

# JUSTICIABILITY OF THE RIGHT TO EDUCATION

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## 1 Introduction

Already in the nineteenth century, European countries began to lay down the provision of compulsory primary education in domestic law.<sup>1</sup> After the Second World War, the right to education became part of international human rights law. It was included in the Universal Declaration of Human Rights, the First Optional Protocol to the European Convention on Human Rights and Fundamental Freedoms, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in a number of other international instruments.<sup>2</sup> Today, many countries have incorporated the right to education in their constitutions.<sup>3</sup> The present article discusses the modalities of how a number of key dimensions of the right to education have been subject to judicial or quasi-judicial review. In other words, it discusses how the courts have dealt with the educational issues brought before them. Such cases do not always use right-to-education language, but generally speaking they deal with two aspects of the right to education, namely the right to receive an education and the right to choose an education. One of the major arguments against economic, social and cultural rights being on an equal footing with civil and political rights has always been that the former are not justiciable. The present article will reveal that the right to education is and has been fully justiciable in many jurisdictions.

In order to organise a discussion of the case law, the following dimensions of the right to education have been distinguished. Education must be available to everyone, accessible to all, acceptable for pupils and parents and adaptable to the needs of learners. This so-called four 'A' scheme was developed and applied by the late UN Special Rapporteur on the Right to Education, Ms Katarina Tomasevski, in her reports.<sup>4</sup> Such a scheme is appropriate for including elements that do not directly relate to education as a human right but to educational policy issues and the role of state and local authorities in educational matters. The common feature of the four A's is that all dimensions relate to the obligation of governments to respect, protect and implement the right to education. The scope of the concept of justiciability as used in the present article is broad. Justiciability refers to 'the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur'.<sup>5</sup> The concept therefore deals with the question to what extent a claim that is in some way or another related to the right to education in a particular case is suitable for judicial or quasi-judicial review by invoking a remedy. The motto therefore is: there is no right without a remedy.

In selecting the cases for discussion, I have not tried to be exhaustive. That would be practically impossible, because in the vast majority of countries judges occasionally deal in one way or another with educational issues. Lower judges often review decisions taken by administrative bodies that relate to educational interests, such as the way schools are funded, denial of access to educational institutions and the quality level of education. This paper therefore adopts a selective and illustrative approach. This means

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<sup>1</sup> See K. Tomasevski, *Education Denied* (2003) at 44-48.

<sup>2</sup> See K. Beiter, *The Protection of the Right to Education by International Law* (2006).

<sup>3</sup> See: <<http://www.right-to-education.org>> (last visited 2 March 2009).

<sup>4</sup> See Preliminary Report of the Special Rapporteur on the Right to Education, UN Doc. E/CN.4/1999/49, Section II. Due to a lack of sufficient case law, the present article will not deal with the requirement that education must be adaptable to the needs of learners.

<sup>5</sup> International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability* (2008) at 6 (hereinafter, 'ICJ Report').

that cases which are important for understanding the nature of the right to education and the scope of governmental obligations have been selected from a number of domestic jurisdictions and international bodies. Cases have been selected from the case law data base of the International Network for Economic, Social and Cultural Rights as well as from other sources.<sup>6</sup> The emphasis will be on judgments from domestic courts, as this will illustrate the great variety of national educational issues. Most of the cases discussed also relate to more general issues concerning the justiciability of social, economic and cultural rights, such as questions relating to the separation of powers, the review of positive and negative obligations and the (deferential) role of the courts in relation to social rights issues. The focus will also be partly on the rulings of the highest domestic judicial bodies, because these are authoritative for the jurisdiction concerned. Most of these cases will probably be unknown to the general public.

The present article does not deal with the case law of the European Court of Human Rights, as the judgments of this court on the right to education have been discussed elsewhere and are more well-known.<sup>7</sup> Instead, it discusses a number of cases on educational issues that were brought before other regional human rights bodies, such as the African Commission on Human Rights and Peoples' Rights, the Committee on Social Rights under the European Social Charter and the Inter-American Court on Human Rights. The latter cases are also less well-known. The cases selected have been drawn from a random group of countries, both developed and developing. The cases selected relate to countries that have ratified the relevant human rights treaties, such as India, and countries which have not, such as the United States. The purpose of this approach is to demonstrate how courts representing different constitutional systems have dealt with educational claims. Finally, the present article deals with older and more recent cases in order to demonstrate that specific issues ought to be understood from a time-bound perspective. I am well aware of the fact that this approach of selecting cases may be a bit biased, because many cases that have not been successful will be hard to retrieve, because they have not been published. This applies in particular to education cases that have been qualified as non-justiciable by courts. However, I believe that the cases that are discussed in the present article present an interesting overview of educational questions that judicial or quasi-judicial bodies have to deal with.

This article starts with a brief introductory section on the place and status of the right to education in different jurisdictions (Section 2). Next, Section 3 deals with case law on the role of state bodies in making education available to learners, as interpreted by courts. Section 4 analyses some dimensions of the state obligation to make education accessible, as explained in the case law. Section 5 discusses cases that relate to the question whether education offered to learners was acceptable. Finally, section 6 briefly deals with the key importance of the principle of non-discrimination in educational issues.

## 2 The Place and Status of the Right to Education in Different Jurisdictions

One question that needs to be answered first concerns the nature of the right to education: is it a right that has a self-standing and independent meaning or is it implicit in other rights? Several courts have dealt with this question. In a case before the Supreme Court of India, the Court reaffirmed that the fundamental right to life under Article 21 of the Indian Constitution includes the right to live with human dignity and all that goes along with it.<sup>8</sup> In the view of the Court, the right to education flows directly from the

<sup>6</sup> See: <<http://www.escri-net.org>> (last visited 7 April 2009). The case law database was developed under the leadership of the Centre for Legal and Social Studies (CELS – Argentina), the Centre on Housing Rights and Evictions (COHRE – Geneva) and Social Rights Advocacy (Canada).

<sup>7</sup> See, for example, B. Vermeulen, 'The Right to Education', in P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (2006) at 895-910. However, one case before the European Court of Human Rights will be discussed briefly, namely a judgment on the right to education for children of Roma descent in the Czech Republic.

<sup>8</sup> *Mohini Jain v. State of Karnataka and Others*, 1992 AIR 1858. See also ICJ Report, above n. 5, at 65-72.

right to life. The life and dignity of an individual cannot be assured unless they are accompanied by the right to education. Consequently, the state government is under an obligation to endeavour to provide educational facilities at all levels to its citizens. In the Indian Constitution, the right to education was not a justiciable right; it was included in the Directive Principles of State Policy contained in Chapter IV of the Constitution (Articles 41 and 45). It was thus not part of the fundamental rights included in Chapter III. However, the Court argued that these Principles had to be read into fundamental rights. Both are complementary to each other: ‘without making the right to education under Article 41 of the Constitution a reality, the fundamental rights under Chapter III shall remain beyond the reach of the large majority which is illiterate’.<sup>9</sup> A similar approach was taken by the Inter-American Court of Human Rights. In a number of cases, the Court has emphasised that the lack of educational facilities for vulnerable groups (e.g. juvenile prisoners and members of indigenous communities) may constitute a violation of the right to life. The protection of life is not limited to negative obligations but may also include positive obligations, such as fostering the rehabilitation and development of children. Such measures may also be read into Article 19 of the American Convention on Human Rights, which deals with the protection of children, and Article 13 of the Protocol of San Salvador, which provides for the right to education.<sup>10</sup>

In other jurisdictions, such as in a number of US states, courts have not recognised education as a right but rather as a responsibility of the state authorities. This is logical, because provisions on education in state constitutions are not framed in terms of rights. For example, the Constitution of Texas stipulates that ‘it shall be the duty of the Legislature of the State to establish and make suitable provisions for the support and maintenance of an efficient system of public free schools’.<sup>11</sup> In the state of Arkansas, the Supreme Court has argued that a debate over whether education is a fundamental right is unnecessary, because ‘the State has an absolute duty under our constitution to provide an adequate education to each school child’.<sup>12</sup> Failure to comply with such a duty is subject to judicial scrutiny. In other US states, constitutional courts have held that an adequate education is a fundamental right in that state. For example, the Supreme Court of New Hampshire has ruled that ‘a constitutionally adequate public education is a fundamental right ... held by the public to enforce the State’s duty’.<sup>13</sup>

The South African Constitution is well known for its extensive provisions on social and economic rights, which were drafted with the ICESCR in mind. On the justiciability of social and economic rights, the Constitutional Court was of the opinion that ‘these rights are, at least to some extent, justiciable. ... The fact that socio-economic rights will almost inevitably give rise to such (budgetary) implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion’.<sup>14</sup> The justiciability of these rights has thus been recognised by the highest judicial body. Finally, an example of the opposite position is the case of the Netherlands. Provisions on social rights in the Dutch Constitution are framed as instructions to the government and not as individual rights. For example, the provision on education begins with the following clause: ‘Education shall be the constant concern of the Government’.<sup>15</sup> In addition to this weak constitutional status,

<sup>9</sup> Id., at para. 1.03.

<sup>10</sup> Inter-American Court of Human Rights, *Case of the Juvenile Re-education Institute v. Paraguay*, Judgment of 2 September 2004, Series C, No. 112; *Case of the Indigenous Community Yakye Axa v. Paraguay*, Judgment of 17 June 2005, Series C, No. 125; *Case of Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146.

<sup>11</sup> Article VII, Section 1 of the Texas Constitution.

<sup>12</sup> *Lake View School District No. 25 of Phillips County, Arkansas et al. v. Governor Mike Huckabee and Others*, 351 Ark. 31 (2002), 21 November 2002, available at: <<http://caselaw.lp.findlaw.com>> (last visited 6 April 2009).

<sup>13</sup> *Claremont I*, 635 A.2d, 1381.

<sup>14</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744; 10 BCLR 1253 (CC) para. 78.

<sup>15</sup> Article 23(1) of the Dutch Constitution.

the courts are barred from reviewing acts adopted by the legislator.<sup>16</sup> This means, for example, that all Acts of Parliament on educational issues cannot be reviewed by the courts.

### 3 Availability of Education

One key feature of the right to education is that educational services of different types and levels have to be made available. For example Article 13(2)(a) ICESCR stipulates that primary education shall be compulsory and available free to all. Other types and levels of education have to be made progressively available. It is clear that the state is the only actor that is able to provide the necessary human and financial resources to set up and maintain a system of schools. This is also recognised by the UN Committee on Economic, Social and Cultural Rights (UNCESCR), which is the body that monitors the implementation of the treaty by states. In its General Comment on the right to education, the Committee states that Article 13 regards ‘States as having the principal responsibility for the direct provision of education in most circumstances’.<sup>17</sup> Availability in the view of the Committee means that ‘educational institutions and programmes have to be available in sufficient quantity’, such as buildings, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, teaching materials, libraries, laboratories and computer facilities.<sup>18</sup> Availability also means that private bodies and persons have the freedom to establish and run private educational institutions as provided for in Article 13(4) ICESCR.<sup>19</sup>

A good example of a case in which a court held that governmental authorities have an obligation to make education available to children is the judgment of the Supreme Court of India in *Unnikrishnan J.P. v. State of Andhra Pradesh*.<sup>20</sup> In the Indian Constitution, education did not belong to the category of fundamental rights. As already mentioned above, education was a Directive Principle of State Policy. Article 45 reads: ‘Provision for free and compulsory education for children. – The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years’. Since the country’s independence, however, free and compulsory education had not been implemented in India. The Court argued:<sup>21</sup>

10 years spoken to under the Article, had long ago come to an end. We are in the 43rd year of Independence. Yet, if Article 45 were to remain a pious wish and a fond hope, what good of it having regard to the importance of primary education? A time limit was prescribed under this Article. Such a time limit is found only here. If, therefore, endeavour has not been made till now to make this Article reverberate with life and articulate with meaning, we should think the Court should step in. The State can be obligated to ensure a right to free education of every child up to the age of 14 years.

...

Does not the passage of 44 years – more than four times the period stipulated in Article 45 – convert the obligation created by the article into an enforceable right? ... What has actually happened is – more money is spent and more attention is directed to higher education than to – and at the cost of – primary education. ... We are not seeking to lay down the priorities for the government – we are only emphasizing the constitutional policy as disclosed by Article 45... Be that as it may, we must say that at least now the State should honour the command of Article 45. It must be made a reality – at least now. ... We hold that a child (citizen) has a fundamental right to free education up to the age of 14 years.

It should be recalled that, in the *Mohini Jain*, case the Court held that the right to education was implicit in the fundamental right to life. This broad interpretation by the Court of the right to life, in combination with the key importance of education as a fundamental right for living a life in dignity, led to a constitutional amendment. In 2002, a new article was included in the Constitution making the right to free and compulsory education for children aged between 6 and 14 a fundamental right under

<sup>16</sup> Article 120 of the Dutch Constitution.

<sup>17</sup> UNCESCR, General Comment No. 13 on the right to education, UN Doc. E/C.12/1999/10, para. 48.

<sup>18</sup> Id., at para. 6(a).

<sup>19</sup> Tomasevski, above n. 1, at 51.

<sup>20</sup> (1993) 1 SCC 645.

<sup>21</sup> *Unnikrishnan J.P. v. State of Andhra Pradesh*, paras. 45, 145.



Chapter III of the Constitution.<sup>22</sup> This case shows that courts are willing to enforce the realisation of social rights by directing financial and other resources to areas that have been identified in the Constitution. The Court forced the government to live up to its constitutional obligations and make education available to those large numbers of children for whom the right to education was only something to be hoped for but which in practice remained far from reality.

The Indian case dealt with large numbers of people and had an impact at the macro socio-economic policy level. Other cases also deal with a lack of availability of educational facilities, but their reach is more limited. For example, in a case before the Constitutional Court of Colombia, the lack of educational facilities for displaced persons was denounced.<sup>23</sup> This situation was due to structural problems in the country caused by a lack of resources and poor institutional capacities. The Court determined that the extreme vulnerability suffered by displaced persons and the state's repeated failure to provide timely and effective protection violated their right to a dignified life, including the right to education. The Court ordered supportive and rehabilitative measures to strengthen a dignified life for this vulnerable group of people. In the view of the Court, education was a key instrument to achieve this. In a case from Argentina, a court order forced the government to build a school, because the local authorities had for several years failed to implement a law ordering the construction of the school. This was a collective case, initiated by a group of working children who had an interest in having a school available.<sup>24</sup>

Once educational services have been made available, the state has an obligation not to take retrogressive measures that would mean a step back in the enjoyment of rights and the provision of services. As the UNCESCR has explained in its authoritative General Comment No. 3 on the nature of states parties' obligations, 'any deliberately retrogressive measure ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.<sup>25</sup> Such retrogressive measures were at stake when the authorities in Zaire closed universities and secondary schools in the early 1990s. A number of NGOs filed a complaint with the African Commission on Human and Peoples' Rights, alleging gross mismanagement of public financial resources. The African Commission concluded that the closure of universities and secondary schools for two years was a violation of the right to education laid down in Article 17 of the African Charter on Human Rights and Peoples Rights.<sup>26</sup> While the Zaire case dealt with a reduction in educational services at the macro level, similar retrogressive measures also occur at the micro level in individual cases. An example is the *Tandy* case from the United Kingdom.<sup>27</sup> This case dealt with the situation of a child that was chronically ill. It depended on the provision of home tuition. The number of hours for home tuition had been reduced from five to three hours per week. The relevant question was whether this retrogressive measure found support in the Education Act 1993. Section 298 of the Act provides:

<sup>22</sup> This became Article 21A. See S. Muralidhar, 'Judicial Enforcement of Economic and Social Rights: The Indian Scenario', in F. Coomans (ed.), *Justiciability of Economic and Social Rights – Experiences from Domestic Systems* (2006) 237 at 254-255.

<sup>23</sup> Case T-025/04, *Acción de tutela instaurada por Abel Antonio Jaramillo, Adela Polanía Montaña, Agripina María Nuñez y otros contra la Red de Solidaridad Social, el Departamento Administrativo de la Presidencia de la República, el Ministerio de Hacienda y Crédito Público, el Ministerio de Protección Social, el Ministerio de Agricultura, el Ministerio de Educación, el INURBE, el INCORA, el SENA, y otros*, Judgment of 22 January 2004.

<sup>24</sup> Buenos Aires Court of Appeals, Chamber I, *Asesoría Tutelar Jutica Contencioso Administrativo y Tributario de la C.A.B.A. c. s/Amparo*, 6 January 2001; discussed by C. Courtis, 'Socio-Economic Rights before the Courts in Argentina', in F. Coomans (ed.), *Justiciability of Economic and Social Rights – Experiences from Domestic Systems* (2006) 309 at 336-337.

<sup>25</sup> UNCESCR, General Comment No. 3 (1990), available at: <<http://www.unhchr.ch/tbs/doc.nsf>> (last visited 10 March 2007). On retrogressive measures, see also ICJ Report, above n. 5, at 29-32.

<sup>26</sup> *Free Legal Assistance Group and Others v. Zaire*, Comm. Nos. 25/89, 47/90, 56/91 and 100/93, views of October 1995, para. 48.

<sup>27</sup> *R v. East Sussex County Council, ex parte Tandy* [1998] 2 All ER 770.

- (1) Each local education authority shall make arrangements for the provision of suitable full-time or part-time education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.
- (7) In this section ‘suitable education’, in relation to a child or young person, means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have...

The key issue in this case was whether the local authority could take its financial resources into account when making an assessment of what is a ‘suitable education’. In the view of the House of Lords, there was no reason to treat the resources of a local education authority as a relevant factor in determining what constitutes ‘a suitable education’. On the basis of a textual interpretation of the language of the statute, the House of Lords held that the availability of resources was absent from the definition of suitable education. This meant that the Court was willing to review resource allocation decisions and not to defer to the administrative body which, for policy and financial reasons, had decided to cut expenses for educational services to children who were ill.<sup>28</sup>

Availability of educational services for a specific group was at stake in a case before the European Committee of Social Rights under the Collective Complaints Procedure of the European Social Charter. The complaint was lodged by an NGO, called Autism-Europe, against France.<sup>29</sup> The organisation alleged that, in practice, insufficient provision was made in France for the education of children and adults with autism, due to shortcomings – both quantitative and qualitative – in the provision of mainstream education as well as in the special education sector. It argued that the implementation of relevant French law was contrary to Articles 15(1), 17(1) and E of the Revised Social Charter. These articles deal, inter alia, with the right of persons with disabilities to independence, social integration and participation in the community and the right of children and young persons to social, legal and economic protection. These articles refer to education as a key instrument for achieving these goals. Article E is the non-discrimination clause of the Revised Charter. Autism-Europe substantiated its complaints by pointing out that special education for the disabled in France does not fall under the general Finance Act and that it is therefore not regarded as a public service that the State must provide. Special education is normally funded from the sickness-insurance budget through the Social Security Finance Act, with the exception of teachers in special educational institutions, who are paid from the state budget. The Committee began its assessment of the merits by stating that one of the aims of the Revised Social Charter is to respect disabled people as equal citizens rather than ‘treating them as objects of pity’.<sup>30</sup> It then explained the nature of the steps states parties must take to implement the Charter:

The Committee recalls ... that the implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.<sup>31</sup>

The Committee held that, in France, the proportion of children with autism being educated in general or specialist schools was much lower than in the case of other children, whether disabled or otherwise. It also concluded that there was a chronic shortage of care and support facilities for adults with autism.<sup>32</sup> Consequently, France

<sup>28</sup> For background information on this case, see E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007) at 220-225. On judicial deference and implementation of social, economic and cultural rights, see ICJ Report, above n. 5, at 85-86.

<sup>29</sup> *Autism-Europe v. France*, Complaint No. 13/2002, decision on the merits adopted on 4 November 2003, available at: <[http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp)> (last visited 17 March 2009).

<sup>30</sup> *Id.*, at para. 48.

<sup>31</sup> *Id.*, at para. 53.

<sup>32</sup> *Id.*, at para. 54.

had ‘failed to achieve sufficient progress in advancing the provision of education for persons with autism’.<sup>33</sup> This situation constituted a violation of Articles 15(1), 17(1) and E of the Revised Social Charter.

This case is interesting, because the Committee gave an assessment of (the lack of) implementation of positive obligations in a policy field in which governments usually have a considerable degree of latitude. On the basis of figures provided by the NGO and the French government, the Committee concluded that the government had not done enough to cater for the special educational needs of people with autism. This is remarkable, because judicial or quasi-judicial bodies often defer to the executive when it comes to reviewing policy decisions that imply choices, priorities and the allocation of resources. In this case, however, the Committee recognised that ‘it is primarily for States themselves to decide on the modalities of funding’.<sup>34</sup> The Committee was nevertheless willing to assess whether the actual implementation and practice were in conformity with the provisions of the Charter. It can accordingly be concluded that France failed to comply with its duty to implement the right to education.<sup>35</sup>

A different scenario was followed in a case before the House of Lords in the United Kingdom.<sup>36</sup> The case concerned 300 children of compulsory school age who were unable to attend school due to a shortage of teachers. Under the Education Act 1944, the local education authority was obliged to provide ‘sufficient’ primary school places for children. In the view of the Court, the law did not entail an obligation on the part of the local authority to place all children in schools. It was not possible to derive from the law an individual right of access to school that was justiciable and enforceable. The obligation of the local authority was merely a ‘target duty’ that was not owed to particular persons but to the public at large. According to the Court, such a duty was not justiciable.<sup>37</sup> Therefore, the law did not provide for an entitlement to access to education. It merely contained programmatic obligations the implementation of which was dependent upon the availability of resources and which could consequently only be effective over time.

Another case on budgetary allocations for education arose in the Philippines in the early 1990s. Article XIV, sections 1-5 of the Philippine Constitution deal with the right to education. Section 5(5) contains, inter alia, the following clause: ‘The State shall assign the highest budgetary priority to education...’. However, other domestic laws provide for automatic appropriations for payments of principal and interest on public debt. In practice, allocations for debt service are much higher than allocations for education.<sup>38</sup> In a case before the Supreme Court, the constitutionality of these automatic appropriations for debt servicing was challenged for violating Section 5(5) of the Constitution.<sup>39</sup> The Court ruled that the automatic appropriations were not unconstitutional, because Congress (the legislator) in the Philippines must have the power to respond to ‘the imperatives of the national interest and ... the attainment of other state policies or objectives’. What was at stake in the view of the Court was ‘the very survival of our economy’. Although ‘the Constitution mandates that the highest budgetary priority be given to education, it does not follow that the hands of Congress are so hamstrung’ as to deprive it of its power to respond to economic and financial challenges. The Court also held that the Philippine government had complied with its constitutional mandate under the education section, because it had increased the budget for education since 1985.<sup>40</sup> This case demonstrates that, even in a situation in which a constitutional rights provision is quite strict, the Court is willing to defer to the political branches of government to set

<sup>33</sup> Id., at para. 54.

<sup>34</sup> Id., at para. 54.

<sup>35</sup> Cf. ICJ Report, above n. 5, at 49-50.

<sup>36</sup> *R v. Inner London Education Authority, ex parte Ali and Murshid* [1990] 2 All ER 822.

<sup>37</sup> See the discussion of this case by Palmer, above n. 28, at 220-221.

<sup>38</sup> M.S.I. Diokno, ‘Short-Changing the Right to Education in the Philippines’, (2007) 15 *Interights Bulletin* 201 at 204.

<sup>39</sup> *Guigona Jr. v. Carague*, 196 SCRA 221 (1991).

<sup>40</sup> Diokno, above n. 38, at 203.

priorities and take decisions that are considered to be of superior importance for the sake of the national (economic) interest. Although the right to education in this case was fully justiciable, it could not be enforced through judicial intervention.

## 4 Accessibility of Education

### 4.1 Introductory Remarks

A second key feature of the right to education is that existing educational institutions and services must be accessible to all. The UNCESCR has identified three overlapping dimensions of accessibility:<sup>41</sup>

- Non-discrimination – Education must be accessible to all in law and in fact, without discrimination on any ground. Special attention must be given to vulnerable groups. The right to education is inclusive: it extends to all persons of school age residing in a country, including non-nationals and irrespective of their legal status. The prohibition of discrimination is an obligation of an immediate nature.
- Physical accessibility – Education has to be within safe physical reach, either by attendance at a reasonably convenient geographic location or via modern technology (‘distance learning’).
- Economic accessibility – Education has to be affordable to all. Primary education shall be available free to all, while secondary and higher education shall be made progressively free. Free in this respect means free of charge for children, parents or guardians. Fees imposed by the government, local authorities or the school constitute disincentives to the enjoyment of the right. Other indirect costs, such as compulsory or so-called voluntary contributions by parents, also undermine actual participation of pupils in school.<sup>42</sup>

A number of cases concerning non-discriminatory access and economic accessibility are discussed below.

### 4.2 Non-discriminatory Access

A discussion of cases on non-discrimination and equal treatment in matters of education should start with the famous judgment of the US Supreme Court in *Brown v. Board of Education*.<sup>43</sup> In this case, the plaintiffs argued that the use of race to segregate white and black children in public schools was a violation of the equal protection clause of the Fourteenth Amendment of the US Constitution. The Court said that when a state in the United States has undertaken to provide education, it is a right that must be made available to all on equal terms. The Court held that ‘to separate them [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone’. The Court ruled that ‘in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal’. Consequently, the segregation complained deprived the plaintiffs of the equal protection of the laws guaranteed by the Fourteenth Amendment.

For a long time, the matter of race has been absent from the case law of European courts. However, it re-emerged when Roma in Eastern European states began to

<sup>41</sup> UNCESCR, above n. 17, at paras. 6(b), 31, 34.

<sup>42</sup> UNCESCR, General Comment No. 11 on plans of action for primary education, UN Doc. E/C.12/1999/4, para. 7.

<sup>43</sup> 347 US 483 (1954).



denounce their inferior position in matters of housing and education before the courts. As far as education is concerned, complaints dealt with a practice of segregation in education between Roma children and children from non-Roma descent. For example, complainants against the Czech Republic alleged that Roma children were disproportionately channelled to schools for the mentally disabled. In a key judgment, the Grand Chamber of the European Court of Human Rights ruled that in certain regions of the Czech Republic Roma children

were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population.<sup>44</sup>

The Court concluded that there had been a violation of the non-discrimination rule, read in conjunction with the right to education laid down in Article 2 of the First Protocol to the European Convention on Human Rights.<sup>45</sup>

Domestic courts have also dealt with discrimination of Roma children in education. An example is the case lodged by the European Roma Rights Centre (ERRC) against the Bulgarian Ministry of Education and the 103rd Secondary School in the Filipovtzi District of Sofia.<sup>46</sup> The Bulgarian Protection Against Discrimination Act 2003 (PDA) provided the procedural possibility for the ERRC to submit the complaint in its own capacity as an international public interest organisation. School 103 has a 100% Roma student population. It is based in a poor Roma settlement in Sofia. The ERRC denounced the failure of the Bulgarian authorities to put an end to the conditions of racially segregated education of the Roma students attending School 103. The ERRC also claimed a violation of the right of Roma children in School 103 to equal treatment in education and the right to equality in education. It argued that the school was sub-standard in the sense of material conditions, quality of teachers and students' performance. Pursuant to Article 29 of the PDA, the Bulgarian authorities have a positive obligation to take measures to prevent and eliminate discrimination. The Court ruled:

Therefore, it has been proven ... that there exist the facts of isolation, based on ethnic origin, of Roma children in an educational institution (school), given that in the country as well as in the city where the school is located (Sofia) there exist different ethnic communities; whereby the isolation is not a result of their free will but of circumstances beyond their control, and under continuing inaction on behalf of authorities that owe measures to overcome this situation, for a period during which the PDA has been in force; hence, it can be inferred that there is segregation, a form of discrimination, violating the right to equal treatment and opportunity to participate in the public life.<sup>47</sup>

The Court also found a violation of the right of Roma children to equal and integrated education on the basis of the sub-standard level of the school in various respects. This constituted unequal treatment and put the Roma children in a disadvantaged position. This case is interesting, because it demonstrates the importance of public interest litigation to force new member states of the European Union to comply with fundamental rights laid down in domestic law, international human rights law and European Community law. Compliance is not limited to the law, but also to practice. However, the Court neither indicated what kind of measures the authorities must take to comply in practice, nor the timeline for implementation. It said that the decision concerning what kind of measures were to be taken was 'a question of expediency', leaving the mode of implementation to the domestic authorities. One commentator has argued that the judgment is therefore 'strikingly toothless'.<sup>48</sup>

<sup>44</sup> *Case of D.H. and Others v. The Czech Republic*, Application No. 57325/00, Judgment of 13 November 2007, para. 207.

<sup>45</sup> *Id.*, at para. 210. See also *Orsus and Others v. Croatia*, Application No. 15766/03, currently pending before the European Court of Human Rights.

<sup>46</sup> *ERRC v. The Ministry of Education and Science and the 103rd Secondary School at Sofia*, Sofia District Court, Case No. 11630/2004, 22 July 2005, judgment available in English translation at: <<http://www.errc.org/cikk.php?cikk=2411&archiv=1>> (last visited 12 March 2009).

<sup>47</sup> *Id.*, at 5.

<sup>48</sup> C. Cojocariu, 'Racial Discrimination against Roma Children in Schools: Recent Developments from Courts in Bulgaria and Hungary', (2007) 15 *Interights Bulletin* 214 at 215.

Does non-discriminatory access to education also apply to so-called ‘undocumented children’? These are children that do not have an official residence permit. This issue is important, because of the growth in the number of undocumented migrants currently living in European countries and the measures some of these countries have taken to restrict provision of socio-economic services to these migrants. This question came before the US Supreme Court in *Plyler v. Doe*.<sup>49</sup> The specific question the Court had to answer was whether it was in accordance with the Equal Protection Clause of the Fourteenth Amendment to the US Constitution for the State of Texas to deny undocumented school-age children the free public education that was provided to US citizens and legally admitted aliens. This was a class action filed on behalf of a number of school-age children of Mexican origin who had not been legally admitted to the United States. In 1975, the state of Texas adopted a law to withhold from local school districts any state funds for the education of children who were not legally admitted to the USA. Local school authorities were also obliged to deny enrolment of such children in public schools. The Fourteenth Amendment provides that ‘no State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws’.

The Court ruled that the clause ‘any person within its jurisdiction’ extends to anyone, citizen or stranger, who is subject to the laws of a state. What is decisive is the presence of such a person on a state’s territory. For that reason, he or she is entitled to the equal protection of the laws of that state. The judgment is an important one, because it stresses the value that education has for the personal development of people and society as a whole:

Public education is not a ‘right’ granted to individuals by the [Texas] Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. ... In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests. ... Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.<sup>50</sup>

On the basis of this reasoning, the Court declared the Texas law unconstitutional. This is an important judgment, because it illustrates that a class action can be successful in claiming access to education for a vulnerable group, even if education is not recognised as a right under constitutional law. The fact that the exclusion of undocumented children was contrary to the Equal Protection Clause was decisive. The right to education was indirectly justiciable through the Equal Protection Clause.

Another case about the legal status of children in the Dominican Republic arose before the Inter-American Court of Human Rights.<sup>51</sup> Most Dominicans of Haitian descent live in a condition of poverty. They belong to the marginalised and vulnerable groups in society. In this case, a girl of Haitian descent born in the Dominican Republic was refused registration by the national authorities and denied a birth certificate and a nationality. Due to the lack of the proper documentation, she was expelled from a regular day school and was forced to attend evening classes for adults for one school year. The Court held that refusing birth registration and denial of a birth certificate amounted to a failure to recognise legal personality. This harmed human dignity, because the person concerned was unable to be a subject of rights. In this case, the Court concluded that the child did not have legal personality.<sup>52</sup>

<sup>49</sup> 457 US 202 (1982).

<sup>50</sup> *Plyler v. Doe*, 457 US 202 (1982) at Section IIA.

<sup>51</sup> *Yean and Bosico v. The Dominican Republic*, Judgment of 8 September 2005, Series C, No. 130.

<sup>52</sup> *Id.*, at paras. 179, 180.

On the relationship between the lack of a birth certificate and access to education, the Court said the following:<sup>53</sup>

It was precisely because she had no birth certificate that she was forced to study at evening school, for individuals over 18 years of age, during this period. This fact also exacerbated her situation of vulnerability, because she did not receive the special protection, due to her as a child, of attending school during appropriate hours together with children of her own age, instead of with adults. ... It is worth noting that, according to the child's right to special protection embodied in Article 19 of the American Convention, interpreted in light of the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development.

The Court combined several articles from different treaties to come to the conclusion that the State had failed to comply with its obligation to make primary education available and accessible to the said child. The case demonstrated that the right to education can be indirectly justiciable through the general provision on the protection of children's rights.<sup>54</sup>

In some countries pregnant girls are suspended from school as a form of punishment for violating school regulations and moral norms that prohibit teenage sexual intercourse. This social norm and practice clearly affects their right to education. The Supreme Court of Colombia, however, has rejected this form of disciplinary measure and confirmed the girl's right to education.<sup>55</sup>

Although a suspension from school attendance does not imply a definitive loss of the right to education, it does imply the provision of instruction to the pregnant schoolgirl in conditions which are stigmatising and discriminatory in comparison with other pupils in her ability to benefit from [the right to education]. Surely, the stigmatization and discrimination implied in the suspension from school attendance have converted this method of instruction [through tutorials] into a disproportionate burden which the pupil has to bear solely because she is pregnant, which in the opinion of the Court, amounts to punishment. ... The conversion of pregnancy – through school regulations – into a ground for punishment violates fundamental rights to equality, privacy, free development of personality, and to education.<sup>56</sup>

A similar case before the Botswana Court of Appeal challenged a college regulation that forced pregnant students to disclose their pregnancy and, depending on the point in the academic year at which the pregnancy was discovered, to leave the school, or to continue to the end of the academic year and miss the next one. The Student Representative Council of the College was successful in denouncing this rule and practice. The Court held that the regulation was discriminatory against women. From the proceedings before the Court, it became clear that the real aim of the regulation was to punish unmarried female students.<sup>57</sup>

### 4.3 Economic Accessibility

Economic accessibility is about affordability of education. Direct costs, such as fees, and indirect costs, like expenses for school transport or uniforms, may limit or even block accessibility of education. From a human rights perspective, it is generally accepted that primary (basic) education must be provided free of charge, while secondary and higher education should be made progressively free.<sup>58</sup> However, many countries charge fees for attending primary education, although some of them are in a process of rolling

<sup>53</sup> Id., at para. 185.

<sup>54</sup> See also ICJ Report, above n. 5, at 68-69.

<sup>55</sup> Case No. T- 77814, *Crisanto Arcangel Martinez Martinez y Maria Eglina Suarez Robayo v. Collegio Ciudad de Cali*, 11 November 1998, as quoted by Tomasevski, above n. 1, at 165.

<sup>56</sup> For a list of more than 40 countries where early marriage and pregnancy constitute obstacles to girl's education, see the report submitted by the UN Special Rapporteur on the Right to Education, UN Doc. E/CN.4/2004/45, para. 33.

<sup>57</sup> Case Note, 'Is the Right to Get Pregnant a Fundamental Right Human Right in Botswana?', (1995) 39 *Journal of African Law* 97 at 99.

<sup>58</sup> Cf. Arts. 13 and 14 ICESCR and Art. 28 of the Convention on the Rights of the Child.

them back.<sup>59</sup> There are quite a number of cases on the permissibility of fees that were brought before the courts. I have selected three cases from different regions that also demonstrate the different ways in which courts deal with such cases.

The first case is from the Netherlands and dates from 1989. In a case before the Dutch Supreme Court, a student organisation challenged rising fees in higher education, which were allegedly a retrogressive measure. Students invoked Article 13(2)(c) ICESCR, which provides for the progressive introduction of free higher education. Raising fees would be contrary to Article 2(1) ICESCR, which contains the general obligation for states to progressively realise social, economic and cultural rights. The Court dismissed the claim on formal legal grounds. It held that Article 13(2)(c) ICESCR could not be qualified as a self-executing provision as required by the Dutch Constitution. The Court ruled:<sup>60</sup>

Already the wording of Articles 13 and 2 ICESCR indicates that these are non-self-executing provisions. In order for citizens to enjoy these rights, they require positive measures by the state which need elaboration and implementation in the domestic legal order.

This meant that the Court did not review the substance of the allegation by the student organisation and that this part of the complaint was in fact non-justiciable. This ruling is in line with the traditional view of courts in the Netherlands that claims invoking social rights provisions laid down in treaties will rarely be successful due to the non-self-executing nature of those provisions. In the view of the courts, the nature, content and wording of such provisions are aimed at progressive realisation by means of legislative and other measures. They cannot be invoked directly by citizens, because they are qualified as programmatic obligations directed to governments.<sup>61</sup> One could therefore argue that, in such cases, no effective remedy is available.

In a case before the Supreme Court of India, the question that had to be answered was whether private medical colleges in the state of Karnataka could charge an admission fee for students from outside the state that was 30 times higher than the fee paid by students who were admitted on so-called 'government seats'.<sup>62</sup> The fee fixed by the government for public medical colleges and 'government seats' in private medical colleges was 2,000 rupees per year. The Association of Private Medical Colleges had set a fee of 60,000 rupees for students from outside the state of Karnataka. Although the right to education was part of the Directive Principles of State Policy, the Court held that these were not mere 'pious declarations'. In addition, Article 14 of the Constitution guarantees equal protection before the law and equal protection of the law to any person within the territory of India. The Court ruled that the fee of 60,000 rupees per annum for students from outside Karnataka was not a tuition fee but actually a capitation fee. Students coming from the state of Karnataka only paid 2,000 rupees per year. The Court said that a capitation fee was 'a patent denial of a citizen's right to education under the Constitution'. In addition, the Court held that a capitation fee placed education beyond the reach of the poor:

The capitation fee brings to the fore a clear class bias. It enable the rich to take admission whereas the poor has to withdraw due to financial inability. A poor student with better merit cannot get admission because he has no money whereas the rich can purchase the admission. Such a treatment is patently unreasonable, unfair and unjust. ... The only method of admission to the medical colleges in consonance with fair play and equity is by means of merit and merit alone.

This judgment demonstrates that even though the right to education is framed as a Directive Principle, it can be fully justiciable when read in conjunction with the duty of the state to guarantee and enforce equal treatment in law and in fact for all citizens of the state. Admission can only be based on merit and not on financial criteria. In addition, this case shows that the state is under an obligation to protect the right to education in

<sup>59</sup> See the overview at: <<http://www.right-to-education.org/node/289>> (last visited 31 March 2009).

<sup>60</sup> *Harmonisatiewet arrest*, Hoge Raad, 14 April 1989, *Administratiefrechtelijke Beslissingen* (1989) 207 (translation by the author).

<sup>61</sup> On the Netherlands, see F. Vlemminx, 'The Netherlands and the ICESCR: Why Didst Thou Promise Such a Beauteous Day?', in F. Coomans (ed.), *Justiciability of Economic and Social Rights – Experiences from Domestic Systems* (2006) 43; ICJ Report, above n. 5, at 19.

<sup>62</sup> *Mohini Jain v. State of Karnataka and Others*, above n. 8.



a situation where the applicant (the student) and the respondent (the Private College) disagree on the issue of access to an educational institution. The Court held that equal economic accessibility of education also applied in a horizontal relationship between private parties.

In South Africa, school fees are a topical issue. The South African Schools Act (SASA) stipulates that part of the budget for public schools is to be provided by the state. This means that public resources are not sufficient for running schools. The SASA allows schools to charge fees as a complementary source of funding. Together with the parents, a school may decide to introduce or raise fees. However, the law also provides for the exemption of parents who are unable to pay the fees.<sup>63</sup> Special regulations were drafted to determine whether parents were eligible for exemptions. In cases where parents who were not eligible for an exemption failed to pay, the school could sue them for outstanding school fees.<sup>64</sup> Although exemptions were possible, the rules caused a lot of obstacles in practice. Pupils whose parents were unable to pay were sometimes discriminated against by teachers or the management. In addition, one major problem was that some schools did not inform parents that they could be exempted from schools fees, some did not have an exemption policy and some did not grant exemptions to parents who met the eligibility criteria.<sup>65</sup> In addition, schools put pressure on parents by sending letters to pay arrears in school fees and threatening to sue them.<sup>66</sup> Those parents who were unable to get an exemption faced serious financial problems, because they had to pay for other school related expenses as well, such as transport, school uniforms and textbooks.

In 2005, some changes were introduced in the regulatory framework for school fees. The notion of 'no fee' schools was introduced. At such poor schools, no fees from parents are required, because the funding that they receive from the state is sufficient. In addition, an amendment providing for a strict prohibition of discrimination against children of non-fee paying parents was included in the SASA.<sup>67</sup> However, it has been reported that schools are not always willing to implement an exemption policy.<sup>68</sup> This brings us to an interesting case. In 2006, the Centre for Applied Legal Studies of the University of Witwatersrand, together with two mothers from a poor community, started a class action against a public secondary school. This school had started legal proceedings against parents to recover outstanding school fees.<sup>69</sup> In an order, the Court forced the school to stop legal action against parents for recovering outstanding school fees and to comply with its obligations under the SASA.<sup>70</sup> In addition, the school had to inform parents about the criteria for total and partial exemptions from the payment of school fees. Finally, the Court instructed the school to inform parents of previous learners of the school who still had arrears in the payment of fees that they may have been eligible for an exemption of fees. Those parents had to be invited to submit an application for exemption. This case demonstrates that a court order can be a useful

<sup>63</sup> SASA (1996), Section 39.

<sup>64</sup> SASA (1996), Sections 40-41.

<sup>65</sup> See F. Veriava, 'The Amended Legal Framework for School Fees or School Funding: A Boon or a Barrier?', (2007) 23 *South African Journal on Human Rights* 180.

<sup>66</sup> See F. Veriava, 'Enforcing the Current Laws on School Fees', (2003) 4(2) *ESR Review* 11-14, available at: <[http://www.communitylawcentre.org.za/ser/esr\\_review.php](http://www.communitylawcentre.org.za/ser/esr_review.php)> (last visited 6 April 2009).

<sup>67</sup> SASA (1996), Section 41(5) provides as follows:

'a learner has the right to participate in the total school programme despite non-payment of compulsory school fees by his or her parent and may not be victimised in any manner, including but not limited to (a) suspension from classes; (b) verbal or non verbal abuse; (c) denial of access to cultural, sporting or social activities of the school; or (d) denial of a school report or transfer certificates.'

<sup>68</sup> Veriava, above n. 65.

<sup>69</sup> *Centre for Applied Legal Studies & Others v. Hunt Secondary School & Others*, High Court of South Africa, Durban and Coast Local Division, Case No. 10091/2006, Order of 15 June 2007, available at: <<http://www.saflii.org>> (last visited 31 March 2009). Class actions are possible under Section 38 of the South African Constitution.

<sup>70</sup> Under Section 172(1)(b) of the South African Constitution, a court may make any order that is just and equitable.

mechanism for prohibiting (school) authorities from continuing a certain practice. The Court was not faced with a number of possible options; in fact, only one remedy was appropriate, namely a prohibition of certain actions by the school authorities.<sup>71</sup>

## 5 Acceptability of Education

Acceptability of education means that the form and substance of education, including curricula and teaching methods, have to be relevant, culturally appropriate and of good quality for students and parents. This means that certain minimum guarantees for the quality of education have to be set, monitored and enforced by the authorities. This may include respect for the (linguistic, cultural and religious) rights of minorities and indigenous groups in education and a ban on corporal punishment.<sup>72</sup> The present section discusses two cases, one on respect for a student's cultural identity at school and the other on the quality level of education in public schools.

In present-day multicultural societies, it is crucial that the form and substance of education is culturally appropriate. This may include a formal requirement for students to attend lessons, such as a school code laying down rules for the behaviour of students in school. Insofar as possible, such a code should accommodate the different cultural and religious backgrounds of students. In this respect, an interesting case arose in South Africa a couple of years ago. Sunali Pillay, a girl of Hindu/Indian descent, was prohibited from wearing a nose stud at school. The mother of the girl challenged this decision before the Equality Court, which found that the school had not unfairly discriminated against the student. On appeal, the case eventually reached the Constitutional Court, which concluded that the school's discrimination of Sunali Pillay was unfair.<sup>73</sup>

The key issue in this case was the place of religious and cultural expression in public schools. Chief Justice Langa was of the view that the wearing of the nose stud was important for the girl's identity:

I am accordingly convinced that the practice was a peculiar and particularly significant manifestation of her South Indian, Tamil and Hindu identity. It was her way of expressing her roots and her faith. While others may have expressed the same faith, traditions and beliefs differently or not at all, the evidence shows that it was important for Sunali to express her religion and culture through wearing the nose stud.

... [R]eligious and cultural practices can be equally important to a person's identity. What is relevant is not whether a practice is characterised as religious or cultural but its meaning to the person involved.<sup>74</sup>

What was important was that within South African society there is a constitutional obligation to affirm and reasonably accommodate differences between groups, not merely to tolerate them. In that respect it was crucial that the School Code did not contain a standard or procedure by which exemptions could be granted. In addition, the provision on the wearing of jewellery did not permit students to wear a nose stud.<sup>75</sup>

From the perspective of the justiciability issue, it is interesting to note that the Court discussed the question whether it was competent to review the decision of the school not to permit the wearing of the nose stud. The school and the other applicants had argued that courts should show a degree of deference to governing bodies that are statutorily required to run schools and have the expertise to do so.<sup>76</sup> The Court, however, held that:<sup>77</sup>

This Court has recognised the need for judicial deference in reviewing administrative decisions where the decision-maker is, by virtue of his or her expertise, especially well-qualified to decide.<sup>78</sup> It is true that the

<sup>71</sup> ICJ Report, above n. 5, at 84.

<sup>72</sup> UNCESCR, above n. 17, at para. 6(c).

<sup>73</sup> Case CCT 51/06, *MEC for Education: Kwazulu-Natal and Others v. Pillay*, 5 October 2007, [2007] ZACC 21, available at: <<http://www.constitutionalcourt.org.za>> (last visited 30 March 2009).

<sup>74</sup> *Id.*, at paras. 90, 91.

<sup>75</sup> *Id.*, at para. 37.

<sup>76</sup> *Id.*, at para. 80.

<sup>77</sup> *Id.*, at para. 81.

<sup>78</sup> The reasons both for deference in administrative review, and for limiting it, were well expressed in *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para. 48 (footnote in original).

Court must give due weight to the opinion of experts, including school authorities, who are particularly knowledgeable in their area, depending on the cogency of their opinions. The question before this Court, however, is whether the fundamental right to equality has been violated, which in turn requires the Court to determine what obligations the School bears to accommodate diversity reasonably. Those are questions that courts are best qualified and constitutionally mandated to answer. This Court cannot abdicate its duty by deferring to the School's view on the requirements of fairness. That approach is obviously incorrect for the further reason that it is for the School to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove.

As Sunali Pillay was no longer at school when the judgment was delivered, it was moot to order the school to give the student permission to wear the stud. However, the Court ordered the school's governing body to amend the school code to provide for reasonable accommodation for deviations from the code on religious and cultural grounds and a procedure for applying for and granting such exemptions.<sup>79</sup>

The quality of education offered to learners can be subject to judicial review as well. In the United States, the quality level of education is often characterised in terms of adequacy: an obligation upon the state to provide sufficient funding to ensure minimum quality standards in education.<sup>80</sup> For example, in the state of Arkansas, a school district and a number of individuals sued the governor of the state and other officials in 1992. They claimed that the school-funding system was unconstitutional, because it failed to meet certain adequacy requirements. There were not enough financial resources available to meet these requirements.<sup>81</sup> The case finally reached the Supreme Court of Arkansas in 2002. The judgment was delivered in November of that year. The relevant article of the Arkansas Constitution reads as follows:<sup>82</sup>

Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.

The state of Arkansas argued that the funding of public schools was a political question that was beyond the reach of the courts and that it should therefore be regulated through the interplay between the state, the school districts and the legislature. Settlement by the Court would be a violation of the separation of powers. The Supreme Court rejected this view. It held:<sup>83</sup>

This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.

The Court adopted the view of the trial court that education must be directed towards achieving a number of detailed capacities that each child must have.<sup>84</sup> On the basis of detailed information on the funding of the school system at that time and information collected from witnesses, the Court came to the conclusion that the state had not fulfilled its constitutional obligation to provide children with a general, suitable and efficient school-funding system. This was in violation of the education article of the Arkansas Constitution.<sup>85</sup> The Court also concluded that there were inequalities in educational opportunities between rich and poor school districts in the state. The state government failed to address this issue by providing more funding to poor school districts.<sup>86</sup> In order to give the competent state bodies the opportunity to cure the deficiencies in the school-funding system, the Court decided to stay its mandate: 'were we not to stay our mandate in this case, every dollar spent on public education in Arkansas would be constitutionally

<sup>79</sup> *MEC for Education: Kwazulu-Natal and Others v. Pillay*, above n. 73, at para. 117.

<sup>80</sup> ICJ Report, above n. 5, at 37.

<sup>81</sup> *Lake View School District No. 25*, above n. 12. Lake View District was a small, predominantly black district in the Arkansas Delta.

<sup>82</sup> Article 14(1).

<sup>83</sup> *Lake View School District No. 25*, above n. 12, at 13.

<sup>84</sup> *Id.*, at 18.

<sup>85</sup> *Id.*, at 31.

<sup>86</sup> *Id.*, at 38.

suspect. That would be an untenable situation and would have the potential for throwing the entire operation of our public schools into chaos'.<sup>87</sup> The Court's mandate was stayed until 1 January 2004.

However, the Arkansas state legislature failed to put in place changes in the education system before the deadline of 1 January 2004. As a result, the Court once again intervened and appointed a headmaster to bring the state's school system up to constitutional standards.<sup>88</sup> This case shows that the Court was willing to enforce positive duties implying huge financial consequences for the state budget because a constitutional obligation to provide adequate education had been violated. At first, the Court left it to the legislature to act but reserved the right to intervene if the political branches failed to comply with the remedy. The Court then adopted measures aimed at a solution that is effective and efficient.<sup>89</sup>

## 6 The Key Importance of the Non-Discrimination Principle

Discrimination in educational matters – whether incidental or systemic, active or passive – undermines the inclusive nature of the right to education as a human right. Although in most jurisdictions the principles of non-discrimination and equal treatment have been enshrined in law, what is decisive is equality in fact. Discrimination often manifests itself in subtle ways. For example, although formal equal treatment of all social groups in a specific country may be guaranteed, discrimination of groups that are in a disadvantaged position from a socio-economic perspective may occur. This can occur, for example, in the area of school fees, which are nominally the same for everyone but disproportionately affect lower income groups in society. In addition, discrimination in education often manifests itself in a setting where elements of availability, accessibility and acceptability of education interact. For example, cases in the United States have shown that government funding of public education in US states reflects patterns of discrimination in terms of violation of equity and adequacy requirements. These instances of discrimination in education were often based on inequality in tax-based school funding between rich and poor districts and a lack of sufficient resources in poor districts to guarantee a minimum quality level of education.<sup>90</sup>

In addition, the right to education as a key right for the enjoyment of other rights implies that discrimination in education has a negative impact on the enjoyment of other rights, such as the right to work. A woman who lacks basic vocational training because she was not allowed to go to school for cultural reasons will encounter major difficulties in finding a job and enjoying an adequate standard of living. From the cases discussed in the previous sections of this article, it emerges that instances of discrimination in education are present in almost all regions and jurisdictions. The form, nature and consequences may differ, but the social phenomenon seems to be inherent to humanity. It is therefore crucial that courts are aware of hidden instances of (indirect) discrimination in educational matters that undermine effective and real enjoyment of the right to education. Hearing experts on these types of issues in court may help in tackling them.

## 7 Concluding Remarks

From the discussion of the cases above, it can be concluded that the three dimensions of the right to education – availability, accessibility and acceptability – have been fully justiciable.

<sup>87</sup> *Id.*, at 55.

<sup>88</sup> Arkansas court to oversee school reform, 23 January 2004, available at: <<http://edition.cnn.com/2004/EDUCATION/01/23/arkansas.schools.ap/index.html>> (last visited 27 January 2004; on file with the author).

<sup>89</sup> Cf. ICJ Report, above n. 5, at 80-81.

<sup>90</sup> ICJ Report, above n. 5, at 57-58; and UNCESCR, above n. 17, at para. 35.



The courts have been able and willing to review both negative and positive obligations flowing from the right to education, such as non-interference with the exercise of the right to education by individuals and the role of the state as the key actor in making education available. The right to education is directly justiciable as a free-standing right. An example of this is the case of *Autism-Europe v. France* under the Collective Complaints Procedure of the European Social Charter. However, in most of the cases discussed, the right to education was indirectly justiciable through other rights, such as the right to life and the rights of children. This indirect approach highlights the importance of the notion of the interdependence and indivisibility of all human rights. The most effective way of challenging a violation of the right to education before the courts seems to be through the principles of non-discrimination and equal treatment. Many of the cases discussed contain an element of discriminatory treatment. In such cases, the courts carried out a full review and rejected a margin of discretion for state organs. An additional advantage of following the non-discrimination/equal treatment route is that the prohibition of discrimination is an obligation of immediate effect under domestic and international human rights law. Consequently, strict judicial review is needed.

The justiciability of the right to education has also been accepted when political issues were at stake. The courts have not been engaged in reviewing political decisions taken by the legislature and the executive. However, they have reviewed whether political bodies lived up to their constitutional obligations to make adequate education available and accessible, even if this has financial implications. The right to education is therefore a good example of a socio-economic right whose dimensions can be challenged before courts in a manner similar to many civil and political rights. This also applies to the right to receive an education, which implies positive obligations for the state, thus calling for measures that may have huge consequences for the state budget.