**Iain Byrne and Duncan Wilson**

**1** Katarina Tomaševski, 'Has the Right to Education a Future Within the United Nations? A Behind the Scenes Account by the Special Rapporteur on the Right to Education.' *Human Rights Law Review*, 2005, 5(2): 205-237.

# The Right to Free and Compulsory Education: Unrealised and Under Threat

**Duncan Wilson**

The right to free and compulsory education has been at the core of global commitments to the right to education since at least 1948. This article shows that, despite the fact that this is one of the clearest immediate obligations under economic, social and cultural human rights law, the duty remains unfulfilled. The article presents the state of human rights law on free and compulsory education, and showcases the results of the final report by Katarina Tomaševski, the first UN Special Rapporteur on the Right to Education, on the practice of violating this right, from Angola to the United States of America.[1]

## International Human Rights guarantees of free and compulsory education

For 85 years international human rights standards have recognised the importance of securing free and compulsory education for all children until the minimum age of employment[2] and there is a high level of concordance among international and regional instruments on protecting the guarantee. Since the revision of the European Social Charter in 1996, all regional systems, as well as core international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC), recognise this right.[3]

Whilst, in general, economic, social and cultural rights (ESC rights) are to be fully realised progressively,[4] the duty to realise the right to free and compulsory primary education is an obligation of immediate effect,[5] and a component of the "minimum core obligations" of the ICESCR.[6] This is clear from the text of the ICESCR itself, where the stronger obligation "shall be"[7] is used in regard to the free and compulsory nature of primary education. A weaker phrase, "shall be made", is used in respect of obligations to realise rights to secondary, technical, vocational and higher education.[8]

Article 14 further outlines the obligation and, according to its provisions, those states parties which have not yet secured compulsory primary education, free of charge, are required to work out and adopt a detailed plan of action to do so, within a reasonable number of years.[9] This plan is to be developed within two years of ratifying the ICESCR, or within two years of a relevant change of circumstance.[10] Where this is not possible given available financial, technical and other resources at the national level, states should seek, and should receive, international assistance and cooperation to enable them to do so.[11] In this case the Committee on Economic Social and Cultural Rights (CESCR) has made clear that "the international community has a clear obligation to assist."[12]

> *"The clarity of international human rights law in its guarantee of free and compulsory primary education contrasts sharply with national and international education strategies adopted over the last thirty years."*

The states parties to the ICESCR, of whom there are 155 at the time of writing, are required to ensure the availability of primary education free of charge for the child, parents or guardians. This means removing all direct charges – such as fees and transport costs – as well as combating indirect charges which in effect are a barrier to access. As the UN CESCR has stated, "the nature of this requirement is unequivocal."[13] According to the ILO Minimum Age Convention[14] of 1973, the right to free and compulsory education should be guaranteed until the general minimum age of employment, which may be set no lower than fifteen, or temporarily, fourteen. The CRC includes a governmental obligation to take measures to encourage regular attendance and the reduction of drop-out rates,[15] such steps can include compensating families for the opportunity cost of ensuring the right to education of their children.

The clarity of international human rights law in its guarantee of free and compulsory primary education contrasts sharply with national and international education strategies adopted over the last thirty years.

## Revisiting the global consensus on free primary education

As the ICESCR was entering into force in 1976, numerous countries were making notable progress towards ensuring that primary education was free. Tanzania famously introduced free primary education in 1972, and Kenya followed suit for grades one through four in 1974, the latter resulting in the enrolment of an additional 1.8 million school-age children.

During the structural adjustment period of the 1980s, international economic advice stated that charging for education would not damage "demand" where "supply" was insufficient led many countries to regress from the provision of free education. During this period the World Bank supported the "judicious use of modest fees" in primary education,[16] other charges and fees (cost sharing) and bursaries for the poor, extremely poor or even the "ultra poor". [17] This was despite evidence from the UN that the impact of this was, "the exclusion of poorer students from education and partial return to educational patterns that perpetuate social inequalities."[18]

User fees and other direct charges perpetuate economic exclusion from education, where those who are too poor to pay to send all children to school are forced to make harsh decisions at the household level. This most frequently and disastrously affects the enrolment of girls where, "years of attending school appear wasted when women do not have access to employment and/or are precluded from becoming self-employed, do not have a choice as to whether to marry and bear children, or their opportunities for political participation are foreclosed."[19]

Bursary schemes developed during this period continue to be widely used. However, such policies have not been shown to be effective,[20] and there is evidence to suggest they are unfair and expensive (with much of the cost coming as a result of heavy infrastructure required for distribution).[21] Unlike human rights law, which requires states to ensure that education is available, accessible, acceptable and adapts[22] to the needs of children in difficult circumstances (such as children living on the street, parentless children[23] and children who work) these exemption schemes focus on the application of arbitrary economic criteria to their parents.

The move away from free and compulsory education as a public service was reflected in global education strategies. The 1990 World Declaration on Education for All, adopted by representatives of 155 states, stressed the importance of "partnerships"[24] between government and non-government organisations, the private sector, local communities, religious groups, and families to ensure the resources needed for basic education. This political backtracking on free and compulsory education for all children as an immediate obligation was partially rectified in 2000, at the World Education Forum where the international community committed to ensuring free and compulsory primary education of good quality for all children by 2015.[25]The transformation of an immediate human rights obligation, into a long-term political goal, was reiterated in the Millennium Development Goals, adopted by the General Assembly later in the same year.[26]

> *Over 140 constitutions include a protection of the right to education. However, in around 40 countries there is no legal guarantee of compulsory education.*

The effects of charging policies have proved deeply unpopular and successive African governments, from Malawi in 1994 to Liberia in 2005, and beyond have been elected after pledging to eliminate school fees. Removing direct charges has seen surges in enrolment, often into educational systems which have not been able to cope.[27]

A change of approach at the international level followed the decision, in 2001, by the US Congress to adopt legislation requiring US representatives to international financial institutions to oppose any loan which included user fees *for the poor* for primary education and basic health care.[28] That year the World Bank commissioned a study of the prevalence of user fees in primary education projects which it supported. In March 2002, the review, eventually published in 2004, found that fees were charged in 97% of the relevant countries. In many of these the fees were supported by the Bank, even where this was illegal according to national laws.[29]

While the World Bank currently "does not support user fees for primary education" and "is actively involved in attempts to eliminate user fees, and to provide alternate sources of financing"[30] its education support is not yet framed in terms of international human rights law. At the same time in many countries what is currently classed as primary education may amount to no more than a few years of education, and certainly not to education which is free and compulsory until the minimum age for employment. Additionally, some of the alternate sources of financing which the World Bank has identified in order to remove fees has raised concerns among human rights and development organisations. For example, in the Democratic Republic of Congo (DRC) Amnesty International has expressed concern that "financial simulations presented in the World Bank document on how to cover the government financing gap from the removal of primary education charges … include reducing the number of secondary schools by up to 28 per cent outside Kinshasa, and/or by 'drastic' restriction of enrolments in higher secondary and tertiary education".[31] Such measures, if adopted would amount to retrogression on the part of the DRC in meeting its human rights obligations to ensure that secondary education is progressively available and accessible and to continuously improve the material conditions of teachers.[32]

## What chances for change 2005-2015?

Despite the universal nature of the right to education, the reality of the child's right to free and compulsory education has been summarised as a "country-code lottery". Children in the European Union and other original OECD countries generally benefit from compulsory education for an increasingly prolonged period which is not only fee-free but also often supported through subsidies for other direct and indirect costs on families.[33] Still, the trend in higher education appears to be towards commercialisation.[34] The rich states have often been slow to recognise the universal nature of the right to education, and have failed to live up to their obligations to provide international assistance where children elsewhere would not otherwise be guaranteed even free *primary* education. In Kenya and Tanzania, for example, donors have reportedly been slow to provide assistance to support efforts to ensure free primary education.[35]

In her seminal review of *The State of the Right to Education Worldwide*

Katarina Tomaševski has noted the importance of ensuring that legal guarantees of the right to education are enforceable, as a check against governmental inaction or unwillingness.

Over 140 constitutions include a protection of the right to education.[36] However, in around 40 countries there is no legal guarantee of compulsory education,[37] and, as a 2004 report by the Right to Education Project and UNESCO has shown, despite the commitment to equalising the general minimum age for employment and the minimum age of completion of compulsory education, the reality is a patchwork of laws on minimum ages, often with gaps between the age of guaranteed education and the minimum age of official employment.[38]

Where legal guarantees do exist, these are often ignored and rarely enforced;[39] policy and practice does not always comply with the rule of law. Nevertheless, a growing pattern of enforcement of the right to education is emerging. Various direct and indirect charges for education have been subject to legal challenge in jurisdictions around the world, [40] including the duty on the state to ensure transport to compulsory education free of charge,[41] free transport to secular education,[42] free textbooks[43] and the duty to adopt measures to combat opportunity costs which in practice keep children out of school. A notable example of the *latter is the case of Mehta v State of Tamil Nadu*,[44] where the Supreme Court of India proposed an innovative response to widespread child labour. The court mandated an approach which explored the possibilities of substituting work of an adult family member in lieu of the child, requiring that employers reduce working hours for children under 14, pay for at least two hours of education per day for each child in their employment, and where none of these options was feasible, the provision by the state of a small stipend to families to enable them to send children to school.

The reality of free or for-fee education varies from region to region. The increasing number of African countries taking steps towards free education generally limit th is to a gradual reduction of direct charges. Such schemes are not supported with the kind of plans to achieve free and compulsory education, using the maximum of available resources, including international assistance, which the ICESCR requires. Other regions, notably Eastern Europe and Central Asia, and the Middle East and North Africa, expose how legal commitments alone are not enough, where policies move in opposite directions. Current practice in Eastern Europe and Central Asia appears to be largely retrogressive on free primary education, contradicting constitutional guarantees, as informal charges are increasingly permitted to subsidise inadequate and decreasing public allocations. South Asia demonstrates the greatest variation, from a right to compulsory education which is nearly universally realised in Sri Lanka, to the absence of *any* commitment to free or compulsory primary education in Bhutan, where nearly half of children do not even enrol in primary education.

According to Tomaševski's overview, the brightest picture is in Latin America, where, not only is the right to education embedded in constitutions and implementing laws (with the exception of Colombia, where there is no effective constitutional guarantee of free education), but innovative policies have been developed to ensure the right is realised in practice. In addition to removing direct fees, Brazil and Mexico have piloted projects to compensate poor families for the lost income where children attend compulsory education. The *bolsa escola* in Brazil and the PROGRESA programme in Mexico have proven so successful that they are now being internationally exported.

A more concerted attempt to realise the universal right to free and compulsory education requires recognition of universal obligations to respect, protect and fulfil the right to education for everyone, including through obligations of international cooperation and assistance. Anything less than international education strategies which are based on and uphold the right to education and the rule of law, will not ensure that everyone, everywhere is guaranteed at the very least free and compulsory education until the age of fourteen. ■

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1 Katarina Tomaševski, "The State of the Right to Education Worldwide: fee or for free, 2006 Global Report", available at <www.katarinatomsevski.com>

2 ILO Minimum Age (Agriculture) Convention (10) 1921.

3 See for example, UDHR, Article 26(1); ICESCR, Article 13(2)(a); CRC, Article 28(1)(a).

4 Article 2(1), ICESCR.

5 The UN Committee on Economic, Social and Cultural Rights (CESCR) has clarified that, "the obligation to provide primary education for all is an immediate duty of all States parties.", UN CESCR, General Comment No. 13, *The right to education*, UN Doc. E/C.12/1999/10, para 51.

6 CESCR, *ibid*., para 57.

7 Article 13(2)(a), ICESCR, "Primary education shall be compulsory and available free to all".

8 Articles 13(2)(b) and (c), ICESCR. Article 13(2)(b) states, "Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education"

9 Article 14, ICESCR.

10 UN CESCR, General Comment No. 11, *Plans of action for primary education*, UN Doc. E/C.12/1999/4, para 8.

11 "…when States ratify the Convention, they take on obligations not only to implement it within their jurisdiction but to contribute, through international cooperation, to global implementation", UN Committee on the Rights of the Child, General Comment No. 5 (2003), *General measures of implementation for the CRC,* UN Doc. CRC/GC/2003/5.

12 CESCR, General Comment 11 (1999), Plans of action for primary education (art.14), para 9.

13 CESCR, *ibid*., para 7.

14 ILO Convention 138, 1973, Articles 3 and 4.

15 CRC, Article 28 (1)(e).

16 World Bank, *Education in Sub-Saharan Africa: policies for adjustment, revitalisation and expansion*, Washington D.C. 1988, p 55.

17 Mingat A and Tan J(1986) '*Expanding Education Through User Charges*: What can be achieved in Malawi and other LDCs?' Economics of Education Review Vol. 5(3), 273-286

18 United Nations, *1985 Report on the World Social Situation*

19 Annual Report of the UN Special Rapporteur on the Right to Education, 2001, UN Doc. E/CN.4/2002/60.

20 According to a January 2000 UNICEF paper ("Absorbing Social Shocks, Protecting Children and Reducing Poverty"), "remarkably little evidence exists on the effectiveness of exemption systems [for user fees]."

21 The World Bank's Operations Evaluation Department (OED) reported on the widespread failure of exemption systems to adequately protect the poorest citizens from health clinic user fees ("Investing in Health," OED, 1999).

22 The '4-A scheme' of governmental obligations was developed by Katarina Tomaševski as the UN Special Rapporteur in her preliminary report of 1999, UN Doc. E/CN.4/1999/49; it was later adopted by the UN CESCR in its General Comment No. 13.

23 Household size was shown by a comprehensive DFID survey to be "a significant determinant of whether children will have the opportunity to be schooled", DFID 2002, p 4. Cited in Tomaševski, supra n1.

24 Jomtien Declaration on Education for All, Article 7, available at: <http://portal.unesco.org/education/en/ev.php-URL_ID=45386&URL_DO=DO_TOPIC&URL_SECTION=201.html>

25 *Education for all: meeting our collective commitments*, text adopted by the World Education Forum, Dakar, Senegal, 26-28 April 2000, available at: <http://www.unesco.org/education/efa/ed_for_all/dakfram_eng.shtml>

# Language Rights in Education

**Fernand de Varennes**

Until recently, most legal observers were probably of the view that there existed no "right to be educated in one's own language" in international law,[1] based on the absence of any clear treaty provision to this effect and on a rather restricted reading of the European Court of Human Rights' leading case in this area, known as the *Belgian Linguistics Case*.

That position needs to be re-examined in the light of a two-pronged evolution occurring in international law: first, because a number of documents and treaty provisions have emerged to permit some degree of language rights in education; and secondly because case-law, including from the European Court of Human Rights itself, now contradicts the traditional view which rejected any language right in education, thus opening the door to a re-assessment of what had been a rather restrictive interpretation of language rights in education.

## Initial, Cautious First Steps in International Law

The initial responses as to whether a language right in education ought to be recognised at the international level can be characterised as both cautious and hesitant in the period after the Second World War.[2] An initial draft outline of what was to become the Universal Declaration of Human Rights proposed that states with "substantial numbers of persons differing in race, language, or religion from the majority of the population, should give such persons the right to establish and maintain out of an equitable proportion of public funds, schools, cultural and religious institutions'. This was rejected, partly because it was seen as inconsistent with the individualistic approach of the Declaration.[3]

Just ten years later however, there emerged a gradual movement for some sort of language rights in education, first with the adoption of a treaty dealing with indigenous and tribal populations, and then more generally with another dealing with discrimination in education. The International Labour Organisation Convention No. 107 of 1957 concerning Indigenous and Tribal Populations[4] provides for protected indigenous populations a right to be taught in their mother tongue or, where this is not practicable, in the language most commonly used by the group to which they belong. More generally, though still limited to a specific category, UNESCO's Convention against Discrimination in Education[5] of 1960 provides in Article 5(1)(c), that it is essential to "recognise the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each state, the use or the teaching of their own language", provided that "this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty".

The UNESCO treaty provisions are however timid and limited in terms of the recognition of language rights in education. Not only are they restricted to a right for "national minorities' only, a category which in itself remains undefined and still controversial, but they also seem to only refer to the entitlement of these minorities to have their "own" educational activities, meaning private as opposed as to state provided education. Additionally, the treaty's recognition of a language right in education for national minorities is further diluted by another qualification: the choice of the language of instruction to be used in private minority schools is not left to the parents but is dependent "on the educational policy of each state" and cannot prevent "the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty". Article 5 of the treaty thus has limited usefulness as the basis for a language right in education even if only for national minorities: first, because it only deals with the creation of private schools and does not actually require that state

**26** Available at: <http://www.un.org/millenniumgoals/>

**27** According to the World Bank, for example, "When Malawi abolished tuition fees in 1994, enrolments increased around 51 per cent", World Bank, *School fees: a roadblock to Education for All*, August 2004.

**28** Foreign Operations Appropriates Bill 2001, Section 596.

**29** World Bank, *User Fees in Primary Education – draft for review,* Raja Bentaouet Katta and Nicholas Burnett, July 2004.

**30** World Bank, *School fees: a roadblock to Education for All*, August 2004.

**31** Amnesty International, *Children at War, creating hope for the future*, AI Index AFR 62/017/2006.

**32** ICESCR, Articles 13(2)(b) and (e).

**33** Such positive measures as required to eliminate discrimination and encourage attendance under the ICERD and CRC for example, are not uniformly available or applied, as the widespread exclusion, discrimination and abuse of Roma children in education in education in Central and Eastern Europe vividly demonstrates.

**34** With the frequent exception of non-nationals, and also, according to the OECD, around 10 per cent of students in Japan and the USA. See Tomaševski, *supra*, pp 222-227.

**35** *Supra* n1, pp. 41 and 62.

**36** <www.right-to-education.org>

**37** Duncan Wilson, "Human Rights: promoting gender equality in and through education", *UNESCO Prospects*, 34(1) March 2004, pp. 11-27(17).

**38** Angela Melchiorre, *At What Age…are school-children married, employed and taken to court?* 2nd edition, 2004, Right to Education Project and UNESCO; Available at: <www.right-to-education.org>

**39** ILO figures on child labour show this clearly. For a useful overview see Alec Fyfe, "Compulsory education and child labour: historical lessons, contemporary challenges and future directions", Working Draft, <http://www.ilo.org/public/english/standards/ipec/themes/education/efa.htm>

**40** For an overview see Katarina Tomaševski, *Human Rights Obligations in Education: the 4-A Scheme*, 2006, Nijmegen: Wolf.

**41** *Inter alia* in Brazil (Tribunal of the State of Minais Gerais (TMG), Apelacao Civel No. 000.197.843-6/2000) and the UK (*Devon County Council v George*, [1989], A.C. 573, 604B, UK House of Lords)

**42** *Secular College Victory for Aethist School-girl*, Guardian, 4 April 2004.

**43** Czech Republic – Pl. US 25/94, Judgment of the Constitutional Court of the Czech Republic, 13 June 1995.

**44** Judgment of 10 December 1996.

authorities establish publicly-funded schools for national minorities. Secondly, because the provision does not clearly guarantee that the language used in these schools actually be the language of the minority. It is permissive rather than mandatory in this regard, meaning that this will only eventuate if the state's educational policy permits the use of a minority language.

## A Slow but Steady Evolution

These very modest beginnings have however only been precursors to further developments in the last 30 years which can be divided into two parts: those at the truly global level which have generally been more timid and restrained; and those at the regional level with the Council of Europe that have been significant in giving a legal recognition and structure to language rights in education. At the regional level outside of Europe developments have been markedly limited: Inter-American and African treaties are silent on any language aspect to the right of education.[6]

At the global level there is Article 27 of the 1966 International Covenant on Civil and Political Rights[7] which provides that "[i]n those states in which...linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture...or to use their own language". Though silent on the issue of education, this provision is believed to at least protect private minority schools and the language used in these schools.[8] Interestingly, on one occasion dealing specifically with the funding of a private minority school, the UN Human Rights Committee dealt with the matter by referring to the prohibition of discrimination and therefore did not feel obliged to examine the exact extent of a minority's right to their own schools under this treaty provision.[9]

In the case of indigenous and tribal populations, the International Labour Organisation's 1989 Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries[10] guarantees a right to education in indigenous languages, "where practicable", as well as an entitlement to measures to preserve and promote the development and practice of indigenous languages. The 1989 Convention on the Rights of the Child[11] for its part asserts in Article 29 that the education of the child is to be directed to the development of respect for the child's parents, his or her own cultural identity, language and values. The wording of this provision does not require the use of one's language of choice as a medium of education, or even any suggestion that it should be taught: it only requires that states must direct education in a way that develops respect for his/her language, cultural identity and values.

> *"There is not yet a general, unambiguous and legally binding obligation at the global level for the right to be educated in one's language."*

Other documents at the global level often referred to as "proving" a language right in education, such as the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[12] and the draft UN Declaration on the Rights of Indigenous Peoples,[13] are limited to only certain categories and are not legally binding instruments. While they may be indicative of a growing trend towards acceptance of the principle that a right to be educated in one's language should be guaranteed, the fact remains that there is not yet a general, unambiguous and legally binding obligation for such a right at the global level. The limitations and vague wording of Article 27 of the International Covenant on Civil and Political Rights and Article 29 of the Convention on the Rights of the Child, the small number of ratifications of the Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, and Article 5 of the UNESCO Convention being subject to a state's policy all suggest that there is still, in strictly legal terms, some difficulty in getting the broad international consensus in this area.

Even more recent and significant developments at the Council of Europe are the entry into force of two legally binding treaties giving form and structure to this right, at least in the case of national minorities and regional or minority languages. Article 14 of the 1995 Framework Convention for the Protection of National Minorities[14] and Article 8 of the 1992 European Charter for Regional or Minority Languages[15] both indicate that "in appropriate circumstances" states must make available in schools the teaching of or in a minority language. While both treaties have been criticised for the ways states could limit their obligations under these treaties (such as restricting the treaties' application to national minorities or traditional languages, the possibility for states to "opt out" from some clauses or even only nominate certain specific minorities are being allowed to be protected) and the weakness of both treaties' enforcement mechanisms, it remains that in legal terms they are the clearest expression of a right to not only learn, but in some cases to also receive, some part of education in one's own language.[16]

Still, it is necessary to keep in mind the limitations both documents maintain in relation to the recognition to any language right in education. The more detailed of the two treaties, the European Charter for Regional or Minority Languages, indicates for example that the numbers of individuals seeking such a right must be "sufficient" for this purpose. This could suggest that the mere presence of one or a handful of pupils in a particular district would not automatically give rise to a right to be taught a minority language in a state school. One could argue however, in light of the obvious trend in the many international and European instruments which generally refer to a state's obligation to protect and promote the language (and culture) of minorities, that what is "sufficient" should be interpreted in a generous and flexible way in line with the tolerance and respect for diversity which are cornerstones of truly democratic and open societies, and that the number of pupils required in order to be able to claim the right to be taught in one's own language should be quite small if a State's resources make it reasonably practical to accommodate them.

Both at the global and the European levels, there have also emerged in the last decades, in addition to these specific legal developments, a number of political and

other pronouncements which together create an acknowledgment of the desirability, at least for certain groups and in certain circumstances, of providing education in a minority, regional or indigenous language if not necessarily in all languages.[17] As impressive as this acknowledgement is, these documents still do not of themselves create a direct or implicit language right in education from a strictly legal point of view, despite suggestions to the contrary.[18]

It seems therefore, except for the two more recent Council of Europe treaties and to a limited extent for treaties dealing with indigenous populations, that legally binding conventions in international law either only recognised explicitly or implicitly a right to learn or to use one's own language as medium of instruction in private minority schools – as seems to be the case under Article 27 of the International Covenant on Civil and Political Rights – or left it for state authorities to determine whether or not to accommodate any language rights in state-provided education.

## A Phoenix Rises in International Human Rights

There is still a second important trend that needs to be considered which may have considerable impact on any language rights in education, and it comes from a somewhat surprising and recent reversal by the European Court of Human Rights and emerging case-law from a number of international bodies.

The prevalent belief until recently was that there is no language "component" to the right to education under traditional human rights treaties such as the European Convention on Human Rights and Fundamental Freedoms. This conclusion mainly had for its basis the 1968 judgment of the European Court of Human Rights in the *Belgian Linguistics Case*,[19] to the effect that the State has the absolute and unqualified right to determine the language of instruction in state schools under Article 2 of Protocol 1 (the right to education), even in combination with the prohibition of discrimination (article 14). The court in that case had recognised that Article 2 of the First Protocol was of no assistance to the petitioners since the right to education did not in itself enshrine the right to the establishment or subsidisation of schools in which education is provided in one's preferred language. In other words, it is on the basis of this judgment that it has generally been assumed that there is no language right in education under the European Convention. This interpretation however was always an incorrect reading of the decision. What the European Court actually stated was that, given the social and political context at the time in Belgium, the overall linguistic regime which mainly included monolingual Dutch (as well as German and French) language territories for the purposes of public schooling was not arbitrary or unjustified in the circumstances, and therefore was not discriminatory.

That traditionalist view is starting to make way for the recognition that rights such as non-discrimination may require the use of other languages in addition to an official one in areas of state activities, including state education. In other words, it may be unreasonable and unjustified in some circumstances – such as where a large number of people use a minority language – and therefore discriminatory not to provide for some use of an individual's language of choice by state authorities. This is in effect the reasoning which has recently been used in the majority position in *Diergaardt v Namibia*,[20] and can be extrapolated in a more considered reading of the *Belgian Linguistics Case*. More to the point, the European Court of Human Rights itself has revisited the issue of language rights in education in a way which directly contradicts the more traditionalist views.

In *Cyprus v Turkey*,[21] the Court noted that children of Greek-Cypriot parents in northern Cyprus wishing to pursue a secondary education through the medium of their (Greek) language were obliged to transfer to schools in the south, though children could continue their education at a Turkish or English-language school in the north.

The traditionalist view, premised on the European Court's previous reasoning in the *Belgian Linguistics Case*, had assumed that it was entirely at the discretion of state authorities to determine the language used in state schools, since there was simply no possible language right in education. The European Court, however, completely reversed its previous position by now acknowledging that there can be a language dimension in the right to education:

> 277. … Admittedly, it is open to children, on reaching the age of 12, to continue their education at a Turkish or English-language school in the north. In the strict sense, accordingly, there is no denial of the right to education, which is the primary obligation devolving on a Contracting Party under the first sentence of Article 2 of Protocol No. 1 (see the Kjeldsen, Busk Madsen and Pedersen v. Denmark judgment of 7 December 1976, Series A no. 23, pp. 25-26 § 52). Moreover, this provision does not specify the language in which education must be conducted in order that the right to education be respected (see… the *Belgian Linguistics judgment*, pp. 30-31).

The above paragraph appears to contain the Court's acknowledgement that it had seemed to indicate in the *Belgian Linguistic Case* that the right to education under the European treaty is *prima facie* "language neutral", since Article 2 of Protocol No. 1 "does not specify the language" of education. The Court even admits that the children are able to exercise their right to education – albeit in Turkish or English. Then it adds a completely new, and largely unexpected, dimension for most legal experts which had assumed that the *Belgian Linguistic Case* had precluded any expansion of a language right in education:

> 278. However, in the Court's opinion, the option available to Greek-Cypriot parents to continue their children's education in the north is unrealistic in view of the fact that the children in question have already received their primary education in a Greek-Cypriot school there. The authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language. Having assumed responsibility for the provision of Greek-language primary schooling, the failure of the ["Turkish Republic of Northern Cyprus"] authorities to make continuing provision for it at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue. It cannot be maintained that the provision of secondary education in the south in keeping with the linguistic tradition of the enclaved

> Greek Cypriots suffices to fulfil the obligation laid down in Article 2 of Protocol No. 1, having regard to the impact of that option on family life …

The European Court admits on the one hand that Article 2 of Protocol No. 1 is devoid of a linguistic component, but on the other hand goes on to say that there is a linguistic component for secondary education because state authorities in Northern Cyprus have previously provided Greek-language at the primary education level; to stop offering it after primary school would, according to the European Court, be so unrealistic as to "negate" the right to education. It thus concludes that in the circumstances, there is a right to education in the Greek language in secondary state schools.

The logic used by the European Court of Human Rights seems at first glance to be difficult to reconcile with its previous, and thoroughly argued, reasoning in the *Belgian Linguistics Case*. For example, the Court does not explain why it is "unrealistic" for the parents to keep their children in schools that teach in Turkish or English (assuming the children are fluent in either) instead of sending them to the southern part of the island. If one assumes that the children have some knowledge of English, it is to say the least perplexing why it would be unrealistic to have them pursue their secondary education in that language.

The only tentative explanation that the Court offers is that once authorities offer education in a minority language, "the failure…to make continuing provision for it at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue." This however is still difficult to reconcile with its previous reasoning in the *Belgian Linguistics Case* since it seems to suggest that language ought to be considered as an aspect to the right to education, whereas this was clearly rejected in its previous case law.

Among the various other interpretations possible is that the Court considered the "requirement" to travel south if children were to be educated in their own language as to be impractical, especially because of the effects this would have on family life. This does appear to have been considered by the Court in its conclusion, but it still does not address the central issue: the children did not have to travel south, as they had a right to education offered to them, albeit in Turkish or English.

Another explanation is that perhaps what the European Court was attempting to say was that the restrictions on state education in the Greek language were unreasonable and unjustified because they were so blatantly inappropriate, and therefore discriminatory.[22]

> *"In 2001 the European Court completely reversed its previous position by acknowledging that there can be a language dimension in the right to education."*

It is probably in this latter way that the judgment should be properly understood: otherwise, if the main reason - the absence of Greek language secondary education - was in breach of the right to education under Article 2 of Protocol No. 1, it would simply mean that the authorities of Northern Cyprus could avoid this human rights violation by simply abolishing all education in Greek provided in primary public schools: this is unlikely to be the direction and spirit of tolerance and inclusion the European Court had in mind.

Be that as it may, this judgment of the European Court of Human Rights now opens the door to a re-examination of the potential for language rights in education within the framework of traditional human rights provisions.

Finally, though not precisely identifying an unqualified right to be educated in a minority language in state schools, a number of UN treaty bodies have on occasion made reference to such a right in a variety of contexts, especially in application of the prohibition of discrimination, such as for example the Committee on the Elimination of Racial Discrimination:

> 174. The Committee is concerned about discrimination affecting the Korean minority… It is recommended that the State party undertake appropriate measures to eliminate discriminatory treatment of minorities, including Koreans, in this regard and to ensure access to education in minority languages in public Japanese schools.[23]

## Conclusion

While various documents frequently laud the benefits of language rights in education and other areas, these documents were either not treaties and therefore not a source of international legal obligations, or they contained ambiguous provisions which in the end seemed to leave the matter of the language of education in state schools to the discretion and determination of state authorities. Less controversially, it seems fairly clear that minorities and indigenous populations have the right to use their own language in private educational schools under Article 27 of the International Covenant on Civil and Political Rights, at the very least.

At the level of the Council of Europe, this legal obligation is now entrenched in two treaties: state authorities in countries having ratified these treaties must provide for education in a minority language where it is practical to do so, though acquisition of the official language must also always be assured. Future clarification of these legal norms is however still needed and likely to focus on the circumstances where it can be said to be practical, or not, for this right to be applied.

There are nevertheless two distinct trends that may have considerable impact in the future. There is first and foremost the development of legally binding treaties (with the Council of Europe) and other instruments that are confirming and solidifying the position and content language rights in education. Even if the instruments at the global level such as the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities do not create directly any legal obligations, they still indicate an acceptance of the validity of language rights in education for linguistic minorities.

Secondly, there is the even more recent trend of re-assessment of the

significance and impact of human rights norms, including the right to education and non-discrimination, by legal scholars and adjudicative and monitoring bodies such as the European Court of Human Rights and UN Human Rights Committee. Where once the traditionalist view had simply taken it for granted there was absolutely no possibility of a language right in education, the European Court of Human Rights has contradicted that conclusion and suggested such a right can indeed exist, though its exact scope and the conditions under which it can exist are far from clear. ■

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**1** Lebel, M., "Le choix de la langue d'enseignement et le droit international", *Revue Juridique Thémis*, 1994, 9(2): 231-232.

**2** There were a number of "minorities treaties" under the League of Nations which did recognise such a right for a number of countries. It was not however a universal system – involving mainly bilateral treaties and specific minorities – and it ended with the demise of the League. Nevertheless, the targeted minorities were to enjoy the same treatment in law and in fact as other nationals and in particular had an equal right to establish schools and institutions at their own expense. Such schools were distinct from state schools where the minority language was the language of instruction. Additionally, in those towns and districts where the minorities constituted a considerable proportion of the population, they would be assured of an equitable share in the enjoyment and application of sums provided out of public funds under state, municipal, or other budgets for educational, religious or charitable purposes. On the issue of the right to education under these treaties, see in particular Advisory Opinion on Minority Schools in Albania, (1935) Permanent Court of International Justice, Series A/B, No. 64, and Rights of Minorities in Upper Silesia (Minority Schools), (1928) Permanent Court of International Justice, Series A, No. 12: 132. For a historical description of the system and its operation, see de Varennes, F. (1996) Language, *Minorities and Human Rights*, Dordrecht: Kluwer Law International, Chapter 2.

**3** McKean, W. (1983), *Equality and Discrimination under International Law*, Oxford: Clarendon Press, Oxford, at p. 63.

**4** Article 23. The full text of the treaty is available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107>.

**5** Available at <http://www.unesco.org/most/rr4educ.htm>.

**6** See Article XII of the American Declaration of the Rights and Duties of Man (available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>), Article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights available at <http://www1.umn.edu/humanrts/oasinstr/zoas10pe.htm>), and Article 17 of the African Charter on Human and Peoples' Rights (available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm>). A further Inter-American document (the Proposed American Declaration on the Rights of Indigenous Peoples) recognises for indigenous peoples a right to be educated in their own language, but this document has not yet been approved as binding.

**7** Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

**8** See among others Coomans, F., *Clarifying the Core Elements of the Right to Education*, Netherlands Institute of Human Rights, SIM Special No. 18, F. Coomans and F. van Hoof (eds.), in cooperation with K. Arambulo, J. Smith and B. Toebes, "The right to complain about economic, social and cultural rights: proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", 1995, p. 8.

**9** The communication in *Waldman v. Canada*, Communication 694/1996, CCPR/C/67/D/694/1996. Decision of 3 November 1999 dealt only with a situation where public authorities only provided financial assistance to Catholic private schools in Ontario. The Jewish complainants argued mainly that this was discriminatory, and the UN Human Rights Committee concurred, indicated that "the differences in treatment between the Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the author's religion, which are private by necessity, cannot be considered reasonable and objective". This therefore constituted discrimination contrary to Article 26 of the ICCPR.

**10** Article 28. Full text available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

**11** Available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

**12** Available at <http://www.unhchr.ch/html/menu3/b/d_minori.htm>.

**13** A final draft was approved by the UN Human Rights Council (Resolution 2006/2) and submitted to the General Assembly for consideration and, perhaps, eventual approval. One should however be careful with this document since, as a mere draft, it cannot be considered to represent a formal statement from the UN, since this will require a formal resolution at the General Assembly. Text of the final draft is available at <www.ohchr.org/english/issues/indigenous/docs/declaration.doc>

**14** As a "framework" treaty, this convention is not considered by the Council of Europe as involving any immediate and directly enforceable rights for individuals *per se*, but is seen as requiring some enacting legislation by state parties. Some countries such as Germany, however, have interpreted its obligations differently, indicating that once ratified a treaty becomes enforceable in German law. The text of this treaty can be found at <http://conventions.coe.int/treaty/en/Treaties/Html/157.htm>. For a good overview of the practice of the Advisory Committee to the Framework Convention on Article 14 and a minority's right to education in or teaching of its language, see Commentary on Education under the Framework Convention for the Protection of National Minorities, ACFC/25DOC(2006)002.

**15** It should be pointed out that this treaty does not create directly any rights as such which individuals are entitled to invoke. It is strictly speaking only supposed to create obligations on state parties to the treaty. The text of the Charter is available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/148.htm>.

**16** de Varennes, F. and Thornberry, P. (2005) "Article 14", in M. Weller (ed) *The Rights of Minorities*, Oxford Commentaries on International Law, Oxford University Press, pp. 397-419.

**17** Amongst the more prominent are the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the draft UN Declaration on the Rights of Indigenous Peoples, the Organisation on Security and Cooperation in Europe's Document of the Copenhagen Meeting of the Conference on the Human Dimension, the The Hague Recommendations regarding the Education Rights of National Minorities, as well as a very large number of resolutions from bodies such as the European Parliament.

**18** Smith, R., "Mother Tongue Education and the Law: A Legal Review of Bilingualism with Reference to Scottish Gaelic", *International Journal of Bilingual Education and Bilingualism*, 2003, 6(2): 130-132.

**19** Cases relating to certain aspects of the laws on the use of languages in education in Belgium, judgment of 23 July 1968, series A, No. 6. A group of French-speaking parents living near Brussels sought to have their children to be educated in French. In six communes in this region, French was only allowed as the language for primary state education, but this right was not extended to French-speaking children whose parents lived outside the communes and wished to send their children to those schools, while Dutch schools in the same communes could accept any child, regardless of the residence or language of his or her parents. Among other arguments, the applicants claimed that this amounted to discrimination, since the Belgian legislation prevented, or severely restricted, French-language education in these communes, as well as prevented the applicants' children from attending those French classes that did exist in some cases.

**20** *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community)* et al. *v Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000), available at <http://www1.umn.edu/humanrts/undocs/session69/view760.htm>.

**21** Judgment of 10 May 2001, Grand Chamber, available at <http://www.hri.ca/fortherecord2001/euro2001/documentation/judgments/applno25781-94.htm>.

**22** de Varennes, F., "The right to education and minority language", *Eumap.org* (2004), at <http://www.eumap.org/journal/features/2004/minority_education/edminlang/>.

**23** Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan. 27/04/2001. CERD/C/304/Add.114. The CERD has in fact commented on a number of occasions on "mother-tongue education" which means to indicate the Committee considers such matters to potentially involve issues of discrimination: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Albania. 10/12/2003. CERD/C/63/CO/1. See additionally the Concluding Observations of the Committee on the Elimination of Racial Discrimination: Latvia. 10/12/2003. CERD/C/63 /CO/7, where it seems to indicate that private minority schools teaching in Russian must have access to funding on a non-discriminatory basis.

# Bridging the Divide: Education and Human Rights in Northern Ireland

**Laura Lundy**

Northern Ireland's education system is an interesting subject for exploring the impact of the right to education, not only because it is emerging from over thirty years of violent conflict between its Protestant and Catholic communities but also because the system reflects the wider divisions in Northern Irish society. Schools in Northern Ireland are almost completely religiously segregated in terms of their pupil profile. Protestant children generally attend state-owned controlled schools (managed by local education authorities) and Catholic pupils generally attend state-funded voluntary schools which are in the ownership of the Catholic Church. Only five per cent of children attend 'integrated' (mixed religion) schools and a smaller number still attend Irish medium schools – schools in which instruction is provided mainly through the Irish language (a language associated mainly with the Catholic community). The high level and varying types of segregation within schools has meant that Northern Ireland's education system has provided a venue in which the jurisdiction's complex religious, social and political divisions find a public outlet and therefore a setting in which claims that human rights are being infringed arise frequently. The objective of this article is to evaluate what the human rights discourse has contributed to Northern Ireland's school system, focusing on two of the issues which have proved most contentious: disputes about equity in school funding and the use of schools as venues for political protest.

## Equity in school funding

The fact that Northern Ireland's school system is highly segregated has meant that it has been a breeding ground for disputes and litigation on the issue of equality in school funding. The grievances date to the partition of Ireland in 1921. Following partition, the new Unionist (Protestant) administration in Northern Ireland sought to overhaul the organisation of schools. Existing schools were offered the opportunity to transfer their assets to the state in return for positions on the school's management committee.[1] While Protestant-owned schools availed themselves of the opportunity, the Catholic Church was suspicious of the new Northern Ireland state, viewing the process of transfer as a threat to Catholic education. Hence Catholic schools chose to retain their voluntary status, and secured their autonomy by accepting a lower level of state funding (initially 65 per cent and then 85 per cent) towards the capital costs of the school.[2] The formation of the two newer sectors (integrated and Irish medium) in the late 1970s and early 1980s added to the potential for intersectoral comparison and therefore an increased likelihood of contention.

Three cases have addressed some of these issues. In the first decision from 1978, *X and Y v United Kingdom*, an application to the European Court of Human Rights, it was argued that the reduced levels of capital funding (which amounted to 85 per cent of the normal total) received by integrated schools amounted to a breach of parents' rights to have their children educated in accordance with their philosophical convictions under Article 2 of the First Protocol of the European Convention on Human Rights (ECHR) i.e. their belief that children of different religions should be educated together.[3] In the *Belgian Linguistics Case*, the European Court of Human Rights had established that states had a wide discretion as to how to regulate their education systems and in particular how they should be funded.[4] In the light of this, the application in *X and Y* was deemed inadmissible by the European Commission of Human Rights who considered that the reduced funding was an appropriate offset for the increased autonomy in the school's management structures.

The second funding case arose out of the government's decision in 1989 to create a new category of school – the grant-maintained integrated school. These schools are required by law to have a reasonable balance of both Protestant and Catholic pupils and are eligible for full funding for capital and recurrent costs. When they were established, the Catholic Bishops initiated a judicial review in which they argued that the funding allocation for integrated schools discriminated against Catholics and was therefore contrary to the religious discrimination provisions of the Northern Ireland Constitution Act 1973. Section 19 of the 1973 Act made it unlawful for a public body to "discriminate or aid or incite another person to discriminate against a person or class of person on the ground of religious belief or political opinion".[5] In *In Re Daly's Application*, the Catholic Bishops argued that the higher levels of funding received by integrated schools (at a time when Catholic Schools received only 85% of capital costs) discriminated against Catholic children.[6] This was not accepted by the High Court of Northern Ireland which considered that, insofar as the new funding arrangements did discriminate, they discriminated against the Catholic and Protestant communities equally and were therefore not unlawful under the constitutional prohibition on religious discrimination.

The third case, *In Re Scullion's Application*, involved a challenge to the Department of Education's refusal to

provide funding and recognition to an Irish medium secondary school.[7] The school, like many such medium schools, was established on a charitable basis by parents and later sought recognition and state funding from the Department of Education. The legal issues in the *Scullion* case focused mainly on the Department's application of viability criteria which require the applicant school to show specified pupil enrolments before they will be accorded state recognition. The High Court decided that the Department was legally entitled to apply the criteria which it had used. However, it is interesting to note that, in support of this, the judge referred directly to the European Charter for Regional and Minority Languages. This was not binding on the court (the UK had not even ratified the Charter at that time). However, in deciding that it was both legitimate and necessary for the Department to apply criteria to determine which schools were eligible to receive ongoing state funding, the judge cited Article 8(1) of the European Charter which states that education in or of minority languages could be provided "where demand exists in a number considered sufficient".

A common feature of these three cases is that they were all unsuccessful in the domestic courts and yet, despite the apparent setbacks at the time, today all three categories of school (Catholic voluntary, integrated and Irish medium) have the option of 100 per cent state funding for both capital and recurrent costs. What happened to bring about this change and did the litigation, although unsuccessful, play a role as part of a wider social advocacy movement ?

The decision to provide 100 per cent funding to integrated schools was taken in 1989 as part of a series of measures designed to increase parental choice. At the same time, the Department of Education was placed under a legal obligation to support and facilitate the development of integrated schools.[8] In 1993, legislation was enacted which allowed voluntary schools (the vast majority of which are Catholic) to opt for full funding of capital costs.[9] This major change in policy was initiated in response to a body of academic research which indicated that lower levels of attainment in Catholic schools could be linked to the reduced capital funding.[10] The key change for the Irish medium sector came about as a result of the Belfast Agreement in 1998. Not only did the United Kingdom agree to ratify the European Charter for Regional and Minority Languages but domestic legislation was introduced which required the Department of Education to support and facilitate the development of Irish language education.[11] This ultimately led to a review of the viability criteria for the establishment of new Irish medium schools. It is interesting that each of these fundamental changes came about, not as a direct outcome of the court cases discussed earlier, but rather as a result of systematic campaigning in which litigation was simply one part of the overall strategy for effecting change. The reason why these funding concessions, which exceed the requirements of international minority rights standards, were acceded to by government can, of course, be traced to Northern Ireland's conflict and the government's desire to ensure that there is no differential treatment between the province's two main religious traditions. [12]

> *"The fact that Northern Ireland's school system is highly segregated has meant that it has been a breeding ground for disputes and litigation on the issue of equality in school funding."*

Where might litigation lie in the future? It seems unlikely that there will be many cases involving arguments about the levels of school funding. This is not to say that there are no outstanding grievances. There are ongoing complaints about the funding of schools in the newer sectors (i.e. integrated and Irish medium schools), both of which contend that they are disadvantaged by their relative newness. However, it is unlikely that the existing domestic and international legal frameworks would support a successful challenge. Instead, the areas which may be contentious in the future are likely to be school closures and the withdrawal of funding. As is the case elsewhere in the United Kingdom, Northern Ireland has a declining youth population and falling school rolls. This will inevitably entail a rationalisation of existing school provision which will, at times, be controversial. In England, there have been cases where it has been successfully argued that a closure of a single sex school amounts to a form of sex discrimination.[13] In Northern Ireland, it can be anticipated that similar arguments will be made on the basis of religion. If they do arise, they are likely to involve Article 14 of the ECHR which prohibits discrimination on a wide range of grounds including religion.[14] The European Court of Human Rights has been very conservative in its approach to Article 14 and it can only be invoked in relation to one of the substantive rights contained in the ECHR. However, it is also one of the provisions whose boundaries are being constantly tested in the courts and it will be interesting to see what emerges.

## Schools as venues for protests

Schools in Northern Ireland have often been the scene of political protests. Sometimes, these protests are internal, i.e. initiated by the students themselves. Disputes about the wearing of badges and emblems, which often espouse overtly political and often controversial causes, provide ongoing challenges for schools who generally pride themselves on maintaining a neutral arena in what is often a highly politically charged context. However, most of Northern Ireland's high profile disputes have not taken place within the school walls. Instead schools, constituting as they do one of the most public manifestations of Northern Ireland's religious divisions, frequently become the site of public protest. Sometimes these protests are directed at activities within the school, for example at the presence of the Police Service of Northern Ireland (PSNI) or images of British royalty in Catholic schools. Although none of these protests have resulted in any human rights legal challenges to date the most highly contentious dispute to date – that at Holy Cross Primary School – has been the focus of litigation. Holy Cross is a Catholic all-girls primary school situated in a part of Belfast which is predominantly Protestant. In June 2001, the residents blockaded the school throwing stones at the children and their parents as they tried to enter. The protest continued until the school closed for summer, during which time the police refused to let the children enter by the front gate. When school resumed in September 2001, the protest recommenced. This time the police, dressed in full riot gear, provided a human corridor along the route shielding the children from the

protestors. This arrangement continued for twelve weeks, during which time the protestors shouted sectarian insults, blew whistles and threw missiles at the children (including urine filled balloons). On 6 September 2001 a bomb was thrown at the children and their parents, injuring four police officers.

A mother of one of the children involved in the Holy Cross dispute initiated a legal action against the PSNI for its handling of the protests. The action was based primarily on alleged breaches of the European Convention on Human Rights. The plaintiff argued that the PSNI 's decision to allow the protest to continue, albeit from behind a wall of police officers, breached her daughter's right to life under Article 2, to be free from torture, inhuman and degrading treatment under Article 3 of the ECHR and to education under Article 2 of the First Protocol. It was also argued that the policing decision was in breach of Article 3 of the United Nations Convention on the Rights of the Child which requires the best interests of the child to be "a primary consideration" in decisions taken which affect them.

The Northern Ireland High Court judgment, In *Re E's Application*, issued in June 2004, found that there had not been any breach of any of the provisions of the European Convention on Human Rights.[15] In terms of Article 2, the Court considered that, although the child may have felt that her life was threatened, it had not been proved that the authorities knew or ought to have known at the time of the existence of a real and immediate risk. Nor was the judge prepared to hold that the "indignities, threats and naked intimidation" to which the applicant was subjected amounted to inhuman or degrading treatment, ruling that the policing strategy was within the range of reasonable responses. The court acknowledged that the police had to take into account the fact that a dispersal of the protestors might have been the "catalyst for widespread unrest elsewhere". The judge also considered that there had been no breach of Article 2 of the First Protocol as the children had not been denied their education "because of the sterling efforts of the parents and dedication of the teachers led by their admirable principal". Finally, the court did not consider that there had been a breach of Article 3 of the UNCRC as it had not been established that the police had not made the children's interests a primary consideration when determining their response. Although the judge was unequivocal in his condemnation of the protests, describing it as 'one of the most shameful and disgraceful episodes in the recent history of Northern Ireland', he refused to question the legitimacy of the policing strategy. While the incident was primarily concerned with ensuring that children could get to school safely, the court case focused on the policing response, an area where the courts have always been reluctant to substitute their judgment for that of those charged with keeping the peace. The decision was appealed to the Northern Ireland Court of Appeal in 2005. However, to date the appeal court has not issued a decision.

> *Litigation has its place, but there is perhaps no better way of embedding human rights principles in the fabric of the decision-making process than to have schools and educational interest groups embrace these standards as their own.*

## Conclusion

One of the side effects of the Northern Irish conflict is that lawyers in the jurisdiction have been familiar with human rights law for many years, in particular the ECHR.[16] Nonetheless, education rights as specified in the ECHR and interpreted by the European Court of Human Rights have provided stony ground on which to base litigation. The Holy Cross case is a prime example of this. In spite of the limited scope for successful court actions, international standards, such as those in the United Nations Convention on the Rights of the Child, have been deployed as very effective weapons in campaigns to raise standards in schools or to draw attention to deficiencies in provision. Aspects of the education system, most notably the levels of school funding, have been transformed as a direct result of public campaigns which drew on international human rights law for support. Thus, experience in Northern Ireland has demonstrated that international human rights standards can be harnessed by the educational community in their discussions with government in order to enhance educational provision for students. Litigation has its place, but there is perhaps no better way of embedding human rights principles in the fabric of the decision-making process than to have schools and educational interest groups embrace these standards as their own. ■

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*This article is adapted from Lundy, L, "Human Rights and Equality Litigation in Northern Ireland's Schools", Education Law Journal, 2004, 5(2): 82-90.*

1 See Akenson, D. H., (1973) *Education and Enmity*, Newton Abbott: David and Charles.

2 See , Dunn, S. 'A Short History of Education in Northern Ireland, 1920-1990', Annex B in the *Fifteenth Report of the Standing Advisory* Committee on Human Rights (1990), London: HMSO, pp. 49-96.

3 (1978) DR 179.

4 In the *Belgian Linguistics Case* (1968) EHRR 252 at p.281, the European Court of Human Rights stated that the right of access to education did not require states to "establish at their own expense, or to subsidise, education of any particular type or level" and further that access to education "by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals."

5 The provision is now contained in the Northern Ireland Act 1998, s. 76.

6 Unreported decision of the High Court of Northern Ireland, 5 October 1990.

7 Unreported decision of the High Court of Northern Ireland, 1995.

8 Education Reform (NI) Order 1989, article 64.

9 Education (NI) Order 1993, article 28.

10 R. Cormack, AM. Gallagher and R. Osborne, 'Religious Affiliation and Educational Attainment In Northern Ireland: The Financing of Schools in Northern Ireland' annex E in the *Sixteenth Report of the Standing Advisory Commission on Human Rights (1990-1991)*, London: HMSO, pp.117-212.

11 Article 89 of the Education (NI) Order 1989.

12 Lundy, L., 'From Act to Order: The Metamorphosis of Education Legislation', *Liverpool Law Review*, 1998, 20(1): 63-93.

13 *R v Secretary of State for Education and Science, ex p Keating* [1985] 84 LGR 469 in which parents successfully challenged the closure of a single sex *boys school. However, in R v Northamptonshire CC, ex parte K* [1994] ELR 397 the court considered that a closure due to falling school rolls did not amount to discrimination.

14 Article 14 states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

15 [2004] NIQB 35.

16 B. Dickson, 'Northern Ireland and the European Convention', Chapter 5 in B. Dickson (ed.) (1997) *Human Rights and the European Convention*, London: Sweet and Maxwell, p.182.

# The Right to Education for Disabled Students in England and Wales

**David Ruebain**

During the last decade, the rights of disabled students in England and Wales to receive the support that they require and to be treated fairly have been considerably strengthened. Broadly, the law has developed in two fundamental but distinct ways: (a) enhancing service rights, and (b) guaranteeing some new anti-discrimination rights.

Until 1983, the education of disabled children was determined by which of eleven categories they were placed in (these included the offensive: "backward"; and the frankly odd: "delicate"). Thankfully, the Education Act 1981 replaced this (at least officially) with a more "child-centred" approach, designed to ensure that each child with special educational needs (SEN) was individually considered and had educational provision determined through a process of assessment resulting in a legal document known as a statement of SEN. In addition, a legal right to inclusion within mainstream schools (albeit initially very limited) was introduced.

Since then, a series of court cases have established a number of further rights including that provision for children with SEN should be needs-led and not resource-led,[1] that local education authorities (LEAs) must arrange provision,[2] and that the process of identifying and arranging provision should be undertaken within strict time limits.[3] In the last ten years, parents have been given stronger rights of appeal against LEA decisions and the limited right to inclusion has been strengthened (although there remain circumstances where it may be denied).[4]

Meanwhile, advances in the rights of disabled students in further or higher education have been more limited. The arrangements for statements of SEN do not apply at this level. Instead, there are "target" obligations to secure courses which meet the needs of students with learning difficulties.[5] In addition, a specific financial benefit – Disabled Students Allowance – is meant to ameliorate the additional costs that a disabled student may face at college.

> *"Advances in the rights of disabled students in further or higher education have been limited."*

Finally, in September 2002, new anti-discrimination rights were introduced when the Disability Discrimination Act 1995 (DDA) was extended to cover both school and post-school education[6]. These will be strengthened in September 2007 when General Qualification Bodies (exam boards) are made subject to the DDA.[7]

So what rights do disabled students now have in education? Or, where students are children, what rights do their parents have since the process, although implicitly based on the principle of "best interests" of the child as elaborated in Article 3 of the UN Convention on the Rights of the Child (CRC), appears to provide little scope for acknowledging the rights of children to actively participate in decisions affecting them depending upon their own competences as guaranteed by Article 12 of the CRC.[8]

Firstly, if a child has SEN, i.e. a learning difficulty, including a disability,[9] which requires "special educational provision" (SEP) – additional or different educational provision[10] – they will usually be placed on a school's or nursery's SEN register and assisted through a special programme depending on their level of need. [11] If however, the child's needs are beyond what the school can provide, then they will be made the subject of an assessment process which may result in a statement of SEN.

The process of obtaining a statement may be commenced by a LEA of its own volition, or following a request from the child's parents or school.[12] An assessment involves the LEA obtaining reports from a number of individuals including the parents themselves, the child, a LEA educational psychologist, the school or early years provider, the health authority, social services and others.[13] At the conclusion of the assessment, the LEA will consider whether or not the evidence gathered indicates that the child requires a statement. If so, the LEA will produce a draft for consideration by the parents.[14] The LEA will invite comment on the draft,[15] including as to which school or other placement the parents consider appropriate for the child, before finalising the statement. It is at this point that the statement comes into force and the whole process should not exceed 26 weeks.[16]

Statements, if properly drafted, should set out all of a child's SEN, all of the SEP which will be arranged as well as the school or other placement.[17] It is has been held that the statement must achieve the requisite level of specificity so that everyone involved is clear as to what provision the child is entitled to and should be receiving.[18] If a parent wants his or her child to enter a mainstream school the LEA must arrange this unless that would be incompatible with the provision of education of other children.[19] There are also entitlements to special or independent schools depending on considerations of "efficient use of resources" and the school's ability to meet the child's needs.[20] Sometimes, parents seek funding for education other than at school (for example with home-based programmes) and LEAs can fund this but only if school based-provision is "inappropriate".[21]

If the parent is satisfied with what is set out in a statement no further action is required, the LEA must arrange the SEP and the school or nursery named in the statement must admit the child.[22] The statement will be reviewed at least once per year and will continue in force until it is amended, expires or the child leaves school. However, if the parent does not agree with the LEA's decision they have a right of appeal to the Special Educational Needs and Disability Tribunal for England (SENDIST) or Wales (SENTW) which can consider issues such as the failure to conduct statutory assessments or reassessments; the contents of the statement relating to the description of SEN, SEP) or the school or other placement); the refusal to amend a statement in order to name a different maintained (state) school and ceasing to maintain statements.

However, there are other issues, for example non-provision of SEP or significant delays in carrying out assessment, which do not fall within the Tribunals' jurisdiction and therefore for which alternative remedies, including use of complaints procedures and, occasionally, court proceedings, may have to be sought.

In addition to the SEN provision, since 1 September 2002, amendments to the DDA have extended its provisions to schools and colleges. As with those DDA provisions dealing with employment and services, discrimination in education is defined as arising when a disabled person is treated less favourably for a reason relating to his/her disability without justification and where a "reasonable adjustment" has not been made,[23] the reasonableness being dependent on a number of relevant factors such as cost, practicality, disruption to other students and potential benefits.[24] Victimisation of anyone who assists a disabled student in bringing a complaint is also prohibited.[25] Disabled students in post-school education are also protected against direct discrimination and harassment.[26] Less favourable treatment can only be justified in limited circumstances, e.g. where it is necessary to maintain academic or other prescribed standards.

In addition, LEAs and schools are required to prepare accessibility strategies and plans[27] with a view to: (a) increasing the extent to which disabled pupils can participate in a school's curriculum; (b) improving the physical environment of schools for the purpose of increasing the extent to which disabled pupils are able to take advantage of education and associated services; and (c) improving the delivery to disabled pupils, within a reasonable time and in ways which are determined after taking account of their disabilities and any preferences expressed by them or their parents, of information which is provided in writing for pupils who are not disabled.

*"Discrimination in education is defined as arising when a disabled person is treated less favourably for a reason relating to his/her disability without justification and where a "reasonable adjustment" has not been made."*

Where discrimination has arisen for school aged children, complaints are brought to SENDIST/SENTW or to Independent Appeal Panels (depending on the nature of the complaint). These do not have powers to order financial compensation but may order training and guidance for staff, the involvement of a local education authority equal opportunities officer in the school; changes to policies, practices and procedures, a replacement trip or additional tuition for a disabled child who has missed out on a school experience, the relocation of, for example, the school library, to make it more accessible (short of requiring physical adjustments), the admission of a disabled child to a school, or a written apology and/or re-instatement to the school. Where discrimination arises in post-school education, court proceedings in a county court may be brought, resulting in compensation and, where necessary, an injunction.

In December 2006, LEAs (and, from 2007, schools) will be subject to new Disability Equality Duties,[28] requiring them to produce Disability Equality Schemes which set out how they intend to eliminate unlawful discrimination and harassment of disabled people and promote equality of opportunity. These new duties could, at least in theory, provide a significant lever for change, resulting in better provision for disabled children. ■

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1 *R v Secretary of State for Education and Science ex parte E* (1992) 1 FLR 277.
2 *R v London Borough of Harrow ex parte M* [1997] ELR 62.
3 Regulations 12 and 17 of the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001, SI2001/3455 (the Consolidation Regulations) and the virtually identical regulations for Wales.
4 The right to inclusion is contained in s 316 of the Education Act 1996 as amended by the Special Educational Needs and Disability Act 2001.
5 See s13 of the Learning and Skills Act 2000.
6 These amendments were introduced by Part 2 of the Special Educational Needs and Disability Act 2001.
7 Section 15 of the Disability Discrimination Act 2005 introducing sections 31AA-31AF into the Disability Discrimination Act 1995.
8 Article 23 of the CRC recognizes that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate their active participation in the community; Article 23(3) guarantees education provision designed to ensure fullest possible social integration.
9 Education Act 1996, section 312(1)-(3).
10 Education Act 1996, section 312(4).
11 School Action or School Action Plus for those in school or Early Years Action or Early Years Action for very young children.
12 Sections 323, 329 and 329A of the Education Act 1996.
13 The assessment process is governed by s 323 and Schedule 26 of the Education Act 1996, together with the Consolidation Regulations.
14 Schedule 27, para. 2(1) of the Education Act 1996.
15 Education Act 1996, Schedule 27, para. 2B, and the Consolidation Regulations, Schedule 1
16 Time limits are set out in the Consolidation Regulations, Regulations 12 and 17
17 The format of a statement is prescribed by the Consolidation Regulations, Regulation 16 and 8Schedule 2.
18 See s324 of the Education Act 1996 as interpreted by *L v Clarke (Chair of Special Educational Needs Tribunal) & Somerset County Council* (1998) ELR 129.
19 Section 316(3) of the Education Act 1996.
20 Section 9 of the Education Act 1996.
21 Section 319 of the Education Act 1996.
22 Section 324 of the Education Act 1996.
23 Sections 28B and 28S of the Disability Discrimination Act 1995.
24 An example of a reasonable adjustment could be ensuring that blind or partially sighted students are able to access all of the course materials.
25 Section 55 of the Disability Discrimination Act 1995.
26 These prohibitions were introduced by the Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006 (SI 2006/1721) and came into force on 1 September 2006.
27 Sections 28D and 28E of the Disability Discrimination Act 1995.
28 Disability Discrimination Act 1995, Part 5A .

# Promoting Accurate and Objective Sexuality Education

**Christina Zampas and Pardiss Kebriaei**

Comprehensive sexual and reproductive health education for young people is alarmingly inadequate or completely lacking in many countries across the globe. Where information is provided, it is often of the most elementary sort – a few hours of lecture on the biological aspects of reproduction as part of a broader subject, for example – or presented by teachers with no specialised training in the subject matter or effective teaching methodologies. Even more worrying are biased and ideologically-driven sexuality education[1] programmes, which are proliferating in classrooms in every region of the world, often in contexts where youth have no good alternative sources of information in schools or elsewhere. Generally speaking, these types of programmes – abstinence-only teaching among them – are characterised by several problematic features, including medically inaccurate and biased information about contraception, abortion and AIDS; messages that discourage the use of condoms, use fear and shame to motivate abstinence outside of marriage, and promote gender stereotypes as fact.[2] Research shows that such programmes are not only largely ineffective in delaying sexual activity, but are in fact harmful in undermining the use of contraception and safe practices by young people when they do become sexually active. Beyond the health-related harmful consequences of such programmes, abstinence-only-until-marriage programmes in particular blatantly discriminate by their terms against gay and lesbian youth, who cannot legally marry in most countries.

Yet the need for comprehensive, evidence-based sexual and reproductive health education for youth has never been more critical. Early and unwanted pregnancy and motherhood have been recognised as global public health concerns.[3] Rates of HIV infection and other sexually transmitted infections (STIs) are growing at alarming rates among young people, with over 40 per cent of new HIV infections occurring among 15-24 year-olds.[4] Among this group, young women outnumber young men by two to one.[5] Even if abstinence-only programmes worked in delaying sexual activity until marriage, the very premise that marriage is an effective protection in avoiding HIV is increasingly proving to be a dangerous presupposition. For example, research has shown that young married women have greater rates of HIV infection than their unmarried counterparts in certain contexts.[6] Recent reports from some countries show that the highest percentage of people contracting HIV/AIDS are married.[7] In this context, access to comprehensive information that responds to the realities of adolescents' lives and can help empower and protect them is literally a matter of life and health.

## Access to sexuality education as an international human right

### United Nations treaty bodies

Access to sexual and reproductive health education is not only imperative public policy, but a legal duty of governments under international law. International human rights treaties provide the legal foundation for the right to sexual and reproductive health education. At the UN level, individual treaty monitoring bodies, which oversee governmental compliance with treaties, have articulated the links between sexual and reproductive health education and the broad guarantees of human rights in regional and international treaties. Concluding observations and general recommendations and comments from the Committee for the Elimination of All Forms of Discrimination (CEDAW) Committee, the Children's Rights Committee, the Human Rights Committee, and the Committee on Economic, Social and Cultural Rights have generally framed the right to sexual education in the context of ensuring the right to health.[8] All four have criticised states parties for not ensuring access to sexual education and have frequently asked states parties to implement sexual education programmes.[9] They have often discussed sexual education as a means to reduce maternal mortality, rates of abortion, adolescent pregnancies, and rates of HIV/AIDS.[10] They have asked states to remove barriers hindering access of adolescents to information on HIV preventative measures, such as condoms, and to reintroduce sexual education in schools.[11] While the committees have not included very detailed measures on how to improve sexual education, some have identified at least two areas in need of improvement: that sexual education programmes should include information on gender relations and be free of prejudice and discrimination, and that information should be accurate and objective.[12]

UN treaty monitoring bodies have recently addressed the growing trend of inaccurate and unscientifically based information by requiring that sexual and reproductive health education be accurate and objective. For example, the Committee on Economic, Social and Cultural Rights recommends that in order for state parties to comply with this right they should refrain from "…censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information."[13] In a recent concluding observation to the Philippines, the Children's Rights Committee recommended that the government should continue to "…[p]rovide adolescents with accurate and comprehensive information about HIV/AIDS, including condom use, in schools ..."[14] The Human Rights Committee has also explicitly recom-

mended that the Ministry of Education in Poland "… ensure that schools include accurate and objective sexual education in their curricula.[15]

The CEDAW Committee has addressed the need to ensure sexual education free of discrimination, and in particular the specific needs of adolescent girls and women by tackling the unequal gender relations in such programming. The Committee's General Recommendation on Women and Health states: "… [s]tates parties should ensure, without prejudice or discrimination, the right to sexual health information, education and services for all women and girls …. In particular, States parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed programmes that respect their right to privacy and confidentiality."[16] The CEDAW Committee in a concluding observation to Slovenia explicitly asked the state party to include the topics of gender relations and violence against women in its sexual education programmes.[17]

**Regional courts**

Jurisprudential support for the right to sexual and reproductive health education can also be found in regional human rights treaties, but is less developed. However, it is worth noting one case from a regional human rights body that directly addressed the issue of sexuality education in schools. The European *Court of Human Rights, in Kjeldsen, Busk Madsen and Pederson v Kingdom of Denmark* (1976), held that compulsory sexuality education introduced in state primary schools did not violate the rights of parents of school-age children to education, non-discrimination, privacy, and freedom of religion. The Court decided that the information was provided in an objective and pluralistic manner, and did not constitute indoctrination or disrespect parents' religious or philosophical views. Importantly, the Court noted that the Danish state had a public interest in informing adolescents about sex-related issues. The Court affirmed that "by providing children in good time with explanations [the state] considered useful, [it was] attempting to warn them against phenomena it viewed as disturbing, for example, the excessive frequency of births out of wedlock, induced abortions and venereal diseases."[18] The Court also gave weight to the fact that those parents who continued to object were free to send their children to private schools or educate them at home.

> *Biased and ideologically-driven sexuality education programmes, are proliferating in classrooms in every region of the world, often in contexts where youth have no good alternative sources of information in schools or elsewhere.*

**International policy**

International consensus documents and policy guidance issued by United Nations agencies affirm the right to and critical need for comprehensive sexuality education for youth. Key among the consensus documents are the International Conference on Population and Development's (ICPD) twenty-year Programme of Action and its subsequent five- and ten-year reviews,[19] and the Beijing Platform for Action and its five-year review, all of which set forth specific objectives and actions relating to sexuality education. These documents urge governments to provide and support sexual and reproductive health education both as part of their commitment to reproductive health and rights,[20] and also as a strategy to address the public health imperatives of reducing adolescent pregnancies and unsafe abortion,[21] whilst preventing the transmission and spread of STIs and HIV/AIDS among young people.[22] The five-year review of the ICPD urgently requires governments to "immediately develop, in partnership with youth… [and] educators, youth-specific HIV education and treatment projects, with special emphasis on developing peer-education programmes."[23] The subsequent review of Beijing expounds on the relationship between sexuality education and reduced risk of STIs and HIV/AIDS: "experience shows that educational programmes for young people can lead to a more positive view on gender relations and gender equality, delayed sexual initiation and reduced risk of sexually transmitted infections."[24]

To be effective, reproductive and sexual health education should begin in primary school and continue through all levels of formal and non-formal education.[25] Adolescents themselves should be actively involved in planning, implementing and evaluating programmes,[26] and schools, as with "all who are in a position to provide guidance to adolescents concerning responsible sexual and reproductive behaviour," should receive specific training.[27] These documents specifically recognise the importance of such education for boys and young men in promoting respect for women's self-determination and shared responsibility in matters of sexuality and reproduction, including the prevention of STIs.[28] They also draw special attention to the needs of vulnerable and disadvantaged youth in the design of education programmes.[29] Importantly, these documents also contain ammunition against some of the most problematic aspects of biased sexuality education programmes, namely, discriminatory gender stereotypes that often permeate their messages and curricula,[30] and misleading and inaccurate information on issues such as the efficacy of contraception.[31]

In its policy recommendations on adolescent health issues, the World Health Organisation echoes the need for sexuality education for adolescents and provides guidance on the appropriate content and implementation of such programmes. Curricula should include information on reproduction and contraception, which should be "described, their modes of action explained, and their advantages and disadvantages openly discussed – including with respect to the prevention of [STIs]."[32] Condoms are specifically described as "the single best protective option for many adolescents."[33] In contrast, natural family planning methods are not recommended for adolescents, recognising that "adolescents are very frequently unable to comply with the stringent requirements for the correct and consistent use of [these] methods."[34] Similarly discouraged is the abstinence-only approach to sexuality education.[35] Appropriate training is also recommended for all teachers of sexuality education "so that

they are well informed about sex and birth control and are able to communicate with adolescents in a confidential manner, and without taking a moralising attitude."[36] Like other international standards, World Health Organisation recommendations similarly call for sexuality education programmes to begin in primary school, elaborating that in developing countries in particular, girls in the first classes of secondary school face the greatest risk of the consequences of sexual activity. Such an approach also ensures that students who are unable to attend secondary school can still have access to sexuality education.[37] ■

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**1** "Sexuality education" refers to education on all issues of a sexual nature and is alternatively called "sex education" or "sex and relationships education".

**2** See Sexuality Information and Education Council of the United States (SIECUS), *In Their Own Words: What Abstinence-Only-Until-Marriage Programmes Say* (2005).

**3** See World Health Organisation (WHO), *Adolescent Pregnancy: Issues in Adolescent Health and Development, at vi* (2004), [hereinafter WHO, *Adolescent Pregnancy*].

**4** UNICEF, *Facts on Children, HIV and AIDS*, <http://www.unicef.org/media/media_35904.html >

**5** See Heyzer, Noeleen, Executive Director of UNICEF, quoted in SIECUS, *International Women's Day 2004 Highlights Women's Vulnerability to HIV/AIDS* (2004).

**6** SIECUS, *'I Swear I Won't!' A Brief Explanation of Virginity Pledges* (2005).

**7** Bagala, Andrew, 'Uganda: Married Couples Top HIV Infection Rates', *The Monitor*, 4 December 2006, available at <http://allafrica.com/stories/200612041050.html>

**8** See Committee on the Rights of the Child, *Gen. Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child,* U.N. Doc. CRC/GC/2003/4 (2003). Committee on Economic, Social, and Cultural Rights, *Gen. Comment 14: The Right to the Highest Attainable Standard to Health*, para. 34, U.N. Doc. E/C.12/2000/4 (2000). Committee on the Elimination of Discrimination against Women, *Gen. Recommendation 24: Women and Health* (1999).

**9** See *Concluding Observations of the Committee on the Elimination of Discrimination against Women*: Burundi, 02/02/2001, U.N. Doc. A/56/38, para. 62; Democratic Republic of the Congo, 01/02/2000, U.N. Doc. A/55/38, para. 228; Jamaica, 02/02/2001, U.N. Doc. A/56/38, para. 224; Kazakhstan, 02/02/2001, U.N. Doc. A/56/38, para. 106; Lithuania, 16/06/2000, U.N. Doc. A/55/38, para. 159; Mongolia, 02/02/2001, U.N. Doc. A/56/38, para. 274; Nicaragua,31/07/2001, U.N. Doc. A/56/38, para. 303; Republic of Moldova, 27/06/2000, U.N. Doc. A/55/38, para. 110; Romania, 23/06/2000, U.N. Doc. A/55/38, para. 315; Uzbekistan, 02/02/2001, U.N. Doc. A/56/38, paras. 185–186; Vietnam, 31/07/2001, U.N. Doc. A/56/38, paras. 266–267. *Concluding Observations of the Committee on the Rights of the Child:* Bhutan, 09/07/2001, U.N. Doc. CRC/C/15/Add.157, para. 45; Cambodia, 28/06/2000, U.N. Doc. CRC/C/15/Add.128, para. 53; Comoros, 16/10/2000, U.N. Doc. CRC/C/15/Add.141, para. 36; Egypt, 26/01/2001, U.N. Doc. CRC/C/15/Add.145, para. 44; Georgia, 28/06/2000, U.N. Doc. CRC/C/15/Add.124, para. 47; Iran (Islamic Republic of), 28/06/2000, U.N. Doc. CRC/C/15/Add.123, para. 44; Jordan, 02/06/2000, U.N. Doc. CRC/C/15/Add.125, para. 48; Kyrgyzstan, 09/08/2000, U.N. Doc. CRC/C/15/Add.127, para. 46; Latvia, 26/01/2001, U.N. Doc. CRC/C/15/Add.142, paras. 39, 40; Lithuania, 26/01/2001, U.N. Doc. CRC/C/15/Add.146, paras. 39, 40; Saudi Arabia, 26/01/2001, U.N. Doc. CRC/C/15/Add.148, para. 38; Slovakia, 23/10/2000, U.N. Doc. CRC/C/15/Add.140, para. 38; Tajikistan, 16/10/2000, U.N. Doc. CRC/C/15/Add.136, para. 41; Turkey, 09/07/2001, U.N. Doc. CRC/C/15/Add.152, para. 53; The Former Yugoslav Republic of Macedonia, 23/02/2000, U.N. Doc. CRC/C/15/Add.118, para. 31. *Concluding Observations of the Committee on Economic, Social, and Cultural Rights:* Bolivia, 21/05/2001, U.N. Doc. E/C.12/1/Add.60, para. 43; China, 13/05/2005, U.N. Doc. E/C.12/1/Add.107 para. 100; Poland, 19/12/2002, U.N. Doc. E/C.12/1/Add.82, paras. 28, 50; Senegal, 24/09/2001, U.N. Doc. E/C.12/1/Add.62, para. 47; Ukraine, 31/08/2001, U.N. Doc. E/C.12/1/Add.65, para. 31. *Concluding Observations of the Human Rights Committee:* Poland, 02/12/04, U.N. Doc. CCPR/CO/82/POL, para. 9.

**10** See *Concluding Observations of the Committee on the Elimination of Discrimination against Women:* Belize, 01/07/99, U.N. Doc. A/54/38, paras. 56, 57; Burundi, 02/02/2001, U.N. Doc. A/56/38, para. 62; Chile, 09/07/99, U.N. Doc. A/54/38, paras. 226–227; Dominican Republic, 14/05/98, U.N. Doc. A/53/38, para. 349; Greece, 01/02/99, U.N. Doc. A/55/38, paras. 207–208; Nepal, 01/07/99, U.N. Doc. A/54/38, para. 148; Slovakia, 30/06/98, U.N. Doc. A/53/38/Rev.1, para. 92; Spain, 01/07/99, U.N. Doc. A/54/38, para. 266; United Kingdom of Great Britain and Northern Ireland, 01/07/99, U.N. Doc. A/54/38, paras. 309–310. *Concluding Observations of the Committee on the Rights of the Child*: Cambodia, 28/06/2000, U.N. Doc. CRC/C/15/Add.128, para. 52; Colombia, 16/10/2000, U.N. Doc. CRC/C/15/Add.137, para. 48; Dominican Republic, 21/02/2001, U.N. Doc. CRC/C/15/Add.150, para. 37; Ethiopia, 21/02/2001, U.N. Doc. CRC/C/15/Add.144, para. 61; Grenada, 04/02/2000, U.N. Doc. CRC/C/15/Add.121, para. 22; Kyrgyzstan, 09/08/2000, U.N. Doc. CRC/C/15/Add.127, para. 45; Malta, 02/06/2000, U.N. Doc. CRC/C/15/Add.129, para. 39; Peru, 28/01/2000, U.N. Doc. CRC/C/15/Add.120, para. 24; Russia, 30/09/2005, U.N. Doc. CRC/C/15/Add.274, para. 56; The Former Yugoslav Republic of Macedonia, 23/02/2000, U.N. Doc. CRC/C/15/Add.118, para. 41; Slovakia, 3/10/2000, U.N. Doc. CRC/C/15/Add.140, para. 38; Tajikistan, 16/10/2000, U.N. Doc. CRC/C/15/Add.136, para. 41; Turkey, 09/07/2001, U.N. Doc. CRC/C/15/Add.152, para. 53. *Concluding Observations of the Committee on Economic, Social, and Cultural Rights*: Bolivia, 21/05/2001, U.N. Doc. E/C.12/1/Add.60, para. 43; Honduras, 21/05/2001, U.N. Doc. E/C.12/1/Add.57, para. 27; Libyan Arab Jamahiriya, 25/11/2005, U.N. Doc. E/C.12/LYB/CO/2; Senegal, 31/08/2001, U.N. Doc. E/C.12/1/Add.62, para. 47 ; Ukraine, 31/08/2001, U.N. Doc. E/C.12/1/Add.65, para. 31.

**11** See *Concluding Observations of the Committee on Economic, Social, and Cultural Rights*: Poland, 29/07/99, U.N. Doc. CCPR/C/79/Add.110, para. 11; Zambia, 13/05/2005, U.N. Doc. E/C.12/1/Add.106.

**12** See, e.g., *Concluding Observations of the Human Rights Committee*: Poland, 82nd Sess., para. 9, U.N. Doc. CCPR/CO/82/POL. (2004). Committee on the Elimination of Discrimination against Women, *Report*, para. 120, 16th and 17th Sess., U.N. Doc. A/52/38/Rev.1 (1997).

**13** Committee on Economic, Social, and Cultural Rights, *Gen. Comment 14: The Right to the Highest Attainable Standard to Health*, para. 34, U.N. Doc. E/C.12/2000/4 (2000).

**14** *Concluding Observations of the Committee on the Rights of the Child*: Philippines, 39th Sess., para. 65, U.N. Doc. CRC/C/15/Add.259 (2005).

**15** *Concluding Observations of the Human Rights Committee*: Poland, 82nd Sess., para. 9, U.N. Doc. CCPR/CO/82/POL. (2004).

**16** Committee on the Elimination of Discrimination against Women, *Gen. Recommendation 24: Women and Health* (1999).

**17** Committee on the Elimination of Discrimination against Women, *Report*, para. 120, 16th and 17th Sess., U.N. Doc. A/52/38/Rev.1 (1997).

**18** *Kjeldsen, Busk Madsen and Pederson v Denmark*, ECtHR (ser. A) (1976).

**19** *Programme of Action of the International Conference on Population and Development*, Cairo, Egypt, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995) [hereinafter *ICPD Programme of Action*].

**20** See *ICPD Programme of Action, supra* note 18, paras. 7.3, 7.37, 7.46; see also *Key Actions for the Further Implementation of the Programme of Action of the International Conference on Population and Development*, U.N. GAOR, 21st Special Sess., New York, United States, June 30 – July 2, 1999, U.N. Doc. A/S-21/5/Add.1 (1999) [hereinafter *ICPD+5 Key Actions Document*], para. 73(a); *Beijing Declaration and Platform for Action,* Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, U.N. Doc. A/CONF. 157/23 (1993) [hereinafter *Beijing Declaration and Platform for Action*], para. 107(a), (e), (g).

**21** See *ICPD Programme of Action, supra* note 18, paras. 7.44(a), (b); *see also* para. 7.47. See also *ICPD +5 Key Actions Document, supra* note 19, paras. 35(b), 73(c), (e).

**22** See *ICPD Programme of Action, supra* note 18, paras. 8.29(a), 8.31, 8.32; *see also* para. 7.43; *Further actions and initiatives to implement the Beijing Declaration and Platform for Action*, U.N. GAOR, 23rd Special Sess., New York, United States, June 5-9, 2000, U/N. Doc. A/Res/S-23 (2000) [hereinafter *Beijing +5 Review Document*], para. 44.

**23** *ICPD +5 Key Actions Document, supra* note 19, para. 68.

**24** *Beijing +5 Review Document, supra* note 21, para. 44.

**25** See *ICPD Programme of Action, supra* note 18, paras. 11.9, 11.24.

**26** See *ibid*., paras. 6.15, 7.43, 7.47; see also *ICPD +5 Key Actions Document*, para. 73(c).

**27** *ICPD Programme of Action, supra* note 18, para 7.48; *see also ICPD +5 Key Actions Document, supra* note 19, para. 73(e).

**28** See *ICPD Programme of Action, supra* note 18, paras. 7.8, 7.41; *see also Beijing Declaration and Platform for Action, supra* note 19, para. 107(a).

**29** See *ICPD +5 Key Actions Document, supra* note 19, para. 73(c).

**30** See *ICPD Programme of Action, supra* note 18, paras. 4.19, 11.13.

**31** See *ibid*., para 7.5(a).

**32** WHO, *Adolescent Pregnancy, supra* note 2, at 63.

**33** WHO, *Contraception; Issues in Adolescent Health and Development*, at 11 (2004).

**34** *Ibid*., at 34.

**35** WHO, *Adolescent Pregnancy, supra* note 2, at 13.

**36** *Ibid*., at 63.

**37** *Ibid.*

# International Law Reports

The case summaries in this issue were kindly prepared for the *Bulletin* by lawyers from the law firm of Dechert. Those lawyers were Elise Kim, Mathew Magee, Elizabeth Reilly Hodes, Eduardo Barrachina, Jonathan Scherbel-Ball, Valerie Diden Moore, Marc Penchansky, Kerri DeRuyter, Katherine Burton, Emmanuelle Trombe and Ruth Abernethy.

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**Abbreviations**

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| **ACHR** | American Convention on Human Rights |
| **CEDAW** | Convention for the Elimination of All Forms of Discrimination against Women |
| **ECSR** | European Committee of Social Rights |
| **ECHR** | European Convention on Human Rights |
| **ECtHR** | European Court of Human Rights |
| **IACtHR** | Inter-American Court of Human Rights |
| **ICCPR** | International Covenant on Civil and Political Rights |
| **ICTY** | International Criminal Tribunal for the Former Yugoslavia |
| **RESC** | Revised European Social Charter |
| **UNCAT** | United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| **UNCERD** | United Nations Convention for the Elimination of All Forms of Racial Discrimination |
| **UNHRC** | United Nations Human Rights Committee |

## COMPETENCE

**Competence within Inter-American system to review actions of Inter-American Commission**

### Inter-American System Institutional Review

Advisory Opinion OC-19/05, IACtHR, 28 November 2005

On 12 November 2003, Venezuela filed a request for an Advisory Opinion from the Inter-American Court of Human Rights as to whether any body existed within the Inter-American system of human rights protection with competence to review the legality of the actions of the Inter-American Commission. In the event that the Court's response was positive, Venezuela went on to ask what the powers and functions of such a body were.

Venezuela expressly requested the Court to consider its request by reference to the American Convention on Human Rights and other legal instruments that constitute the Inter-American system for the protection of human rights.

The Court declared itself competent to give an Advisory Opinion on this matter as it concerned an institution of the Inter-American system for the protection of human rights In this respect the Court underlined its role as interpreter of the wording of Convention.

The Court observed that the Inter-American system for the protection of human rights rests on the principle of full independence and autonomy of its organs and institutions. Within this framework that the Court has the power to review whether the Commission has met the provisions of the Convention and other Inter-American instruments of human rights protection. The Court emphasised that any examination of the activities carried out by the Commission must be guided by and construed according to the purpose of the Inter-American system of human rights protection.

*In the view of these considerations, the Court held as follows:* (1) that the Commission has full autonomy and independence in the exercise of its mandate in accordance with the provisions of the American Convention on Human Rights; (2) within the legal frame-work of human rights protection, the Commission exercises its functions and

powers in relation to proceedings of individual petitions as well as the promotion and protection of human rights; and (3) it is for the Court to oversee ("*efectuar el control*") the legality of the work of the Commission in those matters that fall under the supervision of the Court in accordance with the American Convention and other instruments of the Inter-American system for the protection of human rights.

# DISCRIMINATION

**Right to non-discrimination of citizen deprived of restitution – violation of Article 26 of the ICCPR**

## AB and LB v Romania

Communication No. 1158/003, Judgment of the UNHRC, 24 April 2006

AB and LB, Romanian nationals, had purchased an apartment in Bucharest in 1979. In 1988, they left Romania, settled abroad, and did not return prior to the expiry of their exit visas. The Bucharest Municipality consequently expropriated their property pursuant to Resolution 1434/1989, which was based upon Decree 223/1974 providing that the State would obtain ownership of buildings belonging to persons who had left the country or stayed abroad without permission. In 1989, after the fall of the communist regime, Decree 223/1974, was repealed, but property already transferred to the State, such as that of AB and LB, remained unaffected.

On 27 May 1992, AB and LB introduced a claim before the Bucharest District Court, seeking the quashing of Resolution 1434 and the ordering of the restitution of their apartment. On 24 January 1994, after both the Bucharest District Court and the Bucharest City Court had rejected their claim, the Court of Appeal of Bucharest ordered the restitution of their property, ruling that the expropriation violated Article 13 of the Universal Declaration of Human Rights on Freedom of Movement, and was an "abusive regulation" rather than one of "public utility".

Notwithstanding the fact that this decision was non-appealable, the Procurator General filed an appeal in the interest of law against it (and other similar decisions), following a 1995 Supreme Court decision which had held that (civil) courts were not competent to rule on actions for recovery of expropriated buildings. The Supreme Court consequently quashed the Court of Appeal decision on 8 May 1996, by ruling that the latter had exceeded its judicial competence and violated the principle of separation of powers. The State consequently sold AB and LB's apartment pursuant to Act 112/1995 (under which former owners of property could apply for restitution [which was done by AB and LB, although without any reply being granted by the Romanian State] and, if the property was not restituted, it could be sold to State tenants).

On 16 July 2002, AB and LB filed a communication with the UNHRC, claiming that Romania had violated their rights to freedom of movement, fair hearing and not to be discriminated against as protected by Articles 12, 14 and 26 of the ICCPR.

*The Committee held that:* (1) it was not disputed that the Procurator General appealed the Court of Appeal judgment after it had become final and been implemented; (2) judgments, once final, can no longer be reviewed or appealed, except in special circumstances when the interest of justice so requires, and on a non-discriminatory basis; (3) no legitimate arguments have been presented in the present case which could justify the appeal and subsequent annulment; (4) the Romanian State itself has acknowledged that the practice of such extraordinary appeals led to legal insecurity and has consequently abolished the possibility of such appeals in 2003; (5) all reasons based on which the Procurator General's appeal and following Supreme Court decision annulling the 1996 judgment of the Court of Appeals constituted a violation of AB and LB's rights under Article 26 of the ICCPR, read in conjunction with Article 2(3) of the ICCPR; (6) it was consequently not necessary to examine AB and LB's claims under Articles 12 and 14 of the ICCPR; (7) pursuant to Article 2(3)(a) of the ICCPR, the government is under an obligation to provide AB and LB with an effective remedy, including prompt restitution of their apartment or compensation.

**Racial Discrimination – Access to Justice – violation of Article 14**

## Serbia and Montenegro v Durmic

Judgment of the UNCERD Committee, 8 March 2006

DD, a national of Serbia & Montenegro and of Roma origin took part in a series of "tests" organised by the Humanitarian Law Centre in Serbia to establish whether members of the Roma minority were being discriminated against while attempting to access public places such as clubs, restaurants and swimming pools. In February 2000, DD and another individual of Roma origin, together with three non-Roma individuals attempted to gain access to a disco in Belgrade. All were well dressed, well behaved and the only apparent difference was the colour of their skin. The two individuals of Roma origin were denied entry to the club on the basis that it was a private party and they did not have invitations. When DD enquired how to obtain invitations, he was told that it was not possible and that invitations were not for sale. In contrast the three non-Roma individuals were allowed entrance without hindrance.

In July 2000, a criminal complaint was filed on behalf of DD with the Public Prosecutor's Office in Belgrade. The complaint was directed against unidentified individuals employed by the disco on suspicion of having committed a crime under Article 60 of the Serbian Criminal Code. DD claimed his rights to human dignity and equal access to public places, as set out in Article 5(f) of the International Convention on the Elimination of All Forms of Racial Discrimination ("the Convention") had been violated. He requested that the Public Prosecutor's Office identify the perpetrators and initiate formal judicial investigations against them. After seven months without response DD wrote to the Public Prosecutor again asking about progress of the investigation. The Public Prosecutor replied that he asked the police twice to investigate the incident but they had failed to do so.

In October 2001 the Public Prosecutor informed DD that police enquiries had shown there had been a private party at

the disco on the date in question. He also stated that the police had ignored the order to identify and question the security personnel on the evening of the incident.

In January 2002, DD filed a petition in the Federal Constitutional Court (which became the Court of Serbia and Montenegro following the adoption of a new constitution in 2003) against the actions of the Public Prosecutor, complaining about the lack of redress for the violations suffered. He had no response from the Federal Constitutional Court and so filed an Article 14 claim with the Committee in April 2003 alleging breaches of his right to effective protection and remedies under Article 6.

*The Committee held that:* (1) it was unreasonable of the Public Prosecutor to accept the claim of the police that it was impossible to identify the security staff involved in the incident without further investigation or enquiry as to why such information would not be available; (2) the State's response to the claims of racial discrimination was so ineffective that it had failed to ensure appropriate protection and remedies pursuant to Article 6. It also failed to examine DD's claim of a violation of Article 5(f) promptly, thoroughly or effectively; (3) the issue before the Committee is not the incident at the disco itself but rather the shortcomings of the competent authorities in conducting the subsequent investigation and the absence of efforts by Serbia and Montenegro to guarantee an effective remedy. These derelictions have continued after the State's declaration under Article 14 and so DD's petition to the Committee is admissible; (4) nor is the Article 14 claim not time-barred because the Court of Serbia and Montenegro had not yet considered the matter and therefore the six-month limit had not yet begun to run; (5) there is no restriction on the parties to an Article 14 petition publishing information at their disposal relating to a petition; (6) the requirement to exhaust domestic remedies does not apply if the application of those remedies is unreasonably prolonged. In these circumstances as DD had sought to have his claim heard for over four years, this was sufficient to constitute unreasonable delay; (7) the State should provide DD with compensation for the moral damage suffered and also take steps to ensure that the public authorities properly investigate accusations and complaints relating to acts of racial discrimination which should be punishable by law according to Article 4 of the Convention.

# DOMESTIC REMEDIES

**■ Inadmissible for Failure to Exhaust State Remedies - no violation of Article 11 of the CEDAW**

## Kayan v Turkey

Decision of the Committee on the Elimination of Discrimination against Women, 27 January 2006

RK, a Turkish national, taught at several public schools administered under the auspices of the Turkish Ministry of Education. RK wears a scarf covering her hair and neck. On 16 July 1999, she received a warning and subsequently a deduction in salary for wearing a headscarf. During her appeal Amnesty Law No. 455 came into effect and the warning and deduction were withdrawn.

On 13 January 2000, RK's school began an investigation into whether she had disobeyed regulations when she wore her headscarf. The school alleged that she had spoiled the peace, quiet, work and harmony of the school due to her ideological and political beliefs. RK submitted a written statement that claimed that she loved her country and was committed to raising Turkish youth devoted to their country. She also denied having political or ideological objectives.

RK was then provided with the opportunity to defend herself orally or be defended by counsel. She provided ten sworn statements claiming that the accusations were untrue. Her attorney submitted statements to the Higher Disciplinary Council. The attorney alleged any punishment would violate national and international principles of law, including the freedom to work and freedoms of religion, of choice, conscience, and thought. Her attorney further argued that the punishment would violate the right of RK to develop her physical and spiritual well-being.

On 9 June 2000, RK was dismissed from her position. The Council decided that the wearing of a headscarf was equivalent to "spoiling the peace, quiet and work harmony" of the institution by political means in accordance with 125E/a of the Public Servants Law 657. The consequences of her dismissal included deductions from her pension entitlement, as well as deductions from the interest on salary and income, her education grant and health insurance.

On 23 October 2000, RK appealed to the Erzurum Administrative Court of the State Counsel. She argued that a concrete act to upset public order was needed to dismiss her under Article 125E/a. She alleged the record did not include such an act. On 9 April 2003, RK's appeal was rejected.

On 20 August 2004, RK filed an application with the Committee alleging that Turkey violated Article 11. By forbidding the headscarf, a piece of clothing unique to women, RK alleged that Turkey denied, *inter alia*, her right to work, her right to the same employment opportunities as others, her right to promotion and equal treatment. RK alleged she is one of 1,500 women dismissed for wearing a headscarf. RK further alleged that her right to personal identity was violated. RK maintained that all her domestic remedies were exhausted when she appealed to the State Council. The State argued, *inter alia*, that the communication was inadmissible because (1) the same matter had been previously decided in another communication; (2) the subject of the communication occurred prior to the entry into force of the Optional Protocol for Turkey; and (3) RK had not exhausted her domestic remedies. On 20 August 2004 the matter was transmitted to the Court, and on 27 January 2006 declared inadmissible.

*The Committee held that:* (1) the mere presence of a similar case with different parties does not preclude the admissibility of a communication; (2) if the effects of the subject of the communication continue after entry into force of the Protocol the communication may be admissible; (3) RK failed to raise gender discrimination during her State proceedings; (4) the crux of RK's complaint to this Committee was gender discrimination; (5) RK should have raised gender discrimination during State proceedings and by not doing so had failed to exhaust domestic remedies. Consequently, the communication was inadmissible.

# EDUCATION

■ **Discrimination – Right to Education – no violation of Article 14 of ECHR**

## DH and Others v the Czech Republic

Judgment of the ECtHR, 7 February 2006

DH and the other applicants are Czech nationals of Roma origin, who were placed, between 1996 and 1999, in special schools for children with learning difficulties unable to follow the ordinary school curriculum. According to the Czech law, the decision to place a child in a special school is taken by the head teacher on the basis of the results of tests to measure the child's intellectual capacity carried out in an educational psychology and child guidance centre, and requires the consent of the child's legal representative. The placements of the applicants were made after child psychology tests and with the permission or even in some cases at the request of the parents. The decisions contained instructions on the right to appeal but this right was never exercised.

On 15 June 1999, 14 of the applicants sought a review of the placement decisions by the Ostrava Education Department. The Education Department found, on 10 September 1999, that the placements had been made in accordance with the statutory rules. Additionally, on 15 June 1999, some of the applicants appealed to the Constitutional Court. That appeal was dismissed on 20 October 1999.

On 18 April 2000, DH and the others lodged an application with the Court, alleging a violation of Article 14, taken in conjunction with Article 2 of Protocol No. 1 in that, by being placed in such special schools, they had suffered discrimination in the enjoyment of their right to education on account of their Roma origin. The application was declared partly admissible following a public hearing held on 1 March 2005.

*The Court held that*: (1) its role was not to assess the overall social context in the Czech Republic but rather to determine whether the reason for the applicants' placement in special schools had been their ethnic or racial origin; (2) discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations; (3) the setting and planning of the curriculum fell in principle within the competence of States and, given their margin of appreciation in the education sphere, they could not be prohibited from setting up different types of school for children with difficulties or implementing special educational programmes to respond to special needs; (4) furthermore, in the applicants' case, the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but pursued the legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children; (5) in addition, the applicants' representatives had not succeeded in refuting the experts' findings concerning their learning disabilities; (6) attention should also be drawn to the fact that, in some instances, it had been the parents who had asked for their children to be placed or to remain in a special school, and that some of the applicants had subsequently been transferred to ordinary schools; (7) in this respect, despite the worrying overall situation in the Czech Republic, it could not be found, under the circumstances of the case, that the measures taken against the applicants had been discriminatory and based on racial prejudice; (8) therefore, there had been no violation of Article 14 taken in conjunction with Article 2 of Protocol No. 1.

The applicants requested a referral of the case to the Grand Chamber which was accepted by the Court on 19 July 2006.

# FREEDOM OF SPEECH

■ **Incitement of Racial Hatred - Protection of Minorities - Freedom of Speech - Violation of Articles 14 of the UNCERD**

## Jewish Community of Oslo v Norway

Judgment of the UNCERD Committee, 22 August 2005

In August 2000, TS led a neo-Nazi group known as the "Bootboys" on a march through Askim near Oslo, commemorating the Nazi leader Rudolf Hess. At the end of the march TS gave a speech celebrating Hess' attempt to "save Germany and Europe from Bolshevism and Jewry during the Second World War" and stating that Jews and immigrants "suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts". In the year following the march and speech, the city was plagued by incidents of violence against black people and political opponents, culminating in the murder of a fifteen year old boy of mixed Norwegian and Ghanaian descent.

In February 2001, the District Attorney of Oslo charged TS with violating s135a of the Norwegian Penal Code, which prohibited a person from threatening, insulting or subjecting to hatred, persecution or contempt any persons or group of persons because of their creed, race colour, or national or ethnic origin. In March 2001, TS was acquitted by the Halden City Court. He was, however, convicted on appeal, as it was held that his speech had accepted the mass extermination of the Jews, and therefore constituted a violation of s135a. TS appealed to the Supreme Court, which overturned his conviction. It held that the speech was simply Nazi rhetoric and that penalising approval of Nazism would involve prohibiting Nazi organisations, which the Court viewed as being incompatible with the right to freedom of speech. No threats were actually made, and there was therefore no breach of s135a.

In June 2003, a claim was lodged with the UN Committee for the Elimination of Racial Discrimination by the leaders of the Jewish communities of Oslo and Trondheim and the Norwegian Antiracist Centre. The claim stated that the applicants were victims of violations by Norway of Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. They claimed that the state of Norwegian law after the Supreme Court judgment meant that there was a real and imminent risk of being exposed to the effects of the dissemination of ideas of racial superiority and incitement to racial hatred and violence, without being protected or provided with a remedy.

*The Committee held that*: (1) the applicants have exhausted domestic remedies as required by Article 14(1) as the case involves an authoritative decision by the highest Norwegian

Court to acquit a person accused of racist statements. The applicants had no possibility of altering the course of the criminal proceedings and there is therefore no barrier to admissibility in this regard; (2) the Jewish Communities of Oslo and Trondheim do have standing to bring a claim to the Committee under Article 14(1) as "victims" of alleged violations of Articles 4 and 6 as Article 14 allows for submissions by "groups of individuals" and it would render the Convention meaningless if each individual within the group had to be an individual victim of a violation; furthermore, the existence of a legal regime which could give cause to their discrimination is sufficient to give them "victim" status; (3) while the contents of TS's speech are objectively absurd, the lack of logic is irrelevant in the assessment of whether there was a violation of Article 4; the essence of the speech are statements which contain ideas based on racial superiority or hatred and the deference to Hitler and his principles must be taken as incitement to racial discrimination if not violence; (4) freedom of speech is afforded a lower level of protection in cases of racist and hate speech by a broad range of international bodies and this is fully compatible with Article 4; (5) Article 4 requires due regard be given to all principles embodied in the Universal Declaration of Human Rights, not simply the principle of freedom of speech; (6) the statements of TS are of manifestly offensive character, are not protected by the Universal Declaration of Human Rights and, therefore, the acquittal of TS by the Norwegian Supreme Court gives rise to a violation of Article 4 and Article 6; and (7) the fact that Article 4 is couched in terms of States parties' obligation rather than the rights of individuals does not imply that such matters are to be left to the internal jurisdiction of States and are immune from review under Article 14.

# FREEDOM OF MOVEMENT

- **Right to freedom of movement within national territory; - violation of Articles 2 of Protocol No. 4, and Article 14 in conjunction with Article 2 of Protocol No. 4 of the ECHR**
- **Right to education – violation of Article 2 of Protocol No. 1 of the ECHR**

## Timishev v Russia

Judgment of the ECtHR, 13 December 2005

T, a Russian National, lives in Nalchick, a town in the Kabardino-Balkaria Republic of Russia. T was born in the Chechen Republic of Russia and is an ethnic Chechen. On 31 December 1994, T's property in Chechnya was destroyed by a military operation and since 15 August 1996 he has been living in Kabardino-Balkaria as a forced migrant.

In 1997, T applied for registration of his permanent residence in Nalchick. T's application was refused because laws of Kabardino-Balkaria prevented former Chechen residents from obtaining permanent residencies in Kabardino-Balkaria. The decision to refuse registration was upheld by the Nalchik Town Court on 19 September 1997 and by the Supreme Court of Kabardino-Balkaria on 23 October 1997.

On 19 June 1999, T and his driver travelled by car from the Ingushetia Republic of Russia to Nalchick. T's car was stopped on the administrative border between Ingushetia and Kabardino-Balkaria and, acting upon an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to allow ethnic Chechens travelling in private cars to cross the border, Kabardino-Balkaria police officers refused him admission.

T complained to a court alleging the police had acted illegally in refusing him entry and claimed non-pecuniary damages. On 25 August 1999, the Nalchick Town Court dismissed his claim ruling under an order of the State Inspectorate for Road Safety of Kabardino-Balkaria. The Supreme Court of Kabardino-Balkaria upheld this judgment on 21 September 1999.

On 1 February 2000, a prosecutor from the Prosecutor General's Office informed T that, following an inquiry into the facts, the prosecutor's office had ordered the Ministry of the Interior of Kabardino-Balkaria to rectify the violation of Article 27 of the Russian Constitution committed by the police officers on 19 June 1999, and to take measures to avoid similar situations in the future. On 3 March 2000, the Minister of the Interior of Kabardino-Balkaria sent an undated summary of the findings of an internal inquiry into the matter to a human rights activist who had lodged complaints on T's behalf making similar recommendations to those contained in the 1 February 2000 summary.

Between September 1998 and May 2000, T's two children attended school in Nalchick. On 24 December 1999, T received compensation for the property he had lost due to the military action in Chechnya, in exchange T had to surrender his migrant's card, a local document confirming his residence in Nalchick as a forced migrant.

On 1 September 2000, T's children were refused admission to school because T could not produce his migrant's card. On 4 September 2000, T complained to a court about the refusal to admit his children to school. The Nalchick Education Department replied that after 24 December 1999 the applicant had had no lawful grounds for remaining in Nalchick and that his requests amounted to an unlawful encroachment on the lawful rights of other children because the school was severely overcrowded.

On 1 November 2000, the Nalchick Town Court dismissed T's claim ruling that, as T and his family resided in Nalchick without being appropriately registered, T's request to have his children admitted to the school were unsubstantiated. On 21 November 2000, on an appeal by T, the Supreme Court of Kabardino-Balkaria upheld the judgment of 1 November 2000.

On 25 February and 9 March 2000, T filed separate applications with the Court alleging a violation of Article 2 of Protocol 4, taken alone or in conjunction with Article 14 in that he had not been permitted to enter Kabardino-Balkaria because of his Chechen origin and a violation of his children's right to education under Article 2 of Protocol No. 1. On 30 March 2004, the Court declared the application partly admissible.

*The Court held that:* (1) Article 2 of Protocol No. 4 provides that "everyone lawfully within a territory of a State shall, within that territory have the right to liberty of movement and freedom to choose his residence"; (2) in order to be compatible with the guarantees of Article 2 of Protocol No. 4, the imposed restrictions should be in "accordance with

the law," pursue one or more legitimate aims and be necessary in a democratic society; (3) the State argued that the restriction was imposed in accordance with Section 11(2) of the Police Act with a view to deterring criminal offences and guaranteeing public safety; (4) the restriction in the matter had been imposed by an oral order given by the deputy head of the public safety police; (5) the order was not properly formalised or recorded in any other traceable way, enabling the Court to assess its scope or legal basis; (6) as such, the restrictions were not in accordance with the law and, therefore, in violation of Article 2 of Protocol No. 4; (7) as to T's contention that the restrictions on his right to liberty had operated against him in a discriminatory manner because of his ethnic origin in violation of Article 14, the Court reiterated that Article 14 has no independent existence but plays an important role by complementing the other provisions of the Convention and Protocols since it protects an individual placed in similar situations from any discrimination in the enjoyment of the rights set forth in those other provisions; (8) as the senior police officer ordered that the police not admit Chechens (and since a person's ethnic origin is not listed anywhere on Russian identity papers essentially anyone perceived as belonging to this ethnic group), there was a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin; (9) a differential treatment of persons in relevant, similar situations without an objective and reasonable justification is a form of racial discrimination; (10) the government failed to offer any justification; (11) the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on principles of pluralism and respect for different cultures; (12) as such, there has been a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 4; (13) with respect to T's contention that Article 2 of Protocol No. 1 was violated when the domestic authorities refused to secure his children's right to education on the ground that he had no registered residence and did not have a migrant's card, Article 2 of Protocol 1 provides that "no person shall be denied the right to education"; (14) by binding themselves not to "deny the right to education" under Article 2 of Protocol No. 1, the Contracting States guarantee to anyone within their jurisdiction a right of access to educational institutions; (15) Article 2 of Protocol No. 1 prohibits the denial of the right to education and has no stated exceptions; (16) Russian law does not allow the exercise of the right to education to be made conditional on the registration of a parent's residence; (17) as such, the children were denied access to education in violation of Article 2 of Protocol No. 1; and (18) within three months of the date of trial judgment, the State should pay T EUR 5,000 in respect of non-pecuniary damages and, EUR 950 in respect of costs and expenses.

# HEALTH

- **Restrictions on healthcare assistance for illegal immigrants–no violation of Article 13, of the RESC**
- **Restrictions on healthcare assistance for illegal immigrant youth—violation of Article 17**

## International Federation of Human Rights Leagues (FIDH) v France

Judgment of the ECSR, 8 September 2004

FIDH, the International Federation of Human Rights Leagues, registered a complaint against the French government with the European Committee of Social Rights on 3 March 2003. FIDH sought to address concerns over the healthcare coverage available to foreign nationals and alleged that certain legislation and practices of the French government contradicted Articles 13 and 17 of the Revised European Social Charter guaranteeing the right to social and medical assistance and of children and young persons to social, legal and economic protection. The complaint was in response to amendments to French law which changed payment provisions for medical treatments such that medical costs would be covered as follows: (1) French nationals and foreign nationals who established a lawful residence in France of at least three months and also satisfied the minimum income level requirements of the law qualified for universal medical coverage, (2) foreign nationals who were unlawful residents, established three months of continuous residence and also satisfied the minimum income level requirements of the law were entitled to state medical assistance and (3) foreign nationals who were unlawful residents and did not meet the three month continuous residence requirement, but who satisfied the minimum income level requirements, qualified for state medical assistance for medical emergencies or life threatening conditions. Universal medical coverage included health insurance for persons who were not affiliated with a heath insurance program as well as free supplementary health insurance exemptions from advance payments for those who qualified under the means test. State medical assistance met only certain medical costs incurred.

FIDH argued that terminating the payment exemption of illegal immigrants with low incomes constituted a violation of the right to medical assistance provided under Article 13. FIDH further contended that the requirement of lawful presence found in Article 13(4) served only to qualify the care provided to illegal immigrants rather than allowing the denial of all medical assistance. The French government argued that the state medical assistance scheme which applied to illegal immigrants conformed to the requirements of Article 13 since Article 13(4) restricted the coverage to non-residents lawfully within the territory and therefore illegal foreign nationals did not come within the scope of protected persons.

FIDH further argued that the introduction of patient charges for children and young persons violated Article 17. Contrary to the claim of the French government that the legislative reforms sought to provide medical care even for children who were unlawfully present, FIDH asserted that the coverage provided did differ from that provided to French children. Specifically, in respect to the fact that children of

illegal immigrants had to meet residency requirements or have a medical condition that qualified as an immediate threat to life.

*The Court held that*: (1) the Charter must be interpreted so as to give life and meaning to fundamental social rights and restrictions on rights are to be read restrictively, i.e., understood in such a manner as to preserve intact the essence of the rights and to achieve the overall purpose of the charter; (2) legislation or practice that denies entitlement to medical assistance to foreign nationals, within the territory of a state party, is contrary to the Charter; (3) there is no violation of Article 13, since unlawful residents are not deprived of all entitlement to medical assistance under the law;. provisions are made for unlawful residents who have resided within the country continuously for three months and also for unlawful residents who are suffering from a medical emergency or life threatening condition; and, (4) there is a violation of the rights of children and young persons to access care and assistance under Article 17 as the limitations of medical care based on the severity of the medical condition or the time requirements imposed for residency are in contradiction to the rights guaranteed to children under the provision.

# HOUSING

- **Right to adequate housing - violation of Article 31 of the RESC**

## European Roma Rights Centre v Italy

Complaint No. 27/2004, Judgment of the ECSR, 7 December 2005

The European Roma Rights Centre (ERRC) brought a collective complaint alleging a violation of Article 31 of the Revised European Social Charter. They alleged that the Italian Government had denied the Roma population in Italy an effective right to housing because of: (1) the insufficient capacity of and inadequate living conditions in camping sites for Roma who chose to follow an itinerant lifestyle or who were forced to do so; (2) the systematic eviction of Roma from sites or dwellings unlawfully occupied by them and the failure to provide them with alternative housing or resettle them in at least substandard housing; evictions often being accompanied by the destruction of personal belongings and violence by the police; and (3) the lack of permanent dwellings of an acceptable quality to meet the needs of Roma wishing to settle. The ERRC alleged that the policies and practices of the Italian government with respect to housing constituted racial discrimination contrary to Article 31 taken together with Article E. On 6 December 2004, the application was declared admissible.

*The Committee held that:* (1) Article 31 is directed to the prevention of homelessness with its adverse consequences for an individual's personal security and well being; (2) the right to housing secures social inclusion and integration of individuals into society and contributes to the abolition of socio-economic inequalities; (3) with respect to Article E, States must respect difference and ensure that social arrangements are not such as would effectively lead to or reinforce social exclusion; (4) equal treatment requires a ban on all forms of indirect discrimination, which can arise "by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all"; (5) as such, equal treatment implies that Italy should take measures appropriate to the Roma's particular circumstances to safeguard their right to housing and prevent them, as a vulnerable group, from being homeless; (6) Article 31 guarantees access to adequate housing, which means a dwelling which is structurally secure, safe from a sanitary and health perspective and not overcrowded; by persisting with the practice of placing Roma in camps, Italy has failed to take due and positive account of all relevant differences or adequate steps to ensure their access to rights and collective benefits that must be open to all; (7) Italy has failed to show it has taken adequate steps to ensure that Roma are offered housing of a sufficient quantity and quality to meet their particular needs or to see that local authorities are fulfilling their responsibility in violation of Article 31 taken together with Article E; (7) with respect to forced evictions, state parties must make sure that evictions are justified and are carried out in a way that respects the dignity of the persons concerned and that alternate accommodation is available; (8) the law must also establish procedures, specifying when they may not be carried out and provide legal remedies for those who seek redress; (9) Italy has failed to establish that the evictions it carried out satisfy these conditions and has not refuted sufficiently claims that Roma have suffered unjustified violence during such evictions and, as such, have violated Article 31 in combination with Article E; and (10) Italy violated Article 31(1) and (3) taken together with Article E when it failed to take into consideration the situation of the Roma or to introduce measures specifically aimed at improving their housing conditions, including the possibility for effective access to social housing.

# INDIGENOUS PEOPLES

- **Right to enjoy property; claim of land by indigenous people – violation of**
- **Article 21 of the ACHR**

## People of Sawhoyamaxa v Paraguay

Judgment of the IACtHR, 29 March 2006

The people of Sawhoyamaxa formerly lived in Chaco in Paraguay. The land on which they lived was first sold on the London Stock Exchange at the end of the nineteenth century, and thereafter, passed to successive private owners.

In 1991, petitioners for the people of Sawhoyamaxa started administrative proceedings in order to regain ownership of their traditional land. At the same time, a majority of the Sawhoyamaxa community members settled in a roadside camp in front of the claimed property, where they lived in extreme poverty.

Subsequent developments saw the representatives of the people of Sawhoyamaxa being recognised by the Paraguayan authorities in 1993 and the people recognised as a legal entity in 1998; but the land claim itself remained unsettled.

In 2001, a claim was filed with the Commission against Paraguay for alleged violations of the American Convention on Human Rights. The petitioners contended that Paraguay had failed to implement effective measures for the recognition of indigenous peoples' rights to their land and further to protect the health and life of the people of Sawhoyamaxa, in violation of Articles 21, 8.1 and 25, in conjunction with Articles 1.1 and 2.

The Commission, after reviewing the responses made by Paraguay, brought the claim before the Court in January 2005.

*The Court held that:* (1) the duration of the land claim proceedings (more than 13 years) was unreasonable given the circumstances and specially the fact that the delay had been mostly caused by the governmental agencies in charge of reviewing the case; (2) Paraguay breached Article 21 and International Labour Organisation's Policy No. 169 relating to a person's right to use and enjoy his/her property and the special importance of land for the cultures and spiritual values of indigenous peoples, in that (a) Paraguay contended that the people of Sawhoyamaxa failed to bring evidence of their title to the land claimed whereas the continued possession of the land (or, the fact that such possession has been disrupted against the will of the indigenous people because of threat or violence) constitutes title; (b) the right to claim traditional land exists as long as the indigenous people maintain traditional relationships to the land (including hunting or fishing) or as long as they are prevented from doing so by threats or actual violence; (c) Paraguay had not taken appropriate measures to solve the conflict between the rights and interests of the current owners of the land and those of the people of Sawhoyamaxa: in particular, the indigenous people have the right to regain title to their land or, if not possible, to obtain another piece of land of equivalent size and quality; (3) Paraguay had infringed Article 4 relating to the right to life in that Paraguay should have provided sanitary assistance to the most vulnerable persons of the community and in particular the children and the older people; (4) Paraguay had infringed Article 3 in that it had failed to take effective measures to recognise the existence of members of the Sawhoyamaxa community (the birth or death of most its members had not been registered and they had no document enabling them to prove their identity).

The Court ordered Paraguay *inter alia* to: (1) ensure the return of their land to the people of Sawhoyamaxa or the grant of alternative land within three years; (2) put in place a fund of USD 1,000,000 (EUR 771,000) to promote the development of the people of Sawhoyamaxa; (3) pay USD 20,000 (EUR 15,440) as moral damages to the relatives of each person whose death was found to be caused by Paraguay's negligence; (4) provide food and health assistance to the people of Sawhoyamaxa until they regain possession of their land; and (5) adopt the necessary measures to ensure effective land claim procedures in Paraguay.

# LIFE

**Right to life, freedom and torture of "disappeared" teacher – violation of Articles 2, 6, 7, 9 and 10 of ICCPR**

## Saker v Algeria

Communication No. 992/2001
Views of the UNHRC, 24 April 2006

SS, who is an Algerian national and a teacher, was arrested without warrant on 29 May 1994 at his home, by agents of the Wilaya of Constantine (an administrative division of the town of Constantine). At the time of his arrest, SS was a member of the Front Islamiste de Salut (Islamic Salvation Front), a prohibited political party for which he had been elected in the annulled legislative elections in 1991. In July 1994, his wife, LB, wrote to the Director of Public Prosecutions (*Procureur de la République*) requesting information about the reasons for SS's arrest and continued detention. At the time of SS's arrest, the longest pre-trial detention authorised by Algerian law was 12 days, for persons suspected of the most serious offences under the Algerian criminal code, namely terrorist or subversive acts. The law also required that the police officer responsible for questioning the suspect allow him contact with his family.

LB did not receive a satisfactory reply from the Director of Public Prosecutions and, on 29 October 1994, wrote to the President of the Republic, the Minister of Justice, the Minister of the Interior, the Security Officer of the President of the Republic (*Délégué à la Sécurité auprès du Président de la République*), and the Head of Military Area No. 5. No one replied and, on 20 January 1996, LB lodged a complaint with the Director of Public Prosecutions of the Tribunal of Constantine against the security services of Constantine for the arbitrary arrest and detention of SS, pursuant to Article 113(2) of the Criminal Procedure Code. LB also alerted the Ombudsman of the Republic (*Médiateur de la République*) by a letter dated 25 January 1996 and requested information about SS from the Director General of National Security on 28 January 1996.

Receiving no response from these bodies, on 27 September 1996, LB wrote to the President of the National Observatory for Human Rights (*Observatoire National des Droits de l'Homme*) about her difficulties obtaining information about SS and requesting legal aid and assistance.

On 27 February 1997, LB received a letter from the judicial police section of the Security of Constantine (*Service de la Police judiciaire de la Sûreté de la Wilaya de Constantine*), forwarding a copy of Decision No. 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine dated 4 September 1996, which related to the complaint LB had lodged on 20 January 1996. The decision informed B that SS was wanted and had been arrested by the judicial police section of the Security of Constantine and then transferred to the Territorial Centre for Research and Investigation (*Centre Territorial de Recherches et d'Investigation*; the "Territorial Centre") of Military Area No. 5 on 3 July 1994, as evidenced by a receipt of handover No. 848 dated 10 July 1994.

On 10 December 1998, the National Observatory for Human Rights informed LB that, according to information received from the security services, SS had been kidnapped by a non-identified armed group while in custody of the Territorial Centre and the authorities did not have any other information as to his whereabouts.

Further to her petition lodged 20 January 1996, B was summoned on 20 March 1999 by the investigating magistrate of the third chamber of the Tribunal of Constantine. During the hearing, the judge questioned her about SS's arrest and informed her that the matter of SS's disappearance had been registered (Case 32/134) and was being investigated. Since then, a public action (*action publique*) has been pending.

Algeria disputed these facts and instead maintained that SS was taken in for questioning on 12 June 1994 by the police and held for three days. On 15 June 1994, he was handed over to the military branch of the judicial police for further questioning and was released as soon as that questioning ended. The judgment of 29 July 1995, pronounced in absentia, sentenced S to death.

On 9 February 2000, LB, submitted a communication on behalf of SS to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. LB claimed that Algeria violated Article 2(3), Article 6(1), Article 9(1)(3) and (4), Article 10(1), and Article 14(3) of the ICCPR in light of (1) SS's alleged arbitrary arrest and detention, (2) because the Algerian authorities neither conducted a complete investigation nor instigated any proceedings, (3) SS was not promptly brought before a judge and was not granted contact with his family or rights associated with detention, and (4) the authorities failed to protect SS's right to life. The Committee concluded that the communication was admissible under Articles 2(3), 6(1), 7, 9 and 10.

*The Committee held that*: (1) with regard to LB's claim of the disappearance of SS, the parties had submitted different accounts, dates and outcome of the events; (2) Algeria had not responded to LB's sufficiently detailed allegations and had not submitted any evidence such as release papers, records of interrogation or detention; (3) the burden of proof cannot rest alone on the author of a communication, especially considering the author and the State do not always have equal access to the evidence; (4) it is implied in Article 4 of the Optional Protocol that the State has the duty to investigate in good faith all allegations and to furnish the Committee the information available to it; (5) in cases where allegations are corroborated by evidence submitted by the author and where further clarification of the case depends on information exclusively in the hands of the State, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence and explanation to the contrary submitted by the State; (6) as to Article 9(1), the evidence revealed that SS was removed from his house by State agents and the State had not addressed the claim that there was no warrant, and failed to indicate the legal basis on which SS was then transferred to military custody and failed to document how he was subsequently released or released with conditions of safety; (7) as such, the detention as a whole was arbitrary in violation of Article 9(1); (8) as to the violation of Article 9(3), the right to be brought "promptly" before a judicial authority implies that delays must not exceed a few days and that *incommunicado* detention as such may breach this guarantee; (9) as SS was held *incommunicado* for 33 days by the judicial police before being transferred to the Territorial Centre and had no possibility of access to a lawyer during that period, Article 9(3) had been violated; (10) as to Article 9(4), SS had no access to counsel during his detention which prevented him from challenging the lawfulness of the detention during that period and, as such, Article 9 had been violated; (11) as to the violation of Article 6, General Comment No. 6(16) concerning Article 6 provides that States should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which might involve a violation of right to life; (12) as Algeria does not deny that SS has been unaccounted for and has not provided any evidence of his release, the facts reveal a violation of Article 4 in that Algeria failed to protect SS's life; (13) with respect to Article 2(3), the State must ensure that individuals have accessible, effective and enforceable remedies to vindicate their rights and must establish appropriate judicial and administrative mechanisms to address claims under domestic laws; (14) SS did not have access to such effective remedies in violation of Article 2(3) in conjunction with Article 4; (15) in accordance with Article 2, the State is under an obligation to provide LB with an effective remedy, including a thorough and effective investigation into the disappearance of SS, his immediate release if he is still alive, adequate information, and appropriate levels of compensation for the violations. The State is also under a duty to prosecute criminally those responsible for the violations and to prevent similar violations in the future; and (16) within 90 days, Algeria must provide the Committee with information about measures taken to give effect to the Committee's view.

# POLITICAL PARTICIPATION

■ **Exclusion from standing for national election on account of former membership of political party – no violation of Article 3 of ECHR Protocol No. 1**

## Zdanoka v Latvia

Judgment of the ECtHR, 16 March 2006

Z is a Latvian national, who is currently a member of the European Parliament. Z's application resulted from the Latvian authorities ruling that she was not eligible to stand for election in Latvia due to her previous membership of the Communist Party of Latvia ("the CPL") and her activities within the CPL. In 1971, Z became a member of the CPL. In 1990, she was elected to the Supreme Council of the Soviet Socialist Republic of Latvia. After the declaration of Latvia's independence in May 1990, the CPL took part in two failed *coups d'état* and was declared unconstitutional and was dissolved by the Supreme Council on 10 September 1991.

In 1993, Z became a member of the Equal Rights political party and was elected to the Riga City Council in 1997 and subsequently tried to stand as a candidate in the 1998

Latvian parliamentary elections. The Central Electoral Commission ruled that Z's candidacy did not meet the requirements of s5(6) of the Parliamentary Elections Act (the "Act") which provided that persons who had "actively participated" in the CPL's activities after 13 January 1991 were ineligible to stand for office. The Procurator General's office sought a hearing on this issue and the Riga Regional Court held that Z had participated in the CPL's activities after 13 January 1991. Z appealed and on 15 December 1999 the judgment was upheld by the Civil Affairs Division of the Supreme Court. As a result of the judgement Z became ineligible as a candidate and lost her seat on the Council. Z appealed on points of law to the Cassation Division of the Supreme Court, which declared her appeal inadmissible.

Z tried to stand as a candidate in the 2002 Latvian parliamentary elections however the Central Electoral Commission referred to the 1999 Civil Affairs Division judgment and they removed Z's name from the list of candidates. As the Act only applied to national elections it did not prevent Z standing as a candidate in the European elections of June 2004 and she was subsequently elected to the European Parliament.

On 20 January 2000, Z filed an application with the Court, complaining of an infringement of her right to stand as a candidate as a result of the ruling that she was ineligible. She alleged a violation of Article 3 of Protocol No. 1 since, pursuant to section 5(6) of the 1995 Parliamentary Elections Act, she was precluded from standing for election for the Latvian Parliament on the ground that she had "actively participated" in the activities of the CPL after 13 January 1991. She also alleged that her ineligibility violated Articles 10 and 11.

Z's application was declared partly admissible on 6 March 2003. In a judgment on 17 June 2004, the Court held that (i) there had been a violation of Article 3 of Protocol No. 1 in respect of the right to free elections and (ii) a violation of Article 22 in respect of freedom of assembly and association, and (iii) that there was no need to examine separately the complaint under Article 10 of the Convention (freedom of expression). The Government requested that the case be referred to the Grand Chamber and a further hearing was held on 1 June 2005.

At the Grand Chamber hearing Z maintained that there had been an infringement of her right to stand as a candidate in elections because of the ruling that she was ineligible and that this violated Article 3 of Protocol No. 1 to the Convention since, pursuant to section 5(6) of the Act, she was precluded from standing for election to the Latvian Parliament on the ground that she had "actively participated" in the activities of the CPL after 13 January 1991. Z further submitted that her ineligibility as regards both the Latvian Parliament and district councils was contrary to Articles 10 and 11 of the Convention.

*The Court held that*: (1) by a majority that there had been no violation of Article 3 of Protocol No. 1 as the legislation preventing Z from standing as a candidate was primarily intended to protect the democratic process and not to punish those who had been active within the CPL; (2) that in view of the events after 13 January 1991 and the struggle to establish a democracy it was reasonable for the legislature to presume that members of the CPL held an anti-democratic stance, unless they rebutted this presumption by their actions. Z had not made any statement distancing herself from the CPL; (3) that the Latvian authorities' decision that Z's former position in the CPL, and her involvement in the events of 1991, still warranted her exclusion as a candidate in national elections, was within the requirements of Article 3 of Protocol No. 1; (4) that section 5(6) of the Act, providing for the ineligibility of individuals who had actively participated in the CPL's activities was not arbitrary or disproportionate. The Court also considered that Z's current or recent conduct was not a material consideration, as s5(6) of the Act related to Z's political stance during Latvia's struggle for "democracy through independence" in 1991 and that while such legislation may not be considered acceptable in a country with an established framework of democratic institutions, it could be considered acceptable in Latvia's given its political history; (5) that the Latvian authorities were best placed to assess the difficulties faced in establishing and safeguarding democracy and to assess the needs of their society in building confidence in the new democratic institutions and to answer the question whether the legislation was still needed for these purposes. This was subject to the Court finding nothing arbitrary or disproportionate in such an assessment. In reaching this view, the Court noted that the Latvian Parliament had periodically reviewed section 5(6) of the Act. The Constitutional Court had carefully examined, the historical and political circumstances which had given rise to this enactment finding the restriction was neither arbitrary nor disproportionate; (6) It was to be noted by the Court that the Latvian Parliament had a duty to keep the s5(6) restriction under constant review and bring it to an end as soon as feasible particularly in light of the greater stability currently experienced in Latvia by reason of its full European integration. Accordingly, failure to take steps in the future could result in a different finding by the Court; (7) by a majority that the separate examination of Z's complaints under Article 11 was not necessary; and (8) unanimously that a separate examination of Z's complaints under Article 10 was not necessary.

# RELIGION

■ **Right to manifest religion – right to education – no violation of Articles 8, 9, 10, 14, and Article 2 of ECHR Protocol No. 1**

## Leyla Sahin v Turkey

Judgment of the ECtHR, 10 November 2005

S, a Turkish national born in 1973, comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf. At the relevant time she was a medical student at Istanbul University.

On 23 February 1998, the vice-chancellor of Istanbul University issued a circular stating that "students whose 'heads are covered' must not be admitted to lectures, courses or tutorials." Because of this circular, between March and June 1998, S was prevented from attending an examination, enrolling on a course and attending a lecture.

On 29 July 1998, S applied to the Istanbul Administrative Court for an order setting aside the circular of 23 February

arguing that the circular and its implementation infringed her rights guaranteed by Articles 8, 9 and 14 of the Convention and Article 2 of Protocol No. 1, in that there was no statutory basis for the circular and the education authority had no regulatory authority in this sphere. On 19 March 1999, the application was dismissed on the grounds that a university vice-chancellor had the power to regulate students' dress for the purposes of maintaining order. Referring to the settled case-law, the Administrative Court held that neither the regulations in issue, nor the measures taken against S could be considered illegal. On 19 April 2001, the Supreme Administrative Court dismissed S's appeal on points of law.

In May 1998, disciplinary proceedings were brought against S under Istanbul University's disciplinary rules. On 26 May 1998, the Dean of the faculty declared that S's attitude and failure to comply with the rules on dress were not befitting of a student and he issued her with a warning. On 15 February 1999, an unauthorised assembly gathered outside the faculty to protest against the rules on dress and, on 26 February 1999, the Dean of the faculty began disciplinary proceedings against S for joining the assembly. On 13 April 1999, he suspended her for a semester.

On 10 June 1999, S lodged an application with the Istanbul Administrative Court for an order quashing the decision to suspend her. The application was dismissed on 30 November 1999. Following the entry into force of a law which provided for students to be given an amnesty in respect of penalties imposed for disciplinary offences and for any resulting disability to be annulled the applicant was granted an amnesty releasing her from all the penalties that had been imposed on her. On 28 September 2000, the Supreme Administrative Court held that the amnesty made it unnecessary to examine the merits of the applicant's appeal on points of law against the judgment of 30 November 1999. In the meantime, on 16 September 1999, the applicant abandoned her studies in Turkey and enrolled at Vienna University.

S filed a complaint with the Court alleging that a ban on wearing Islamic headscarves in higher education institutions violated her rights and freedom under Articles 8, 9, 10 and 14 and Article 2 of Protocol No. 1. On 29 June 2004, a Chamber of the Court of ruled that, while the restrictions on wearing the headscarf had interfered with S's right to manifest her religion, the interference was prescribed by law and pursued a legitimate aim and therefore there had been no violation of Articles 8, 9, 10 or 14 or Article 2 of Protocol No. 1. S appealed to the Grand Chamber.

*The Court held that:* (1) S submitted that the ban of wearing an Islamic headscarf constituted an unjustified interference with her right to freedom of religion and, in particular, her right to manifest her religion in violation of Article 9; (2) Article 9 provides that "freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedom of others"; (3) freedom of thought, conscience and religion is one of the foundations of a democratic society and that freedom entails freedom to hold or not to hold religious beliefs and to practice or not to practice a religion; (4) Article 9 does not protect every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by belief; (5) the Court must consider whether the applicant's right under Article 9 was interfered with and, if so, whether such interference was "prescribed by law"; pursued a legitimate aim and was "necessary in a democratic society"; (6) the restriction on wearing an Islamic headscarf did interfere with S's right to manifest her religion but Turkish law provided a legal basis for the restriction and those laws were accessible and sufficiently precise in their terms to satisfy the requirement of foreseeability; (7) the restriction primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order; (8) because of their direct and continuous contact with the education community, the university authorities are better placed than the Court to evaluate the requirement for a particular course; (9) in order to assess the "necessity" of the interference caused by the circular, the court must put the circular in its legal and social context and examine it in light of the circumstances of the case; (10) the Courts task is confined to determining whether the reasons given for the interference were relevant and sufficient and the measures taken at the national level proportionate to the aims pursued; (11) the interference was based on two main principles – secularism and equality; (12) the Turkish Constitutional Court had declared in 1989 that secularism in Turkey was among other things, the guarantor of democratic values; (13) upholding the principle of secularism may be regarded as necessary for the protection of the democratic system in Turkey; (14) the impact that wearing a headscarf may have on those who choose not to wear it, in particular where it is presented or perceived as a compulsory religious duty, should be borne in mind; (15) imposing limitations on freedom in this sphere may be regarded as a pressing social need, especially as the Turkish courts have stated, that this religious symbol has taken on political significance in Turkey in recent years; (16) the ban on wearing headscarves did interfere with S's right to education, however, the restriction was foreseeable, proportional and pursued legitimate aims. Consequently the restriction did not impair the very essence of S's right to education and as such there has been no violation of Article 2 of Protocol No. 1; (17) there has been no violation of Article 8 or 10 as the arguments advanced by S under these articles are a mere reformulation of the arguments advanced under Article 9 and Article 2 of Protocol No. 1; (18) the regulations on the Islamic headscarf were not directed at S's religious affiliation and so the courts reasoning applied to Article 9 and Article 2 of Protocol No. 1 also apply to Article 14 and consequently there has been no violation of Article 14.

# TORTURE and INHUMANE OR DEGRADING TREATMENT

**Inhumane and discriminatory treatment of Aboriginal juvenile prisoner with mental disability– violations of Articles 10 and 24(1) of ICCPR**

## CB v Australia

Communication No. 1184/2003: Australia
Judgment of the UNHRC, 27 April 2006

CB was an Australian Aboriginal citizen born on 22 April 1982 who suffered from a mild mental disability resulting in significant impairments of his adaptive behaviour, communication skills and his cognitive functioning. On 12 February 1999 CB was detained in Kariong Juvenile Detention Centre. On 21 March 1999, while at Kariong, CB participated in a riot to draw attention to "the mistreatment and brutalisation by Kariong staff." This led to a request by the Director General of the Department of Juvenile Justice that CB be transferred to Parklea adult correctional facility which happened the following day. The request was granted by the Gosford Children's Court. CB protested against this transfer and asked for a return to a juvenile detention facility but this was denied.

At Parklea, CB was placed in a "safe cell" to protect him from other inmates. An assessment of his psycho-medical condition found that he was not at risk of self-harm. However, after a first instance of self harm was recorded on 30 March 1999 with CB threatening suicide, breaking a plate and shredding his mattress with a broken fragment, CB was moved to a "dry cell" on 1 April 1999, where he was confined for 48 hours (the government maintained that it had no record of this incident, but recorded a very similar one on 13 April 1999).

After being observed obscuring one of the surveillance cameras on 7 April 1999, officers allegedly assaulted CB, removed his clothes except his underwear, confiscated his pillow and blanket, and allegedly confined him to his cell for 72 hours, with lights on day and night. Again the government had no record of this incident. On 13 April 1999, CB attempted to break his cell lights to scratch the lens of a surveillance camera. An additional altercation between CB and prison officers occurred on 15 April 1999, when he refused to return to his safe cell after being allowed out for exercise. CB was later observed trying to hang himself with a noose made from his underwear, and officers forcibly removed the noose when CB resisted. The Inmate Discipline Action Form dated 17 April 1999 indicated that CB pleaded guilty to a charge of failing to comply with a reasonable order, for which he was sentenced to confinement to his cell for 48 hours.

CB was also administered Largactil, an anti-psychotic medication, without it being clear whether his condition had been assessed prior to the prescription of the drug. On 16 April 1999, Parklea's general practitioner prescribed 50 mg of Largactil daily for CB until he could be examined by a psychiatrist, and the treatment continued after CB was examined. The psychiatric assessment dated 16 April 2002 stated that CB's condition "could be described as post-traumatic following a period of about a month being isolated under 24 hour bright lights."

CB was visited by LP, a caseworker of the Aboriginal Deaths in Custody Watch Committee, a number of times in March and April 1999. LP reportedly observed that CB was anxious, nervous, and insufficiently equipped with clothes and blankets to protect him from the cold.

CB claimed that his transfer to an adult correctional facility despite his age, the cruel, degrading and inhuman treatment he experienced at Parklea, and his lack of an effective remedy breached his rights under Articles 2 (3), 7, 10 and, implicitly, of Article 24(1) of the ICCPR. In particular, he alleged that the transfer to an adult institution violated his rights as a detainee under Article 10(2)(b) and (3) of the ICCPR to be treated with humanity and inherent dignity and be segregated from adults because he was placed in a vulnerable position due to his age, disability and status as an Aboriginal. Furthermore, the cumulative effect of his segregation and confinement, the absence of facilities in his cell, lack of appropriate heating, the removal of his blanket and clothes, camera surveillance, 24 hour exposure to artificial light, use of force causing him physical injuries, and prescription of medication without his free consent violated Article 7, read in conjunction with Article 10, of the ICCPR .

In bringing his claim CB argued that no effective domestic remedies existed since there was no common law right of action in Australia to address the alleged harm against him and he could not successfully maintain a personal injury action. He also stated that any provisions specifically guaranteeing rights to prisoners could only be brought to the Minister or Commissioner with no enforceable right to compensation.

*The Committee held that*: (1) CB's claims under Article 10(2)(b), are inadmissible because paragraph 2(b) only protects the right of accused juvenile persons to be separated from adults, and CB was a convicted juvenile person at the time of his transfer to Parklea; (2) CB's claims under Article 10(3) are also inadmissible because he did not substantiate how his transfer to Parklea breached his right to be segregated from adult prisoners, as he was placed in a safe cell, segregated from other inmates, on arrival; (3) CB was not required to exhaust all possible domestic remedies because, in accordance with Article 2(3), it would have been futile for CB to commence court proceedings; (4) persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons; (5) inhuman treatment must attain a minimum level of severity to come within the scope of Article 10; (6) the assessment of minimum depends on all circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects, and in some instances, the sex, age, state of health or status of the victim; (7) even assuming CB's confinement to a state or dry cell was intended to maintain prison order or to protect him from further self-harm, as well as other prisoners, the Committee considers the measure incompatible with the requirements of Article 10 read together with Article 24(1); (8) CB's confinement to an insulated cell without any possibility of

communications, combined with his exposure to artificial lights for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal; (9) as such, the hardship of imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempts, in violation of his right to be treated with humanity and respect for his inherent dignity under Article 10; (10) the administration of anti-psychotic medication to CB, in the absence of any facts that would indicate that the medication was administered for purposes contrary to Article 7, was not in fact a violation of Article 7; (11) CB is entitled to an effective remedy, including adequate compensation.

■ **Universal jurisdiction; prosecution or extradition to be tried for torture – violation of Articles 5 and 7 of UNCAT**

## Suleymane Guengueng *et al* v Senegal

Decision of the UN Committee against Torture, 19 May 2006

The complainants were six Chadian nationals living in Chad who alleged they had been tortured by the agents of the state answerable directly to the then President, Hissène Habré. They lodged a complaint in January 2000 against Habré in Senegal, where he had taken refuge. The complaint was dismissed on the grounds of a lack of jurisdiction to take cognisance of acts of torture committed by a foreigner outside Senegalese territory, based on Article 669 of the Senegalese Code of Criminal Procedure. This decision was confirmed in March 2001 by the Senegalese Court of Cassation which stated that no procedural text conferred on the Senegalese Court universal jurisdiction to prosecute and judge, if they are found on the territory, presumed perpetrators of or accomplices in acts of torture when those acts have been committed outside Senegal by foreigners.

In September 2005, a Belgian judge issued an international arrest warrant against Habré charging him with genocide, war crimes, torture and other serious violations of international humanitarian law. In November 2005, the Dakar Court of Appeal stated that it lacked jurisdiction to rule on Belgium's Request for Extradition.

Senegal ratified the Convention in 1986 and made the declaration under Article 22 in 1996. The complainants alleged that Senegal had violated Article 5 by failing to take appropriate legislative measures to establish universal jurisdiction in cases of torture and Article 7 by failing to prosecute or extradite Habré.

*The Committee held that* (1) Article 5(2) of the Convention requires each State party to take "such measures as may be necessary to establish its jurisdiction over such offences when the alleged offender is present in any territory under its jurisdiction and it does not extradite him"; (2) Senegal does not dispute that it has not taken such measures; (3) the reasonable time frame within which Senegal could have complied with the obligation has been exceeded; (4) and, as such, Senegal has violated Article 5; (5) under Article 7, the State whose jurisdiction a person alleged to have committed offences under Article 4 is found must, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution; (6) the obligation to prosecute does not depend on the prior existence of a request for extradition; (7) the alternative of extradition is only available when a request has been made and puts the State in a position to choose; (8) the State cannot invoke the complexity of its judicial proceedings or other reasons from domestic law to justify its failure to comply with the Convention; (9) as such, Senegal is obliged to prosecute Habré for alleged acts of torture unless it can show that there was not sufficient evidence to prosecute; (10) moreover, since 19 September 2005, Senegal has had the option of extraditing Habré to Belgium at the request of a formal extradition order but refused to comply; (11) by refusing to prosecute or extradite Habré, Senegal has violated Article 7; (12) in furtherance of this decision, Senegal is required to adopt the necessary legislative measures to establish its jurisdiction over such cases or choose to prosecute or extradite Habré; (13) the decision does not impact on the possibility of the complainants obtaining compensation through the domestic courts for Senegal's failure to comply with its obligations.

■ **Prohibition of inhuman and degrading treatment – violation of Article 3 of the ECHR**

■ **Right to a fair trial – evidence obtained in breach of Article 3 and privilege against self-incrimination – violation of Article 6 of the ECHR**

## Jalloh v Germany

Judgment of the ECtHR, 11 July 2006

J was a Sierra Leonean national living in Germany. On 20 October 1993, four policemen saw him on at least two occasions take a "bubble" (a tiny plastic bag) out of his mouth and hand it to another person in exchange for money. The officers, believing that the bubbles contained drugs, arrested J, who then swallowed another bubble he had in his mouth. On searching him they found no drugs. The public prosecutor ordered that a doctor administer emetics to J to make him regurgitate the bubble, in order to preserve the evidence. J was taken to a hospital and refused to take the emetics. Police officers held him down while a doctor forced a tube down his nose into his stomach and administered an emetic, Ipecacuanha syrup, through the tube. The doctor also injected him with apomorphine, another emetic. J regurgitated a bubble containing 0.2g of cocaine and was taken to a police cell. At his trial J objected to the use of the evidence obtained by administration of emetics on the grounds that the method was illegal. However, on 23 March 1994, J was convicted of drug-trafficking and received a one year suspended sentence. He appealed to the Wuppertal Regional Court, which upheld his conviction, as did the Düsseldorf Court of Appeal. J's complaint to the Federal Constitutional Court was declared inadmissible as he had not exhausted all the available measures in the criminal courts.

On 30 January 2000, J filed an application with the European Court of Human Rights alleging that the forcible administration of emetics breached his right not to be subjected to inhuman or degrading treatment under Article 3 and to

respect for private life under Article 8. He also alleged that using the drug bubble in evidence breached his right to a fair trial under Article 6 because it was illegally obtained and in such a way that it violated is right to be protected against self-incrimination.

*The Court held that*: (1) neither Article 3 nor Article 8 prohibits using a medical procedure against a person's will in order to obtain evidence; (2) however, any forcible medical intervention must be convincingly justified, the main factors to consider being (a) the extent to which the intervention was necessary to obtain the evidence, (b) health risks (there should be no risk of lasting detriment to health), (c) the manner in which the procedure was carried out (must not exceed the level of severity prescribed by Article 3 case-law), (d) the degree of medical supervision available, and (e) the effects on the suspect's health; (3) in J's case (a) the procedure was not necessary (they could simply have waited for the bubble to pass through J's body naturally), (b) the health risks were more than negligible (some medical experts considered them serious), (c) the manner of the intervention must have caused pain, anxiety and humiliation, as force verging on brutality was used to restrain J and he was watched by four police officers and a doctor, (d) there was medical supervision (though J denied that a doctor had questioned him about his medical history) and (e) J claimed that he had suffered stomach troubles as a result of the procedure, but this was not established; (4) in the circumstances, J had been subjected to inhuman and degrading treatment contrary to Article 3; (5) no separate issues arose under Article 8; (6) Article 6 does not lay down any particular rules on the admissibility of evidence so it could not be said that evidence obtained unlawfully was inadmissible; (7) the Court's role was to decide whether the proceedings as a whole, including the way in which evidence was obtained, were fair; (8) although the evidence in J's case was not obtained in breach of domestic law (as the national courts had found that the procedure was permitted), it was obtained by breaching Article 3; (9) the Court would have regard to whether the rights of the defence had been respected and in particular whether J was given an opportunity to challenge authenticity of the evidence; (10) J had and took an opportunity to challenge the use of the evidence; (11) the public interest in securing the conviction was relevant but here could not be of such weight as to warrant allowing the evidence to be used at trial, since the drug dealing was on a relatively small scale; (12) therefore the use in evidence of the drugs obtained by the forcible administration of emetics to J rendered his trial as a whole unfair; (13) the privilege against self-incrimination, with the right to silence, lies at the heart of the notion of a fair procedure, to protect the accused against improper compulsion by the authorities; (14) in deciding whether the privilege against self-incrimination has been breached, the Court will have regard to (a) the nature and degree of the compulsion, (b) the weight of public interest in punishment of the offence, (c) the existence of safeguards in the procedure, and (d) the use to which such material is put; (15) allowing the use at J's trial of evidence obtained by the forcible administration of emetics infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair, because (a) the nature and degree of compulsion was great as the procedure significantly interfered with J's physical and mental integrity and was inhuman and degrading, (b) the public interest was not sufficient to justify recourse to such a grave interference with J's physical and mental integrity, given that he was only a street dealer, (c) there were safeguards in domestic law, as the procedure had to be carried out by a doctor, and (d) the drugs obtained were the decisive evidence in J's conviction; and (16) the State within three months of the judgment must pay J EUR 10,000 (USD 12,950) in respect of non-pecuniary damage, EUR 5,868.88 (USD 7,600) in respect of costs, plus tax and interest.

# VIOLENCE AGAINST WOMEN

■ **Protection against domestic violence – violation of Articles 2(a), (b) and (e), Article 5 in conjunction with Article 16 of CEDAW**

## AT v Hungary

Views of the Committee on the Elimination of Discrimination against Women, 26 January 2005

AT, a Hungarian national, was the victim of severe domestic violence and serious threats by her common law husband, LF. Together they had two children, one of whom was fully disabled. LF possessed a firearm and had threatened to kill AT and rape the children. LF moved out of the family apartment in March 1999 but continued to abuse AT during subsequent visits. LF did not pay child support for three years. Criminal charges were brought against LF in 1999 in connection with two incidents of assault and battery that resulted in bodily harm to AT .

In order to protect herself and her children, AT changed the lock on her apartment on 11 March 2000. However, on 28 March 2000 LF kicked in part of the door when AT refused to let him into the apartment. LF subsequently battered AT on several occasions. Ten medical certificates were issued in connection with separate incidents of severe physical violence, the most recent of which took place on 27 July 2001, when LF broke into the apartment and beat AT so severely that she required hospitalisation.

Civil proceedings were commenced regarding access to the family's apartment, which was jointly owned by AT and LF. The Budapest Regional Court issued a final decision on 4 September 2003 authorising LF to return to and use the apartment on the grounds that LF's abuse of AT could not be substantiated and that his right to possession of the property could not be restricted. AT submitted a petition for review of the decision to the Supreme Court, which was pending at the time of her submission to the Committee. AT offered to compensate LF for half the value of the apartment in exchange for turning over ownership to AT, but LF refused. AT's motion for injunctive relief in the form of her exclusive right to use the apartment was rejected on 25 July 2000.

Further criminal charges were brought against LF in July 2001 in connection with the assault and battery that resulted in AT's week-long hospitalisation with serious kidney injuries. LF was never detained in connection with these charges and the Hungarian authorities took no action to protect AT from him. While AT had sought assistance from local child protection authorities, her appeals were unsuccessful.

As part of her original submission to the Committee on 10 October 2003, AT requested effective interim measures under Article 5(1) of the Optional Protocol in order to save her life, which she felt was threatened by LF. On 20 October 2003, Hungary was requested to provide AT with immediate, appropriate and concrete preventive interim measures of protection. In January 2004, Hungary contacted AT and offered to provide a lawyer with experience in cases of domestic violence and to coordinate with local family and childcare services to stop the violence and secure the safety of the children.

AT claimed that Hungary had violated Articles 2(a), (b), and (e), 5(a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women for its failure to provide effective protection from her former common law husband. She also claimed that Hungary passively neglected its affirmative obligations under the Convention and supported the continuation of domestic violence against her. She further claimed that the lack of protection or restraining orders under Hungarian law violated her rights under the Convention and the Committee's General Recommendation 19. AT also maintained that the criminal procedures were irrationally lengthy and could not be considered effective and/or immediate protection.

*The Committee held that*: (1) Hungary's obligations, as set out in Article 2(a), (b) and (e) of the Convention, extend to the prevention of and protection from violence against women, and those obligations remained unfulfilled in the instant case and thus constitute a violation of AT's human rights and fundamental freedoms, in particular her right to security of person; (2) traditional attitudes by which women are regarded as subordinate to men contributing to violence against women exist in Hungary and are revealed in the present case, evidenced by the fact that, despite four years of abuse by her former common law husband, AT was unsuccessful in both civil and criminal proceedings to either temporarily or permanently bar LF from the apartment where AT and her children live; (3) AT could not seek a protection or restraining order because such safeguards are not legally available in Hungary, and she was unable to take refuge in a shelter because none were equipped to accept her with her children, one of whom is disabled; (4) these facts were undisputed by Hungary and taken together, indicate a violation of AT's rights under Articles 5(a) and 16 of the Convention; (5) the lack of effective legal and other measures prevented Hungary from dealing satisfactorily with the CEDAW's request for interim measures; (6) therefore, Hungary should take immediate and effective measures to guarantee the physical and mental integrity of AT and her family and ensure that they are given a safe home and receive appropriate child support and legal assistance in addition to reparation proportionate to the physical and mental harm undergone and the gravity of the violations of her rights; (7) further, Hungary should respect, protect, promote and fulfill women's human rights, including their right to be free from all forms of domestic violence; (8) Hungary must assure victims of domestic violence the maximum protection of the law by action with due diligence to prevent and respond to such violence against women; (9) take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated; (10) take all necessary measures to provide training on the Convention and the Optional Protocol to judges, lawyers, and law enforcement officials; (11) implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters; (12) investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards; (13) provide offenders with rehabilitation programs and programs on non-violent conflict resolution methods; (14) in addition, Hungary shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee; and (15) Hungary is requested to publish the Committee's views and recommendations in the Hungarian language and distribute them widely.

# WAR CRIMES

**War crimes – crimes against humanity**

## Prosecutor v (1) Dusko Sikirica; (2) Damir Dosen; (3) Dragan Kolundzija

Sentencing Judgment ICTY, 13 November 2001

The three co-accused were charged with a number of violations of the laws or customs of war and crimes against humanity. All the charges arose from events at the Keraterm detention camp in Bosnia and Herzegovina in the summer of 1992, where on average about 1,200 people were held in cramped conditions with inadequate bedding and toilet facilities and with limited access to medical care. Detainees were subject to interrogations and physical and psychological mistreatment and there were frequent beatings by guards and visitors to the camp. On 24 July 1992 more than 120 men were killed in a massacre at the camp.

All three of the accused entered into separate plea agreements with the prosecution by which they entered a guilty plea to the charge of persecution on political, racial or religious grounds. The Trial Chamber accepted the pleas and entered findings of guilt and accepted the withdrawal of all the other charges.

S was the Commander of Security at the camp. While he did not hold any rank and had no power to punish subordinates, there was evidence that he was treated as senior to the other shift commanders. However, he was not responsible for ensuring adequate food, clothing, water and medical assistance. S admitted to the murder by shooting of a detainee. There was no evidence that S was present during the build up to the massacre but he admitted that there was considerable evidence of murder, killing and beating of other individuals at the camp during the period of his duties. There was also evidence of humiliation, harassment and psychological abuse of detainees and confinement in inhumane conditions.

D was a shift leader and as such exercised some limited authority although he did not have the power to punish anybody and had no role in the administration of the camp. There was evidence that beatings had occurred during D's shift and he admitted to being aware of them. He admitted that the beatings contributed to the atmosphere of terror in the camp and that the detainees were held in inhumane conditions. There was also evidence that he had attempted to prevent mistreatment of detainees.

K was a guard and subsequently promoted to shift leader. There was no evidence that K personally mistreated or condoned the mistreatment of detainees. He accepted responsibility for continuing as a shift leader despite being aware of the inhumane camp conditions.

The Trial Chamber set out the relevant provisions of the Statute and Rules pertinent to the sentencing (following the factors set out in the *Todorovic* case). Under Article 24 the penalty to be imposed was limited to imprisonment and the Trial Chamber had to take into account the gravity of the offence and the individual circumstances of the convicted person. Under Rule 101 the Trial Chamber had power to imprison a convicted person for periods up to and including life. The Trial Chamber had to take in account any aggravating circumstances, any mitigating circumstances, the general practice regarding prison sentences in the Court of the former Yugoslavia and the extent of which any penalty for the same crime had been served.

As set out in the *Celebici* appeal judgment the gravity of the offence is the primary consideration in imposing sentence and only those matters which are proved beyond reasonable doubt could be taken into account in aggravation of that sentence. Mitigating circumstances need only be established on the balance of probability. An accused's substantial co-operation with the prosecutor is the only mitigating circumstances which the Trial Chamber is obliged to take into account. However, the submissions on cooperation were not of sufficient substance as to effect the present decision. Under the penal provisions in effect in the former Yugoslavia at the relevant time, the crime of persecution for which each of the accused had been convicted, would have attracted sentences of between 5 and 20 years imprisonment.

As to the determination of sentence the overriding obligation was to individualise the penalty to fit the individual circumstances of the accused based on the gravity of the crime. Each of the accused was convicted of the crime of persecution, which as a crime against humanity was inherently very serious and justified a severe penalty.

*In relation to S, the Chamber held that:* (1) S's superior position in the camp should be taken into account and accordingly his failure in his duty to prevent outsiders from coming into the camp to mistreat detainees was an aggravating factor. The position of authority was also an aggravating factor in respect of his murder of one of the detainees and this must have left the impression that this conduct was encouraged (or at least not subject to sanction) and contributed to the overall atmosphere of terror that existed in the camp; (2) the primary mitigating factor was S's decision to enter a guilty plea although the Tribunal also took into account his sincere expression of remorse. The guilty plea facilitated the work of the Tribunal by saving time and also contributed directly to one of its fundamental objectives, namely its truth finding function. While an accused who pleads guilty to the charges against him prior to the commencement of this trial will usually receive full credit for that plea, one who enters a plea of guilt thereafter will still stand to receive some credit, but not as much as he would have, had the plea been made prior to the commencement; (3) the gravity of S's crime was distinguished from that of the co-accused on account of the breadth of the underlying criminal conduct and the extent of his direct personal involvement in the crimes, including the murder in the camp, which was aggravated by his role as Commander of Security. However, his guilty plea was a mitigating factor in the absence of which, even taking into account the lateness of the plea, he would have received a much longer sentence. Fifteen years imprisonment was an appropriate punishment.

*In relation to D, the Chamber held that:* (1) D's position of shift leader was an aggravating factor in relation to this crime. He was in a position of trust which he had abused. He permitted the persecution of, and condoned violence towards, the very people he should have been protecting. However, the amount of aggravation must be limited in the light of the limited nature of his authority; (2) as with S, despite the lateness of the guilty plea, D would receive some credit for the plea of guilt. Other mitigating factors were his sincere expression of remorse and the fact he, as shift leader, often acted to ameliorate conditions in the camp; (3) D had been convicted of a grave offence but while D had admitted being aware of beatings occurring on his shift, the plea agreement did not suggest he had direct involvement in any of those beatings. D's guilty plea and evidence of consideration for the detainees were of primary importance when considering mitigation. The expression of remorse had also been considered. Five years imprisonment was an appropriate sentence.

*In relation to K, the Chamber held that:* (1) K was in a similar position to D, a shift leader with limited authority. However, by continuing as a shift leader, although aware of the camp conditions, he abused his position of trust. This amounted to an aggravating factor, albeit one limited in line with his authority; (2) for the same reasons as in relation to S and D and also considering the additional savings to the Tribunal on account of his more timely guilty plea (having pleaded guilty before the start of his case, albeit after the close of the prosecution case) K should receive close to full credit for his guilty plea. Furthermore on the basis of ample evidence of K's efforts to ease the harsh conditions in the Camp, K should receive a significant reduction in his sentence. His sincere expression of remorse was also taken into account; (3) although K had been convicted of the crime of persecution, the gravity of his crime was considerably diminished by the fact that there was no evidence of his direct personal involvement in any of the underlying criminal conduct. The Chamber took into account his guilty plea and the evidence of many of the former detainees that he had on many occasions acted to alleviate conditions in the camp. These mitigating factors weighed heavily in favour of a substantial reduction in the sentence, and it was considered that a sentence of three years imprisonment was appropriate.

In all three cases, credit was given for the time already spent in detention.

# Short-Changing the Right to Education in the Philippines

**Maria Socorro I. Diokno**

The Philippine Constitution guarantees the right of all Filipinos to ***quality*** education at all levels. It mandates free public education at the elementary and high school levels and compulsory elementary education for all children of school age whilst promoting the use of formal, non-formal and indigenous learning systems.[1] Other related guarantees include academic freedom and the right to choose one's field of study, the rights of teachers to professional advancement and adequate remuneration, and the right of academic and non-academic personnel to protection from the state.[2] The Philippine Supreme Court has recognised the right to education as among the most important of economic, social and cultural rights[3] and its decisions cover a range of related issues. Upholding students' rights has formed a major part of the Court's case law. However, at the same time, the Court's refusal to uphold challenges to the state's budgetary allocation for education has resulted in a lack of much needed resources.

## The Supreme Court I: Protecting Education Rights

In a series of cases, university students, who were barred from re-enrolling because they had led or participated in mass actions and demonstrations against school authorities, petitioned the Court to allow them to re-enrol and to prevent university authorities from blacklisting them and subjecting them to unlawful surveillance and harassment. The Court categorically pronounced that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[4] and that the exercise of these rights, should not be a basis for preventing enrolment. The Court further enjoined schools and officials from acts of surveillance, blacklisting, suspension and refusal to re-enroll students who exercised their free expression and assembly rights.[5] The impact of these decisions can be seen in the fact that there have been no subsequent reports of universities barring students' enrolment due to participating in or leading public gatherings.

The Court has also upheld the rights of students to freely exercise their religion while at school. In *Ebralinag v Division Superintendent of Schools of Cebu*,[6] the Court struck down expulsion orders issued against students belonging to *Jehovah's Witnesses* for refusing to salute the Philippine flag, sing the national anthem and recite the patriotic pledge holding that these orders violated the students' rights to freely exercise their religion and to education.

> *"The Constitution obligates the Philippines not only to invest in education but also to assign it the* highest budgetary priority. *"*

Proceeding from the thesis that enrolment is a contract between students and schools for the duration of the study period until completion,[7] the Court has also in *University of the East v Jader*[8] clarified the obligation of schools to their students stating that the former should "promptly inform the student of any problem involving the latter's grades and performance and also most importantly, of the procedures for remedying the same."

Similarly, in a number of cases the Court has stressed that schools, administrators and teachers exercise special parental authority over minor children while the latter are under the school's supervision, instruction or custody and can be principally or jointly liable for any acts or omissions.[10]

Regarding academic freedom the Court has not only upheld it in relation to all institutions of higher learning but also adopted an expansive definition stating that: "The essential freedoms subsumed in the term "academic freedom" encompasses the freedom to determine for itself on academic grounds: (1) who may teach, (2) what may be taught, (3) how it shall be taught, and (4) who may be admitted to study."[10]

The Court also upheld the rights of teachers against inequality and discrimination. In *International School Alliance of Educators v Quisumbing*,[11] Filipino teachers hired in the Philippines complained about receiving salaries less than their counterparts hired abroad, and claimed the practice was discriminatory. The Court agreed, and invalidated the practice of using point-of-hire classification as the basis for distinguishing salary rates for teachers hired locally as against those hired abroad.

## Supreme Court II: Refusing to Address Budgetary Allocations

Recognising that the right to education is among the more resource-intensive of all human rights, the Philippine Constitution obligates the Philippines not only to invest in education but also to assign it the *highest budgetary priority.*[12] Yet the country has consistently under-invested in education: classrooms are overcrowded, with an average class size of 50 students operating under a double-shift policy. Some public schools have resorted to converting corridors, stairways, toilets, and garages into classrooms; other public schools hold classes under the trees and in the playground. In most public schools, four to five children share a textbook, and three to four children share a desk.

The quality of education is also endangered by the lack of appropriately

**Table 1: Expenditure Breakdown of Education Budget**

| Item | Total in PhP* (000's) | Per cent of Total |
|---|---|---|
| Pre-School Education | 125,783 | 0.09 |
| Elementary Education | 62,421,884 | 46.32 |
| Secondary Education | 25,907,888 | 19.23 |
| Other Programs for Elementary and Secondary Education Combined: | | |
| • Creation of Teaching and Non-Teaching Positions | 970,350 | 0.72 |
| • Teachers' Benefits/Reclassification/Upgrading | 2,988,650 | 2.22 |
| • Government Assistance to Students and Teachers in Private Education | 1,827,554 | 1.36 |
| • Purchase of Desks and Armchairs | 1,000,000 | 0.74 |
| • Purchase of Textbooks | 809,846 | 0.60 |
| • School building (Land and Land Improvement/Titling and Survey/Furniture and Equipment) | 60,161 | 0.04 |
| • School Health and Nutrition (including Medical, Dental and Nursing Services) | 127,477 | 0.09 |
| • Physical Fitness and School Sports | 41,196 | 0.03 |
| • National Education Test Development | 159,715 | 0.12 |
| • Educational Projects Development and Implementation | 20,935 | 0.02 |
| • National Science Teaching Instrumentation Center | 16,811 | 0.01 |
| Tertiary Education | 19,501,529 | 14.47 |
| Non-Formal Education | 75,547 | 0.06 |
| Vocational Education | 2,470,953 | 1.83 |
| General Administration | 16,225,720 | 12.04 |
| **Total** | **134,751,999** | **100** |

*Source: Department of Budget and Management*
**Exchange rates: 1 PhP = 0.0158433 EUR; 0.0204502 USD (January 17, 2007)*

qualified teachers: only 27 per cent of all physics teachers in the public school system are physics majors; 34 per cent in chemistry; 44 per cent in biology; and 58 per cent in science.[13] Perhaps it is not surprising then that most Filipino children did not pass the National Achievement Test administered by the government in 2004-2005: the overall achievement rate for graduating elementary students was only 58.7 per cent, while that for graduating high school students was even lower, at 46.8 per cent. Only 20 per cent of graduating elementary students who took the test passed it (achieving scores of 75 per cent and higher). The situation is even more alarming for the high school graduating class: less than one per cent of fourth year high school students passed the test.[14] Compared to the performance of students from other countries, the Trends in International Mathematics and Science Study (TIMSS) revealed: "Filipino fourth graders ranked 23rd in both Math and Science among 25 countries; while the Second Year students ranked 41st in Math and 42nd in Science among 45 countries."[15]

Poor student performance have been linked to large class size and poor textbook-student ratio. Thus more investment is needed to improve student performance: the government's own reports indicate that 8,684 classrooms still need to be built and that 2.4 million desks and 26.85 million books still need to be provided; 10,000 more teachers still need to be hired and 80 per cent of all public school teachers need to be retrained.[16]

Other programs also need to be adopted and implemented to keep children in school with some 14 million not attending. For every 100 Filipino children who enter the formal educational system, only 66 will complete primary education, 43 secondary education, and 23 will receive university degrees.[17] A study has shown that Filipino children who do not complete elementary education are likely to be condemned to a life of poverty.[18]

Complementary programs, such as school nutrition and school health programs, also need to be improved. 30 per cent of all pupils aged six to twelve are underweight and under-height; 65 per cent of school children are iodine-deficient; 33 per cent are afflicted with iron deficiency anemia; and 87 per cent have dental problems.[19] Poor health and malnutrition have been found to be significant causes for dropping out of school.

Although the Constitution mandates *free* public education at the elementary and high school levels, many public schools throughout the country collect from each student a mandatory "parent-teacher-community association fee" ranging from PhP 150 to 600 (EUR 2.37 to 9.50; USD 3.07 to 12.27); failure to pay the fee bars a student from enrolling in a public school, thus jeopardising universal access to public education. Parents' complaints have led the Department of Education to issue a memorandum directing public schools to accept students regardless of whether or not they pay the fee; there have been reports of public schools disregarding the memorandum.

Addressing resource gaps, improving quality, and enhancing access to education require substantial public investment; since no public money may be "paid out of the Treasury except in pursuance of an appropriation made by law,"[20] the national budget (more formally, the General Appropriations Act) points to the extent and intent of public investments in the right to education, and the extent to which government complies with the constitutional mandate to afford education the *highest* budgetary priority. Under the 2005 national budget,[21] government allocated PhP 134.7 billion (EUR 2.13 billion; USD 2.76 billion) to realise the right to education.[22] This amount represents 14.7 per cent of the total budget for the year. In per capita terms, government allotted PhP 6,272.18 (EUR 99.24; USD 128.27) per Filipino student for the entire year.

The 2005 budget for the right to education shows that 46.32 per cent is devoted to providing elementary education, 19.23 per cent to secondary education and 14.47 per cent to tertiary education. Pre-school, non-formal and vocational education are allocated insignificant amounts. Allocations for pre-school and non-formal education combined account for less than one per cent of the entire education budget, while allocations for vocational education account for only 1.83 per cent. 12.04 per cent is devoted to general administration.

Purchase of textbooks needed by children accounts for less than one per cent of the entire education budget. Likewise, less than one per cent of the education budget is allotted to purchase school desks and armchairs. Allocations for school health and nutrition also account for less than one per cent of the entire education budget.

Personal services account for 86 per cent of the entire education budget. 90 per cent of these allocations are devoted to pay the salaries and wages of public school teachers, who are critical contributors to the realisation of the right to education. Maintenance and other operating expenses, from which allocations for purchase of textbooks, development of instructional materials and teaching aids, and teacher-training seminars are drawn, account for only 10 per cent of the total education budget. Capital outlay for construction of school buildings and purchase of furniture (including school desks), fixtures and equipment (including computers) receives only 4 per cent of the education budget for 2005.

The Government has admitted that "severe budgetary constraints have led to under investment in basic education."[23] On top of the budgetary allocations, government estimates it needs an additional PhP 9.9 billion (EUR 156.9 million; USD 202.7 million) to address backlogs in classrooms, desks, textbooks and teachers. Others believe the resource gap is much larger. The House Majority Leader, for instance, estimates that from 2007 to 2015, government needs PhP 11.35 billion (EUR 179.8 million; USD 232.3 million) more annually "to methodically wipe out the systems critical resource shortages, implement reforms needed to fully address quality, access and equity issues, and at the same time allow for inflation and enrolment growth."[24]

Concerned over the impact of public under-investments in education on the country's economy, the private sector has also began investing in education. Most major corporations, private foundations and business chambers now operate programs or projects designed to build more schools, provide internet access to schools, upgrade teachers' capabilities, or strengthen parents' and local communities' participation in the administration of public schools. However private investment, together with more active parents' and local communities' involvement in education, should not substitute for government compliance with its constitutional mandate and obligations arising from the right to education. After all, the Constitution has mandated the government with the duty to ensure quality education for all.

**Table 2: Comparative Allocations for Debt Service and Education, as Per cent of Budget**

| | 2000 (Actual) | 2001 (Adjusted) | 2002 (Actual) | 2003 (Actual) | 2004 (Actual) | 2005 (Actual) |
|---|---|---|---|---|---|---|
| Debt Service | 20.6 | 25.9 | 25.0 | 32.3 | 30.1 | 34.1 |
| Allocations for the Right to Education | 17.0 | 17.3 | 16.8 | 15.5 | 14.8 | 14.7 |

*Source: Department of Budget and Management*

> *"Making debt service the major priority of the national budget calls into question the intent of the Philippine government to comply with its treaty obligations to take steps towards progressively realising all economic, social and cultural rights through the maximum use of available resources."*

Realising the right to education is the third priority of government, following general administration and debt service. The latter[25] remains the primary priority of government, receiving the largest share (34.1 per cent) of the total budget. Philippine law mandates *automatic appropriations* for payments of principal and interest on public debt:[26] total debt service payments (both interest and principal payments combined) represented 89 per cent of the country's total revenues for 2005.[27] As of April 2006, total Philippine public sector debt reached a staggering PhP 6 trillion (EUR 95 billion; USD 122.8 billion): each Filipino now owes the country's domestic and foreign creditors the sum of PhP 46,846 (EUR 742; USD 959).[28]

The apparent conflict between prioritising debt service over education was resolved in a negative decision by the Supreme Court in 1991.[29] Petitioners assailed the constitutionality of the automatic appropriations provision of the law and asserted that the debt service appropriation in the 1990 budget violated the constitutional provision assigning the highest budgetary priority to education. The Supreme Court disagreed. While affirming the constitutional mandate, the Court decreed that Congress could not be deprived of the "power to respond to the imperatives of the national interest and … the attainment of other state policies or objectives." The Court went on to find that government had complied with the constitutional mandate because it had increased the budget for education since 1985 holding:

> Having faithfully complied therewith, Congress is certainly not without any power, guided only by its good judgment, to provide an appropriation, that can reasonably service our enormous debt, the greater portion of which was inherited from the previous administration. It is not only a matter of honor and to protect the credit standing of the country. More especially, the very survival of our economy is at stake. Thus, if in the process Congress appropriated an amount for debt service bigger than the share allocated to education, the Court finds and so holds that the said appropriation cannot be thereby assailed as unconstitutional.[30]

Since its promulgation, this decision has not been challenged. Its impact is all the more evident today, amidst reports of massive increases in public borrowing:[31]

as a share of the budget, debt service payments are increasing, while allocations for the right to education are decreasing. More importantly, the gap between these allocations has widened. In 2000, debt service was slightly higher than allocations for the right to education; but, by 2005, debt service rose to more than double the allocations for the right to education.

The amount set aside for debt service is so substantial it could have easily paid for the construction of the thousands of much-needed classrooms,[32] desks, textbooks, and teachers. Equally important, the funds appropriated for debt service amount to more than double the funds allocated for the realisation of the rights to education, food, health, housing, work and social security combined. Like the right to education, allocations for the rights to health and housing, already representing minimal shares of the budget, also declined over the same period.[33]

Making debt service the major priority of the national budget calls into question the intent of the Philippine government to comply with its treaty obligations under the International Covenant on Economic, Social and Cultural Rights to take steps towards progressively realising all economic, social and cultural rights through the maximum use of available resources. While the United Nations Committee on Economic, Social and Cultural Rights has yet to speak on the Philippines' skewed budgetary priorities as these relate to the enjoyment of economic, social and cultural rights, the Committee has nonetheless identified servicing of external debt as a factor that impedes the implementation of the Covenant.[34]

Similarly, although the Committee has yet to comment on the Court's 1991 decision affirming automatic appropriations for the payment of the country's debt, it can be legitimately viewed as an impediment to the government's compliance with its treaty obligations under the Covenant. However, this impediment is not insurmountable since Congress has the power to repeal the provision on automatic appropriations. Achieving this reform is one of the major challenges faced by rights advocates today. ■

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**1** Sections 1, 2 (2) and (4), Article IV, 1987 Constitution.

**2** Sections 5(2), (3), (4), Article IV, 1987 Constitution.

**3** *Villar v Technological Institute of the Philippines*, 135 SCRA 707 (1985).

4 *Malabanan v Ramento*, 129 SCRA359 (1984).

**5** *Villar v Technological Institute of the Philippines*, 135 SCRA 707 (1985), *Arreza v Gregoria Araneta University Foundation*, 137 SCRA 94 (1985), *Guzman v National University*, 142 SCRA 699 (1986), Non v Dames II, 185 SCRA 527 (1990).

**6** 251 SCRA 509 (1995).

**7** *Non v Dames II*, 185 SCRA 525, 536-540 (1990).

**8** 325 SCRA 805 (2000).

**9** *St. Mary's Academy v Carpitanos*, 376 SCRA 473 (2002).

**10** *Miriam College Foundation, Inc. v Court of Appeals*, 348 SCRA 265, 285 (2000). See also *Isabelo, Jr. v Perpetual Help College of Rizal, Inc.*, 227 SCRA 591 (1993); *Ateneo de Manila University v Capulong*, 222 SCRA 643 (1993); *Garcia v The Faculty Admission Committee, Loyola School of Theology*, 68 SCRA 277 (1975).

**11** 333 SCRA 13 (2000).

**12** Section 5(5), Article XIV, 1987 Constitution.

**13** Medium Term Philippine Development Plan (MTPDP) 2004-2010, at p. 197.

**14** National Statistical Coordination Board, 'Quality of Basic Education Remains Poor but Improving; Eastern Visayas is Tops!' available at <www.nscb.govph/06/SS-200606-SS2-01.asp>.

**15** *Ibid*.

**16** Table 18-5, MTPDP, at p. 201; Testimony of Officer-in-Charge of the Department of Education Fe Hidalgo before the Senate Committee of the Whole deliberating on the General Appropriations Bill for FY 2006, on 16 November 2005.

**17** Testimony of Hidalgo, F.

**18** Nebres, B. cited in Monsod, S. and Monsod, T., (1998) 'International and Intranational Comparisons of Philippine Poverty,' in Balisacan and Fujisaki (eds.), *Growth, Poverty, and Income Inequality in the Philippines*, Tokyo: Institute of Developing Economies, pp. 48-49.

**19** Luz, J. cited in del Mundo, F., 'Decline in Quality Hobbles Job Creation Program,' *Philippine Daily Inquirer*, 6 June 2006, pp. A1, A6.

**20** Section 29(1), Article VI, 1987 Constitution.

**21** The Philippine Congress did not enact the 2006 proposed budget into law. Under Philippine law (Section 1(8), Chapter 1, Book VI, Revised Administrative Code of 1987), if Congress fails to enact the budget for the succeeding year, the budget of the current year is re-enacted. Hence the budget for 2006 is essentially the same as the 2005 budget.

**22** Allocations for the right to education are drawn from the budgets of the Department of Education, State Universities and Colleges, Departments of Interior and Local Government, Labor and Employment, National Defense, Science and Technology, Commission on Higher Education, National Book Development Board, the Municipal Development Fund and the School Building Program.

**23** MTPDP, at 195.

**24** House Majority Leader Gullas, E., cited in Tubeza, P., 'Gov't Needs P 102B a Year to Save Public School System,' *Philippine Daily Inquirer*, A11, 14 July 2006.

**25** Only interest payments are drawn from the national budget; payments on the principal are off budget.

**26** Section 26, Chapter 4, Book VI, Revised Administrative Code of 1987.

**27** Habito, C. 'Repealing the Debt Penalty,' *Philippine Daily Inquirer*, B2, 17 July 2006.

**28** *Ibid*.

**29** *Guingona, Jr. v Carague*, 196 SCRA 221 (1991).

**30** *Ibid*, at 227.

**31** In his Explanatory Note to House Bill 2390 ('An Act Repealing the Automatic Appropriation for Debt Service, Amending for the Purpose Executive Order No. 292 Otherwise Known as the Revised Administrative Code of 1987, and for Other Purposes'), Representative Benjamin D.C. Abalos, Jr. claims that in 2002, public borrowings were 448 per cent higher than total borrowings in 1996.

**32** Government estimates the cost of constructing a classroom at PhP 436,810 (EUR 6,920; USD 8,942) (Table 18-5, MTPDP, at 201); total cost of constructing 8,684 classrooms is PhP 3.79 billion (EUR 60.1 million; USD 77.6 million), just 1.2 per cent of debt service.

**33** In 2000, allocations for the right to health accounted for only 2.15 per cent of the entire budget; by 2005, allocations had declined to 1.41 per cent of the total budget. Allocations for the right to housing are even more negligible as a share of the budget: in 2000, allocations amounted to only 1.21 per cent of the total budget; by 2005, allocations fell to less than 1 per cent (0.19 per cent).

**34** Concluding Observations of the Committee on Economic, Social and Cultural Rights: Philippines 07/06/95, E.C. 12/1995/7. It is important to note that since it ratified the Covenant. the Philippines has submitted only one report to the Committee on Economic Social and Cultural Rights. This report covered only Articles 10 to 12 of the Covenant.

# Realising the Right to Education in Post-Conflict Northern Uganda

**Judith Oder**

Uganda's constitution stipulates that all persons have a right to education.[1] It also provides that a child is entitled to basic education which shall be the responsibility of the State and the parents of the child.[2] In addition, Uganda is party to international instruments that include provisions on the right to education.[3] These obligations require it to make education available, accessible, acceptable and adaptable.[4] However, the twenty-year civil conflict between the Ugandan government and Lord's Resistance Army (LRA) forces in northern Uganda, which is currently the subject of a fragile ceasefire, has had a drastic effect on the education system of this region and, consequently, the ability of children to gain access to their right to education. This article seeks to analyse some of the main current challenges facing education in a region emerging from a long period of conflict against the country's constitutional and international obligations.

## Availability

Although international law requires that primary education should be compulsory and free for all it also recognises that in the absence of free provision and where families cannot afford the cost of education, compulsion cannot be enforced.[5]

In 1996 the government launched Universal Primary Education (UPE) a policy initiative to remove direct fees for primary school-attending children. However, despite the government's contribution, parents still have to pay for school materials, uniforms, Parent Teacher Association fees, and lunch and building fees.[6] The government's policy of Universal Secondary Education, which will eradicate fees for secondary education, is set for implementation in February 2007. Again, under the policy the government will not cover boarding and meal costs.[7]

In northern Uganda the massive influx of children enrolling in schools following the country's declaration of UPE has been undermined by a very high drop-out rate. This is largely linked to children's involvement in work to support or contribute to the family's living expenses, early marriage of girls, and lack of opportunity for and inability of households to meet the cost of post primary schooling.[8]

> *'The impact of the armed conflict has led to a wide variety of human rights abuses of children including abduction, killing, sexual abuse, displacement, psychosocial and physical traumatisation.'*

At the national level, schools are under-funded. With a constrained budget, education authorities do not provide the requisite professional support and supervision of teachers in schools. Moreover, not all of the funds allocated to the Ministry of Education and Sports are released to primary schools.[9]

## Accessibility

Realising the right to education from a low base will often be a gradual process involving an incremental inclusion of those previously excluded.[10] In terms of accessibility it will require expanding the focus away from merely providing the necessary "hardware" resources (funding, schools, teachers) to "software" in order to address the qualitative dimensions of education (i.e. the type of education delivered) as well as its intersection with the wider society.[11] This is particularly true in northern Uganda where children face a number of barriers – economic; physical, psychological – which hinder their ability to access the state school system.

Many children have been orphaned or have been forced to become the heads of their households, engaging in work. Children returning from captivity as a result of conflict are too old to enrol in age appropriate grades in the formal schools and, in addition to their domestic responsibilities, often have psycho-social difficulties that hamper their effective participation.[12]

Girls in particular have problems accessing education. In internally displaced persons (IDP) camps, where people generally have no money to pay for schooling, if a child does go to school (as per the practice across the country) it will tend to be the boy who attends.[13]Due to the household responsibilities they must carry out, girls who are sometimes older when they begin are behind from day one.[14]

The various education stakeholders – national and local government, international aid organisations – need to surmount the economic and psycholog-

ical barriers affecting children's attendance and participation at school, although this is beginning to be addressed by some local and international organisations through specially tailored programmes (e.g. Save the Children).

## Acceptability and Quality

The quality of education reflects one of its key purposes, namely maximising the development and abilities of all learners.[15] The government's obligation to define and ensure the quality of education requires an assessment of the existing conditions against postulated goals which in turn means effective monitoring through the use of appropriate human rights indicators and benchmarks.[16]

As a Save the Children report makes clear, the national education system in Uganda has to a large extent not responded sufficiently to the learning needs, aspirations and challenges of children particularly in the conflict affected and post-conflict areas. Children's attainment of requisite learning competencies is poor and school attendance is erratic, with either too few children attending or too many, often leading to problems of over-crowding due to lack of resources. Schools lack feeding arrangements and safe water and do not provide children with opportunities for play and recreation. There is a shortage of teachers in remote areas and teachers lack skills to proficiently manage large classes.[17]

A large proportion of available teachers are unqualified, poorly motivated, and ill-equipped with most of them residing far from schools with the result that they are perpetually late or absent from work. Most communities are not effectively involved in school programmes and school inspectors rarely provide support supervision to teachers. Schools lack instructional materials for infant classes and for children with disabilities. Children sit on floors due to shortage of desks.[18] The result is that after seven years of compulsory education many students still lack basic numeric and literacy skills.[19]

## Adaptability

The education system has not been adapted to respond to the needs of children affected by the conflict many of whom still live in IDP camps. The impact of the armed conflict led to a wide variety of human rights abuses of children including abduction, killing, sexual abuse, displacement, psychosocial and physical traumatisation.

Clearly such a situation requires a rights-based education approach which strives towards aligning different sectors (such as education and employment) within a common conceptual framework based on universally recognised human rights. Because human rights are interrelated and interdependent, the enjoyment of the right to education leads to the exercise of other human rights, while its denial precludes the enjoyment of most, if not all, other rights.[20]

> *"The national education system has not responded sufficiently to the learning needs, aspirations and challenges of children, particularly in conflict affected areas."*

Yet instead of education (although perhaps understandably) the main focus of service providers to date has been security (the government) and humanitarian aid (NGOs).[21] Education provision is extremely limited since much of the school infrastructure has been destroyed, resulting in instruction taking place in camp learning centres with a clustering of primary schools under the same management.

A Working Committee has since been created to coordinate the activities related to provision of social services including education in conflict and post conflict districts. This committee reports periodically to the various organs of the Ministry of Education and Sports.[22]

## Facing Key Challenges: Protection, Resourcing and Remedies

The Ugandan government should respect its international obligations by playing a leading role in enforcing the right to education for children in its post conflict northern region rather than relying on local and international organisations. Human rights standards can provide stakeholders in Uganda with guidance on the substantive and procedural standards that ought to be translated into models best suited for communities in northern Uganda. Ideally, (although this may currently be unrealistic) and in accordance with Article 12 of the Convention on the Rights of the Child, children should be involved in the development and assessment of programmes.

However, little will be achieved without sufficient resources. One strategy could be to make the link between the right to education and the government's obligations in the form of constitutionally guaranteed educational resource allocations.[23]

In addition to greater resources the other key issue that must be addressed is child protection which has been undermined by displacement, poverty and conflict related insecurity. This includes issues of child abduction, abuse and molestation by militias and rebel forces, and sexual abuse and cruel treatment of children, including in school. Other critical protection issues that need to be dealt with include: heavy domestic chores and children assuming adult roles such as heading households, harsh enforcement of school discipline including corporal punishment, and lack of separate remand facilities for children in conflict with the law, as well as hunger deprivation.[24]

Courts have begun to be active on protecting the welfare of pupils although the level of punishment might not always reflect the seriousness of the offence, e.g. a recent criminal case, involving a teacher who sexually assaulted a fourteen year old girl in the Apac district, saw him sentenced to only two years imprisonment by a Magistrate's Court. A case concerning an HIV positive head teacher who sexually assaulted six female pupils and infected them with HIV is pending at the time of writing before the Magistrate's Courts in Gulu district.[25]

Enforcing the right to education requires the development of a uniform and comprehensive legal framework which provides effective remedies for

those whose rights have been breached.[26] Although litigation on the right to education issues as guaranteed under Article 30 to date been minimal, this is likely to increase in the near future as NGOs begin to see the benefits of using strategic cases to interpret Uganda's domestic and international obligations for improving policies and programmes.

One of the most significant recent education cases was heard by the Supreme Court in early 2006 when it dismissed an appeal filed by three Seventh-Day Adventist students at Makerere University's law school who claimed the institution breached their religious rights by making them take exams and attend lectures on the Sabbath, or Saturday.[27] The Constitutional Court had held[28] that the Makerere University policy complained of by the Seventh-Day Adventist students was fair and its students, including the petitioners, had voluntarily joined the university.[29] On appeal to the Supreme Court, the main issue was whether in refusing to consider alternatives proposed by the students, the university had infringed the students' right to education and freedom to practice religion[30] provided for in the Constitution. The Supreme Court held that the university had not acted unconstitutionally as it would be unfair to expect the university to accommodate the student's wishes and that any infringements on the appellants' right to education and freedom of religion were reasonably justifiable in a free and democratic society in accordance with Article 43 of the Constitution. The Court noted that the university's policy had resulted in: (a) university education being made accessible to a larger number of students; (b) an increase in the intake of privately sponsored students; (c) a greater variety of courses; (d) the generation of more revenue; and (e) the cost of education for many students being reduced. In these circumstances these wider benefits clearly justified the infringements to individual rights and by adopting such a stance the Ugandan courts were able to indirectly guarantee enhanced protection of the right to education for a much wider number of students. ■

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**1** Article 30 of the Constitution of the Republic of Uganda, according to which education is a fundamental right. The promotion of free and compulsory basic education is also provided for in the Preamble, under "National Objectives and Directive Principles of State Policy".

**2** *Ibid*., Article 34 (2)

**3** Article 11 of the African Charter on the Rights and Welfare of the Child; Article 17 of the African Charter on Human and Peoples' Rights; Articles 28 and 29 of the Convention on the Rights of the Child; Article 13 of the International Covenant on Civil and Political Rights; and Article 10 of the Convention on the Elimination of Discrimination Against Women.

**4** See General Comment 13 of the UN Economic, Social and Cultural Rights Committee on the Right to Education (E/C.12/1999/10)

**5** Katarina Tomaševski, *How to implement the right to education under the African Charter on Human and Peoples' Rights*. Paper prepared for presentation at the Seminar on Economic, Social and Cultural Rights Under the African Charter, Pretoria, 13-17 September 2004, p 3; Also cf. CESCR Gen. Comment 11, para. 6. "*Compulsory*. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by Articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasised, however, that the education offered must be adequate in quality, relevant to the child and must promote the realisation of the child's other rights."

**6** Women's Commission for Refugee Women and Children, Learning in War Zone: Education in Northern Uganda, p 3 accessed 7 Jan 2007 at <http://www.womenscommission.org/pdf/Ed_Ug.pdf>

**7** Fortunate Ahimbisibwe, *Uganda: Free Secondary Education Starts*, The New Vision Newspaper, 5 January 2007, accessed 8 Jan 2007 at <http://allafrica.com/stories/200701060002.html>

**8** *Quality Education for Children Affected by Armed Conflict*, Save the Children, January 2006, p. 5.

**9** *Ibid*., p. 5.

**10** Tomaševski, *supra*, p. 3.

**11** Tomaševski, *supra*, p. 4.

**12** Save the Children Uganda Report Uganda, *supra*, p. 4.

**13** However, in early primary school, there are often more girls than boys attending.

**14** Womens Commission interview with Distirct Education Officer Kitgum, 20 September 2004 accessed on 7 Jan 2007 at <http://www.womenscommission.org/pdf/Ed_Ug.pdf>

**15** Article 29(1), Convention on the Rights of the Child

**16** Tomaševski, *supra*, p. 5. See General Comment 13, para. 52.

**17** Save the Children Uganda Report, *supra*, p. 8.

**18** Save the Children Uganda Report, *supra*, p. 9.

**19** Uganda National Examinations Board (UNEB) National Assessment of Progress in Education (NAPE) report, January 10, 2005 indicates that numeracy level of primary six pupils (P6) had slipped from 41.5 per cent in 1999 to 20.5 per cent in 2003. Competence in literacy, numeracy and life skills in the sample classes (P3 and P6) was below 50 per cent across the country, except in Kampala where it was above 80 per cent. 64 per cent of the P3 pupils tested were found 'inadequate' in their performance in English reading and writing and as high as 76 per cent were 'inadequate' in oral English. At P6, 80 per cent of the sample pupils tested were 'inadequate' in English reading and writing, just over 30 per cent in oral English and over 80 per cent in numeracy.

**20** Tomaševski, *supra*, p. 6.

**21** Christopher Wimon Okecho, Assistant Commissioner Special Needs Education, Education in Northern Uganda, A Paper presented at the October 2006 Education Sector Review, 25-27 October 2006, accessed at <http://www.education.go.ug/Northern.htm> on 7 Jan 2007.

**22** *Ibid*.

**23** Tomaševski, *supra*, p. 3. For example, see countries such as Brazil, Costa Rica, Hungary and the Philippines where constitutions indicate the amount of resources to be devoted to realising the right to education.

**24** Save the Children Uganda Report, *supra*, p. 10.

**25** Interview with Dennis Obita, Education Officer, Save the Children Uganda, 8 Jan 2007

**26** Tomaševski, *supra*, p. 7.

**27** University, Supreme Court Constitutional Appeal No. 2 of 2004 8/1/2006.

**28** *Dimanche Sharon and 2 Others vs. The Makerere University*, Constitutional Court Const Cause No. 1 of 2003 9/24/2003.

**29** Mark A. Kelner, *Uganda: University Students Upset in Quest for Sabbath Rights*, Adventist News Network, 7 October 2003.

**30** Constitution of the Republic of Uganda, Article 29(1)(c).

# Practice and Procedure

## Securing the Right to Education in Brazil: A Brief Overview of the Role of the Courts

**Renata Mesquita Ribeiro**

The right to education is defined in Article 6 of the Constitution of the Federal Republic of Brazil of 1988 as a social right. It is not clear why the drafters of the Constitution adopted this definition although it may be due, at least in part, to the legal tradition handed down by former Brazilian constitutions, e.g. education was also implicitly so defined in the Brazilian Empire Constitution of 1824, which asserted that free primary education should be guaranteed by the State to all citizens (Article 179) (an extremely progressive step at the time). Another reason could be the desire to concentrate power in the hands of the State, instead of affirming the libertarian or cultural aspect of this right in the Constitution. However, such an approach risks negating the other economic, cultural civil and political elements of the right to education[1] as are reflected in international standards and comparative case law. Despite these definitional constraints Brazilian courts have been active in securing education rights across a wide range of issues as this brief survey seeks to illustrate.

### Resourcing Education

The economic aspects of education were explored in a recent cases before the Federal Supreme Court of Brazil when Judge Ceso de Mello held that that constitutional guarantees which demand State action and budgetary resources to make them effective – i.e. the so-called 'second generation' rights which includes the right to education – must be enforced in accordance with public priorities but that the State is responsible for guaranteeing an "essential minimum" enjoyment.[2] However, the Court also recognised that: "In principle, the Judiciary must not intervene in a jurisdiction reserved to another Power, such as the Executive, unless there is clear evidence of an exceptional case of an arbitrary violation of the other's constitutional obligations."

A leading commentator, Ana Paula de Barcellos, has stated in relation to assessing budgetary allocation: "There is a limitation of resources and this is a contingency that cannot be ignored…when affirming that any goods/means/ properties may be judicially demanded…[and which] magistrate[s] when determining… provision by the State, must also take… into account."[3] However, it must not be forgotten that the purpose of the State in obtaining resources to finance services, public works and policies is to achieve the fundamental objectives of the Constitution. Indeed, the chief purpose of the current Constitution of 1988 is to promote welfare with its starting point being to ensure dignity to all human beings. This includes, besides the protection of individual rights, the right to the minimum material conditions necessary for a self-respecting existence. Moreover, it is by determining the fundamental elements that confer such dignity (the basic minimum), that the main priorities for public spending are established. Any discussion regarding investment in other projects must only be undertaken after these fundamental objectives are achieved, and is contingent on the existence of remaining resources.

> *Without a serious plan to address poverty, particularly in relation to vulnerable groups, the right to education will continue to be violated.*

Consequently, restrictions on expenditure imposed by the clause "availability of resources" on the process of materialising economic and social rights depends on the one hand on (a) the reasonableness of individual or public expectations and, on the other (b) the resources available to the State in order to provide financial support. In the light of governmental responsibility to ensure that economic, social and cultural rights are effectively realised, it is self-evident that these two factors – reasonableness of expectations and available State finances – must not only be present but also complement one another in a positive manner. Conversely, if either is absent the State will not be able to carry out its duty. Hence, notwithstanding that the formulation and execution of public policies is achieved through a political process by those democratically elected, it must be recognised that both the legislator and executive are constrained by public expectations and resource limitations. Consequently, where either of these branches act unreasonably or with the clear unjustified intention of neutralising or compromising the enjoyment of economic, social or cultural rights the judiciary is justified on both legal and ethical grounds to intervene. In applying these principles the Supreme Court, although accepting to some extent that the executive could argue lack of resources for delays in enforcing the right to education (potentially a risky strategy if the judiciary fails to impose time limits since lack of funds will always be put forward as an excuse), has established an important precedent whereby a State may be held to account for repeatedly violating the right to education, absent any acceptable justification for such failures.

### Education for All

The right to education is set out in detail in the Federal Constitution in ten articles (Articles 205-214), which can be found in Section VIII covering social order. Article 205 explicitly states that the duty of the State and of the family, in conjunction with society, is to ensure the provision of education for all and that it

is received by all. This is characteristic of the duality of the right: on the one hand the obligation of provision, and on the other the right to receive. It is important to emphasise that the constitution guarantees education as a right to which *all* are entitled, regardless of nationality, age, ethnic or social origin, religion etc. Although the constitution is not sufficiently articulated regarding the right to education of certain vulnerable groups, such as indigenous people (mentioned in paragraph 2, Article 210) or the Roma (not mentioned), Article 206(1) makes it clear, through its open-ended, non-discriminatory provision, that they are equally entitled. With respect to the principle of equality, the Tribunal of Justice of the Federal District and the Tribunal of the State of Minas Gerais have issued two significant decisions in relation to school admissions. In the first ruling the Tribunal held that there should be no entrance criteria based on economic or social origin.[4] In the second decision, dealing with the enrolment of a child in the first year of an elementary school, the Tribunal, affirming that access to free, mandatory elementary school is a subjective public right and consequently should be implemented immediately, held that denying an able child's enrolment in the first year of elementary school due to the fact that he had not reached a certain minimum age constituted unlawful discrimination.[5]

## State Obligations: Facilitating Attendance

Article 208 of the Constitution elaborates a detailed set of State obligations in relation to education provision including the progressive universality of public secondary education, specialised schooling for the disabled, preferably in the regular school system, assistance to children from zero to five years of age, in day-care centres and pre-schools, access to higher levels of education, research and artistic creation according to individual capacity; provision of regular evening school courses according to the needs of the student and assistance to elementary school students by means of supplementary programmes providing school materials, transportation, meals and medical assistance. These supplementary programmes target students in elementary education[6] and, indeed, are essential to guaranteeing school attendance through the provision of transport. A study prepared by the Brazilian Company for Transport Planning (Geipot), a research body of the Brazilian Ministry of Transport, indicates that 2.3 million children and adolescents in rural areas cannot access public school transport. This number represents 36 per cent of students enrolled at the elementary level of education.[7] Consequently, access to education has been considerably affected. For instance, children from the city of Crato, in the State of Ceará, need to take a boat and then ride in the back of a truck to reach the school that is situated fifteen kilometres from their homes. They need to wake up at 03h30 to arrive at school on time.[8] This is in breach of the provision of the Statute of the Child and Adolescent that determines the obligation of the Municipality to provide safe public transport for students who live some distance from school, especially when the resources allocated for this service are guaranteed by the Federal Government through the National Fund for the Development of Education (FNDE).[9]

> *"The right to education like other constitutional rights can only be truly considered a "right" if it is legally enforceable against those who have the duty of guaranteeing its enjoyment."*

The issue of transport was considered by the Tribunal of the State of Minas Gerais when it ruled that the Municipality of Novo Cruzeiro had violated Article 207(7): "…the Municipality, whilst admitting its duty to offer public transport to those localities most in need, is failing in its provision, which in consequence is clearly hampering children and adolescents' access to those State schools sited in different localities. The municipality argued that this omission was due to the dreadful conditions of the roads in some of these localities. More than one opportunity was given to the municipality to regularise its school transport programme. However, after almost three years, there are still localities where the service does not exist. Thus, it is consistent with the obligation of the *Ministério Público* to demand the observance of the Brazilian Constitution and the preservation of a collective good, education, which should be promoted, primarily, through the offer of free public education in State establishments (Article 206, IV) together with the offer of supplementary programmes which are indispensable in assuring access to and permanence within school (Article 208, VII). Without education, the fundamental objectives of the Republic, namely the construction of a free, fair and understanding society, the guarantee of national development, the eradication of poverty and marginalisation and the reduction of social inequalities, will not be achieved".[10] The decision may only be faulted for its failure to recognise education as a right referring instead to it as a "collective good".

Article 208(3) of the Constitution empowers the government to carry out a census of elementary school students, enrol them and to ensure that parents or guardians ensure their children's attendance. In addition, Article 12 of the Basic Tenets for National Education Law (*Lei de Diretrizes e Bases da Educação Nacional* – LDB) determines that educational institutions are responsible for providing parents and guardians with information about school attendance and performance of students. Nevertheless, despite these obligations drop-out rates in Brazil are still high (8.3 per cent, in 2001)[11] due to causes such as criminality, drug abuse, child prostitution and child labour.[12] The *Ministério Público* has intervened in many cases, often ensuring that children return to school or are sent for medical treatment. Clearly, many of the situations are directly related to poverty, and constitute proof that, without a serious plan to address it, particularly in relation to vulnerable groups, the right to education will continue to be violated.

## Securing Redress

Article 208(2) of the Constitution stipulates that access to free and

compulsory education is an individual public right, and that the State is responsible for non- or irregular provision of elementary schooling. However, the provision's real significance lies in the fact that it empowers any individual who is receiving inadequate, or not receiving any primary education at all to demand that the State take steps to immediately rectify the situation. In line with this constitutional provision Article 5(4) of the LDB prescribes the civil and criminal responsibility of public authorities negligently failing to provide elementary school education as a result of proven negligence. This statutory provision is an essential tool for social control enabling rigorous scrutiny of public authorities. However, for it to be truly effective there is a need to raise public awareness about it and how people can use it to obtain redress for breaches of their rights.

Article 5 of the LDB also affirms that the access to fundamental education is a public individual right, stipulating that any citizen, group of citizens, community association, trade union, or any other legally constituted organisation in addition to the Ministério Público (which can take cases in the public interest) can demand that the State ensure the enforcement of the right. It should be emphasised that the use of the term "citizen" instead of "individual" undermines the principle of universality since enjoyment of the right to education should not depend upon status.

## Conclusion

In a country with approximately 15 million illiterate people above the age of fifteen,[13] the government clearly needs to pay more attention to education. Illiteracy not only reinforces social marginalisation, hampers the development of the State and increases the likelihood of violence and the perpetuation of poverty, it is also a direct consequence of daily violations by the State of the right to education for millions of its citizens.

Article 206 protects standards of quality in education. This is by far the most neglected of all the education guarantees as evidenced by the poor quality of education in public institutions – in stark contrast to that found in private schools. Consequently, it is not surprising that State school students achieve low success rates in university entrance examinations, whilst private students fill the majority of places. Some Brazilian universities have already implemented affirmative action programmes, enabling a percentage of their admissions to be granted to afro-descendants[14] or public school students in order to counterbalance historic chronic social inequality. Academics have argued that justification for such assistance can be derived from Article 3 of the Constitution which seeks to eradicate poverty and reduce poverty and social and regional inequality.[15] However, others maintain that such affirmative action is contrary to Article 208 when it requires the State to guarantee access to higher stages of education based on individual competence.

The legal supremacy of the Constitution means that no other law can restrict its scope, including those provisions guaranteeing the right to education. Moreover, the Constitution must be interpreted so as to be in conformity with international law principles such as non-discrimination and equality for all as contained in those treaties ratified by the State (ICCPR, ICESCR, CRC, CEDAW and the Inter-American Convention). This is reinforced by the fact that Articles 1-3 guarantee that the primacy and dignity of the human being should guide public policy. Above all, the Constitution must be understood as a bill of rights and not merely a compilation of good intentions. However, the right to education like other constitutional rights can only be truly considered a "right" if it is legally enforceable against those who have the duty of guaranteeing its enjoyment[16] and in this respect, the judiciary plays a key role. The cases described above demonstrate that, when faced with breaches of their education rights people have relied on the courts to secure redress. However, further progress will also depend on strengthening broader democratic principles of participation, accountability and transparency. ■

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**1** Law No. 8.069/1990 (ECA) in its article 53, first paragraph, asserts the right of parents and guardians to be informed of the educational process applied to their children, and to participate in the definition of educational proposals. Although this provision could be regarded as respect for parental freedom in choosing a child's education, it is not clear enough to be understood as such.

**2** ADPF no. 45 MC/DF

**3** de Barcellos, Ana Paula, (2002) *A Eficácia Jurídica dos Princípios Constitucionais*, Rio de Janeiro: Renovar, p. 245-246.

**4** Tribunal of Justice of the Federal District, APC4640997, 1ª Turma Cível, p. 85.

**5** Tribunal of Justice of Minas Gerais (TJMG), 1.0396.04.012987-8/001(1), 24 February 2006.

**6** Basic education in Brazil includes the following stages: *ensino infantil* (equivalent to kindergarden, or nursery school), *ensino fundamental* (primary, or elementary education) and *ensino médio* (secondary education). These stages span the following age ranges *ensino infantil*: from four to six years old (two years), *ensino fundamental*: from six to fourteen years old (nine years) and *ensino medio*: from fifteen to seventeen years old (three years).

**7** *Folha On-line*, 23 September 2002, <http://www.folha.uol.com.br/>

**8** *Ibid*.

**9** The Ministry of Education included a question regarding the access to public transport by students in the educational census of 2002.

**10** TJMG, Apelação Cível No. 000.197.843-6/2000; The Municipality has been condemned to provide public school transport in 30 days with a fine of one thousand *reais* (EUR 364; USD 335) per day of delay if each locality is not provided with this service.

**11** Available at: <www.mec.gov.br>

**12** Zanetti, E., *Folha de São Paulo*, 22/17/97

**13** Data released from the Ministry of Education, <www.mec.gov.br>. Depending on the criteria considered this number can almost double, Brazil has approximately 30 million (functional) illiterates.

**14** For instance, Universidade Federal da Bahia e Universidade Estadual da Bahia (UNEB).

**15** For example, Prof. Fabio Konder Comparato, Head of the Faculty of Law of the University of São Paulo.

**16** Waldron, J., (1984) *Theories of Rights*, Oxford: Oxford University Press.

# Filling the Lacuna in the International Human Rights Framework: The Recently Adopted Disability Treaty

**Nikki Naylor**

Although historically international laws have aimed to protect the rights of persons with disabilities, until now there has never been a binding international human rights convention with explicit guarantees. Since the 1970s, the United Nations has only adopted a small number of non-binding declarations and resolutions to provide guidance when considering the rights of persons with disabilities. The recently adopted Convention on the Rights of Persons with Disabilities ("Disability Convention") has thus aimed to fill what has been a gaping *lacuna* in the international human rights framework for many years. The Convention was adopted by the UN General Assembly on 6 December 2006 and will be opened for signature and ratification on 30 March 2007. It will enter into force after it has been ratified by twenty countries.

The process of drafting a new treaty dealing with disability rights has been the culmination of five years of work within the UN. In December 2001, the UN General Assembly[1] established the *Ad Hoc* Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of People with Disabilities (the *Ad Hoc* Committee). The Committee started its negotiations on a Draft Convention in 2004 and finalised a draft text in August 2006 for presentation to the General Assembly.

The Convention amounts to a comprehensive international treaty aimed at promoting and protecting the rights and dignity of persons with disabilities and should make a significant contribution to addressing the profound social disadvantage they face by promoting their participation in civil, political, economic, social and cultural spheres.[2] Whilst the Convention consolidates and expands upon existing international human rights and obligations, it will undoubtedly become the authoritative binding text in relation to the rights of persons with disabilities.

Dignity, autonomy, equality and social support lie at the heart of the Disability Convention.[3] In this regard the Preamble recognises that to date, despite various undertakings, persons with disabilities continue to face barriers in their participation as equal members of society.[4] Therefore, the Convention emphasises the mainstreaming of disability issues as an integral part of all strategies relating to human rights and reaffirms principles of substantive equality insofar as they relate to persons with disabilities.[5]

The Disability Convention's provisions elaborate in detail the content of rights and the measures that States must take to promote, protect and ensure the full and equal enjoyment of all human rights by persons with disabilities. It highlights the importance of equality and non-discrimination and the fact that women, girls and children are in a particularly vulnerable position and at greater risk of exploitation and abuse.[6]

The Convention covers the right to education, health, work and a range of other protective measures for people with disabilities. In addition, it requires ratifying States to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices that discriminate against such persons.[7]

The Convention aims to give effect to a paradigm shift in attitudes toward persons with disabilities by regarding them as individuals with human rights, as opposed to viewing them as subjects of charity. This change in attitudes is particularly evident in Article 8, which sets out State responsibilities to eradicate all stereotypes, prejudices and harmful practices.

A further important theme is the integration, accessibility and inclusion of disabled persons into society, which requires States to take appropriate measures to remove physical barriers preventing accessibility in relation to buildings, roads, transportation, indoor and outdoor facilities, schools, housing, medical facilities and workplaces.[8] This requires the implementation of minimum standards and guidelines in relation to accessibility facilities and for States to take effective measures to ensure personal mobility and independence for persons with disability.ix Article 19 in turn promotes inclusion and de-institutionalisation by recognising the right to live independently and within the community as opposed to institutional settings.[10] All of these obligations, in so much as they seek to guarantee economic, social and cultural rights, are, of course, subject to the overarching qualification located in Article 4(2) that they must be progressively realised according to the maximum available resources (thereby adopting the controversial formula of the International Covenant on Economic, Social and Cultural Rights).

The Convention establishes a reporting mechanism whereby ratifying States are required to submit comprehensive reports detailing measures taken to give effect to obligations under the Convention. A Committee on the Rights of Persons with Disabilities will be responsible for consideration of State reports and an Optional Protocol[11] will allow for communications to be submitted to the Committee on behalf of individuals who claim to be victims of violations under the Convention.

At the adoption of the Convention the then UN Secretary-General, Kofi Annan, applauded the Convention and stated the following:

> This Convention is a remarkable and forward-looking document. While it focuses on the rights and development of people with disabilities, it also speaks about our societies as a whole – and about the need to enable every person to contribute to the best of their abilities and potential. Throughout the ages, the treatment of people with disabilities has brought out some of the worst aspects of human nature. Too often, those living with disabilities have been seen as objects of embarrassment, and at best, of condescending pity and charity…On paper, they have enjoyed the same rights as others; in real life, they have often been relegated to the margins and denied the opportunities that others take for granted.[12] ■

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# Case Law Developments

## The Right to Education in the Jurisprudence of the Inter-American Court of Human Rights

**Christian Courtis**

While the Protocol of San Salvador – the regional treaty on economic, social and cultural rights[1] – enshrines the right to education[2] and indeed provides for its justiciability,[3] the Inter-American Court of Human Rights ("the Court") has yet to hear cases based on its direct application. However, the right to education has been considered by the Court in a number of cases, following at least two different strategies. Both approaches examine the right as a specific component of existing guarantees enshrined in the American Convention on Human Rights ("the Convention") – either as substantive rights (particularly the right to life) or as part of the right to reparation or redress.

### The right to education as a specific component of rights enshrined in the American Convention on Human Rights

This trend began with the Court's interpretation of the rights of the child provision, Article 19 of the Convention,[4] in the "*Street Children" v Guatemala*[5] case. While the Court did not mention explicitly the right to education, it considered that Article 19 should be read in light of the Convention of the Rights of the Child (CRC) (para. 194). Thus, the Court, quoting Article 27 of the CRC (para. 195), held that the content of the "measures of protection" referred to in Article 19 includes positive duties such as, *inter alia*, guarantees for the survival and development of the child, the right to an adequate standard of living and to social reinsertion of every child who is a victim of abandonment or exploitation (para. 196), Applying these principles, the Court ruled that Guatemala had not adopted adequate measures and was therefore in breach of Article 19 of the Convention. As part of the remedies the Court ordered the State to name a school after the victims.

In a case decided some years later, *Juvenile Re-education Institute v Paraguay*,[6] the Court varied its approach. Instead of reading Article 19 as an autonomous clause, it decided, whenever children were involved in the case, to read in special duties regarding other Convention rights. The case dealt with a number of deaths in a juvenile institution in Paraguay. As the victims of the case were children in State custody, the Court interpreted the rights to life and to personal integrity in relation to the rights of the child. To some extent, this interpretive strategy reinforced a previous trend in the case law of the Court, namely that the right to life does not only require negative, but also positive duties from the State.[7] The Court also went further in determining that the relevant instruments to decide the extent of the State's positive duties and measures of protection were both the CRC and the Protocol of San Salvador (para. 148). Furthermore, the Court stressed that the case did not only involve civil and political rights, but also economic, social and cultural rights of children (para. 149).

Firstly, the Court stated that positive duties regarding the protection of children's development whilst in custody, stemming from their right to life, included the provision of education (para. 161, quoting the Beijing Rules – the United Nations Standard Minimum Rules for the Administration of Juvenile Justice). Then the Court went on to analyse whether the State had complied with its duties regarding the children's lives and personal integrity under the measures of protection imposed by Article 19. Again, the Court found that these measures of special protection required the State to provide adequate education, applying both the extended interpretation of the right to life and Article 13 of the Protocol of San Salvador. The Court emphasised that adequate funding and staff are especially needed when the children come from disadvantaged groups (para. 174) and that failure to provide adequate education affects the possibility of social reinsertion and life development. The Court thus found that the State had violated its duties under Articles 4 and 5, guaranteeing right to life and humane treatment respectively read through Article 19, inter alia, for failing to provide the victims with adequate education.

*Yakye Axa v Paraguay*[8] concerned the right to communal property of an indigenous group in Paraguay. In this case, the Court maintained its expansive approach to the right to life, stating that under the positive obligations which stem from the right to life, the State should have provided the children of the community, *inter alia*, with adequate education (para. 163), quoting again Article 13 of the Protocol of San Salvador. The Court, stressing the connection between the right to health and the right to education, found that the State had not fulfilled its duties under either (paras. 165, 167 and 169). In a similar case, *Sawhoyamaxa vs Paraguay*,[9] the Court also considered insufficient State measures regarding the provision of educational material to an indigenous community, pointing out the high degree of illiteracy in the community and going on to rule that such failure, *inter alia*, constituted a violation of the right to life, in connection with Article 19 (paras. 167, 168, 170, 177 and 178).

In *Yean and Bosico v Dominican Republic*,[10] regarding the issue of the failure of the State to register two girls of

1 In terms of Resolution 56/168
2 Preamble, para. (y)
3 Preamble, para. (h); Article 3
4 Preamble, para. (k)
6 Articles 5, 6 and 7
7 Article 4
8 Article 9
9 Article 20
10 Article 19
11 Optional Protocol to the Convention on the Rights of Persons with Disabilities
12 Speech by Secretary-General Kofi Annan, 13 December 2006, accessible at: <http://www.un.org/News/Press/docs/2006/sgsm10797.doc.htm>

Haitian descent born in the Dominican Republic and to provide them with documentation and a nationality, the Court analysed a claim regarding the right to education of one of the girls. Due to the impossibility of producing proper documentation, one of the victims was expelled from regular school, and was forced to join a night course for adults. The Court did not approach the issue as a separate violation of Article 26 of the Convention – as the Inter-American Commission and the representatives of the victim requested – but treated it jointly with other violations, under the duties stemming from Article 19. The Court held that there had been a failure to fulfil the duty to undertake special protection measures imposed by Article 19 (pursuant to the CRC, the Protocol of San Salvador and Article 26 of the Convention), requiring the State to provide free elementary school to all children, in a proper environment and conditions to ensure their full intellectual development (para. 185).

Finally, the Court has also issued an advisory opinion on the legal condition and human rights of the child.[11] Again, the Court adopted an expansive interpretation of the right to life, including positive obligations regarding the right to education (paras. 80-81, 83-86), continuing to point out that provision of education is one of the protective measures to which Article 19 refers (para. 88).

## The right to education as a component of the right to reparation or redress under the American Convention on Human Rights.

The second path by which the Court has approached the right to education has been through reparations. In so doing the Court has broadly interpreted Article 63.1 of the Convention,[12] ordering not only individual, but collective reparations. Beyond monetary compensation, the Court has, in a number of cases, ordered the State to undertake measures oriented to ensure the right to education of individuals and groups, which are classified under "other forms of reparation."

As early as 1993, in one of its first judgments, *Aloeboetoe,*[13] regarding the massacre and displacement of an indigenous group in Suriname, the Court ordered the State to reopen the school located in the affected town and to staff it with teaching and administrative personnel to ensure its permanent functioning (para. 96 and point 5 of the Court order).

In *Juvenile Re-education Institute v. Paraguay*,[14] the Court ordered the State to provide within six-months vocational assistance, as well as a special educational programme, to the former inmates of a juvenile facility (para. 321 and point 13 of the Court order).

In the decision on reparations in the *Plan de Sánchez Massacre* case[15] – regarding a massacre perpetrated by the military against an indigenous community in Guatemala– the Court issued an impressive order for the State to allocate, within five years, a developmental fund to provide the community, *inter alia*, with the study and dissemination of the indigenous language, and with adequate inter-culturally and bilingually trained teaching staff for primary, secondary and technical education (paras. 109-11 and point 9 of the Court order).

The decision in the *Moiwana*[16] case – yet another massacre and massive displacement of an indigenous community in Suriname – also involved an order to establish a developmental fund "directed to health, housing and educational programs for the Moiwana community members". The Court also decided that representatives of the community should participate in the determination of how the developmental fund should be implemented (paras. 213-215 and point 5 of the Court order).

Similarly, in the *Yakye Axa* case,[17] the Court ordered that the State create a developmental fund for a fixed amount to implement educational, housing, agricultural and health programs for the members of the community to be implemented by a committee including representatives of the community (paras. 205-206 and point 9 of the Court order).

The *Jean and Bosico* case[18] also included a general order for the State to "comply with its obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special protection that must be provided to children" (para. 244).

Finally, the *Sawhoyamaxa* case[19] ordered the State to guarantee, among other things, that the school that served the indigenous community be provided with adequate materials and staff, that another temporary school be created in the place where the community was located, that education considered the cultures of Paraguay and the indigenous community, and that it be delivered in a language of the community's choice, either their own, Spanish or the indigenous Guarani language (para. 229 and point 9 of the Court order).

## Conclusion

While not always consistent, the Inter-American Court of Human Rights has developed a progressive trend towards placing positive duties on states regarding the right to education both through the interpretation of several substantive provisions of the American Convention on Human Rights (the rights to life, to personal integrity and the rights of the child), and through devising remedies for individual and collective violations. The Court has also been open to interpreting the duties stemming from the American Convention in the light of other international human rights treaties, such as the Convention on the Rights of the Child and the Protocol of San Salvador. Given this favourable trend, the path seems ripe for litigation directly based on the right to education provided by the Protocol of San Salvador. ■

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1 See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", adopted on November 17, 1988; entered into force on November 16, 1999.

2 See Protocol of San Salvador, Article 13:
"Right to Education
1. Everyone has the right to education.
2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.
3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:
a. Primary education should be compulsory and accessible to all without cost;
b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular,

# Racial Discrimination against Roma Children in Schools: Recent Developments from Courts in Bulgaria and Hungary

**Constantin Cojocariu**

Discrimination in the field of education[1] seems to be at the root of the many afflictions suffered by the Roma, a substantial minority living throughout Central and Eastern Europe. Solve the problem of education, advocates for the Roma cause reason, and you will solve all other problems, such as lack of employment and access to goods and services, precarious living conditions etc. At the same time, racial segregation in schools, a blatant case of discrimination, has been seen as the ideal target for those attempting to achieve widespread social change by way of strategic litigation, a concept imported from the struggle for civil rights in the common law world. In short, human rights lawyers and activists have explicitly sought to replicate the landmark *Brown v Board of Education*[2] US Supreme Court judgment in the countries of Central and Eastern Europe.

The last year has seen a number of decisions delivered by domestic and international courts in relation to claims of racial segregation of Roma children in schools. In October 2005, a Bulgarian court delivered a harsh condemnation of racially segregated education in response to a complaint filed by the European Roma Rights Centre, while in May 2006, a local court gave an equally important decision invalidating a scheme that consolidated separation along racial lines in a town in Hungary. Finally, in February 2006, the European Court of Human Rights (ECtHR) issued a long awaited judgment in the *D.H. v Czech Republic*[3] case (otherwise known as the *Ostrava School Segregation Case*; the case is now before the Grand Chamber of the ECtHR).

This article will examine in detail the two domestic decisions from Hungary and Bulgaria, and their significance in the long term struggle for equal rights for the Roma.

## The *School No. 103* judgment

On 25 October 2005, the Sofia District Court released its judgment in a civil suit filed two years earlier against the Ministry of Education, the Sofia Municipality and School No. 103 of Sofia.[4] School 103 is a typical ghetto school with one hundred percent Romani students, situated in a poor Romani settlement in the larger Sofia area. The court ruled in favour of the plaintiff and found that the Romani children "who have attended and are attending School 103 have been and continue to be subjected to segregation and unequal treatment"[5] and that their right to equal and integrated education had been violated. The court made a *bona fide* application of the law to the facts of the case, issuing a very strong condemnation of racial segregation that echoes the sort of activist language that is more typical

by the progressive introduction of free education;

c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;

d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;

e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties".

**3** See Protocol of San Salvador, Article 19.6:

"Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights".

**4** American Convention on Human Rights, Article 19:

"Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state".

**5** Inter-American Court of Human Rights, *Case of the "Street Children" (Villagrán-Morales et al.) v Guatemala*. Judgment of November 19, 1999. Series C No. 63. The case-law of the Inter-American Court of Human Rights can be found at its webpage, <www.corteidh.or.cr>.

**6** *Case of the "Juvenile Re-education Institute" v Paraguay*. Judgment of September 2, 2004 (only in Spanish). Series C No. 112.

**7** See Tara J. Melish and Ana Aliverti, "Positive Obligations in the Inter-American Human Rights System", in *Interights Bulletin*, 2006, 15(3): 120-123.

**8** Inter-American Court of Human Rights, *Case of the Indigenous Community Yakye Axa v Paraguay*. Judgment of June 17, 2005. Series C No. 125.

**9** Inter-American Court of Human Rights, *Case of Sawhoyamaxa Indigenous Community v Paraguay*. Judgment of March 29, 2006. Series C No. 146.

**10** Inter-American Court of Human Rights, *Case of the girls Jean and Bosico v Dominican Republic*. Judgment of September 8, 2005. Series C No. 130.

**11** Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17.

**12** American Convention on Human Rights, Article 63.1:

"If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

**13** Inter-American Court of Human Rights, *Case of Aloeboetoe et al. v Suriname*. Reparations (Article 63(1) American Convention on Human Rights). Judgment of September 10, 1993. Series C No. 15.

**14** Inter-American Court of Human Rights, *Case of the "Juvenile Reeducation Institute" v Paraguay*. Judgment of September 2, 2004. Series C No. 112

**15** Inter-American Court of Human Rights, *Case of the Plan de Sánchez Massacre v Guatemala*. Reparations (Art. 63.1 American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116

**16** Inter-American Court of Human Rights, *Case of the Moiwana Community v Suriname*. Judgment of June 15, 2005. Series C No. 124.

**17** Inter-American Court of Human Rights, *Case of the Indigenous Community Yakye Axa v Paraguay*. Judgment of June 17, 2005 (only in Spanish). Series C No. 125.

**18** Inter-American Court of Human Rights, *Case of the girls Jean and Bosico v Dominican Republic*. Judgment of September 8, 2005. Series C No. 130.

**19** Inter-American Court of Human Rights, *Case of Sawhoyamaxa Indigenous Community v Paraguay*. Judgment of March 29, 2006 (only in Spanish). Series C No. 146.

of decisions given by common law courts. Particularly striking were the emphatic statements made by the court on the long term consequences of racial segregation, a territory traditionally the preserve of the executive in this part of the world (i.e. "the negative consequences of the existing situation are enormous").[6]

The court ruled that segregation persisted due to the failure of the authorities to act pursuant to the positive obligation to fight discrimination placed on them by the law. This is remarkable because the vast majority of courts in the region do not see positive obligations in the field of social and economic rights, which are generously included in domestic laws, as binding upon governments. Consequently the task of assessing compliance with those obligations is not generally considered to fall within the mandate of the judiciary.

Another notable aspect of this decision was that the court was willing to look beyond the surface, and uncover the inner workings of racial segregation which operates under the guise of equality-for-all education. Thus, where many other peer courts in the region take the authorities' word for granted, the Sofia court adopted a more critical approach. In response to the accusations brought against them, the respondent authorities argued that the Romani children were segregated due to their parents' choice, as well as because of their own reprehensible behavior. The court rejected that argument by pointing out that the children's isolation was more due to "the impossibility for them to study anywhere else; the setting apart of the district itself as a Romani one: for the children this is a nearby and easily accessed school; the difficulties of being enrolled in other schools; the attitude toward Roma or children of other ethnicity; the comfort of being enclosed inside their own community etc" and therefore "their isolation is not a result of their free will but of circumstances beyond their control"[7].

## The *Miskolc Desegregation Plan* judgment

In this case, a Hungarian NGO challenged in court the way in which the local council in the town of Miskolc implemented an order from the government to desegregate schools in the area.[8] While the local authorities merged a number of local schools with the stated aim of ending separation between Roma ghetto schools and predominantly non-Roma elite schools, they omitted one essential element: to reform the catchment areas of the schools. Thus a plan, the stated aim of which was to eradicate segregation, resulted instead in consolidation; the Romani children continued to study in nominally integrated but separate facilities.

The first instance court rejected the complaint, mainly because it could not find a causal connection between the continued segregation of Roma children and action by the Miskolc local council.[9] However, on 9 June 2006, the appeal court reversed this decision,[10] ruling that by integrating the local schools without simultaneously redrawing their catchment areas, the Miskolc municipality maintained the segregation of Romani children, and therefore violated their right to equal treatment based on ethnic origin. The court emphasised, in language similar to that used in the judgment given in the *School No. 103* case, "the maintenance of a situation that results in disadvantage, which is, however, not a result of an action, may also amount to the violation of the law".[11]

## Some Observations

The decisions reported above are two luminous examples of how courts should apply anti-discrimination legislation. Upon closer inspection however, the two decisions present a mixed picture and must be viewed in context.

Bulgaria and Hungary are countries which quite successfully incorporated the European Commission Race Directive into their own legislation. The plaintiffs in the above cases relied on provisions granting *locus standi* for non-governmental organisations to file class actions, an innovation for legal systems in Central and Eastern Europe. The two courts applied explicitly the provisions requesting the shifting of the burden of proof when a *prima facie* case of discrimination is established. In Bulgaria, the plaintiff organisation relied on the remarkable wording of the relevant Protection Against Discrimination Act (PDA) provisions, defining racial segregation as a type of racial discrimination which is prohibited by the law. Furthermore, the PDA placed a positive obligation on the relevant authorities to take measures to prevent and eradicate discrimination. In other countries, such as Romania or Croatia, where the relevant legislation is weak, anti-discrimination litigation has not achieved the expected results. It therefore follows that strong anti-discrimination legislation will increase the chances of litigation success in the field of education.

The two decisions reflect a marked preference of advocates for actio popularis claims over individual petitions,[12] which had been used in major cases such as the Ostrava school segregation case, before major anti-discrimination legislation was adopted. While such a preference is understandable, and is motivated by attempts to avoid victimisation of Romani children or their families, combined with the difficulty of finding clients willing to engage in long-term litigation with uncertain results, it needs some qualification. The choice between the two will depend on the facts of the case. Where general measures such as the desegregation plan adopted by the Miskolc municipality are challenged, use of *actio popularis* claims might be justified. In many cases, however, the lack of an individual claimant to whom some identifiable harm may be assigned, may constitute a reason why courts, unaccustomed to this type of action, consider that no remedy is necessary.

This approach to remedies is reflected to some extent in both of the decisions discussed above where the courts mostly refrained from elaborating on the thorny issue despite the fact that their findings may have warranted such an examination. The Bulgarian decision, in particular, is strikingly toothless, despite its triumphant language. After acknowledging that a finding of violations entailed some obligations on the part of authorities, the court basically left it to the very same authorities to choose the measures and the timeline for their implementation ("segregation is found, engaging the responsibility of the indicated municipal and state authorities to take measures; what kind of measures is a question of expediency").[13] A similar approach was taken by the court in the Miskolc case. The plaintiff organisation asked the court to order the Miskolc authorities to actively engage in implementing a desegregation plan, in accordance with the relevant decree and instructions issued by the Ministry of Education. Instead, the court, invoking limitations of its perceived mandate, refused to grant the request, as doing

otherwise "would amount to the enforcement of measures in public law".[14]

## Conclusion

This article focused on two significant recent rulings of domestic courts in Hungary and Bulgaria concerning claims of racial segregation of Romani children. The two decisions suggest that courts in the region are slowly learning to live with the innovations brought by anti-discrimination legislation adopted under pressure from the European Union. The next challenge is for courts to provide remedies that would resonate with the seriousness of the violations found. It is uncertain how much time will pass before a judgment as consequential as *Brown*[15] is adopted. This may prove to be the forthcoming decision in the *D.H. and Others v Czech Republic*[16] case, currently pending on appeal before the Grand Chamber of the European Court of Human Rights. However, it has to be concluded that it is more likely that no such momentous decision will be handed down in the near future. Instead, reform, will probably only be achieved after a long and painful process of social change in which litigation will play a secondary role. ■

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1 See generally on discrimination against Roma in the field of education Rekosh, E., and Sleeper, M. (eds) (2004) *Separate and Unequal: Combating Discrimination against Roma in Education*, Budapest: Public Interest Law Initiative.

2 *Brown v. Board of Education*, 347 U.S. 483 (1954).

3 *D.H. and Others v Czech Republic*, ECtHR Application no. 57325/00, Judgment of 7 February 2006. In rejecting the applicants' claim, the Court relied on the following reasons: it refused to look at the social context of the complaint (therefore diminishing the importance of statistics that constituted an important part of the evidence put forth by the applicants); dismissed the contention that the placement of Romani children in special schools was discriminatory by stressing that the Czech authorities had no intention to discriminate; deferred to the expertise of psychologists in response to the applicants' argument that the use of tests in the Czech context was discriminatory; and finally, placed responsibility for the failure to take action on the children's parents. For a critical analysis of that judgment see Goodwin, M., '*D.H. and Others v Czech Republic*: A Major Setback for the Development of Non-Discrimination Norms in Europe' *German Law Journal*, 2006, 7(4): 421-431.

4 *ERRC v The Ministry of Education and Science* et al., Sofia District Court, 22 July 2005, available at <http://www.errc.org/cikk.php?cikk=2411&archiv=1>. The appeal against this decision is currently pending before a higher court.

5 *Ibid*., p. 4.

6 *Ibid*., p. 5.

7 *Ibid*., p. 4.

8 *Chance for Children Foundation v Local County of Miskolc*, Debrecen Appeals Court, Pf. I. 20683./2005/7, 9 June 2006. Further details about this judgment can be found on the website of the Chance for Children Foundation, at <http://www.cfcf.hu/?language=english&folder_id=101>.

9 A detailed report of that judgment can be found at <http://www.cfcf.hu/?nelement_id=29&article_id=36>.

10 *Supra*, note 8.

11 *Ibid.*

12 See on this issue the discussion in Farkas, L., *A Good Way to Equality: Roma Seeking Judicial Protection against Discrimination in Europe, European Anti-Discrimination Law Review*, 2006, 3: 21-29.

13 Decision of 22 July 2005 by Sofia District Court, *supra* note 4, p. 4.

14 Report on the decision in the Miskolc case, supra note 10.

15 Brown, *supra* note 2.

16 D.H., *supra* note 3.

Book Reviews

## *DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS*

**Peter Blanck, Eve Hill, Charles D. Siegal and Michael Waterstone**

American Casebook Series, Thomson/West, 2005, 1396 pp, ISBN 0314145133

The authors modestly call their work a casebook and its title seemingly limits its ambit to the civil rights of persons with disabilities. Yet this book traverses beyond these apparent self-imposed constraints, containing a wealth of material in addition to judgments and covering much more than the so-called traditional "civil" rights of persons with disability. Indeed, in accordance with the notion of indivisibility and continuum of rights, it covers some of the critical socio-economic rights, including education, health, housing, and welfare. It also embraces newly evolving contours of disability rights such as technology policy, especially concerning private and public internet sites, together with policies on taxation and privatisation. In so doing it not only recognises but contributes to the expanding frontiers of the disability rights movement.

While judgments are its mainstay, it also tackles fundamentally important disability issues such as the various models of disability rights and the forces – political, social, economic and attitudinal factors – that shape disability laws and policies. At the same time the movement of disability rights from the public to private sphere, together with the gradual extension of affirmative action and positive discrimination to the sector, have also been comprehensively explored.

Clearly, as the series title suggests, the geographical location and focus of this book is principally the United States of America, with the country's disability laws, policies and court judgments, as well as the socio-economic-political milieu of American disability rights, very exhaustively dealt with and forming the core of the material. However, studies focusing on other parts of the globe are also included, thereby providing useful contextual and comparative insight.

The book benefits from the varied blend of the expertise of its authors – two academics, a disability rights advocate, and a litigator who has "worked on both sides of disability cases" – combining academic scholarship in disability rights with active experience of the legal process leading to their actualisation. The rich collection of recent leading disability rights judgments of the US courts that will undoubtedly be of great use to all disability rights lawyers, is interestingly interspersed with a large amount of historical and theoretical information. These are supported by very useful cross-references and links to significant judgments, authorities and sources for further information, that will be of use both to the novice in the field or a seasoned researcher, as well as disability rights lawyers from other countries, especially those with less evolved disability jurisprudence.

The background provides an overview of the development of the Americans with Disabilities Act, 1990 (ADA), the most important current disability rights statute in the US, tracing its history from the early precursor vocational laws based on the medical model of disability and aimed principally at "rehabilitation" of persons with disabilities or the provision benefit/welfare programmes, to the ADA's present approach of directly addressing discrimination against persons with disabilities and their right to be mainstreamed into the rest of society as a right. The salient features of other disability rights statutes – Voting Accessibility for the Elderly and Handicapped Act 1984, Air Carrier Access Act 1986, Fair Housing Amendments Act 1988, Architectural Barriers Act 1968, Individuals with Disabilities Education Act (IDEA) 1997 – are all briefly described.

A substantial portion of the book comprises a detailed commentary on the ADA beginning with the concept of "reasonable accommodation", the statutory three-pronged definition of disability, and the other pertinent defini-

tions, before going on to examine substantive issues in detail: employment rights, access to public services (tucked away in which is the US Supreme Court's interesting divided verdict on access to justice in *Tennessee v Lane* and its unanimous decision against unjustified institutionalisation of persons with mental disabilities in *Olmstead v Zimring*), and access to public accommodation (including case-law on access to insurance and internet/cyberspace even though they do not occupy a physical "place"). There is also a comprehensive and well laid-out section on enforcement and remedies for all the aforementioned three major heads of disability rights thereby facilitating the mechanics of litigation while the next part explores American states' laws on disability.

The authors then shift focus to examine two other countries' disability rights approaches and, through them, explore the Welfare/Medical versus Rights Models and the sub-models within them, especially those with a more solid human rights foundation. From the developed world the Canadian model which locates disability rights squarely within its apparatus for dealing with all forms of discrimination, including its constitution, is analysed. A much shorter analysis follows of the disability rights framework in South Africa as a representative of the developing countries. These are accompanied by descriptions of the regional and international standards on disability rights, that include some interesting rulings and opinions from the European regional system. There is useful information on the historical evolution of the UN's incorporation of disability rights within its mandate, including brief descriptions of the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities that created an international monitoring mechanism for disability rights and finally, the UN Convention on the Rights of Persons with Disabilities, the analysis of which suffers from the fact that the text of the treaty was only finalised subsequent to the book's publication. This chapter too, like the previous ones, carries rich referencing to sources of more information for the interested reader.

The final sections examine the various policies of the US Government with regard to employment, health, housing, taxation, technology, internet and special education, the IDEA, and its conceptual pillars such as the Free Appropriate Public Education and Least Restrictive Environment. The appendices of the book carry the text of the important American statutes for ease of reference.

Overall, the book is a comprehensive resource for anyone interested in disability rights, even those who wish to make their first forays into the subject. While this reviewer is not competent to comment on the quality and comprehensiveness of the case selection process from the US, those decisions that are presented, especially those recently handed down, are certainly note-worthy. Remarkably, throughout the book the authors manage to generate a variety of stimulating discussions through their fascinating end-notes and questions. By thus preventing the text from lapsing into esoteric legalese, accessibility for the lay reader is enhanced and the book also becomes an excellent resource for teaching disability rights to both legal and non-legal students.

However, given the book's length and the large number of judgments it contains it would have been helpful to have a complete listing of judgments under each relevant issue, within the table of contents instead of only the existing nominal presentation. Another significant omission is the failure to pointedly address some important areas of disability rights such as intersectional discrimination, especially vis-à-vis disabled women and children, rights of persons with mental disabilities, some of the critical civil rights of persons with disabilities such as personal security, physical and mental integrity, protection from violence/abuse, exercise of full legal capacity and access to justice. While some of these issues have been included under the main thematic sections it would have been better to have listed them under separate sub-headings in order to facilitate reading. The lack of any case-law from South Africa is also noticeable leading to the conclusion that either the jurisdiction lacks any jurisprudence (which is not true – for instance the ruling in *Hoffmann v South African Airways*) or it would have been better to select another developing country to focus on, like India which has made impressive progress in its disability jurisprudence in recent years with two disability statutes having been passed in last decade and a large number of judgments on disability rights having been handed down by its courts both under constitutional and statutory laws. Subject to these few minor caveats, the book, for the immense wealth of information it contains, is certainly recommended as a must on the shelf of any disability rights advocate or enthusiast. ■

**Shruti Pandey is an Indian Supreme Court advocate, human rights activist and co-author of *Disability and the Law* (Human Rights Law Network India, 2005).**

## *HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME*

**Katarina Tomaševski**

Wolf, Nijmegen, 2006, ISBN: 90-5850-135-3

Education has been receiving explicit international human rights attention for 85 years ever since ILO Convention No. 10 on the minimum age for working in agriculture in 1921 established the link between child labour and the lack of schooling. Yet with over a hundred million children still without access to education, violations of the right continue to be widespread. Despite this grim statistic it is often difficult to pinpoint exactly when a violation of the right has taken place, due in part to the ambiguity regarding what obligations exist and to whom they belong. This book by the late Katarina Tomaševski (who passed away in October 2006) aims to address this problem by linking violations to specified obligations.

Those concerned with the right to education include two groups with frequently differing knowledge and perspectives on the obligations involved in the provision and quality of education: human rights lawyers and education experts and activists. As a human rights lawyer who had accrued a wealth of experience in the field of education through six years as UN Special Rapporteur on the Right to Education, Tomaševski was in a unique position to be able to link the human rights law realm to that of education advocacy and to make sense of the international human rights "spaghetti bowl".

In her manual on *Rights Based Education: Global Human Rights Requirements Made Simple* (2004), Tomaševski outlined the 'four As' – availability, accessibility, acceptability and adaptability – which states must fulfil to meet their obligations and where each of these requirements are located in global *human rights treaties. In Human Rights Obligations in Education: The 4-A Scheme* for the first time, Tomaševski goes on to flesh out what these requirements mean practically in terms of developing appropriate education policies. There is no attempt to set out all of the individual domestic legislative requirements. Instead, the author concentrates on international human rights law whilst selecting examples of domestic legislation where they provide alternative or useful insights.

However, recognising that awareness of judicial decisions on violations is of paramount importance for those seeking to obtain redress, Tomaševski weaves into the text a comprehensive selection of cases from various national, regional and international jurisdictions. Yet this is much more than a legal manual since it also includes a wealth of facts and figures from various up-to-date reports presented in tabular form to assess countries' progress against a range of various indicators in order to give a detailed picture of what is happening on the ground.

This sensible pragmatic approach to the assessment of the state of education worldwide has been mirrored in the logical progression of the book. An impassioned yet lucid preface explains the importance of education as a human rights issue, underlining that denial has a subsequent negative impact on a range of other rights. Each of the 4-As is then presented in depth, beginning with availability as the issue of initial concern and ending with the ultimate aim of a rights-based education system, that of adaptability to every student's particular needs whatever their social or cultural background.

For each of the 4-As dealt with in chapters one through four, Tomaševski emphasises that, although education laws differ from State to State, general human rights law imposes universal obligations on governments. A large part of each of the first four chapters is dedicated to outlining and giving examples of the many and varied problems associated with each 'A' found in education systems around the world historically and today. This provides the opportunity for comparison of various models of education as well as examples of relative successes.

There is a clear desire to reveal the various layers/levels of accountability that both legally and morally exist with regard to the right. Indeed whilst placing the weight of obligation on governments

Tomaševski acknowledges that public authorities, parents, families and teachers also have their part to play.

Attention is also brought to the fact that the provision of schools and increasing attendance figures is only the beginning. The quality of education and the existence of freedom of and in education are identified as key factors so that it can be a vehicle to transport children away from poverty and/or oppression.

Throughout this book, Tomaševski's approach is to draw attention to the denial of education rights, the corresponding obligations, judicial and other responses and finally tools for improvement. For example, using cases before South African and Senagalese courts, she debates the contradictions involved when the rights of teachers as prescribed by international law run counter to current government policy. The international affirmation of teachers' rights is focused on the one tool that Tomaševski emphasises as being vital to improve the situation for teachers: their being suitably represented by unions.

One of Tomaševski's stated aims is to "map out where consensus exists and where it is absent." This she achieves neatly by posing argument and counter-argument when two conflicting schools of thought or policies exist. A self confessed educationalist outsider looking into education systems around the world, Tomaševski concludes the book by addressing the key changes necessary to the furtherance of the right to education. She does this by posing and responding to five frank and fundamental questions designed to encourage examination of the ideal purposes and processes of education.

It is clearly impossible to cover every type of socio-economic situation for each of the 4-As. Hence, inevitably, when reading this book, not everyone will be able to ascertain the exact path that their local education system should take. A useful next step for comprehensiveness would be to have a database of the obligations in each country as they stand and what this means practically in terms of the 4-As. A possible vehicle for this could be the existing Right to Education website (http://www.right-to-education.org) which already contains some of this information.

Nevertheless, in a clear, concise yet comprehensive manner, this book achieves its aims: to set out what problems exist, who is responsible and what they should do about them. ■

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