

PLR
Pázmány
Law
Review

4. (2016)



Pázmány Péter Catholic University
Faculty of Law and Political Sciences
Budapest

Pázmány Law Review

4. (2016)

ISSN 2064-1818

Pázmány Péter Catholic University
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The printing was financed by Pázmány Péter Catholic University's
KAP17-61004-1.1. JÁK project.

Published by

Pázmány Péter Catholic University

Faculty of Law and Political Sciences

H-1088 Budapest, Szentkirályi u. 28-30.

Responsible publisher: Dr. István SZABÓ dean

www.jak.ppke.hu

Corrector: Ildikó Csizner

Edited, prepared for printing by Andrea Szakaliné Szeder

Printed and bound by Vareg Kft.

www.vareg.hu

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THEMATIC FOCUS:
Educational Rights in Global and Comparative perspective



EDITORIAL

*of the International Journal for Education Law and Policy
and the Pázmány Law Review*

Educational rights may be approached from any direction, however the common element in every model is the justiciability and the awareness and knowledge of enforceability of this prior right. This is especially important for the more vulnerable groups of society, since there are specific needs may arise, which are necessary to reflect.

The International Conference on ‘The Justiciability of the Prior Right to Education – The Role of Civil Society for the Awareness, Advocacy and Accountability of the Right to Education’, organized by the European Association for Education Rights and Policy (ELA) in cooperation with the Ereky Public Law Research Center at the Pázmány Péter Catholic University, Budapest on 20-22 October 2016 was devoted to the launch of a dialogue between representatives of science, jurisdiction, and civil society, – inviting them to exchange their experience in this field. The conference examined primarily the role of civil society in the protection of education rights for the more defenceless people and groups.

We are proud to submit for your interest most of the lectures, rewritten for the special occasion of this volume, – a very special volume indeed: both Journals worked together in a complementary way. The target groups of IJELP and PLR is quite different and followed a similar peer review. We consider this initiative as a truly European concept of cooperation, to be followed by international and national

On Saturday the 22 October the Global Education Law Forum (GELF) - Committed to Good Governance, Human Dignity and Effective Policies in Education, was also officially launched.

The right to education and rights in education are essential in dealing with student and school diversity, but expertise on these fundamental concepts is relatively rare and scattered. In 2015, a group of concerned individuals, active in education, research and public administration, decided to join forces and provide a concerted helping hand to all those who want to formulate and implement sound education principles, policies, codes, rules and regulations.

Prof. Jan de Groof
President of ELA
(Bruges, Tilburg)

Balázs Sz. Gerencsér PhD
Director of PPKE Ereky RC
(Budapest)

THE JUSTICIABILITY OF THE PRIOR RIGHT TO EDUCATION

Summary of an International Conference held at the PPCU, 2016

Balázs Szabolcs GERENCSÉR – Kata GYÖNGYÖSI
(PPCU)

1. The aims of the conference

The series of conferences, which has been organized annually by *European Association for Education Rights and Policy* (ELA) in various research locations around the world for decades, are more than valuable. The purpose of these conferences and all the related scientific efforts is to try to find answers to all the emerging and sometimes alarming questions of educational law, mainly on a comparative legal basis. This work is particularly effective if, besides science, it gives input to legislation and jurisdiction too. In 2016 the ELA held its Annual Conference at the Pázmány Péter Catholic University Faculty of Law and Political Sciences.

On 20-22 October 2016 the ELA in cooperation with the *Ereky Public Law Research Center* at the Pázmány Péter Catholic University, Budapest, organized an international conference on the Justiciability of the Prior Right to Education. The conference was devoted to launch a dialogue where representatives of science, jurisdiction and civil society can exchange their experience in this field. The subtitle of the conference explained its focus: *“The Role of Civil Society for the Awareness, Advocacy and Accountability of the Right to Education”*. The conference examined primarily the role of civil society in the protection of education rights especially for the most defenseless people and groups such as minorities and special linguistic or religious communities.

2. Organizing in co-operation

The ELA, founded in 1993, is an independent and worldwide NGO, with its head office in Antwerp. According to the motto of ELA, education has the potential to unlock the door to equality and participation, it constitutes the basis necessary for empowerment of each individual, and for the promotion of all human rights. Education law means constructing, block by block, the foundation that will support educational

rights in all nations and for all peoples and individuals. The importance of the law not with standing, its members are aware of the relative value of each legal principle, whether it is founded on a convention or on some other legal source. ELA aims to encourage progress in educational rights by promoting the right to education as a right, by elaborating education law as a discipline and by actively supporting every serious effort made toward the gradual and progressive codification of educational rights and educational legislation. See more at: <http://www.lawandeducation.com>.

The co-organizer of this conference is the *Ereky Public Law Research Center* that was founded in 2011 within the PPCU Faculty of Law and Political Sciences, Budapest. Its founder's aim was to develop an independent think tank, which is actively involved in the current trends and development of public administration and policy. The research center conducts joint and individual research projects, in search for answers to the pressing questions. This way the research group can participate in central and local (governmental) development projects, where knowledge management, scientific basis or international comparison is essential. Research topics are related to human rights, the exercise of state power, central and local public administration, and the control mechanisms of public administration. The team is led by Andras Zs. Varga, professor of law, Head of Department at PPCU and judge of the Constitutional Court of Hungary. The director of the Research Center is Balázs Gerencsér associate professor, while its members are professors, senior researchers and doctoral students, and sometimes even graduate students. See more at: <http://ereky.jak.ppke.hu>.

The importance of the topic was acknowledged by the supporters as well. It was the organizers' honor that the conference was financed by multiple sources who considered this issue important. Such was the PPCU K.A.P.; the Institute for Minority Rights Protection (KJI, Budapest); State Secretary of the Prime Minister's Office (Hungary); the Rákóczi Alliance (Hungary) and the Research Institute for Hungarian Communities Abroad (NPKI, Budapest).

3. Sessions of the conference

The conference had seven sessions, splitting by the main cornerstones of the topic. By this method it had an opening keynote session, which was followed by sessions dealing with issues of constitutional law and jurisdiction. These two sessions was devoted to general issues of justiciability of educational rights, as well as the courts' and ombudsman's experience. The second day focused more on the experiences of the civil society in a comparative approach. The comparison had a special attention on the Central and Eastern European region as well as on the enforcement of international and domestic obligations. Lecturers came from thirteen different countries from Russia to the United States.

In the first, opening session keynotes were presented by prof. Jan de Groof, president of ELA, who highlighted the need of judicial case law that can be referred to later on. Prof. Szabolcs Szuromi rector of PPCU in his keynote emphasized the close relation of educational and religious rights on the basis of human dignity. He proved that denominations improves values of the society through their own educational and

other services. Lajos Aáry-Tamás, ombudsman of Educational Rights of Hungary, underlined the importance of forums that are able to solve problems related to educational rights. He presented the best practices that his office gained in the past decades, which is quite unique in Europe. All the keynotes highlighted the need for justiciability of these rights, and the importance of both hard and soft law in domestic and international law.

The second session was about the concerns of constitutional law. Prof. András Zs. Varga, who is also a member of the Venice Commission, exposed the human dignity as the ultimate basis for educational rights. Professor Schanda, Head of Department of Constitutional Law at PPCU, mentioned that not only the state but primarily the family has to educate. The crisis of traditional families has a strong effect on the state's educational role. He highlighted that the way out of the problems is to go back to the family and the children. Renáta Uitz, Chair of the Comparative Constitutional Law Program, Head of Department of Legal Studies at Central European University, dealt with the meaning of justiciability from a comparative legal point of view. Pablo Meix Cereceda, professor of Administrative Law at the University of Castilla-La Mancha, highlighted the importance of EU law in educational rights. The debate was about whether the forum was more important than the rights to be exercised. The second session finished with Krisztina Rozsnyai, associate professor at ELTE Faculty of Law, who talked about the present system of remedies and the administrative jurisdiction as a special legal procedure.

In the third session Elisabeth Sándor-Szalay, the ombudsman for minority rights, underlined that there is a real significant case law at the ombudsman offices all around Europe. She detailed the Hungarian case of minority affairs. Maria Smirnova, researcher of Manchester International Law Centre at The University of Manchester, presented the 2012 Russian law of education. Lilla Berkes, researcher assistant at PPCU, presented a true story from a Canadian school about the freedom of religion versus rights and freedom of other public order. Dragos Efrim, young Romanian scholar at University of Craiova, talked about the Romanian new legislation in connection with the religious education in public schools.

The next day, Friday, prof. Charles Glenn, Boston University, opened the fourth session. He presented his paper on the strengthening of the civil society, mainly from a US perspective. Following, Ingo Richter, Professor at Irmgard Coninx Stiftung and University of Tübingen, dealt with the German case of thousands of immigrants and their relation to education. He expressed that if the state is not able to solve a problem, than the civil society has to. He thinks that the language pre-training of immigrant people is a kind of segregation and civil organizations should keep an eye on these segregated classes and promote the transfer of the children into the regular classes. He underlined the importance of the ELA-type umbrella organizations to raise civil society. Roberto Toniatti, Professor of Constitutional Law at Trento University, talked about a multicultural citizenship that is in close relation with a political and social notion of citizenship. This is the main character of minority rights in Europe. He believes that a "hidden hand" can be a rule making in civil sphere

just like in the economics.¹ Prof. Charles Russo from Dayton University analyzed the perspectives from the US according to the Justiciability of the Prior Right to Education. He presented a broad overview on the case law on educational rights in a historical perspective with a special attention to equality. He concluded that the that litigation will continue as the US continues to seek to provide equal educational opportunities for all Americans.

In the next session a great amount of good practices of single cases were presented. Here we have heard about a Jesuit educational initiative presented by P. Tamás Forrai SJ. He conferred their roma education and refugee integrated education programs, which are successfully led in the previous years. Later, individual cases of minority civil associations were presented from Hungary, Slovakia, Croatia and Romania. Lecturers came from this Central European region representing civil actors in the field of education. At last, Balázs Gerencsér talked about the most recent findings of the Council of Europe of educational systems in Central and Eastern Europe.

The fifth session was on the rethinking of the A4 scheme (adequacy, accountability, awareness and advocacy). Prof. de Groof's said the most important keywords on this topic were respect, protect, promote, fulfill and facilitate. All these are concentrating to implement the right to education. Merilin Kiviorg, professor at the Estonian University of Tartu, underlined the importance of building the environment of acceptance instead of breaking the rules of living together. She said that "freedom had a price". Gábor Kardos, member of Committee of Experts of the European Charter for Regional and Minority Languages, and professor of international law at ELTE, Budapest, presented in-depth the CoE's language charter and its finding and tendencies in implementing educational rights.

4. Summaries

The sixth was the closing of the plenary sessions. Prof de Groof, summarizing the conference, said there were good practices in the world regarding educational rights, which were called "best interest of the child". In his opinion we need a sustainable development in the quality of education. In this regard the United Nations have documents and valuable knowledge. The role of ELA is to promote the best ways of implementation of this fundamental right. Educational rights are very close to educational policy, which are in connection with political systems. In his summary he highlighted there was a valuable role of the extra-judicial systems (like the ombudsman) that were need to be developed. Finally he talked about the importance of interculturality. The Brugge document of the early ELA years can be renewed. Politics and research are both needed for future development of these rights.

Balázs Gerencsér in his summary highlighted the importance of focusing on the human being and its dignity. The human rights cannot be treated only as legal elements or mosaics of normative rules. If just some of the elements of dignity is

¹ The „religionclause.blogspot.com” blog was mentioned in the debate as a source of cases.

focused on, we lose the real content: the humanity. He urged to keep always close to the real unchangeable values. As an outcome of this Conference organizers agreed on a continuous collection of best practices in Europe that can be a basis for future researches and policy making.

At the end of the Conference, as a separate event, the Global Education Law Forum (GELF) as an independent initiative was officially launched by its founders (Peter Van der Hijden, Marco Matthijsen) on the 22th October 2016. GELF will be a nonprofit consortium that will address the issue of a broader and a more equal access to education both from a practical and a scholarly perspective. GELF will aim thus to add an education rights' perspective to the implementation of the newly adopted UN Sustainable Development Goal 4: 'Ensure inclusive and quality education for all and promote lifelong learning' and the UNESCO Education 2030 Framework for Action.

ON THE IMPLEMENTATION AND JUSTICIABILITY OF THE RIGHT TO EDUCATION

Jan De GROOF*

President of the European Association for Education Law and Policy

1. Ratio behind the implementation and the justiciability of the right to education

International human rights treaties grant everyone the right to education. States, upon ratification of these treaties, have the primary responsibility to guarantee that individuals subject to their jurisdiction enjoy this right and to ensure that their national educational systems meet the requirements assigned to human rights as proscribed by international human rights conventions.¹ To fulfil their obligation and to fully realise the right to education, it is not sufficient that the right to education merely exists in their national legal order but it is of the utmost importance that national states undertake additional steps.²

Contracting parties must effectively implement the right to education into their national legal system in order to create the necessary setting for ensuring the enjoyment of the right to education. Upon ratification concrete and effective measures, such as the adoption of constitutional provisions, legislation and policies or the abolishment of existing inconsistent laws or policies, must be taken by contracting parties.³ Most of the states have created such settings and abided by their legal obligations to implement international treaties into their national legal order. Still this is not sufficient for guaranteeing the effective and full protection of the right to education.

* Professor at the College of Europe (Bruges, Belgium) and at the University of Tilburg (the Netherlands), Government Commissioner for Universities (Belgium, Flemish Community), UNESCO Chair for the Right to Education and former UNESCO Chargé de Mission.

¹ Jan De GROOF: *No Person shall be denied the Right to Education*. Nijmegen, 2004. 725.

² Jan De GROOF – Gracienne LAUWERS – Kishore SINGH: *The Right to Education and Rights in Education*. Nijmegen, 2006. 426.; Kishore SINGH: Report of the Special Rapporteur on the right to education, justiciability on the right to education. *A/HRC/23/35*, (2013) para 17.

³ *Justiciability*, Right to Education Project, promoting mobilisation and accountability. <www.right-to-education.org/issue-page/justiciability>

1.1. “Justiciability”

Having a legal right and its mere incorporation into a domestic legal order is not enough; enforcement mechanisms must also be available. Indeed, ‘for rights to have meaning, effective remedies must be available to redress violations’.⁴ It is not conceivable to have a right without a remedy.⁵ One of the options to enforce a right is to render it justiciable. 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’.⁶ The right to education is justiciable in all its dimensions since it is internationally recognised as demonstrated by the enshrinement of this right in various international and regional treaties as well as its implementation in the national constitutions.⁷

However, this latter statement is contested as the justiciability of economic, social and cultural rights has encountered some opposition based on two main arguments namely: the ‘specific nature’ of these rights and the doctrine of the separation of powers. The former argument stipulates that since social and economic rights are vague, show a lack of precision and demand the adoption of positive measures for its implementation, the justiciability of such rights is not possible, contrary to civil and political rights which are clearer and impose a negative obligation. The second argument, believes that the doctrine of separation of powers is undermined since by adjudicating on matters related to the right to education the judges step into the executive’s sphere of competence. As was said in the *case R v Cambridge Health Authority ex parte B* ‘Difficult judgments on how a limited budget is best allocated to the maximum advantage of the maximum number [...] is not a judgement a court can make.’⁸ However, these arguments can be counter argued.⁹ With regards to the first argument, ‘[t]he nature of the rights themselves is not a legitimate basis for rejecting their justiciability’.¹⁰ The unwillingness to recognise economic, social and cultural rights often stems from political and ideological ideas as well as the cultural and political history of the state.¹¹ Indeed, political and ideological ideas rather than scientific ones are often behind the non-recognition of economic, social and cultural

⁴ General comment No. 5 (2003) *General measures of implementation of the Convention on the Rights of the Child*. CRC/GC/2003/5, para 24.

⁵ F. COOMANS: The Justiciability of economic social and cultural rights. In: E. HEY – F. AMTENBRINK – W. VAN BOOM – S. TAEKEMA – R. VAN SWAANINEN – A. NAUDÉ-FOURIE – K. HENRARD: The justiciability of economic, social and cultural rights. *Erasmus Law Review*, 2009/2. 427.

⁶ INTERNATIONAL COMMISSION OF JURISTS: *Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability*. 2008.

⁷ SINGH op. cit. para 27.

⁸ *R v Cambridge Health Authority ex parte B*, B [1995] 2 All ER 129 (CA).

⁹ A. P. JAMES: The forgotten Rights: the case for the legal enforcement of Socio-economic rights in UK national Law. *Opticon*, 1826, (2) 1.

¹⁰ E. C. CHRISTIANSEN: Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court. *Colum. Hum. Rts. L. Rev.*, Vol. 38, (2006–2007) 347.

¹¹ JAMES op. cit. 1.

rights¹² and non-justiciability of these rights are simply ‘a perception’.¹³ As to the second argument, the separation of powers does not exclude the possibility that the judges may play a role in the enforcement of the right to education, especially since the separation of powers is currently described as the “dynamic and ongoing interaction between the different branches of government” where the courts engage not only ‘in an exacting examination of state policies with respect to socio-economic rights’, but also in the ‘normative development of the content [... thereof], drawing where appropriate on international and comparative standards’.¹⁴ Besides, the principles of equality and fair hearing, including access to court, would be undermined if some executive decisions would not be entitled to be subject to review. The paradigms of the rule of law or the *Rechtstaat*, to name only two different but celebrated models, rather require the existence of judicial review of administrative and governmental decisions as a guarantee for the individual. Indeed, scholars specializing in administrative law have devoted substantial work to establishing when and how policy decisions may be subject to judicial review.¹⁵ If the allocation of a state’s financial resources is certainly a political decision, there are nevertheless certain constitutional goods (among these, the social state clause) that not even a legislating body can overlook, as the theory of the “essential core” of fundamental rights has explained.¹⁶

This entails that individuals can have recourse to courts to challenge states’ compliance with their obligations to protect the right at stake. And it means that international, regional and national judicial and quasi-judicial bodies can review state parties’ actions, omissions, provisions and policies, related to education.¹⁷

¹² F. PIOVESAN: The Implementation of Economic, Social and Cultural Rights: Practices and Experiences. In: B. K. GOLDEWIJK – A. C. BASPINEIRO – P. C. CARBONARI (eds.): *Dignity and Human Rights: the Implementation of Economic, Social and Cultural Rights*. Antwerp–New York, Intersentia, 2002. 113.

¹³ D. MARCUS: The Normative Development of Socioeconomic Rights through Supranational Adjudication. *Stan. J. Int’l L.*, 2006/42. 53., 101.

¹⁴ P. O’CONNELL: *Vindicating Socio-Economic Rights: International Standards and Comparative Experience*. Abingdon–New York, Routledge, 2012. 201.; INTERNATIONAL COMMISSION OF JURISTS: *Courts and the legal Enforcement of Economic, Social and Cultural rights- comparative experiences of justiciability*. 2008. 75.

¹⁵ Studies on judicial review tend to base on national law, and therefore it is difficult to cite an internationally valid reference. In English language: P. CRAIG: Competing models of judicial review. *Public Law*, Autumn, 1999. 428–447.

¹⁶ P. HÄBERLE: *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz. Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt*. Heidelberg, Müller, 1983. 43.

¹⁷ F. COOMANS: In search of the Core Content of the Right to Education. In: A. CHAPMAN – S. RUSSELL (eds.): *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. Hart Publishing, 2002. 220. Antwerp, Intersentia,

1.2. Why is justiciability important?

The role of the court in the enforcement of the human right is crucial. It guarantees that the right is respected, protected and fulfilled. Judicial and quasi-judicial bodies not only protect but also promote the right to education in guaranteeing and enforcing this right. The justiciability of a right renders the state accountable for action or inaction according to international, regional and national legal norms. Judicial enforcement has a role in granting remedies in cases of violation of the right to education. A finding of violation of the right to education in an individual case may have a large impact and lead to systematic institutional change consequently benefit to other victims of the state behaviour which was challenged and it may simultaneously prevent future violations of the right at stake. Besides, judicial bodies play an important role in the clarification of the scope and the content of the right to education and in the specification of the different rights available to individuals.¹⁸ The court's role is also important as it gives a voice to the marginalised group in a democratic society which often neglects their interests. Indeed, the distinctive nature of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.¹⁹ Moreover, a judgment of an adjudicating body may bring a state's violation of a right in the public eye and potentially attract the media's attention. In turn, this will enhance a state's accountability and the possibility of change. With regards to the quasi-judicial mechanisms, such as an ombudsman and domestic human rights establishments, the political and legal pressure put on states subsequent to the decision of quasi-judicial mechanisms illustrates their importance despite the non-binding nature of their decision. Moreover, such mechanisms may, on the basis of their findings, lodge a complaint in domestic courts.²⁰

Justiciability of the right to education is also necessary for socio-economic reasons. Besides the fact that education alleviates poverty, persons immigrate in order to obtain better education for their children and better opportunities in other countries. If countries universally implement and realize the right to education, immigration might not be necessary since there will be education everywhere.²¹

¹⁸ INTERNATIONAL COMMISSION OF JURISTS (ICJ): Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability, 2008. *Human Rights and Rule of Law Series*, No. 2, 75.; Key concepts on ESCRs – Can economic, social and cultural rights be litigated at courts? <http://www.ohchr.org/EN/issues/ESCR/Pages/CanESCRbelitigatedatcourts.aspx>

¹⁹ C. SUNSTEIN: Social and economic rights? Lessons from South Africa. *Public Law and Legal Theory Working Paper No. 12*, University of Chicago; see also C. SUNSTEIN: *Design Democracy, What constitutions Do*. Oxford, Oxford University Press, 221–237.

²⁰ SINGH op. cit.

²¹ For a discussion of this issue see Christian DUSTMANN – Albrecht GLITZ: Migration and Education. *Nordface Migration, Discussion Paper*, No. 2011–11.; E. A. HANUSHEK – S. MACHIN – L. WOESSMANN (eds.): *Handbook of the Economics of Education*. Vol. 4., Amsterdam, North Holland, 2014.

2. Examples of justiciability of the right to education via judicial and quasi-judicial mechanisms at national and international level

The right to education is and has been justiciable in many jurisdictions.²² This section will provide some of the many examples illustrating the justiciability facets of the right to education. It will illustrate how the right to education is widely recognised as enforceable in international and national courts. The chosen national case law relates to countries that have ratified the relevant human rights treaties.²³ These countries, although several human rights violations still exist in them and the right to education has not necessarily been fully realized, present models of justiciability. These countries have ratified human rights treaties containing the right to education and incorporated it in the domestic law in attempts towards justiciability.

The Supreme Court of the United States stresses the state's responsibility by stating that 'providing public schools ranks at the very apex of the function of a state'.²⁴ Another case in this regard, is the *Campaign For Fiscal Equity v. State of New York* case where the Supreme Court of New York held that the State funding of public education did not meet the minimum constitutional requirements in order to comply with the duty to provide a "sound basic education". On appeal, the decision was upheld.²⁵ In *Brown v. Board of Education*, the US Supreme Court adjudicated on discrimination and ruled that distinct educational infrastructure for black and white children are "inherently unequal" and it recognised education as an element of the foundations of a democratic society.²⁶

The South African Constitution, 1996 is famous for its extensive provisions on economic and social rights, which was drafted with the ICESCR in mind.²⁷ Section 38 of the South African Constitution, dealing with the enforcement right of the Constitution, states that 'anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights'. The court has given a broad interpretation to this provision requiring that the claimant seeking for a remedy demonstrates sufficient interest in receiving the sought relief.²⁸ Besides, through *amicus curiae* (friends of the court) action has

²² F. COOMANS: The Justiciability of economic social and cultural rights. In: E. HEY – F. AMTENBRINK – W. VAN BOOM – S. TAEKEMA – R. VAN SWAANINEN – A. NAUDÉ-FOURIE – K. HENRARD: *The justiciability of economic, social and cultural rights*. 2009. 427.

²³ COOMANS op. cit. 428.

²⁴ *Wisconsin v. Yoder* (1972), 406 U.S 205, 213, 92 S.Ct. 1526, 32 L.Ed.2d 15.

²⁵ State Supreme Court of New York, *Campaign For Fiscal Equity v. State of New York et al.*, 710 N.Y.S. 2d 475, January 9, 2001; see also New York Court of Appeals, *Campaign For Fiscal Equity v. State of New York et al.*, 100 N. Y. 2d 893, June 26, 2003; New York Appellate Division, First Department, *Campaign for Fiscal Equity, Inc. v. State of New York*, 2006 NYSlipOp 02284, March 23, 2006.

²⁶ US Supreme Court of Justice, *Brown v. Board of Education of Topeka*, 347 US 483 (1954).

²⁷ COOMANS op.cit. 429.

²⁸ S. LIEBENBERG: South Africa adjudicating Social Rights Under a Transformative Constitution. In: M. LANGFORD (ed.): *Social Rights Jurisprudence, Emerging Trends in International and Comparative*

been made possible for individuals and organisations to take part in human rights court's litigation by proving that their contribution will be useful for the court and distinct from those of the disputing parties. In practice, South African jurisprudence demonstrates how the courts are developing a model for judicial review of socio-economic rights which supports the constitution's provisions.²⁹

In Colombia, the constitutional court has developed a pile of case law concerning the right to education.³⁰ Its jurisprudence, based on article 27 of the constitution, clarifies that the constitution recognises the right to education as a fundamental right directly enforceable by courts via writ of protection, even in the case where the education provided has been privatised.³¹ The writ of protection is enshrined in article 86 which provides that every person has the right to file a writ of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may send it to the Constitutional Court for possible revision. The Court found a violation of the right to education when a private school stopped to carry on providing education to a child with attention deficit disorder and it ordered all schools to provide education for such children even if they are not specialised to educate them.³²

In *O'Donoghue v. Minister for Health*, the Irish High court adjudicated on the subject of the right to education for children having disabilities and held contrary to the defendant (the state) that a severely mentally disabled child is not uneducable.³³ It based its decision on the definition of education clarified by the Supreme Court in the case of *Ryan v. AG* which defines it as 'the teaching and training of a child to make the best possible use of inherent and potential capacities, physical, mental and moral'.³⁴ It also considered the advance made internationally in the field of education for children with disabilities. Thus, the court made it clear that the constitution obliges the state to provide for free primary education to all children, including disabled ones, and that special measures must be undertaken for those children whose handicap prevented them from enjoying the conventional education.

In Israel, the Supreme Court decided that the right to education for children with disabilities includes the right to free education not only in respect of special education, but also in integrated educative settings. In this case, the government was ordered to arrange its budgetary provisions to cover these services.³⁵

Law. Cambridge, Cambridge University Press, 2009. 80.

²⁹ LIEBENBERG op. cit. 80.

³⁰ M. SEPULVEDA: Colombia: The Constitutional Court's Role in Addressing Social Injustice. In: LANGFORD (ed., 2009) op. cit. 155.

³¹ Sentencia T-534/97.

³² T-255/01.

³³ *O'Donoghue v. Minister for Health & Ors* [1993] IECH 2.

³⁴ *Ryan v. A.G.* [1965] IR294, O' Dalaigh C.J.

³⁵ Supreme Court of Israel, *Yated and others v. the Ministry of Education*, HCJ 2599/00, August 14, 2002.

The right to education has also been recognised as justiciable by international court.³⁶ In *the Belgian Linguistics Case No. 2*, the European Court of Human Rights held that despite the negative formation of the first sentence of article 2 protocol No.1 stating ‘no person shall be denied the right to education’, this article secures this right.³⁷

The right of people with disabilities was also protected by the European Committee on Social Rights who held in a collective complaint by Autism-Europe that the European Social Charter was infringed by the French government’s general lack of progress.³⁸ Likewise, the advisory opinions of the French National Consultative Commission defended the right for such children.³⁹

Even when the right of education was not mentioned in the constitution, legal recourse has been available for this right as it constitutes an essential element for the exercise of other rights. The Supreme Court of India held that the right to education formed part of an element of the right to life and thus it is enforceable even though it was at that time not identified in the Indian constitution.⁴⁰ In India, any individual can directly go to the Supreme Court when there is a violation of the right to education since fundamental rights are considered as primordial element of the constitution. The Inter-American Court of Human rights took a similar approach and underlined in several cases that a violation of the right to life may occur when there is a lack of educational facilities for vulnerable groups.⁴¹ The Inter-American Court of Human Rights has held in a number of cases that the special measures of protection afforded to children by the State (Article 19 of the American Convention on Human Rights) includes the provision of education.⁴² Another example of the justiciability of the right to education in India is the following; the Commission for Protection of Child Rights in accomplishing its task to protect the enjoyment of the right to education had examined complaints about the imposition of school fees for primary education when there should not be any. The findings of this Commission led court actions and resulted into parents having their fee reimbursed.⁴³

³⁶ L. CLEMENTS – A. SIMMONS: European Court of Human Rights. In: LANGFORD (ed., 2009) op. cit. 424.

³⁷ *Belgian Linguistics Case* (No 2 (1968) 1) EHRR 252.

³⁸ *International Association Autism Europe vs. France*, Complaint No. 13/2002. European Committee on Social Rights, 4 November 2003.

³⁹ Avis sur la scolarisation des enfants handicapés <http://www.cncdh.fr/fr/publications/avis-sur-la-scolarisation-des-enfants-handicapes>

⁴⁰ *Unni Krishnan, J.P. v State of A.P.* (1993 I.SCC 645).

⁴¹ 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.

⁴² See Inter-American Court of Human Rights, *Instituto de Reeducación del Menor v. Paraguay*, September 2, 2004, paras. 149, 161 and 174.

⁴³ SINGH op. cit. para 17.

As already mentioned, most of the states have abided by their legal obligations to implement international treaties into their national legal order. Still this is not sufficient for guaranteeing the effective and full protection of the right to education.

3. *Status quo* of the right to education with regards to its implementation

Human rights entail both rights and obligations. Thus, the various international and regional conventions containing the right to education not only grant this right but also impose an obligation on the state parties to guarantee the exercise of this right. As the Limburg principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (the Limburg Principles) specifies, contracting parties are accountable to their individuals as well as to the international community for their compliance to these obligations.⁴⁴ There exist different guidelines clarifying the states' duties with regards to the implementation of human rights, including the right to education. This section will expose the main obligations so far imposed on states with regards to the right to education.

The states, when implementing all human rights, must respect three landmark obligations namely: the obligation to respect, protect and fulfil. The obligation to respect prevents the states from interfering with the exercise of human rights. The obligation to protect requires the states to prevent third parties, such as private entities or, individuals or international organisation, from interfering with the enjoyment of the rights. The last obligation requires the states to use all appropriate measures, *inter alia*, judicial, administrative, and budgetary measures to ensure the total realisation of human rights.⁴⁵

The General Comment of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) number 3 clarifies the state obligation with regards to, amongst other rights, the right to education provided in the International Convention on Economic, Social and Cultural Rights (ICESCR).⁴⁶ The nature of a state's obligation is provided in article 2 of the ICESCR providing for an obligation of conduct and an obligation of result. The Maastricht guidelines on Violations of Economic, Social and Cultural rights (Maastricht Guidelines) specifies that the former obliges the state to take actions aiming to realise the right and the latter requires the state to realise

⁴⁴ *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*, para 10. <<http://www.escri-net.org/docs/i/425445>>

⁴⁵ Fernandez ALFRED – Zachariev ZACHARIE: *Bibliographie choisie sur le droit à l'éducation*. 2011. 7. www.oidel.org/doc/Bibliographiedroiteduc/Biblio%202012%202.pdf; *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*. Maastricht, January 22–26, 1997, para 10.; 18–19. ; UN Human Rights Office of the High Commissioner for Human rights, <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>.

⁴⁶ CESCR, *General Comment No.3: The Nature of States Parties Obligations* (Art. 2, para.1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23).

a specific objective to ‘satisfies a substantive standards’.⁴⁷ According to this article contracting parties must ensure that the rights present in the Convention will be exercised without discrimination and it must ‘undertake steps with a view to achieving progressively the full realization of the rights recognized in the present Covenant’. To this end, state parties must use all appropriate means, including particularly the adoption of legislative measures in order to satisfy the obligations to take steps (article 2(1) ICESCR). Otherwise said contracting parties must incorporate the right to education into their legislation and policies at all levels.⁴⁸ The failure to effectively enforce legislation aiming to implement the ICESCR violates this Convention.⁴⁹ The Committee underlines that the adoption of legislative measures does not exhaust the obligations of contracting parties and it states that the ultimate word as to whether appropriate means have been undertaken by the states is reserved for the Committee itself.⁵⁰ Concerning the measures to be taken, the committee of the right of the child stipulates that ‘each state party must respect and implement the right of the child to have his or her best interests assessed and taken as a primary consideration, and is under the obligation to take all necessary, deliberate and concrete measures for the full implementation of this right.’⁵¹

Other measures than legislative measures must be taken for states to fulfil their obligations under the ICESCR.⁵² The provision of judicial remedies with regards to rights that can be considered justiciable belongs to the means which are considered appropriate.⁵³ The Limburg principles provide that economic, social and cultural rights can be justiciable.⁵⁴ The committee stipulates that article 13(2)(a),(3)(4) ICESCR, providing the right to education, seems to be ‘capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain’.⁵⁵ The Maastricht guidelines and the Limburg principles stipulate that access

⁴⁷ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*. Maastricht, January 22–26, 1997, para 7.

⁴⁸ CRC, *General Comment No. 1 (2001), article 29 (1): the aims of education*, CRC/GC/2001/1., para 17.

⁴⁹ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*., Maastricht, January 22–26, 1997, para 15.

⁵⁰ CESCR, *General Comment No.3 (1991): The Nature of States Parties Obligations (Art. 2, para. 1, of the Covenant)*, Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23) para 1–4.

⁵¹ CRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*.

⁵² *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*, para 17.

⁵³ CESCR, *General Comment No.3: The Nature of States Parties Obligations (Art. 2, para. 1, of the Covenant)*, Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23) para 5.

⁵⁴ *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*; para 8.

⁵⁵ CESCR, *General Comment No.3: The Nature of States Parties Obligations (Art. 2, para. 1, of the Covenant)*, Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights

to effective judicial or other remedies and adequate reparation should be available to any victims of a violation of an economic, social or cultural right.⁵⁶ Jurisprudence in the area of economic and social rights is also encouraged by the Committee via the General Comment adopted in 1998 as it states that ‘the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring government accountability must be put into place.’⁵⁷ Besides this measure administrative, financial and social measures are an example of other appropriate measures. Moreover, impunity of any violations of the rights at stake should be prohibited.⁵⁸

Article 2 ICESCR uses the term ‘progressive realisation’ of the right to education. This term must be read in the context of the general objective of the conventions meaning that it imposes an obligation on the states to realise the right at stake as quickly as possible. Any retrogressive measures must be justified.

Every contracting party must ensure a minimum core of obligation in order to guarantee the enjoyment of ‘minimum essential levels’ of each rights which states parties have the obligation to guarantee;⁵⁹ a failure to satisfy this ‘minimum core obligations’ amounts to a violation of the ICESCR.⁶⁰ The assessment as to whether a state has fulfilled this obligation must take into consideration resource constraints. However, to be able to justify failure to comply with minimum core obligations the state will have to prove that it did its best to use all available resources in order to be in line with these obligations. This entails that a lack of resources does not *de facto* relieve the states from guaranteeing some minimum core obligations.⁶¹ In education, the universal minimum corresponds to primary education. When a state is unable to provide free and compulsory education, it should create strategies to do so and seek

(contained in Document E/1991/23) para 5.

⁵⁶ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22–26, 1997, para 22–23.; *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural*, para 19.

⁵⁷ CESCR, *General Comment No.9: The domestic application of the Covenant*, UNE/C.12/1998/24, para 2.: See O. DE SCHUTTER: *Economic, Social and Cultural Rights as Human Right: An introduction. CRIDHIO Working paper*, 2013. 7.

⁵⁸ *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*, para 72; *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22–26, 1997, para 27.

⁵⁹ *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*, para 25; CESCR, *General Comment No.3: The Nature of States Parties Obligations (Art. 2, para. 1, of the Covenant)*, Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23).

⁶⁰ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22–26, 1997, para 9.

⁶¹ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22–26, 1997, para 10.

assistance from the international community.⁶² In general, international cooperation in implementing the right to education is strongly encouraged.

More specific to the right to education, is that it has a social aspect and a freedom aspect. The former aspect implies that the realisation of this right demands a positive obligation from the part of the state. As providing access to education and making it available to all, demands the states to get involved and to put some efforts. The second aspect refers to the freedom of individuals to choose whether to receive education from a private or a public institution. From this arise, the freedom of legal entities and natural persons to institute their own educational establishment. This aspect implies a negative obligation and demands the states to not-interfere with this freedom.⁶³

Four criteria are contained in the *General comment No. 13* on the right to education which on the one hand can be used as a tool to analyse the content of the right to education provided an on the other hand these criteria impose general obligations resulting from them.⁶⁴ The four features of the right to education are (1) availability (2) accessibility (3) acceptability (4) adaptability. In my report as Chargé de Mission: adequacy, accountability, awareness, advocacy.⁶⁵

However, when rating the success of the *Millennium Development Goals 2015*, and more specifically Goal 2, it is to be determined whether the measures concerning the justiciability of the right to education have been effective.

4. Failure to achieve the millennium goals

The Millennium Development Goals (MDGs) are eight international development goals that were established following the Millennium Summit of the United Nations in 2000, following the adoption of the United Nations Millennium Declaration. Goal 2 aims to achieve universal primary education. More specifically, target 2A hopes to ensure that, by 2015, children everywhere, boys and girls, will be able to complete a full course of primary schooling. However, the UNESCO Institute for Statistics found that progress in reducing the number of children out of school has come to a virtual standstill just as international aid to basic education falls for the first time since 2002. More than 57 million children continue to be denied the right to primary education, and many of them will probably never enter a classroom.⁶⁶

Clearly, effective means of justiciability regarding the right to education is necessary.

⁶² K. TOMASEVSKI: Human Rights and Poverty Reduction. Strengthening pro-poor law: legal enforcement of economic and social rights. *ODI*, 2005. 5.

⁶³ COOMANS op. cit. 220.

⁶⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10.

⁶⁵ J. De GROOF: *Report Fulfilling the Right to Education*. 2009. 25.

⁶⁶ UNESCO INSTITUTE FOR STATISTICS: *Schooling for millions of children jeopardised by reductions in aid*. June 2013, Number 25.

5. Remedial actions

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights⁶⁷ is an international treaty establishing complaint and inquiry mechanisms for the International Covenant on Economic, Social and Cultural Rights. Another remedial action that can be taken is the example of the Optional Protocol to the Convention on the Rights of Persons with Disabilities⁶⁸. The Optional Protocol establishes an individual complaints mechanism Parties agree to recognise the competence of the Committee on the Rights of Persons with Disabilities to consider complaints from individuals or groups who claim their rights under the Convention have been violated.⁶⁹ The Committee can request information from and make recommendations to a party.⁷⁰

⁶⁷ Adopted by the UN General Assembly on 10 December 2008 and opened for signature on 24 September 2009.

⁶⁸ Adopted on 13 December 2006, and entered into force at the same time as its parent Convention on 3 May 2008.

⁶⁹ Optional Protocol to the Convention on the Rights of Persons with Disabilities: Article 1.

⁷⁰ Optional Protocol to the Convention on the Rights of Persons with Disabilities: Articles 3 and 5.

RELATION BETWEEN THE RELIGIOUS FREEDOM AND RIGHT TO EDUCATION ON THE BASIS OF HUMAN DIGNITY

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1. Introduction

The existence of religion is coeval with the mankind. The religious conviction of the different human communities have defined their culture on the day to day basis since the beginning of history. Therefore, this essential characteristic has made a strong influence not only on the daily life, mentality, on the social relations and structures in general, but particularly on the education at home and even on its institutionalized system.¹ Hence, the personal attitude toward the ‘Saint’ is a natural feature of every human being, which feature is rooted in his/her own conscience. It is not accidental therefore, that the religious freedom has become one of the first generation human rights in the 18th century.² The organized form of European public education has started by the Catholic schools which dominated this field until the 16th century, when we could see the transformation of this system in Europe into a Christian education. Naturally, the Virginia Declaration (1776), Constitution of the United States of America (1787), the French Constitutions – based on the results of the French revolution (1789-1799) – (1791, 1792, 1795)³, the German Imperial Constitution (1849), constitutional laws of December 1867 of the Austrian Empire, or the Constitution of Weimar (1919), moreover ecclesiastical decrees of which were adopted by the Fundamental Law of Bonn, show precisely the gradual secularization

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¹ SZUROMI, SZ. A.: *Bevezetés a katolikus hit rendszerébe* (Introduction into the system of the Catholic Faith). Budapest, 2014.⁷ 13.

² SZUROMI, SZ. A. – FERENCZY, R.: *Kérdések az állami egyházjog köréből* (Question about the ecclesiastical law). [Bibliotheca Instituti Postgradualis Iuris Canonici Universitatis Catholicae de Petro Pázmány nominatae III/17] Budapest, 2014. 5., 45. [SZUROMI (2014a)]

³ J-L. THIREAU: *Introduction historique au droit*. Paris 2001. 270–277.

process of state laws and of the society.⁴ Through this process have been crystalized not only different models of state and church relationship, but also a strong basis for religious freedom as one of the most emblematic expression of the human dignity. This new social and legal situation have needed new concept to protect the citizens' rights for education based on their own religious conviction, without the intervention of the state into religious affairs.⁵ Peter Card. Erdő points out, that even if a state does not follow in institutionalized form one particular religion or religious ideology, it does not mean necessarily that it makes the state automatically atheist.⁶ Nevertheless, the above described brief overview supports well, that within a secularized society every religious educational system has become more vulnerable than before, therefore the ecclesiastical education carries minority characters nowadays, as compared with neutral state- or private schools. Therefore, we cannot neglect to make remarks here regarding the principle and legal basis of the religious communities' right to the teaching of their own faith, in order to educate trough that their children. The *II Catholic – Orthodox Forum* on October 22nd 2010 underlined in its closing Communiqué, that “The participants in the Forum believe that the role as dominating Church or State Church should not result in a legal discrimination for the other Churches and the members of minority religious groups, whose religious freedom should be fully guaranteed, including the right to profess their faith using any means respecting personal freedom.”⁷

2. The religious school

When we are talking about the religious schools in Eastern Europe, within former communist countries, we cannot forget that the suppression of the religious educational system represents in these countries the loss of their religious freedom during the time of the communist dictatorship. Like in Hungary, when on June 16th 1948 the Hungarian Parliament accepted the secularization of the entire educational system by Act 33/1948. István Barankovics (†1974) – who represented the minority opinion – concluded his parliamentary speech: “This prepared new law certainly will get the majority sympathy of the Parliament; however it will never get the volitional and emotional acceptance of the majority of the Hungarian Nation.”⁸ Therefore, it

⁴ SZ. A. SZUROMI: The Changes of Modern Era Relation of Church and State in Europe. *Folia Canonica*, 8, (2005) 65–77.

⁵ A. M. ROUCO VARELA: *El derecho a la educación, ¿de nuevo a debate?* In: A. M. ROUCO VARELA: *Ecclesia et Ius. Escritos de derecho canónico y concordatario*. [Studia Canonica Matritensia 1] Madrid, 2014. 389–409.

⁶ ERDŐ, P.: Az Európai Unió és az Egyház (The European Union and the Church). In: ERDŐ, P.: *Egyház, kultúra, társadalom* (Church, Culture and Society). Budapest, 2011. 273–277., especially 273–274.

⁷ IICATHOLIC – ORTHODOX FORUM: *Communiqué*. In: *Church and State relations: from Historical and Theological Perspectives*. (Atti del II Forum Europeo Cattolico – Ortodosso, Rodi, Grecia, 18–22 ottobre 2010) Bologna, 2011. 215–221., especially 217. (n. 3).

⁸ MÉSZÁROS, I.: *Mindszenty és Ortutay. Iskolatörténeti vázlat: 1945–1948* (Mindszenty and Ortutay. An outline of School-history: 1945–1948). Budapest, 1989. 175.

must be underlined that the religious educational system does not only depend on emotions, but a clear element of the really existing liberty, justice, solidarity and peace in the particular country. This testifies the acceptance of the cultural values, the religions, and the natural characteristic of the citizens.⁹

Already Pope Pius XI (1922–1939) dedicated an Encyclical letter *Divini illius magistri* (December 31st 1929) to the right of parents to educate their children in ecclesiastical school, following freely their own faith, which is recognized by the state.¹⁰ The pope explicitly argues in this document, Art. 8: “[...] From this we see the supreme importance of Christian education, not merely for each individual, but for families and for the whole of human society, whose perfection comes from the perfection of the elements that compose it. From these same principles, the excellence, we may well call it the unsurpassed excellence, of the work of Christian education becomes manifest and clear; for after all it aims at securing the Supreme Good, that is, God, for the souls of those who are being educated, and the maximum of well-being possible here below for human society [...]”.¹¹ Pius XI points out also, that: “[...] Besides every Christian child or youth has a strict right to instruction in harmony with the teaching of the Church, the pillar and ground of truth. And whoever disturbs the pupil’s Faith in any way, does him grave wrong, inasmuch as he abuses the trust which children place in their teachers, and takes unfair advantage of their inexperience and of their natural craving for unrestrained liberty, at once illusory and false [...]”.¹²

Obviously, beside the cited document are those particular social, political, even legal transformations which had happened between the two wars. Nevertheless, the cited papal description – because the argumentation proceeds from the basis of human dignity – is applicable to any denomination. If we take a glance into the Universal Declaration of Human Rights (December 10th 1948) which was composed after the tragedy of the Second World War, we can find the summary of the afore-mentioned concept in general, that the education has to be observant of all characteristics of the human personality (Art. 26,2). The Spanish Constitution (December 27th 1978) – based on the documents of international human rights – in Art. 27 (6) – which was inserted into the Fundamental Law of Spain in 1985¹³, and was specified in 2006¹⁴) expressively declares the principle of the freedom to create educational centers with respect for constitutional principles. The description makes clear that this legal basis is in force for every type of educational categories, mean private-, religious-, or other convictions, as it is explained well by Javier Martínez-Torrón,

⁹ ROUCO VARELA (2014) op. cit. 339–365., especially 340.

¹⁰ PIUS XI: Litt. Enc. *Divini illius magistri* (31 dec. 1929). *AAS* 22 (1930) 49–86.

¹¹ Ibid. 49.

¹² Ibid. 52.

¹³ Ley Orgánica 8/1985 (3 jul. 1985).

¹⁴ Ley Orgánica 2/2006 (3 mai. 2006). Cf. SZUROMI, SZ. A.: Spanyol állami egyházjog – új hangsúlyok (Spanish Ecclesiastical Law – New Emphases). *Iustum Aequum Salutare*, X., 2014/2. 155–171., especially 156–157. [SZUROMI (2014b)]

professor of the Complutense University of Madrid.¹⁵ I would like to add to Prof. Martínez-Torrón's note, that Art. 27 of the Spanish Constitution deals in detailed the freedom of education within the Spanish Kingdom. The state gives guarantee the free moral and religious educational right of the parents regarding their children.¹⁶ It is supplemented with the principles of the concordat between the Holy See and Spain (January 3rd 1979) which contains the introduction into the Catholic faith even for the universities.¹⁷ Recently, the legal regulation of the teaching in public schools – concerning primary schools – (ECI/2211/2007)¹⁸ and also about the high schools (ECI/2200/2007)¹⁹ have been modified by the order ECD/7/2013.²⁰ The new rule – based on the recommendations of the United Nation, of the European Council, and of the European Union – touches upon the respect of the entire human person and the unique value of his/her life, but contains also the respect of human dignity, religious belief – including the right for the studies on the basis of his own faith –, the value of the family and the teaching for that.²¹

3. Catholic education and its regulation by the Catholic Church

The Second Vatican Council (1962–1965) regulated in general by the Declaration *Gravissimum Educationis* the field of the independent – without state influence – Catholic education.²² The first chapter defined the legal basis of this independent educational system: “[...] All men of every race, condition and age, since they enjoy the dignity of a human being, have an inalienable right to an education that is in keeping with their ultimate goal, their ability, their sex, and the culture and tradition of their country, and also in harmony with their fraternal association with other peoples in the fostering of true unity and peace on earth. For a true education aims at the formation of the human person in the pursuit of his ultimate end and of the good of the societies of which, as man, he is a member, and in whose obligations, as an adult, he will share [...]” Antonio María Card. Rouco Varela establishes well

¹⁵ J. MARTÍNEZ-TORRÓN: *Religion and Law in Spain*. New York, NY., 2014. 138.

¹⁶ Art. 27 (3) Los poderes públicos garantizan el derecho que asiste a los padres para que sus hijos reciban la formación religiosa y moral que esté de acuerdo con sus propias convicciones. A. MOLINA – M. E. OLMOS – J. L. CASAS (ed.): *Legislación eclesiástica* (Civitas Biblioteca de Legislación). Madrid, 2007. 55.

¹⁷ AAS 72 (1980) 38–39.

¹⁸ ECI/2211/2007 (July 12th 2007).

¹⁹ ECI/2200/2007 (July 12th 2007).

²⁰ ECD/7/2013 (January 9th 2013); Cf. SZUROMI (2014b) op. cit. 157.

²¹ Cf. Orden ECD/7/2013, de 9 de enero, por la que se modifica la Orden ECI/2211/2007, de julio, por la que se establece el currículo y se regula la ordenación de la Educación Primaria, y la Orden ECI/2220/2007, de 12 de julio, por la que se establece el currículo y se regula la ordenación de la Educación Secundaria Obligatoria. A. MOLINA – M. E. OLMOS – J. L. CASAS (ed.): *Legislación eclesiástica* (Civitas Biblioteca de Legislación). Madrid, 2013. §§. 154–155.

²² *Conc. Vaticanum II* (1962–1965), Sessio VII (28 oct. 1965), *Declaratio de educatione christiana: Conciliorum oecumenicorum decreta*, Bologna, ³1973. 959–968, Art. 1: 960.

regarding this introductory chapter that its contents is in harmony with the Universal Declaration of Human Rights (Art. 26,1) and also with the Additional Protocol to the European Convention (May 30th 1952; Art. 2).²³ The cited conciliar document is also an important source of how the parents should fulfill their duties and rights based on their religious conviction within the educational system. In Art. 6 of the *Gravissimum Educationis* we can clearly read: “[...] Parents who have the primary and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools. Consequently, the public power, which has the obligation to protect and defend the rights of citizens, must see to it, in its concern for distributive justice, that public subsidies are paid out in such a way that parents are truly free to choose according to their conscience the schools they want for their children [...]”²⁴

The Catholic Church, in particular Saint John Paul II (1978–2005) and the Congregation for Catholic Education have published several times such documents which intended to enlighten more precisely the importance of the own schools and educational system of a certain denomination, because within the new secularized society the faithfully committed and institutionalized religious education is the most important instrument to keep the religious attitude, beside the public activity and the teaching- and personal example in the family. This situation shows the minority characteristics of the religious groups which could be easily discriminated, if the state forgets the consequence of its own citizens’ right for religious freedom.²⁵ In order to apply the directives of the Second Vatican Council, the Congregation for Catholic Education composed a guideline about the religious dimension of education on April 7th 1988. The congregational document testifies well the realism of the Holy See regarding the status of the religious schools within the contemporary society. Already in the introduction is noticed: “[...] Not all students in Catholic schools are members of the Catholic Church; not all are Christians. There are, in fact, countries in which the vast majority of the students are not Catholics – a reality which the Council called attention to. The religious freedom and the personal conscience of individual students and their families must be respected, and this freedom is explicitly recognized by the Church. On the other hand, a Catholic school cannot relinquish its own freedom to proclaim the Gospel and to offer a formation based on the values to be found in a Christian education; this is its right and its duty. To proclaim or to offer is not to impose, however; the latter suggests a moral violence which is strictly forbidden, both by the Gospel and by Church law [...]”²⁶ The Holy See was prepared therefore to give proper answer based on the contemporary circumstances to the current problems, conflicts and questions in the field of education. It is quite clear

²³ ROUCO VARELA (2014) op. cit. 342.

²⁴ *Conc. Vaticanum II* (1962–1965), Sessio VII (28 oct. 1965), *Declaratio de educatione christiana: Conciliorum oecumenicorum decreta*, 963.

²⁵ Cf. ERDŐ, P.: A vallási közösségek és jogi kezelésük (Religious Communities and their Legal Status). In: ERDŐ (2011) op. cit. 253–261, especially 261.

²⁶ CONGREGATIO PRO INSTITUTIONE CATHOLICA: Lineamenta. *Dimensione religiosa dell’educazione nella scuola cattolica* (7 apr. 1988), *Introduzione*, art. 6.

from that precise overview which dealt with the coming century, and was edited on December 28th 1997, under the title: *The Catholic school on the threshold of the third millennium. The instruction emphasized that* “[...] The phenomena of multiculturalism and an increasingly multi-ethnic and multi-religious society is at the same time an enrichment and a source of further problems. To this we must add, in countries of long-standing evangelization, a growing marginalization of the Christian faith as a reference point and a source of light for an effective and convincing interpretation of existence [...]”²⁷ Also in the same introduction, the legislator calls attention for that misleading idea, which comes from the domination of the state education. As compared with that, the religious education is in minor position, even those which have wide and large organization. Therefore, those initiatives and theories – ignoring the principle of religious freedom and the free choice of the citizens to educate their children on the basis of their own traditional belief – can destroy many values. The document describes: “[...] in recent years there has been an increased interest and a greater sensitivity on the part of public opinion, international organizations and governments with regard to schooling and education, there has also been a noticeable tendency to reduce education to its purely technical and practical aspects [...] There is a tendency to forget that education always presupposes and involves a definite concept of man and life. To claim neutrality for schools signifies in practice, more times than not, banning all reference to religion from the cultural and educational field, whereas a correct pedagogical approach ought to be open to the more decisive sphere of ultimate objectives, attending not only to “how”, but also to “why” [...]”²⁸ If we compare this stand point with the most recent working document of the same Congregation, which analyzes the entire field of education from the kindergarten to the university, can be seen the most relevant stresses, and every single one derives from the human dignity and from the primary principle of religious freedom. The well detailed text was composed on April 7th 2014 and really considerable in particular concerning the challenge of identity of religious schools and also on the legal challenges. Regarding these the document fixes that the “[...] Contemporary educators have a renewed mission, which has the ambitious aim of offering young people an integral education as well as assistance in discovering their personal freedom, which is a gift from God [...]”²⁹ Concerning the legal problems the document gives a clear reflection on the grievous reality: “[...] Some governments are quite keen on marginalizing Catholic schools through a number of rules and laws that, sometimes, trample over Catholic schools’ pedagogical freedom. In some cases, governments hide their animosity by using lack of resources as an excuse [...]. Under the guise of a questionable “secularism”, there is hostility against an education that

²⁷ CONGREGATIO PRO INSTITUTIONE CATHOLICA: *The Catholic school on the threshold of the third millennium* (28 dec. 1997). *Introduction*, art. 1.

²⁸ *Ibid.* *Introduction*, art. 10.

²⁹ CONGREGATIO PRO INSTITUTIONE CATHOLICA: *Instrumentum laboris. Educare oggi e domani. Una passione che si rinnova* (7 apr. 2014) III, 1, a.

is openly based on religious values and which, therefore, has to be confined to the “private” sphere.”³⁰

4. Conclusion: Denominations improves values of the society through their own educational and other services

The religious communities – particularly the historical churches and denominations – make considerable contribution to the general culture, to the development of humanity and to improving of morality in the society. This unique value which originates from the natural religious feature of the human nature – the relation to God, person, and society – gives proper responsibility for the states and even for the denominations in the common work and cooperation for the moral and cultural value of the human society which naturally has civil and religious aspects. The state cannot neglect the fact that the religious beliefs are part of most of its citizens’ natural characteristics, and from the exercise of which obligations devolve on the state.³¹ This basic concept can be demonstrated well by § 10 (1) Act CCVI/2011 of Hungary which clearly expresses, that the state in order to promote the common goals of the society can cooperate with the Churches. This is eminently true regarding the educational, medical, and social activity of the different denominations.³² Joseph Schweitzer (†2015; former Chief-Rabbi of whole Hungary) emphasized in 2006 that even an economical or basically political organization needs to manifest ethical values if we liked to speak seriously about a real respect of human rights and religious freedom.³³ Similar clear conviction follows from Joseph Ratzinger’s comments (published in 1987)³⁴ and from statements of representatives of the Hungarian Reformed Church, which analyze values in our contemporary society, in which the family should have an eminent place in social and religious context.³⁵ Therefore, the religious sphere and the faithful activity of the churches, denominations, etc. have a fundamental impact on the formation of the human values of the concrete society as a community

³⁰ Ibid. III, 1, 1.

³¹ Sz. A. SZUROMI: Legislazione successiva alla trasformazione dei rapporti tra Chiesa e Stato nell’Europa centro-orientale. *Ius Missionale*, 9, (2015) 213–224., especially 221–224.

³² Cf. SCHANDA, B.: *Allami egyházjog. Vallásszabadság és vallási közösségek a mai magyar jogban* (Ecclesiastical Law. Religious Freedom and Religious Communities in the Hungarian Law). Budapest, 2012. 78–84.; SZUROMI (2014a) op. cit. 36–38., 45–46.

³³ J. SCHWEITZER: *Jewish values in the European Union* in *The Epoch of Crisis of the Classical Categories*. In: E. S. VÍZI – T. G. KUCSERA (ed.): *Europe in a World in Transformation* (Conference at the Hungarian Academy of Sciences, 14th–16th December 2006). Budapest, 2008. 129–134., especially 129.

³⁴ J. RATZINGER: *Chiesa, ecumenismo e politica. Nuovi saggi di ecclesiologia*. [Saggi Teologici I] Cinisello Balsamo, 1987. 202–204.

³⁵ LUKÁTS, A.: A Dunántúli Református Egyházkerület és az EU csatlakozás. In: *Egyházakkal az Európai Unióba* (A 2003. április 28-án Esztergomban tartott konferencia előadásai; Párbeszéd I). 25–30., especially 28.; cf. SZABÓ, I.: Reformation and Transformation. In: VÍZI–KUCSERA op. cit. 135–138.

of people, which aspects support the needy of their special protection.³⁶ This idea shows well the essential difference between the “laicism” and the “neutral” concepts, the latter of which is ready for cooperation with denominations in order to fulfill the basic human right for religious freedom of the state own citizens.

³⁶ Cf. B. MUNONO MUYEMBE: *Le bien commun et la diaconie: service de l'Église dans la société. Possibles formes de coopération en vue d'un bien-être intégral de la personne humaine.* In: *II CATHOLIC – ORTHODOX FORUM* op. cit. 191–198.

STRENGTHENING CIVIL SOCIETY

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After an overview of the importance of voluntary associations and other civil society institutions, especially those with a religious character, for the social and political health of liberal democracies, we will consider how well-meaning public policies can do grave damage to the viability of civil society and thus to democratic freedoms, while wiser policies can help to strengthen both.

1. Civil Society as a Limitation on Tyranny

Mary Ann Glendon of Harvard Law School reminded us, a quarter-century ago, that “*the institutions of civil society help to sustain a democratic order, by relativizing the power of both the market and the state, and by helping to counter both consumerist and totalitarian tendencies*”.¹ As we will see, this is not all that they do, but it is crucially important.

This is not to say that what the state does, when it acts appropriately, is not vitally important. “*The public sector tends to be better [...] at policy management, regulation, ensuring equity, preventing discrimination or exploitation, ensuring continuity and stability of services, and ensuring social cohesion*”.² An argument for the independence of civil society is not an argument against this oversight role of the state; indeed, Osborne and Gaebler argue that the state becomes more effective as it focuses on ‘steering the boat’ while leaving it up to civil society to pull on the oars.

One classic summary of the purposes of government in a free society is found in the Preamble to the United States Constitution, adopted in 1787: “*We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare,*

* Professor.

¹ Mary Ann GLENDON: *Rights Talk: The Impoverishment of Political Discourse*. New York, Free Press, 1991. 137.

² David OSBORNE – Ted GAEBLER: *Reinventing Government*. Reading, MA, Addison-Wesley, 1992. 45.

and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." This Constitution, and its subsequent amendments, was concerned not only to define the authority and functioning of the national government, but also to state clearly the limits on that authority, and to define the rights of the people.

But no constitution is self-enforcing. With respect to the tendency of government to encroach upon the freedom of citizens, it is surely not necessary to point out that constitutional and statutory limitations upon governments have proved again and again insufficient. Only a strong countervailing force in the form of a variety of civil society institutions can resist the temptation of legislators and government officials to continually expand their interventions into the lives of citizens. These interventions are especially insidious because they are so often motivated by the conviction that those exercising governmental authority, like Plato's Guardians, possess a superior wisdom about what is in the best interest of citizens.

We should not overlook the other power to be resisted, in Glendon's formulation: that of the market. She is not referring, I think, to what French writers are fond of calling "*Anglo-Saxon savage capitalism*," but rather to the insidiously seductive power of consumerism and the market's continual generation of new temptations to fill one's life with diversions.

Kept in their place, markets (like government) are a very good thing, as the dismal failure of 'planned economies' has shown again and again, but, as with government, there is danger that markets will undermine the ability of men and women to live lives of steady purpose informed by moral conviction, and to do so in trustful cooperation to meet their common needs and those of others. Markets depend upon, but do not foster, trust.

But markets and government are not the only alternatives. Much of the policy debate in the European Union and in North America over recent decades has been about how to balance the roles of government and the market, debates over "public goods" and privatization. This public/private dichotomy is over-simplified; it misses the essential role, in a free society, of what has been called the "third sector" of voluntary associations, which "*tends to be best at performing tasks that generate little or no profit, demand compassion and commitment to individuals, require extensive trust on the part of customers or clients, need hands-on, personal attention [...] and involve the enforcement of moral codes and individual responsibility for behavior*".³

Or, to put it another way, such "*mediating structures are the value-generating and value-maintaining agencies in society*".⁴ Governments can prescribe what is legal and illegal, but not what is good and what is evil and how we should seek to live

³ OSBORNE-GAEBLER op. cit. 46.

⁴ Peter L. BERGER – Richard John NEUHAUS: *To Empower People* (1977). In: Michael NOVAK (ed.): *To Empower People: From State to Civil Society*. Washington, DC, American Enterprise Institute, 1996. 163.

decent and purposeful lives. Simple compliance with laws is not enough to sustain a healthy society.

There are many different types of associations and institutions making up a healthy civil society, derived from the common concerns of citizens. Few are explicitly intended to limit the power of governments or the influence of markets, but many in fact have this effect. The degree to which this is the case tends to reflect the reason for the existence of the association: those formed to promote a hobby or sport may be quite susceptible to market incentives or government regulation, while those based on a shared religious faith and worldview may be highly resistant to both. This is a reason why religious liberty is one of the most basic of human rights, and is indeed the first freedom protected by the Bill of Rights in the American Constitution.

Religious liberty is important not only as a protection for the conscience of the believer, but also as a limit on the intrusions of the state into civil society. As sociologist Peter Berger has pointed out, “*it can be argued that it is the single most important right and liberty.*” In fact, “*religious liberty is fundamental because it posits the ultimate limit on the power of the state. The status of religious liberty in a society is a very good empirical measure of the general condition of rights and liberties in that society.*”⁵

This is because “*religion ipso facto relativizes, puts in their proper place, all the realities of this world, including all institutions. This proper place, of course, is an inferior place – mundane, profane, penultimate.*” Thus, “*the state that guarantees religious liberty does more than acknowledge yet another human right: it acknowledges, perhaps without knowing it, that its power is less than ultimate.*”⁶ José Casanova makes a similar point, that “*religion has often served [...] as a protector of human rights and humanist values against the secular spheres and their absolute claims to internal functional autonomy.*”⁷ Today, Berger and Casanova are saying, it is not – at least in the West – religion which is making hegemonic claims, but secularism as a militant and intolerant faith, often in alliance with government, that seeks to marginalize or suppress contrasting views. Vibrant religions serve to keep open a sphere of freedom of conscience and of action.

Attempts by the state to intrude upon the sphere of religious freedom has been one of the most common – and bitter – sources of social conflict throughout recorded history. As law professor Douglas Laycock has pointed out, the violence and bloodshed, the ‘religious wars,’ that we associate with the Reformation in Europe were primarily the result of actions by government rather than by churches. He asks, “what was the dominant evil of these conflicts? Was it that people suffered for religion, or that religions imposed suffering? Is the dominant lesson that religion has a ‘dark side’ that is ‘inherently intolerant and prosecutory’ or that efforts to coerce

⁵ Peter L. BERGER: The Serendipity of Liberties. In: Richard John NEUHAUS (ed.): *The Structure of Freedom: Correlations, Causes, and Cautions*. Grand Rapids, MI, Eerdmans, 1991. 14.

⁶ BERGER op. cit. 14.

⁷ José CASANOVA: *Public Religions in the Modern World*. Chicago, IL, University of Chicago Press, 1994. 39.

religious belief or practice cause great human suffering?” Even today, “[m]uch has changed since the Reformation, but one constant is that the State punishes people for disapproved religious practices”.⁸

On the other hand, the insistence of religious individuals and associations on living out their convictions, in public as well as in private, helps to sustain a vibrant civil society. The legal, political, and social arrangements crafted to accommodate the non-negotiable concerns of religious groups serve also to shelter forms of association with less ultimate agendas, and thus allow a rich pluralism to flourish.

2. Voluntary Associations Nurturing Trust

Strongly-held religious convictions can help to create the firm foundation upon which an ordered liberty must rest. Tocqueville famously concluded that “[r]eligion, which never intervenes directly in the government of American society, should therefore be considered as the first of their political institutions, for although it does not give them the taste for liberty, it singularly facilitates their use thereof”.⁹ A recent author, seeking to answer the secularist charge that religion is dangerous, has made the point more universally: “[i]t is fairly clear to any unbiased observer that in most societies, most of the time, religion is one of the forces making both for social stability and for morally serious debate and reform”.¹⁰ Religion and faith-based associations do this through their power to build communities of trust and to imbue them with shared purpose and moral order.

Trust is a quality without which a democratic society cannot flourish: it is the indispensable inclination of citizens to have confidence that most of their fellow-citizens will behave honestly and reliably. Francis Fukuyama has pointed out that “while contract and self-interest are important sources of association, the most effective organizations are based on communities of shared ethical values. These communities do not require extensive contract and legal regulation of their relations because prior moral consensus gives members of the group a basis for mutual trust”.¹¹

In my study of education before and after the collapse of Communism in Eastern Europe, I noted the significance of trust for a healthy civil society and democratic political order, and that this had been damaged much more profoundly in the Soviet Union than in Poland and other Central European countries where, despite decades of communist rule, the habits of trust and cooperation had been preserved at the grass

⁸ Douglas LAYCOCK: Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century (1996). In: *Religious Liberty, Volume One: Overviews and History*. Grand Rapids, MI, Eerdmans, 2010. 652–653.

⁹ Alexis TOCQUEVILLE: *Democracy in America*. [J. P. Mayer (ed.); George Lawrence (trans.)] New York, Harper & Row, 1988. 292.

¹⁰ Keith WARD: *Is Religion Dangerous?* Grand Rapids, MI, Eerdmans, 2006. 55.

¹¹ Francis FUKUYAMA: Trust: The Social Virtues and the Creation of Prosperity. In: Don E. EBERLY (ed.): *The Essential Civil Society Reader: The Classic Essays*. Lanham, Rowman and Littlefield, 2000. 259.

roots within Catholic and other religious organizations.¹² The effort of Communist regimes to eliminate all forms of social organization not directly subordinated to the State and Party did profound damage to the ability of the successor states of the Soviet Union – which were under such a regime for a generation longer than were the other members of the Warsaw Bloc, and most before that under a tsarist autocracy – to the demands of freedom. What Christopher Lasch noted in a Western context, that “[t]he replacement of informal types of association by formal systems of socialization and control weakens social trust, undermines the willingness both to assume responsibility for oneself and to hold other accountable for their actions, destroys respect for authority, and thus turns out to be self-defeating”¹³, was even more universally true under a totalitarian system. The result was “that hypertrophy of central authority which became so very characteristic of Communist society, and with the achievement of the erosion or total destruction of rival centres of countervailing power”.¹⁴ A comparison of the vigorous progress of democracy and the economy in Poland – where even under Communism the Catholic Church sustained alternative forms of association – with the stagnation of both in Ukraine and Belarus as well as in Russia over the past post-Soviet quarter-century suggests that these fears were well-founded.

Of course, religious associations and loyalties are not the only source of such trust, but “democracy requires extra-democratic virtues associated with the commitment to some reasonable comprehensive account of the good, secular or religious. For without the deeper groundings (and I emphasize “groundings” in the plural), the political cooperation is placed at unacceptable risk”.¹⁵ What churches and other religious associations provide is the expectation and thus the habit of gathering regularly, often several times a week, for worship and instruction that help to reinforce this grounding, repairing the damage done to it in other settings through encounters with the dominant culture of materialism. In addition, these regular gatherings solidify the bonds and the trust among the members of the local religious fellowship; it has been suggested that “any observant coreligionist, at least in a demanding faith, is [considered] naturally trustworthy”.¹⁶ The importance of regular gathering to “spur one another on toward love and good deeds [...] encouraging one another”¹⁷ is emphasized in the Christian scriptures and has become an essential feature of non-Christian religious traditions as well as they adapt to American life.

¹² Charles L. GLENN: *Educational Freedom in Eastern Europe*. Washington, DC, Cato Institute, 1995.

¹³ Christopher LASCH: *The Revolt of the Elites and the Betrayal of Democracy*. New York, W. W. Norton, 1995. 98.

¹⁴ E. GELLNER: Civil society in historical context. *International Social Science Journal*, vol. 43, 1991/3. 495.

¹⁵ David BLACKER: Civic Friendship and Democratic Education. In: Kevin McDONOUGH – Walter FEINBERG (ed.): *Citizenship and Education in Liberal-Democratic Societies*. Oxford, Oxford University Press, 2003. 238.

¹⁶ Nicholas WADE: *The Faith Instinct: How Religion Evolved and Why It Endures*. New York, Penguin Books, 2009. 203.

¹⁷ *Hebrews 10:24f* (NIV).

3. Prophetic Challenges to Societal Norms

In addition, communities based upon strongly-held religious faith usually nurture worldviews that are to some degree – sometimes to a very large degree – at odds with that prevalent in the majority culture. They offer an alternative understanding of what really matters, and thus the possibility of a critical stance toward the dominant system or culture, one that is not simply idiosyncratic but rooted in a tradition and a supportive community.

It is common for individuals with strong religious convictions, whether Christians or Muslims (or adherents to any other religion) to perceive conflicts between those convictions and elements of the surrounding culture. This may, in fact, make them *better* citizens, since they are more likely to press for positive changes than those who are complacent about the culture, the economic system, or the political order.

While in earlier generations the role of prophetic minorities was often to challenge conventional morality in the name of authenticity or of justice, today they are more likely to assert that a healthy society cannot function without shared norms, even if those are sometimes violated. Hypocrisy, it has been said, is the tribute that vice pays to virtue. The fact that, in recent years, hypocrisy has been judged by many a greater evil than vice is but another sign of what Hunter has called “*the loss of the languages of public morality in American society*”.¹⁸ In fact, the change American society is experiencing goes much deeper than simple differences over, for example, what are often called ‘life-style choices’ or behavioral preferences.

What is ultimately at issue are not just disagreements about ‘values’ or ‘opinions’. Such language misconstrues the nature of moral commitment. Such language in the end reduces morality to preferences and cultural whim. What is ultimately at issue are deeply rooted and fundamentally different understandings of being and purpose.¹⁹

Religious perspectives and value-judgments, at least for the adherents of what we are calling ‘strong religion’, are foundational. Of course, they may change on particular issues as a result of further instruction or reflection, but it is of their essence that they ‘go all the way down’. In this they are closely related to and indeed often associated with deeply-held cultural norms of the sort that the superficial multiculturalism purveyed in public schools, the multiculturalism of foods, fashions, and fiestas, cannot do justice to.

What do we mean by ‘strong religion’? We use this term, not to distinguish among the usual denominational identifiers, but to describe those individuals and groups who seek to live by the specific requirements of their religious tradition, and do so in a manner which to some extent set them at odds with the surrounding society.

The first thing to note is that strong religions tend to challenge the norms of the surrounding culture, often in ways that make others quite uncomfortable. This may indeed be part of their attraction for those who find the culture either hopelessly perverse or empty of transcendent meanings and assurances. Legal scholar Stephen

¹⁸ James Davison HUNTER: *Culture Wars*. New York, Basic Books, 1991. 316.

¹⁹ HUNTER op. cit. 131.

Carter points out that, “[a]t its best, religion in its subversive mode provides the believer with a transcendent reason to question the power of the state and the messages of the culture.” This in turn leads to government efforts to ‘domesticate religion’, to seduce or compel religious leaders and their followers to become supporters of the status quo and to stop questioning it on the basis of their scriptures or traditions.²⁰

David Wells, writing from an Evangelical perspective, offers a characteristic statement of such disruptive ‘strong religion’: “[u]ntil we acknowledge God’s holiness, we will not be able to deny the authority of modernity. What has most been lost needs most to be recovered - namely, the unsettling, disconcerting fact that God is holy and we place ourselves in great peril if we seek to render him a plaything of our piety, an ornamental decoration on the religious life, a product to answer our inward dissatisfactions. God offers himself on his own terms or not at all”.²¹

Sometimes it is observers from another religious tradition who recognize, perhaps a little enviously, the power of such strong religion. Thus Cardinal Ratzinger, later Pope Benedict, recognized the attractiveness of the evangelical and pentecostal churches that, especially in Latin America, are challenging the Catholicism that, for centuries, has been in a monopoly position. These churches, he wrote, are “able to attract thousands of people in search of a solid foundation for their lives [...] the more churches adapt themselves to the standards of secularization, the more followers they lose. They become attractive, instead, when they indicate a solid point of reference and a clear orientation”.²²

A similar acknowledgment, in this case in a publication by a Church of England organization, is that English converts to Islam “say that they find in Islam all the things that 150 years ago converts said they found in Christianity. These include clear guidance on living; a sense of community or family; a sense of God at the centre of life; meaning and purpose for everyday living; an unequivocal moral code; authoritative scriptures to live by”.²³

Keith Ward makes the case that strong religion serves to keep raising issues that contemporary Western culture would rather forget, questions of the significance of human life and of the right way to live. It keeps alive questions of whether there is a supreme human goal, and of how to attain it. And it keeps alive the question of whether there is an absolute standard of truth, beauty and goodness that underlies the ambiguities and conflicts of human life.²⁴

For adherents to strong religion, living a moral life is not a matter of adhering to rules nor of consulting one’s values, but of “a living relationship to a personal

²⁰ Stephen L. CARTER: *God’s Name in Vain: The Wrongs and Rights of Religion in Politics*. New York, Basic Books, 2000. 30.

²¹ WELLS (1994) op. cit. 145.

²² Joseph RATZINGER: Letter to Marcello Pera. In: *Without Roots: The West, Relativism, Christianity, Islam*. New York, Basic Books, 2006. 119.

²³ COPLEY (2005) op. cit. xv.

²⁴ WARD op. cit. 196.

God of supreme goodness".²⁵ The believer's behavior is based in gratitude and in a desire to express it through concrete actions. By contrast, "if there really is no transcendent source of the good to which the will is naturally drawn, but only the power of the will to decide what ends it desires",²⁶ then there is no reliable basis on which to overcome the selfishness of the consumerist culture that prevails in North America and Western Europe. Appeals to common purpose grow increasingly faint, and it is with a sense of nostalgic regret that many look back to the social movements or national crises of the past.

Societies cannot maintain shared norms for behavior or appeal to their members to make sacrifices for the common good unless those members recognize authority beyond their individual interests and impulses. Sociologist David Martin points out that "religion acts as a repository of human values and transcendental reference which can be activated in the realm of civil society".²⁷ Philip Rieff made the same point more starkly in *The Triumph of the Therapeutic*: "The question is no longer as Dostoevski put it: 'Can civilized man believe?' Rather: Can unbelieving man be civilized?".²⁸ Stephen Macedo, no particular friend of religion, writes that religions "often challenge the materialism, hedonism, and this-worldliness that is so dominant in our time. And religions provide sources of meaning outside of politics that should help keep alive the intellectual arguments by which truth is supposedly approached in a liberal polity".²⁹

It is perhaps ironical that the Voltaires and the David Humes of our post-secular age, challenging the prevailing conventions and pieties, may well be those who speak with the authority of strong religion – Christians, no doubt, but also Muslims and adherents of other faith-traditions, as indeed the Dalai Lama has exemplified. They will of course have to learn how to speak with authority in a way that can be heard beyond the circles of those already convinced (and Muslims in particular will need to learn a Western idiom), but there seems little doubt that the complacency of secular materialism will be challenged in ways that, in the general disarray of Western culture, cannot readily be dismissed.

4. Civil Society as the Nursery of Citizenship

A pluralistic civil society based upon voluntary associations thus nurtures the habits of trust and cooperation essential to a democratic political order, while encouraging the challenges to injustice and vice that keep it healthy. Alexis de Tocqueville was particularly impressed, on his visit in the early 1830s, by the propensity of Americans

²⁵ Ibid. 137.

²⁶ Ibid. 227.

²⁷ David MARTIN: *On Secularization: Towards a Revised General Theory*. Farnham (England), Ashgate, 2005. 24.

²⁸ Philip RIEFF: *The Triumph of the Therapeutic: Uses of Faith after Freud*. New York, Harper Torchbooks, 1968. 4.

²⁹ MACEDO (2000) op. cit. 220

to form voluntary associations to meet needs and to carry out functions that in France would be left to the government, and how the habits thus formed contributed to the success of democracy on all levels. “How can liberty be preserved in great matters,” he asked, “among a multitude that has never learned to use it in small ones?”³⁰

“Where do citizens acquire the capacity to care about the common good?” Mary Ann Glendon asks. “Where do people learn to view others with respect and concern, rather than to regard them as objects, means, or obstacles?”³¹ She expresses her concern that “neglect of the social dimension of personhood has made it extremely difficult for us to develop an adequate conceptual apparatus for taking into account the sorts of groups within which human character, competence, and capacity for citizenship are formed.” As a result, these “seedbeds of civic virtue – families, neighborhoods, religious associations, and other communities – can no longer be taken for granted”.³²

There was indeed much discussion, a few years ago, about the alleged decline of organizational life in the United States, as argued in Robert Putnam’s best-seller *Bowling Alone* (2000). But if there has been a decline in bowling leagues and Parent-Teacher associations, below the surface there may be more happening than is reported by formal associations. After all “existing surveys are unlikely to have captured all recent changes in U. S. associational life – for example, the proliferation of faith-based informal »small groups«.”³³

Putnam recognizes the continuing significance of informal as well as more formal organizations with a religious basis.

“Faith communities in which people worship together are arguably the single most important repository of social capital in America. [...] nearly half of all associational memberships in America are church related, half of all personal philanthropy is religious in character, and half of all volunteering occurs in a religious context. [...] Churches provide an important incubator for civic skills, civic norms, community interests, and civic recruitment. [...] churchgoers are substantially more likely to be involved in secular organizations, to vote and participate politically in other ways, and to have deeper informal social connections”.³⁴

Political scientist Sidney Verba and his colleagues found, in their massive study of the extent to which Americans volunteer for community-building and other civic activities, that participation in churches – especially African-American and white Evangelical congregations – has a strong positive influence on involvement in the wider community as well.

Religious institutions are the source of significant civic skills which, in turn, foster political activity. The acquisition of such civic skills is not a function of SES but

³⁰ TOCQUEVILLE op. cit. 96.

³¹ GLENDON op. cit. 129.

³² GLENDON op. cit. 109.

³³ GALSTON–LEVINE (1998) op. cit. 31.

³⁴ Robert D. PUTNAM: *Bowling Alone: The Collapse and Revival of American Community*. New York, Simon & Schuster, 2000. 66.

depends on frequency of church attendance and the denomination of the church one attends. As we shall see, individuals with low SES may acquire civic skills if they attend church—and if the church is the right denomination. Conversely, individuals who are otherwise well endowed with resources because of their high socioeconomic status will be lower in civic skills if they do not attend church regularly – or if the church they attend is the wrong denomination³⁵.

This positive outcome occurs because “[t]he domain of equal access to opportunities to learn civic skills is the church. Not only is religious affiliation not stratified by income, race or ethnicity, or gender, but churches apportion opportunities for skill development relatively equally among members. Among church members, the less well off are at less of a disadvantage, and African-Americans are at an actual advantage, when it comes to opportunities to practice civic skills in church”.³⁶

This finding is consistent with the results of a study of adults nationwide who had graduated some years before from various types of high schools: those who had attended “Christian” (that is, Evangelical) schools were especially well-integrated into and active in their local communities though rather less involved politically than graduates of other types of schools. The data showed that in contrast to the popular stereotype of Protestant Christian schools producing socially fragmented, anti-intellectual, politically radical, and militantly right-wing graduates, our data reveal a very different picture of the Protestant Christian school graduate. Compared to their public school, Catholic school, and non-religious private school peers, Protestant Christian school graduates have been found to be uniquely compliant, generous individuals who stabilize their communities by their uncommon and distinctive commitment to their families, their churches, and their communities, and by their unique hope and optimism about their lives and the future. In contrast to the popular idea that Protestant Christians are engaged in a ‘culture war’, on the offensive in their communities and against the government, Protestant Christian school graduates are committed to progress in their communities even while they feel outside the cultural mainstream. In many ways, the average Protestant Christian school graduate is a foundational member of society.³⁷

Even with a significant decline in participation in religious services, as has occurred in France, anthropologist John Bowen points out that there has been “a flourishing of religion-based associations. Catholic youth movements [...] grew steadily in numbers in both urban and rural areas after 1945”.³⁸

This community-building and civic-education role of religious congregations is attested by a study of patterns of charitable giving and of volunteering. Arthur

³⁵ Sidney VERBA – Kay LEHMAN SCHLOZMAN – Henry E. BRADY: *Voice and Equality: Civic Voluntarism in American Politics*. Cambridge, MA, Harvard University Press, 1995. 282–283.

³⁶ Ibid.

³⁷ *Cardus Education Survey: Do the Motivations for Private Religious Catholic and Protestant Schooling in North America Align with Graduate Outcomes?* Hamilton, Ontario, 2011. 13.

³⁸ John R. BOWEN: *Can Islam Be French? Pluralism and Pragmatism in a Secularist State*. Princeton, NJ, Princeton University Press, 2011. 181.

Brooks found that, in 2000, “religious people – who, per family, earned exactly the same amount as secular people, \$49,000 – gave about 3.5 times more money per year (an average of \$2,210 versus \$642). They also volunteered more than twice as often (12 times per year, versus 5.8 times).” Nor is this giving directed only to their own churches and related institutions; Brooks found that “religious conservatives are more likely to give to secular charities than the overall population”.³⁹

The findings of this study are especially critical of the stinginess of secular liberals, who are 19 percentage points less likely to give each year than religious conservatives, and 9 points less likely than the population in general. They are even slightly less likely to give to specifically secular charities than religious conservatives. They give away less than a third as much money as religious conservatives, and about half as much as the population in general, despite having higher average incomes than either group. They are 12 points less likely to volunteer than religious conservatives, and they volunteer only about half as often.⁴⁰

Brooks found that the same pattern prevails in Europe. In France in 1998, “73 percent of the population were secularists. The [...] French churchgoer was 54 percentage points more likely than a demographically identical secularist to volunteer, and 25 points more likely to volunteer for secular causes. Similarly, a religious British person would be 43 points more likely to volunteer than a demographically identical British secularist (and 24 points more likely for nonreligious causes)”.⁴¹

It appears that being part of a voluntary association or community whose guiding ethos emphasizes trust and mutual support is a good preparation for engaged civic life beyond that association, contrary to the charge advanced by secular elites that it tends toward selfishness and hostility toward outsiders. Thus “religion matters to public life because it is an important teacher of moral virtues such as self-sacrifice and altruism. The transmission of religious beliefs to one’s children can be thought of as instilling a valuable moral resource that contributes to participatory attitudes.” As a result, “on average, those growing up in homes with religious instruction and practice will be better socialized to contribute to society than those who do not, and a solid body of social science research can be mustered to support this contention”.⁴²

A word of caution is necessary at this point: the fact that religious associations and religiously-motivated individuals make important contributions to civil society and thus to liberal democracy should not be seen as the primary argument for religious freedom. Religious freedom is important above all because it respects the essential humanity, at its deepest level, of every individual in a free society. As political scientist William Galston reminds us, “religion is valuable, not only for the

³⁹ Arthur C. BROOKS: *Who Really Cares: The Surprising Truth About Compassionate Conservatism*. New York, Basic Books, 2006. 34., 47.

⁴⁰ Ibid. 49.

⁴¹ Ibid. 126.

⁴² James G. GIMPEL – J. Celeste LAY – Jason E. SCHUKNECHT: *Cultivating Democracy: Civic Environments and Political Socialization in America*. Washington, DC., Brookings Institution Press, 2003. 122–123.

contribution it may make to politics and society, but in its own right, and there is no guarantee that religion faithfully practiced will always support the existing political or social order. Instead, political pluralism regards human life as consisting of a multiplicity of spheres, some overlapping, but each with distinct inner norms and a limited but real autonomy".⁴³

5. Do Civil Society Associations and Institutions Divide Society?

It is commonly asserted – in the tradition of the post-war discussion of “*the authoritarian personality*”⁴⁴ – that religion is a primary source of social division and intolerance; in fact, however, apart from situations of inter-communal conflict in which religion serves as a convenient marker of identity, the social science evidence tends to point in the other direction. The most intolerant individuals are often those who claim a religious identity but are not actively engaged in a religious community. Gordon Allport and J. Michael Ross found, in their 1967 study, that “*frequent church attenders were less prejudiced than infrequent attenders and often less prejudiced than nonattenders. [...] Several studies revealed that casual and irregular fringe members of churches were the most prejudiced*”.⁴⁵ A study by pollsters George Gallup and Timothy Jones of Americans who are strongly committed religiously, “*found that ‘The Saints Among Us’, are more tolerant of other creeds and cultures than the uncommitted (1992). In fact, the further down the scale of religious commitment, the less tolerant people are*”.⁴⁶

Studies of attitudes toward immigration and immigrants have found that individuals with strong religious commitments tend to be more accepting than individuals sharing the same religious identity who do not make it a central part of their lives. “*Those who attended church services every week ranked about 4 percent higher on the tolerance scale than those who never attended church at all. Viewed in total, the results for diversity confirmed the findings of previous researchers that it is those of nominal-to-middling religious commitment among Protestants, Catholics, and Jews, not the most observant, who are the least accepting of immigration*”.⁴⁷

According to Michael Sandel, this is only to be expected, since “*intolerance flourishes most where forms of life are dislocated, roots unsettled, traditions undone. In our day, the totalitarian impulse has sprung less from the convictions of confidently situated selves than from the confusions of atomized, dislocated, frustrated selves, at sea in a world where common meanings have lost their force*”.⁴⁸ Faith-based schools,

⁴³ William GALSTON: On the Reemergence of Political Pluralism. *Daedalus*, Vol. 135, No. 3, On Body in Mind (Summer), 2006. 120.

⁴⁴ Theodor W. ADORNO – Else FRENKEL-BRUNSWIK – Daniel J. LEVINSON – R. Nevitt SANFORD: *The Authoritarian Personality*. New York, Harper and Row, 1950.

⁴⁵ LEWY (1996) op. cit. 101.

⁴⁶ Elmer John THIESSEN: *The Ethics of Evangelism*. Downers Grove, IL, InterVarsity, 2011. 113.

⁴⁷ GIMPEL–LAY–SCHUKNECHT op. cit. 133.

⁴⁸ SANDEL (1984) op. cit. 7.

by anchoring youth firmly in a particular tradition and worldview, may give them the security to recognize the value of other traditions and worldviews to their adherents.

At least in the American context, then, weak religion, religion that makes minimal claims on its adherents but can serve as an identity over against other identities, is associated with intolerance, while strong religion that shapes habits and convictions is associated with tolerance. Such tolerance is a necessary but not sufficient ingredient of productive civic life. After all, as Christopher Lasch has pointed out, “*democracy [...] requires a more invigorating ethic than tolerance. Tolerance is a fine thing, but it is only the beginning of democracy, not its destination*”.⁴⁹

Quite apart from the promotion of tolerance, there is abundant evidence that religious associations play an important role in developing the more constructive skills and habits crucial to civic life. Some of these are quite basic, but not otherwise available to groups on the margins of society. Sociologist David Martin explains how, in Latin America, the intense and supportive community of Pentecostal churches “*takes those marooned and confined in the secular reality by fate and fortune, and offers them a protected enclave in which to explore the gifts of the Spirit such as perseverance, peaceableness, discipline, trustworthiness, and mutual acceptance among the brethren and in the family*”.⁵⁰ These habits, in turn, tend to make them good and productive citizens.

While religious associations are by no means the only setting within which these skills and habits can be developed, they are by far the most widespread in American society, and they tend to persist as other forms of association wax and wane. Whether religious or secular in their fundamental motivation, “*only many small-scale civic bodies enable citizens to cultivate democratic civic virtues and to play an active role in civil life. Such participation turns on meaningful involvement in some decent form of community, by which is meant commitments and ties that locate the citizen in bonds of trust, reciprocity, and civic competence*”.⁵¹

Islam, often cited as an example of a religion-based threat to American and Western-European society, provide evidence of the positive influence of community-based religious associations. Islamic terrorism in the West is not generally based in practicing Muslim communities, but in isolated individuals and networks formed in prison or on the internet. A study of the careers of several hundred jihadists found that Islamist terrorists find religion fairly late in life, in their mid-twenties, and do not have an adequate background to evaluate the Salafi arguments and interpret the material they read. The new-found faith and devotion to a literal reading of early Islamic texts are not a result of brainwashing in madrassas; their fervor results from their lack of religious training, which prevents them from evaluating their new beliefs in context. Had they received such training, they might not have fallen prey to these

⁴⁹ LASCH op. cit. 89.

⁵⁰ MARTIN (2002) op. cit. 71.

⁵¹ Jean Bethke ELSHTAIN: Civil Society, Religion, and the Formation of Citizens. In: Diane RAVITCH – Joseph P. VITERITTI (eds.): *Making Good Citizens: Education and Civil Society*. New Haven, CT, Yale University Press, 2001. 264.

seductive Manichaean arguments. It follows that more religious education for these young men might have been beneficial.⁵²

The research I have been directing over several years in Islamic secondary schools in different parts of the United States found that parents and staff share a deep concern that students be prepared to be good American citizens, while maintaining their commitment to Islamic beliefs and suitably-adapted behavioral norms. Our interviews with the students themselves found that they shared this understanding of their future, along with a concern to correct the popular identification of Islam with terrorism. One student told us, *“America is kind of like a melting pot, right? And to be able to blend in, you have to stand out in a way. I think faith gives you that edge.”*

6. The Importance of Structural Pluralism

If it is the case that voluntary associations and not-for-profit institutions, and especially those with a religious character, are an essential part of a healthy civil society and of a democratic political order, how should public policy treat them? Certainly, it should not be by entering into an alliance with a particular religious organization, as was the case with the Catholic Church in Franco’s Spain; that is unhealthy not only for democratic freedom but for the religious organization itself, clasped in the fatal embrace of the state. Arguably, one of the reasons for the relatively flourishing condition of Christian churches in the United States is that there has never been a national established church and the last (quite attenuated) state establishment, in Massachusetts, was abolished as long ago as 1830. Similarly, as Casanova points out, *“throughout Europe, nonestablished churches and sects in most countries have been able to survive the secularizing trends better than has the established church. [...] it was the very attempt to preserve and prolong Christendom in every nation-state and thus to resist modern functional differentiation that nearly destroyed the churches in Europe”*.⁵³

Religious freedom includes, centrally, the right to believe as one’s reason and conscience dictate and to act upon such beliefs, within broad constraints that protect the public interest and the rights of others. It includes also the right to reject a particular religion or all religions, and to choose as freely to leave as to enter a religious association. Public policy best protects these rights by refraining carefully from endorsing a particular set of beliefs or of unbeliefs. Thus it must not be secularist. Philosopher Jürgen Habermas points out that the neutrality of the state authority on questions of world views guarantees the same ethical freedom to every citizen. This is incompatible with the political universalization of a secularist world view. When secularized citizens act in their role as citizens of the state, they must not deny in principle that religious images of the world have the potential to express truth. Nor

⁵² Marc SAGEMAN: *Leaderless Jihad: Terror Networks in the Twenty-first Century*. Philadelphia, University of Pennsylvania Press, 2008. 60.

⁵³ CASANOVA op. cit. 29.

must they refuse their believing fellow citizens the right to make contributions in a religious language in public debates.⁵⁴

True neutrality of the state, in an age when so much of social life is organized, directly or indirectly, by some level of government requires a recognition of the need for structural (or institutional) pluralism. ‘Civil society’, Michael Walzer reminds us, “*is a project of projects; it requires many organizing strategies and new forms of state action. It requires a new sensitivity for what is local, specific, contingent – and, above all, a new recognition [...] that the good life is in the details*”.⁵⁵ It is in the nature of government bureaucracies to seek to achieve efficiency and impartiality through the imposition of formal rules and treating identical situations (defined as such by external characteristics) identically. This serves very well for issuing driver’s licenses and other routine tasks, but not at all well for the human care of human beings, including the education of children.

Children differ on a wide range of characteristics, but the most significant for education is the moral formation that children have received at home and the hopes that parents have for the sort of lives their children will choose to lead, and by what norms these lives will be guided. For a free society, this means that institutional pluralism should extend to the sphere where it is most severely challenged, that of k-12 education. Rather than – as often alleged – subjecting children to indoctrination, the “*best guarantee against institutional indoctrination is that there be a plurality of institutions*”⁵⁶ among which families can choose.

What I have called “*the myth of the common school*”⁵⁷ contends that civic peace and cooperation around common tasks require that all children be arbitrarily assigned to schools from which any distinctive worldviews are rigorously excluded. This has been the source of bitter conflict in a number of other countries⁵⁸, and of a mind-numbing blandness in most American public schools. Stephen Carter protests against the contention that all children should be exposed to a common culture that, increasingly, is made up of relentless consumerism and ever-new fads.

Of course believers should have avenues of escape from the culture. Of course believers should have space to make their own decisions, without state interference, about what moral understanding their children need, both to function in this world and to prepare for the next. Of course a society that truly values diversity and

⁵⁴ Jürgen HABERMAS: Pre-political Foundations of the Democratic Constitutional State? In: Brian McNeil (ed.): *Joseph Cardinal Ratzinger and Jürgen Habermas. Dialectics of Secularization: On Reason and Religion*. San Francisco, CA, Ignatius Press, 2006. 51.

⁵⁵ Michael WALZER: The Idea of Civil Society: A Path to Social Reconstruction. In: E. J. DIONNE, Jr. (ed.): *Community Works: The Revival of Civil Society in America*. Washington DC, Brookings Institution Press, 1998. 143.

⁵⁶ Elmer John THIESSEN: *Teaching for Commitment: Liberal Education, Indoctrination, and Christian Nurture*. Montreal, Quebec, McGill-Queen’s University Press, 1993. 274.

⁵⁷ Charles L. GLENN: *The Myth of the Common School*. Amherst, MA, University of Massachusetts Press, 1988.

⁵⁸ Charles L. GLENN: *Contrasting Models of State and School: A Comparative Historical Study of Parental Choice and State Control*. New York-London, Continuum, 2011.

pluralism should support the development of communities that will reach radically different conclusions from those of the dominant culture. The answer is to nurture many different centers of meaning, including many different understandings on how to find meaning, so that the state will have competition.⁵⁹

These different ‘centers of meaning’ cannot find expression in individual consciences alone; they require support through voluntary associations and institutions that are free to express and to live out of “*different understandings of how to find meaning*”. This is not a prescription for social isolation or for mutual incomprehension; to the contrary, as George Weigel points out, “*genuine pluralism is built out of plurality when differences are debated rather than ignored and a unity begins to be discerned in human affairs – what John Courtney Murray called »the unity of an orderly conversation«*”.⁶⁰

Such rightly-understood pluralism “*does not abolish civic unity. Rather, it leads to a distinctive understanding of the relation between the requirements of unity and the claims of diversity in liberal politics*”.⁶¹ Defining those requirements of unity with respect to schooling has always been a source of contention, but never more so than today, when society and culture are roiled by competing norms for personal and group behavior, each claiming for itself authoritative status. Those holding these norms claim for them universal validity and seek to communicate them to such to schoolchildren. The Sixties motto of “different strokes for different folks” as the expression of tolerant non-judgmentalism is seldom heard today; the new mood is expressed by a different catch-phrase: “*my way or the highway*”.

Those exercising strong cultural influence today reject the idea that it is enough simply to tolerate behaviors (especially but not exclusively sexual) that until recently – and for many generations – were not tolerated; they should instead be celebrated and shielded from challenge or question. In particular, these new cultural arbiters tend to be actively hostile toward strongly-held religious beliefs, disparagingly referred to as “*fundamentalism*”⁶².

In contrast with this insistence on replacing one set of unquestionable norms with another, genuine societal and cultural “*pluralism is an achievement, not simply a sociological fact. A true pluralism [...] is a pluralism in which everyone’s truth claims are in play, through a language that is accessible to all, in a public discourse conducted within the bonds of democratic civility*”.⁶³ Surely that is the pluralism a

⁵⁹ CARTER op. cit. 116.

⁶⁰ George WEIGEL: Roman Catholicism in the Age of John Paul II. In: Peter L. BERGER (ed.): *The Desecularization of the World: Resurgent Religion and World Politics*. Grand Rapids, MI, Eerdmans, 1999. 34.

⁶¹ William A. GALSTON: *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*. Cambridge, Cambridge University Press, 2002. 10.

⁶² Louis BOLCE – Gerald DE MAIO: Our Secularist Democratic Party. *The Public Interest*, Fall, 2002.; George YANCEY: *Hostile Environment: Understanding and Responding to Anti-Christian Bias*. Downers Grove, IL, IVP Books, 2015.

⁶³ George WEIGEL: Achieving Disagreement: From Indifference to Pluralism. *The Journal of Law and Religion*, VIII, 1990/1–2. 184.

liberal democracy should seek to achieve, one that recognizes, protects, but is not afraid to question and debate the different ways in which we understand the nature of a flourishing human life.

7. Good Intentions Weakening Civil Society

There is something to be said for this new mood, or at least for its rejection of the rather demeaning idea that certain beliefs and behaviors – those at issue presently having to do largely with sexuality and with identity – should be “tolerated,” in what some have called a flight from judgment. George Washington, in a celebrated letter to a Jewish congregation in Newport, Rhode Island, in 1790, wrote that the “*citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy – a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support*”.⁶⁴

We might elaborate upon that by saying that what citizens owe to other citizens is not mere tolerance but respect for their common humanity, a respect that takes seriously enough how they live out that humanity to be willing to question it. For Jews and Christians it requires that we should see each other as *persons*, valued not only for our characteristics and behaviors, but also – whatever our shortcomings – as made in the image of God;⁶⁵ Habermas, no believer, refers to “*the religious origins of the morality of equal respect for everybody*”.⁶⁶

Unlike tolerance, respect cannot properly be indiscriminating, since it does not simply accept uncritically but also entails judgments about character and achievements. We want to be accepted but also respected not only for just our mere existence, but also for what we have done and become. So Washington expected the Jews of Newport to behave as good citizens, with the implication that, if they did not, they would forfeit the positive regard of their country.

This is the crux of the present controversy over how to deal with sexuality issues in schools in the United States. Most Americans have become tolerant of homosexuality and even of gender-switching as phenomena (however deplorable these may be in the view of many) that exist in the wider society and should not be subjected to public disabilities. As schools teach about these behaviors and identities, however, an inevitable evaluative dimension is added. Are they deserving of respect, as equally-valid choices? If public schools respond affirmatively, are they not taking a partisan

⁶⁴ George WASHINGTON: *Writings*. New York, NY, Library of America, 1997. 767.

⁶⁵ Jacques MARITAIN: *The Person and the Common Good*. (Trans. John J. Fitzgerald) University of Notre Dame Press, 1966. 42.

⁶⁶ HABERMAS op. cit. 27.

position on an issue about which the public is deeply divided? And, if some faith-based schools teach that such practices are contrary to God's will for how people should exercise their sexuality, are these schools engaging in bigotry that calls into question their right to provide a state-approved (if not publicly-funded) education? To receive tax exemption? To satisfy mandatory school attendance laws?

If, as we have argued above, associations motivated and drawn together by shared religious conviction are an important element in a healthy civil society, and serve as what Mary Ann Glendon has called "seedbeds" of the virtues of citizenship, then efforts to impose a single set of moral norms, whether religious or secular, – or, indeed, to deny that moral norms have any authority apart from what we choose to give them – have seriously negative consequences.

Liberal tolerance (as distinct from religiously grounded tolerance) could be lethal to many seedbeds. Not only is liberal tolerance intolerant of its rivals, but it slides all too easily into the sort of mandatory value neutrality that rules all talk of character and virtue out of bounds. [...] Liberalism, in order to survive, may need to refrain from imposing its own image on all the institutions of civil society. [...] The best hope for unpopular, non-liberal seedbeds of virtue may be the tolerant liberal polity whose ultimate values are at odds with theirs.⁶⁷

Schools are of course not the only focal point of such religious freedom issues, as the role of government in funding and regulating non-government providers of human services continues to expand,⁶⁸ but they represent a particularly sensitive arena for controversy because of the impressionable age of their clientele and the guiding and protective urges of many parents. Until the post-war expansion of the role of state governments and of national associations, the intensely local character of American public schools ensured that they reflected the values of most parents in the communities they served. In addition, for many decades non-public schools – especially Catholic schools between the 1850s and the 1960s, and increasingly Evangelical, Jewish, and Islamic schools in recent decades – have served as an alternative for families unwilling to expose their children to public schools.

Today, however, it is not clear that such alternatives will be allowed to retain their distinctive character if they are considered to promote moral norms and perspectives that conflict with the prevailing orthodoxy. The issue is not limited to sexual norms but includes the insistence, on the part of some influential liberal voices, that every school should take as its primary mission to promote the moral autonomy of its students and thus to set them free from any familial or traditional norms. This educational goal is clearly inconsistent with schools that seek to nurture students in a particular religious or cultural tradition, and thus with genuine pluralism.

In supporting separate schools for the children of non-liberal cultural minorities liberals should be able to recognise the gains that will be made [for those minorities]

⁶⁷ Mary Ann GLENDON: *Forgotten Questions*. In: Mary Ann GLENDON – David BLANKENHORN (eds.): *Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society*. Madison Books, 1995. 12.

⁶⁸ See GLENN (2000) *op. cit.*

in terms of cultural congruence and a sense of belonging but they will also have to accept that this entails a loss of individual autonomy. This is only problematic if autonomy is granted absolute status as some kind of foundational human value. As [Isaiah] Berlin observes, the reality is a trade-off between human values. There comes a point where we have to make a choice, and for Berlin the genuine liberal does not require that individuals choose autonomy.⁶⁹

Ironically enough, given the liberal elite's scorn for American consumer culture, this emphasis on autonomy is thoroughly consistent with and encourages a lifestyle based on consumerism with no fixed goals. In what philosopher Charles Taylor has called the Age of Authenticity, the only obligation of the fulfilled human life is "*bare choice as a prime value, irrespective of what it is a choice between, or in what domain*". The corollary of this defining value is the obligation to respect the choices that others make; thus the only "*sin which is not tolerated is intolerance*",⁷⁰ expressing moral judgments on forms of behavior.

Ironically, the most striking aspect of the emphasis, by liberal education theorists, on autonomy and unconstrained choice is its intolerance: it is not itself represented as a choice. There is instead for every child, at least in intention, a compulsion to become autonomous. Thus Meira Levinson asserts unapologetically that "[f]or the state to foster children's development of autonomy requires coercion – i.e., it requires measures that *prima facie* violate the principles of freedom and choice. [...] The coercive nature of state promotion of the development of autonomy also means that children do not have the luxury of 'opting out' of public autonomy-advancing opportunities in the same way that adults do".⁷¹ Nor should this educational objective of autonomy itself be subject to public debate, since, she insists, it is a fundamental premise of the liberal state which is not open to question!⁷²

Rob Reich would extend this requirement to homeschooling, now a very widespread phenomenon in the United States. He urges that government "*provide a forum*" for homeschooled children where their "*educational preferences should be heard and duly considered when they are contrary to the preferences of the parents.*" Government should also require homeschooling parents to use curricula that ensure "*exposure to and engagement with values and beliefs other than those of a child's parents.*" Compliance could then be ensured by subjecting the children to "*periodic assessments that would measure their success in examining and reflecting upon diverse worldviews*".⁷³ Schools, and even homeschooling families, who fail to promote such autonomy should, in this view, be subject to corrective government

⁶⁹ Neil BURTONWOOD: Must Liberal Support for Separate Schools Be Subject to a Condition of Individual Autonomy? *British Journal of Educational Studies*, Vol. 48, No. 3, (2000/Sep.) 282.

⁷⁰ Charles TAYLOR: *A Secular Age*. Cambridge, The Belknap Press of Harvard University Press, 2007. 478., 484.

⁷¹ LEVINSON (1999) op. cit. 38–39.

⁷² Ibid. 139.

⁷³ Rob REICH: Testing the Boundaries of Parental Authority over Education: the Case of Homeschooling. In: Stephen MACEDO – Yael TAMIR (eds.): *Moral and Political Education*. New York, New York University Press, 2002. 304.

intervention. In the face of this prospect, William Galston urges that there are some things that the government may not rightly require all schools to do, even in the name of forming good citizens. The appeal to the requirement of civic education is powerful, but only in civic republican regimes it is dispositive. In politics that embrace a measure of political pluralism, as does the United States, claims based on religious liberty may from time to time override the state's interest in education for civic unity.⁷⁴

After all, as Galston wrote earlier, "*liberalism is about the protection of diversity, not the valorization of choice. [...] To place an ideal of autonomous choice – let alone cosmopolitan bricolage – at the core of liberalism is in fact to narrow the range of possibilities available within liberal societies. In the guise of protecting the capacity for diversity, the autonomy principle in fact represents a kind of uniformity that exerts pressure on ways of life that do not embrace autonomy*".⁷⁵

The ugly political mood in recent years in the United States (and in a number of other Western democracies) reflects a growing resistance to the imposition of newly-discovered or invented elite values on a population that does not share them. In some cases the issues involved hardly seem to justify the furore that they have caused, such as (for example) that over trans-gender bathroom use. A little sympathetic imagination makes it possible to understand, however, that millions of Americans brought up since childhood with the unquestioned assumption that boys and men go to one bathroom or changing room and girls and women to another react to a mandate from the federal government that individuals who are biologically male be allowed to use the facilities provided for women or girls. It is not difficult to imagine that, on complaint from a transgender individual, a zealous government official might enforce this requirement against a church or other house of worship on the grounds that it was "open to the public," perhaps by canceling a property tax exemption.

It seems foolish to devote any attention to such largely-symbolic issues, but cumulatively they could have grave consequences. After all, "*If the large number of Americans committed to religious belief and experience come to believe, as many of them already do, that the political system does not respect their way of life to the same extent it respects secular lifestyles, then they themselves will tend not to respect that system or the government and laws that it generates*".⁷⁶ This alienation, of which we can already see abundant signs, would be serious indeed.

The only remedy is to base public policy on structural pluralism, allowing different worldview-based communities to operate their own institutions reflecting their own norms, provided that – as noted above – individuals be completely free

⁷⁴ William A. GALSTON: Civic Republicanism, Political Pluralism, and the Regulation of Private Schools. In: Patrick J. WOLF – Stephen MACEDO (eds.): *Educating Citizens: International Perspectives on Civic Values and School Choice*. Washington, DC., Brookings Institution Press, 2004. 321.

⁷⁵ William A. GALSTON: Two Concepts of Liberalism. *Ethics*, Vol. 105, No. 3, (1995/April) 523.

⁷⁶ Frederick Mark GEDICKS: Some Political Implications of Religious Belief. In: Margaret J. EARLY – Kenneth J. REHAGE (eds.): *Issues in Curriculum: A Selection of Chapters from Past NSSE Yearbooks. Ninety-eighth Yearbook of National Society for The Study of Education: Part II*. Chicago, IL, University of Chicago Press, 1990. 438.

to enter or to leave them. There was a wise provision under the federal law known as Charitable Choice, that faith-based social-service agencies competing for public funding be allowed to retain and express their religious distinctiveness *provided that* an alternative service without religious character be available to clients. That is certainly as it should be: neither denying nor requiring counseling or other services with a religious character.⁷⁷

To adopt institutional pluralism would entail abandoning the civic republican strategy for social and educational policy, a strategy (as philosopher Charles Taylor and a colleague write) favoring, in addition to respect for moral equality and freedom of conscience, the emancipation of individuals and the growth of a common civic identity, which requires marginalizing religious affiliations and forcing them back into the private sphere. The liberal-pluralist model, by contrast, sees secularism as a mode of governance whose function is to find the optimal balance between respect for moral equality and respect for freedom of conscience.⁷⁸

8. Redefining the Role of Government

The relationship of government and civil society differs considerably among Western democracies and even more in other societies, and this is especially evident in the sphere of popular schooling, entailing as it does so many value-laden choices and conflicting interests.⁷⁹ Only a totalitarian regime can seek, however imperfectly, to absorb all of the functions of civil society into its own domain, but it is inherent in the very nature of any government to seek to extend its influence if not direct control over ever more aspects of life, often for the most commendable reasons of efficiency and social justice. It was, for example, one of the goals of the Progressive Era a century ago in the United States to entrust progress to an elite of ‘social engineers’ who would apply rational scientific method to eliminating a wide range of problems and ensuring a better future.

This agenda of government-managed progress showed very little deference toward democratic decision-making, or toward the diversity and intense localism of American life. John Dewey’s influential *Democracy and Education* (1916), for example, showed no appreciation for the process of decision-making about schooling at the local level that had always, until then, characterized American popular education. Dewey called, instead, for teachers to decide the goals and the means of education, creating on the basis of their superior understanding “*an educational institution which shall provide something like a homogeneous and balanced environment for the young. Only in this way can the centrifugal forces set up by the juxtaposition of different groups within*

⁷⁷ See GLENN (2000) op. cit.

⁷⁸ Jocelyn MACLURE – Charles TAYLOR: *Secularism and Freedom of Conscience*. (Trans. Jane Marie Todd) Cambridge, MA, Harvard University Press, 2011. 34

⁷⁹ See Charles L. GLENN – Jan DE GROOF (eds.): *Balancing Freedom, Autonomy, and Accountability in Education* (four volumes). Nijmegen, Wolf Legal Publishing, 2012.

one and the same political unit be counteracted".⁸⁰ The role of parents and families is seldom mentioned in Dewey's copious writing about education, except occasionally as an influence which teachers should seek to counter.

In the nineteenth and early twentieth centuries in a period of heavy immigration in North America and of nation-building and consolidation in Europe, this government-controlled common school strategy – David Tyack's (1974) "One Best System" – functioned reasonably well in promoting literacy, while inculcating national loyalty and the habits required by industrial employment. It did so by treating all children of a given social class as though their needs and goals were similar, not only ignoring the distinctive beliefs of families and their hopes for their children, but treating these as a problem to be overcome by the effects of schooling.

More recently, however, this common school model has fallen into confusion, struggling to respond to a radically-changed economy, and to a loss of confidence in the possibility of teaching a coherent set of moral norms. What seemed self-evident to Horace Mann and his allies (and to Hofstede de Groot and other Dutch education reformers, to Jules Ferry and his allies in France, to philosophers Kant and Fichte in Germany, and to countless others in the nineteenth century) that popular schooling on a uniform basis would reliably create virtuous citizens⁸¹ is no longer convincing. This is not the place to detail how civic education has given way to a multiculturalist recital of grievances, how character education has been replaced by a focus on nurturing the self-esteem of students. Nor are these developments necessarily inappropriate in contrast with what they have replaced, but they do not provide any sort of basis for a uniform system of forming the personal and civic virtues required by a healthy democracy.

Whatever may have been the case in the past, today it is only in individual schools where staff and parents share a clearly-articulated understanding of the goals and the means of character-formation that children and youth experience a coherent education into personal and civic virtue. It is in such schools, and not in the moral confusion of the "*shopping mall high school*",⁸² that children are "*educated towards autonomy*".⁸³

Most Western democracies have in recent years been moving toward policy arrangements that support autonomous or semi-autonomous schools with public funding and recognition of their right to offer an education based on a distinctive worldview, whether religious or secular.⁸⁴ As Alessandro Ferrari puts it, this is based on "*an awareness that the state is not the only public 'educator' of youth but rather*

⁸⁰ John DEWEY: *Democracy and Education* (1916). New York, The Free Press, 1966. 21.

⁸¹ See GLENN (2011) op. cit.; or Charles L. GLENN: *The American Model of State and School*. New York-London, Continuum, 2012.

⁸² Arthur G. POWELL – Eleanor FARRAR – David K. COHEN: *The Shopping Mall High School*. Boston, Houghton Mifflin, 1985.

⁸³ Elmer John THIESSEN: *Teaching for Commitment: Liberal Education, Indoctrination, and Christian Nurture*. Montreal, Quebec, McGill-Queen's University Press, 1993. 131.

⁸⁴ See GLENN-De GROOF op.cit. for many examples.

the guarantor of a developed and articulated institutional pluralism".⁸⁵ This finds expression in a rich array of schools that teach the essential knowledge and skills from a variety of perspectives on what it means to live a flourishing human life.

This in turn rests on "*a pluralist conception of civil society as itself constituted by irreducibly different spheres, each with its own relative autonomy. [...] each has its own specific goods, as well as its own specific ways of relating to need, aptitude, competence, interest, or faith*".⁸⁶ Education is one of those spheres, and does not flourish under an imposed uniformity that prevents the articulation, in the schools of a wildly diverse society, of a coherent understanding of the nature of a flourishing human life.

It is not enough, though, for the state to refrain from seeking to impose uniformity in education, a uniformity that (as we have seen) can no longer provide the rich moral content required by a real education. The restraint of American governments in neither supporting nor intrusively regulating non-public schools has been a way of avoiding conflict, but it is not sufficient, as the example of other Western democracies demonstrates. After all, a "*just state is one that upholds structural pluralism as a matter of principle, not as an uncomfortable or grudging accommodation to interest groups, or to individual autonomy, or to its own weakness*".⁸⁷ Policies supporting structural pluralism are not just a way of avoiding conflict over fundamental differences; they are a way of showing respect for citizens for whom those differences are life-defining, and for the associations and institutions through which they give them expression and continuity.

Public policies that seek to nurture the health of civil society in one of its key sectors, that of educating the next generation, should go beyond a hands-off restraint, and instead should value and promote structural pluralism. With schools, as with other civil society institutions, the state must do more than simply leave them alone, more than simply abstain from usurping the functions of these groups. It must actively help these groups in discharging their responsibilities, actively seeking through its laws and public policies to empower them, to enable them to effectively discharge their responsibilities, to effectively pursue their particular ends, by providing them with the direct and indirect assistance they need to do so. Hence, as John XXIII notes, the principle of subsidiarity demands state activity "*that encourages, stimulates,*

⁸⁵ Alessandro FERRARI: Religious Education in a Globalized Europe. In: Gabriel MOTZKIN – Yochi FISCHER (eds.): *Religion and Democracy in Contemporary Europe*. London, Alliance Publishing Trust, 2008. 121.

⁸⁶ Joseph DUNNE: Between State and Civil Society: European Contexts for Education. In: Kevin McDONOUGH – Walter FEINBERG (eds.): *Citizenship and Education in Liberal-Democratic Societies*. Oxford, Oxford University Press, 2003. 109.

⁸⁷ James W. SKILLEN: The Pluralist Philosophy of Herman Dooyeweerd. In: Jeanne HEFFERNAN SCHINDLER (ed.): *Christianity and Civil Society: Catholic and Neo-Calvinist Perspectives*. Lanham, MD, Lexington Books, 2008. 111.

regulates, supplements, and complements” the activities of the intermediary groups wherein “*an expanded social structure finds expression*”.⁸⁸

Of course, ‘the devil is in the details’, and it is a matter of great delicacy and importance to decide what aspects of the operation of a school – or of a social agency or other non-government institution serving the public – should be regulated by government and what aspects should be left free. Different pluralistic democracies have drawn the line and different points, though often with an almost inevitable tendency over time for government officials to seek to extend their prescriptions.

A good starting point for prescribing what government should and should not seek to regulate in schools (and homeschooling) is to distinguish between *education* and *instruction*, with the latter encompassing the skills and knowledge which students should acquire, while the former refers to the formation of character and life-perspectives. Of course, these functions of schooling are frequently intermingled. For example, paying close attention to a problem in mathematics or in translation develops character; indeed, according to Simone Weil, “*the development of the faculty of attention forms the real object and almost the sole interest of studies*”.⁸⁹ It is possible, nevertheless, to distinguish between the knowledge and skills that society has a right to expect every school to foster, and the qualities of character that are the business of families and the educators to whom they entrust their children.

It is for the protection of youth and also of the economic interests of society that government may reasonably require that schools provide effective instruction in prescribed areas, though without precluding additional instructional content as the school may determine. Government may also provide oversight to protect the health and safety of students. But it is not government’s role to prescribe how schools *educate* students into a responsible, caring, and purposeful life. Democratic pluralism requires that this crucial dimension of each school’s mission be left to the educators, parents, and supporters who are directly involved. Thus, as the United States Supreme Court has determined, it is no violation of the free exercise clause [of the Constitution] for states to require private religious schools to meet accreditation requirements and be subject to general state standards of educational quality and governance. Nor is it a violation of the free exercise clause for states to impose instructional and testing requirements in reading, writing, and arithmetic, or in civics, geography, and science. Children who graduate from religious schools cannot be handicapped in their abilities and capacities as budding democratic citizens and productive members of society. Private schools are perfectly free to teach those secular subjects with the religious perspective they deem appropriate.⁹⁰

⁸⁸ Kenneth L. GRASSO: The Subsidiary State: Society, the State and the Principle of Subsidiarity in Catholic Social Thought. In *Christianity and Civil Society: Catholic and Neo-Calvinist Perspectives*. In: HEFFERNAN SCHINDLER (ed.) op. cit. 51.

⁸⁹ Simone WEIL: Reflections on the Right Use of School Studies with a View to the Love of God. In: *Waiting for God*. (trans. Emma Craufurd) New York, NY, Harper and Row, 1973. 105.

⁹⁰ John WITTE, Jr. – Joel A. NICHOLS: *Religion and the American Constitutional Experiment*. Third Edition. Boulder, CO, Westview, 2011. 208.

After all, “one of the many competencies arising from institutional sphere sovereignty is precisely the right to decide on the religious or ideological direction which will guide the institution”.⁹¹ Upon this right depends the capacity to provide a coherent educational experience, and thus to form the character of students.

Government agencies and the courts, in exercising their oversight responsibility to ensure that every child receive an adequate education, should take care to respect the pluralist character of a healthy civil society, and “must take special care to note whether apparent ‘facially neutral’ regulations actually create an unfair burden for religious communities.” Expecting faith-based organizations and institutions to conform in all respects to the norms of their secular counterparts leads inevitably either to conflict or to a fatal loss of mission. “Communities of faith contribute to public life in part by offering their adherents alternative modes of meaning and interpretation to the dominant secular culture. If that unique contribution is to be maintained, then the ability of these communities to practice their faith freely becomes especially important”.⁹² Fruitful alternatives must not be regulated away!

In order to promote a flourishing, pluralistic civil society, government agencies and courts need to learn to think in new ways about the nature and goals of regulation and of public funding.

⁹¹ Jonathan CHAPLIN: Civil Society and the State: A Neo-Calvinist Perspective. In: HEFFERNAN SCHINDLER (ed.) op. cit. 84.

⁹² Ronald E. THIEMANN: *Religion in Public Life: A Dilemma for Democracy*. Washington, DC, Georgetown University Press, 1996. 167.

THE ROLE OF THE OMBUDSMAN FOR EDUCATIONAL RIGHTS IN HUNGARY

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Ombudsman for Educational Rights, Hungary

Education directly affects the present and *future of millions of people*. When so many people spend so much time together, conflicts are bound to occur in their day-to-day interactions. In our view the problem is not that conflicts arise in educational institutions, the problem is that there are no satisfactory mechanisms to resolve such conflicts.

Law statutes determine the environment of the educational system. They set out the rights and obligations of the participants in the educational system and also set out the decision-making powers of the authorities. Besides the specific legislative acts on education, the Constitution, various international agreements and a number of other laws also provide rules that govern the relationships between the participants in education. In the course of teaching, various decisions are made and measures are consequently taken. However, sometimes the decisions may infringe upon the rights of others, despite or regardless the best of intentions.

A total of 22.000 complaints have been submitted, thousands of telephone calls have been received and, at conferences, hundreds of problems have been disclosed to the Office thus far. The annual reports on our operations may be of assistance to all actors of education, but especially to pupils, students and their parents. They are those who need to identify cases of infringement, those who seek legal remedy, those who want to make proposals and those who want to file initiatives. The law may offer help in all of these areas but it cannot substitute co-operation. We are convinced that all of us may contribute to promote the development and consolidation of democracy at schools and in higher education. This Office has joined the awareness process; so as to make additional contributions to an open, honest and professional dialogue on childrens' rights, and on the democratic operation of local and higher education institutions.

Our Office may act if educational rights are infringed or directly threatened.

Educational stakeholders will only trust the Commissioner for Educational Rights if they can see that his actions are unaffected by politics or political interests. In addition to autonomy, another prerequisite of trust is impartial and unbiased inquiry.

The Commissioner for Educational Rights may examine the unlawful decisions and measures of educational institutions providing public service. This office was set up by the state to protect its citizens – especially the children – from the unlawful decisions of public service providers. The initiatives and recommendations of the Commissioner for Educational Rights protect the weak, the party who suffered a violation of rights, using legal means exclusively.

The complaints received since 1999 allow us to draw a few *general conclusions*. One of these is that we received many petitions reporting corporal punishment. It has been always known that there is a serious lack of transparency in such issues, many cases are not reported or do not receive publicity outside the school. In our view, the *most serious offence* at school is physical aggression against children and students.

In the course of the investigation of the petitions, it was apparent that conflicts were rooted in the *lack of information*. The children involved in a conflict are often not familiar with the applicable regulations and local provisions. They are not aware of their rights, and do not know what proceedings must be followed in case of legal disputes. If the rules governing the work of educational institutions are not clear for the parents and students, they will not be able to make responsible decisions, and tend to come out of their disputes with the institutions *as losers*. The applicable legislative instruments establish clear lines of distinction between the responsibilities of the family and those of the educational institution. However, when such lines of distinction are known by neither the institution nor the family, conflicts will inevitably occur between them, and the parties will blame each other for the arising situation.

Many cases reveal a total *absence of trust*. A school did not trust a child with disabilities, and did not allow the student to enrol. Another school did not trust that its students would not use drugs at the weekends, and introduced drug tests. Some parents did not trust their children, and authorised drug tests in the school. A student dormitory did not trust the students and bought a breathalyser to check alcohol consumption. The reason why parents do not complain is either that they are afraid of the institution, or do not trust their own children. Institutions tend to dismiss children they do not know how to deal with. These children are not trusted any longer. There are students who prefer not to ask their teacher for advice or help because the latter has abused their confidence. It will lead to a loss of trust if a teacher overtly refuses to observe the rules that would apply to him or her, but does not hesitate to *punish* students when they break the rules. Many teachers do not trust the families. This is because the consequences of family issues tend to appear at school, but teachers feel powerless. We have read hundreds of complaints from parents who want to take their children out of a school because they no longer trust the institution. It is alarming how many forms of control, prohibition and restriction exist.

Trust can be created and strengthened by co-operation. We can often observe that schools are left alone in solving a problem without receiving any external help. In many cases they do not know where they could turn for assistance. Teachers should be aware of the limits of their competence, and they may act only within those limits. However, they should also know that at the point where their own competence ends, someone else's begins, and that this is the person who can help. Teachers need to *find partners* who can take part in the resolution of conflicts which arise in the school,

but not necessarily originate in the school only. Drug and alcohol abuse, violence, children at risk and poverty are all social phenomena which schools are unable to tackle effectively on their own. However, families are also unable to cope with these problems single-handed.

How can one provide effective help in these cases? In our view, co-operation between institutions and NGOs may be the solution in individual cases. Experts agreed that violence at school was often due to factors outside the school, and therefore the various measures and initiatives – especially the preventive ones – could only be successful if the organisations of the local communities work together as partners. Violence results in serious social damage and cost; therefore preventive measures should aim at achieving a tangible reduction of violence. This co-operation must be free of bureaucracy. The joint efforts of professionals from different sectors and services can be a major contribution to success. The possible partners are school communities, local authorities and regional governments, as well as their various educational, cultural and youth services, along with youth and children's organisations, local and regional NGOs, the local and regional media, scientific and research centres, universities and colleges.

Co-operation is of vital importance in the protection of rights as well. Developed democracies have a complex system of institutions for the protection of the rights of citizens. Courts are the ultimate means of dispute resolution, but judicial proceedings tend to be lengthy, expensive and less confidential due to the principle of publicity. Fortunately, the number of institutions helping the better enforcement of children's rights increased in the last few years. The advocates of patients' rights and children's rights, the 'solicitors of the people', mediators and certain NGOs all aim to ensure a more effective protection of rights. They are closer to the stakeholders, and may help mediation in the initial stage of conflicts or contribute to their settlement via cheaper, more confidential and faster procedures.

The purpose of co-operation between authorities, institutions and NGOs is to find the most appropriate assistance for the cases presented by the citizens as quickly as possible. If the institution to which a request is addressed may take action, it will provide a service to the citizen. If the matter falls outside its sphere of authority, it will act as a compass to provide information to the petitioner on where he or she can turn for assistance. Citizens can decide which one of the possibilities presented one of the offered avenues they wish to explore. Such co-operation will create trust, as citizens will have a reason to feel that the institutions are there for them, and not vice versa. Such trust is beneficial to both the state and the individual. In a free society, where the rule of law prevails, there is no alternative to co-operation.

We have a great debt towards the Hungarian society: in the last 25 years we haven't found an answer to the most important question concerning our educational system: *why do we teach, what is the aim of it?* If we look back in time, we find clear answers, for example the aim of eradicating illiteracy. Later, after the first World War, when Hungary lost its raw material treasure and its geographical advantages, the educational government realized that it in fact it is culture and education, that can pull the country out of trouble. Even to educate the so called "socialist human" can be seen as a goal that was able to indicate a clear vision of what the aim of the

whole educational system was – according to the communist regime. Then came the regime change, when all sorts of reforms started to take place, reforms that we believed were important on the basis of international conventions and democratic principals; there was only one question we forgot to ask ourselves: why are we doing all this? Why are we spending all that money on education? What kind of mandate does the society give to the large team of professionals that we call the community of teachers? During the last 25 years we have heard many debates over *what* we should teach, and even more debates over *how* we should teach, but these should be only one of the many steps – while the very first step has not been made, the question of questions has not been answered.

I dont know whose job it should be to start the discussion on the goal of education, but Im sure in one thing: the answer to this question must be consensual. There is actually a good example to this: about three decades ago the then finnish government addressed the scientific elite, the opposition, artists, churches, the civil sector – and they started a program that was aiming to answer the question of „What will we, finns be in 50 years?“. And in the process of this debate that involved the whole society they found the sentence that is now the foundation of the best performing educational system of the world: „We must not let our parents and grandparents pass away without learning from them all that they know“.

I am aware of the fact that we are not the Finns. Still, I firmly believe that if we were to start a search together aiming to find a consensual goal for our future and education, that could stream an immense amount of energy towards the educational system.

EDUCATION OF LINGUISTIC COMMUNITIES IN CEE AND THE ROLE OF THE NGOS IN THIS REGARD

What does the CoE see?

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1. Introduction

This paper examines the justiciability of the prior right to education of the one of the most vulnerable parts of the society: the minorities. In my research I would like to point to the linguistic communities' education, which is a key issue in my opinion in the multilingual and multicultural Central and Eastern Europe (CEE). The two main target groups of this survey are the Roma and Hungarian education as these are the two main minorities in the region, however, I tried to enlarge the survey to all the significant linguistic minorities of the region.

Regarding the connection between linguistic rights and educational rights I focus on the question whether current international framework regarding minority education is relevant, and if yes, does the Council of Europe (CoE) gain appropriate and sufficient information on minority education? What is the role of the civil actors in this respect?

2. Relation between identity, language and education

Regardless of the lack of a general normative definition accepted of “national minorities”, yet we may accept that regarding the meaning of that phenomenon the almost a century-long literature's position is nearly unchanged. Yet, following the UN documents (International Covenant on Civil and Political Rights and Resolution 47/135), the CoE documents (Framework Convention and Language Charter) as well as the relevant literature (Capotorti, Eide, Smith, Kovács, Heintze, Bibo, or Flachbarth) my starting point is that a “national minority” is characterized by

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both a significant character, which directly links to their identity and a numerical component, which is an objective criteria.¹ Thus, it seems to be wise to start our survey at the relevant international documents.²

According to Article 27 of the CCPR, *ethnic, religious or linguistic* character can be determined. However, education is not a direct element of identity of minorities in the related UN and CoE documents. In this regard, linguistic rights can *contribute* fulfilling educational rights and *vica versa*.

Preservation and maintaining of a minority's identity and the language is thus rest on *two pillars*. One is the ability to use the language freely both in oral and written form in private and in public. The other is the possibility to teach the certain language in every level and form to the future generations.³

This importance of education of linguistic communities is, however, can be seen in several international treaties and documents. The United Nations' General Assembly adopted the Resolution 47/135 in 1993 of which Article 4 (paragraphs 3 and 4) calls upon States to promote teaching in/of the mother tongue and culture.

In fact, more than seven decades had to pass in the international organizations' history to be able to deal with the content of the education and not just the frame as was in the early 20th century instruments as it is shown in the following.

3. The early international regulatory framework for education rights in CEE

Codification affecting national minorities has rapidly evolved after the First World War. Contracts closing the cataclysm had separate provisions on minorities, more or less in detail.

In connection with the educational provisions I examined 5 of the era's international treaties such as the 1919 Saint-Germain-en-Laye Agreement with Austria, Czechoslovakia and the SHS Kingdom, the 1919 Paris Agreement with Romania, and the 1920 treaty with Hungary.

The contracts⁴ contains the following issues related to minorities:

- the clause of General legal equality,⁵
- right to life and freedom⁶

¹ In this regard "numerical component" means: group of native citizens who are numerically less than the major group.

² Péter KOVÁCS: Minorités: peuple qui n'a pas réussi. In: Hervé ASCENSIO – Pierre BODEAU – Mathias FORTEAU – Franck LATTY – Jean-Marc SOREL – Muriel UBÉDA-SAILLARD (eds.): *Dictionnaire des idées reçues en droit international*. Paris, Editions Pedone, 2017. 381.

³ Tove Skutnabb-Kangas considers these pillars as Linguistic Human Rights. TOVE SKUTNABB-KANGAS: Linguistic Human Rights. In: TIERSMA–SOLAN (eds.): *The Oxford Handbook of Language and Law*. Oxford, Oxford University Press, 2012. 235–236.

⁴ In the following as "minority contract" I refer to the contracts with Czechoslovakia, Romania and the SHS Kingdom.

⁵ Czechoslovakia Article 7 (1); Romania Article 8 (1); SHS Kingdom Article 7 (1).

⁶ Czechoslovakia Article 2 (1); Romania Article 2 (1); SHS Kingdom Article 2 (1).

- Language rights;⁷
- Freedom of religion and belief⁸
- Citizenship⁹
- Institution-establishment rights¹⁰
- Education¹¹
- Religious and educational autonomy¹²

The examined contracts are mostly similar in structure. Obligations of the states follow each other in the similar order in each agreement, basically in the same text. The texts regarding education had an almost uniform wording:¹³

“[The state] will provide in the public educational system in towns and districts in which a considerable proportion of [the State’s] nationals of other than [majority] speech are residents adequate facilities for ensuring that the instruction shall be given to the children of such [State] nationals through the medium of their own language. This provision shall not prevent the [State] Government from making the teaching of the [majority] language obligatory.”

The prescribed “adequate facilities” provided a broad framework, which allowed the same text to be applied to all countries. Interestingly, despite of the same rules, the domestic legal systems developed in very different ways. Some of the achievements of regulations that were introduced in the mid-war period still can be seen in the contemporary legal systems.

An example for such (non-internationally obligated) instrument is the 3-level linguistic education system, where Type A) is where the teaching language is the minority language, the type B) is where the teaching language is a minority language, however the majority language is a compulsory subject; and type C) is where the teaching language is the majority language, but the minority language is a compulsory subject. However, this variety of linguistic education was introduced by Hungary in the mid-war-period, today this model of education, which takes local characteristics also into account, is exercised only in Croatia among the examined countries.

⁷ Article 7 of Czechoslovakia (3–4); Romania Article 8 (3-4); SHS Kingdom Article 7 (3–4).

⁸ Czechoslovakia Article 2 (2), Article 7 (2); Romania Article 2 (2), Article 8 (2); SHS Kingdom Article 2 (2), Article 7 (2), Article 10.

⁹ Czechoslovakia 3–6. article; Romania 3–7. article; Kingdom of SHS Article 3–6.

¹⁰ Article 8 of Czechoslovakia; Romania Article 9; SHS Kingdom Article 8.

¹¹ Article 9 of Czechoslovakia; Romania Article 10; SHS Kingdom Article 9.

¹² Romania Article 11.

¹³ This is a transformation of the text. Here I highlight the common text of the same regulation.

Above all, the most important experience of these international treaties perhaps is that international law recognized minority rights at an early stage, and within both the language and the education rights.

4. The fulfillment of current international obligations -a comparative study

The international regulation regarding minority protection born in the '90s – in the context of the breaking-up of the Soviet Union – played a key role in maintaining regional stability of CEE. The two main Council of Europe convention, both the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages recognizes not only rights for the minorities, but also obligations to the Member States, which is going to be important with regard to the fulfillment of educational rights.

These two international instruments are monitored by the CoE by a similar way: the country reports are examined by an independent commission of professionals, who are preparing an opinion to the Committee of Ministers to adopt a recommendation. In this research I examined eight¹⁴ middle-European countries' most recent reports and opinions¹⁵ in the scope of the fulfillment of the articles relating education:

- Framework Convention: Articles 12, 13, 14;
- Language Charter: Article 8.

In the following I highlighted the issues that are common in the Carpathian region as well as the tools suggested by the two commissions.

4.1. Statistics

If we have a glance at the population statistics of 2015, with few exceptions, we may conclude that in the examined countries the largest numbers of minorities are Hungarians and Roma/Gypsy. Another observation according to the evolution of the population: the number of ethnic communities (linguistic communities) are running out, while the Roma population is still growing in the last decades.

¹⁴ Austria, Slovakia, Ukraine, Romania, Serbia, Croatia, Slovenia, Hungary.

¹⁵ Language Charter documents reviewed: *Slovakia*: 3rd and 4th monitoring cycle. *Ukraine*: 1st and 2nd monitoring cycle and the country report submitted for the 3rd monitoring cycle (MIN-LANG (2016) PR 1). *Romania*: 1st monitoring cycle and the country report submitted for the 2nd monitoring cycle (MIN-LANG (2016) PR 2). *Serbia*: 2nd and 3rd monitoring cycle. *Croatia*: 4th and 5th monitoring cycle. *Slovenia*: 3rd and 4th monitoring cycle. *Austria*: 2nd and 3rd monitoring cycle. *Hungary*: 5th and 6th monitoring cycle.

Framework Convention documents reviewed: *Slovakia*: 2nd and 3rd monitoring cycle. *Ukraine*: 2nd and 3rd monitoring cycle. *Romania*: 2nd and 3rd monitoring cycle. *Serbia*: 2nd and 3rd monitoring cycle. *Croatia*: 2nd and 3rd monitoring cycle. *Slovenia*: 2nd and 3rd monitoring cycle. *Austria*: 2nd and 3rd monitoring cycle. *Hungary*: 2nd and 3rd monitoring cycle.

	SK	UA	RO	SRB	HR	SI	AU	HU
Country size (km ²) ¹⁶	49 035	603 550	238 391	77 474	56 594	20 273	83 879	93 011
Population ¹⁷	5 421 349	44 429 471	19 870 647	7 176 794	4 225 316	2 062 874	8 576 261	9 855 571
Number of Hungarian Minority ¹⁸	458 467	159 297	1 227 623	253 899	14 048	6 243	25 884	-
Number of Roma ¹⁹	105 738	47 587	621 573	147 604	16 975	8 500	4 348	315 583
3 largest minorities by population (%) ²⁰	Hungarian (8,5), Roma (2), Czech (0,6), Ruthenian (0,6)	Russian (17,3), Belorussian (0,6), Moldavian (0,5)	Hungarian (6,1), Roma (3), Ukrainian (0,2)	Hungarian (3,5), Roma (2), Bosnian (2)	Serbian (4,3), Italian (0,4), Roma (0,4)	Serbian (2), Croatian (1,8) ... Italian (0,1)	Hungarian (7,8), Croatian (5,9), Slovenian (5,4)	Roma (3,2), German (1,8), Slovak and Romanian (0,36)

The statistics also repeatedly refer to census data, in which it is clear that the use of the mother tongue is marked more times than the national belonging. One explanation for that is in many countries Roma tend to taken into account themselves as Hungarians.

Nowadays international obligations are significantly more specific than it was in the previous texts of the early 20th century. The framework of the Language Charter approaches from a structural view from the pre-school to higher education, adult education and vocational education. The Framework Convention has another perspective: approaching from the content of the education.

Both the conventions applied the similar mechanism where the key role lies at the independent body (committee of experts / advisory committee). This body gains information from the state (governments) on the one hand and form its own on-the-spot visits on the other hand. From the point of view of the linguistic communities the main question is whether the committees reach the adequate and relevant information? What does the CoE see from a broad picture of a minority's present?

If we compare the CoE documentation it shows the by today the recommendations are not mainly on legislative and legal issues but *often beyond the law*: means of management, support, cooperation or even sensitizing the majority society and striving towards peaceful coexistence. In the following I highlight the common

¹⁶ Source: Eurostat (2016).

¹⁷ Source: Eurostat (2016).

¹⁸ Source: most recent country reports to the examined conventions.

¹⁹ Source: most recent country reports to the examined conventions.

²⁰ Source: most recent country reports to the examined conventions.

findings of the above mentioned CoE documents. In other words: these are the common issues (or problematic fields) that the CoE sees in the examined CEE region.

4.2. Roma education

The first common highlighted educational area is the Roma/Gypsy education. It seems the CoE recognizes that the Roma community should not be treated as one of the linguistic minorities, partly because they are usually regarded not like that. On the other hand, romas formulate completely different educational demands than others. Roma communities intend to be integrated first and promotion of use of language is a secondary issue besides that. However, it should be noted that romas usually speak in a minority language, so in many countries it is a twofold issue (ethnic *and* linguistic). In contrast, other linguistic communities usually just require self-reliance (self-governance), which may be expressed i.e. as a demand for separated (and not segregated) classes or the right to establish own school. Needs of these two groups are not interchangeable, which is acknowledged by the committees as well. In state reports for the Framework Convention member states usually report the educational programs and integration strategies in detail. We shall note that special Roma strategy has been introduced to all the countries surveyed, which deals largely with educational issues. However, in spite of the strategies, for example Slovakia and Romania reports difficulties of inclusion of Roma in education. We can observe the similar situation in Croatia where this particular number is high: the Croatian country report refers to a UN survey, which states that only the 25% of Roma children finish primary school. Slovenia employs special language support, and educational advisors for this purpose.

4.3. Recent changes in legislative environment

In the examined region significant legislative changes have taken place between 2010-13. New acts on education were adopted in Slovakia, Ukraine, Romania and Hungary. Beside legislative measures, some institutional changes (such is the Slovakian newly introduced minority plenipotential or the Educational Center in Komarno/Révkomárom) have occurred in the same period of time. These new instruments will have effect on the educational system, which will provide measurable outcomes in the next cycles of reports.

4.4. Accessibility

The accessibility to the right to education for minorities in this particular region is basically guaranteed. The reports and the opinions of expert committees and the advocacy of civil actors can further refine this picture.

The meaning of a “minority-language” or “bilingual” school get different interpretations in different countries. Slovakia set a strict 50–50% of Slovak and minority-language classes in the curriculum. In contrast, Croatia, which introduced a differentiated educational model, does have a school that works completely in the

minority language. Another variation can also be observed in the case of Slovenia, which has mixed schools, but there are also many who are involved in trainings in neighboring countries (Hungary and Austria).

It is an important element of accessibility to have the minorities informed about the opportunity of minority-language training, for example in those countries where the participation is bound to limit (Serbia, Austria). Awareness, as a role of local civil society actors is invaluable in this regard.

According to the reports, it seems that a well-functioning minority school shall have: 1) student, 2) teacher and 3) teaching materials, school books. Among these three factors the teacher training and the curriculum is included in the conventions. Comparing the most recent reports (the last in three years' time), only Serbia reported the increasing number of students enrolled in the bilingual trainings. In all the other countries, the number of students is decreasing parallel to their population.

4.5. Quality of training

The summaries of the expert committees contain more information about the quality of training than the country reports. According to the results of this comparison, two subjects can be pointed out as main factors of minority-language training: (1) the issue of the quality of the language, and (2) the quality of the textbooks and teaching materials. However, any minority language is a living language, without conscious use of that particular language it is more exposed to shallowing, archaizing or loss. Worrying reports have been coming for more than a decade from East-Slovenia, where a fast loss of language can be detected of the small Hungarian community. The Slovenian report unfolds that the teachers' command of the Hungarian language is so weak that in many cases they do not able to reach the appropriate level of teaching in minority language. In Slovenia, there are only four kindergartens, four elementary schools and one middle school accessible for the little more than six thousand Hungarians – no wonder that nurturing a new generation of teachers struggling with significant problems. Similar, but not that alarming warnings coming from Transcarpathia (Ukraine), Burgenland (Austria) and East-Croatia as well. These warnings are mainly provided by local civil associations according to the opinions of the committees.

4.6. Publishing textbooks

Publishing textbooks is one of the main problematic issues in all the examined countries. Although, minority language textbooks are available in all the countries (*pro forma*), it is not so easy to use them in minority education (*de facto*). Two striking examples can be highlighted. Serbia for example, reports a long list of minority-language textbooks, but it is clear from the commissions' evaluation report that there is a serious administrative burden related to book publishing, which slows down processes. Due to this barrier, new book almost can not even show up to the semester in which those were supposed to, so the old ones or the Serbian (majority) language books are taken instead. In Slovakia after a long time finally a Hungarian textbook

was introduced to the administrative authority, which was, however, rejected by the Ministry of Education in 2015 and can not be used ever since.

4.7. Teacher training

Teacher training in all regions struggling with challenges. Speaking about the largest Hungarian minority, first it seems that there is at least one higher education institution in each region, which trains minority language teachers. In the low-inhabited minority areas (Slovenia, Austria) the main reported problem is a shortage of students, but in the large population areas, like Vojvodina (Serbia) the lack of training materials and textbooks is the subject of complains. Slovakia recently introduced teaching of tolerance in teacher training which is a novelty in the region. There is also one important issue in this sphere, which appears implicitly in the CoE documents: the low prestige of teaching as a career. The Romanian report is to map out that vocational schools are lack of Hungarian-speaking trainer, who usually go to business sector rather than teach at school. The teaching profession's existential undervaluation is observed, or at least suspected, in almost all the studied countries. If a teacher is the foreign trained (it usually means trained in the kin-state) recognizing diplomas may arise as a problem, which had appeared Romanian-Serbian relations previously.

4.8. Other problematic issues

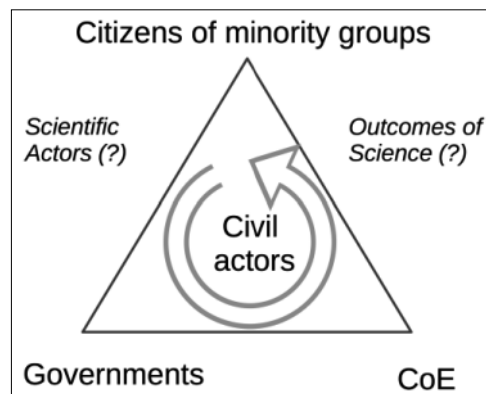
Some of the difficulties that affect the education systems in the region are uncovered during the on-the-spot visits of the expert committees. The first is the trend of centralization of governance, which is common in the CEE counties. In education and mainly regarding curricula, it means the regional needs are counted less than the central interests. Shaping education to the special needs of sub-region or at least recognition of local specialties is almost impossible. (On the other hand we shouldn't forget, that we are speaking about middle and small sized European countries where the local needs are often too small comparing to larger states.) Teaching of history and cooperation between majority and minority is also a sensitive issue, but apparently due to the Language Charter's targeted implementation and monitoring we can observe a much larger dialogue on this issue than before. However, the Language Charter's Committee of Experts regularly calls the examined countries to include minorities in the preparation of curricula.

5. How to develop spreading of information in common issues of education?

The answer to the question raised at the beginning of our survey that whether the correct and sufficient information come to the Council of Europe is mainly yes. The multi-source model, by which the Committees gain information seems to be working properly.

It is important to identify those actors who can provide information for the committees of experts. Besides the governments, the civil and political organizations

have to be highlighted, which are sometimes specialized in certain matters, such as education. As a result of the above comparison, I am convinced that minorities' civil organizations form a bridge – as communication channels – linking the international organization, the state and the minority citizens. Their main responsibility is to provide adequate communication to all other actors, so the relevant information is transferred properly.



In addition to the above, more and more research of the highest quality addresses the educational sector from a point of view of pedagogy, methodology and linguistics. However, the questions examined in the scientific literature are often not echoed in country reports or evaluations, nor even in the linguistic strategies of certain counties or minorities. This leads us to the conclusion that there is no proper channel of information between the scientific sphere and civil or political actors.

In summary, it worth emphasizing that the above examined international treaties have a key role to the region's stability. Developing rational linguistic policies are still the strongest supporters of maintaining peaceful coexistence of different languages and communities in the CEE region.

MULTANI V. COMMISSION SCOLAIRE
MARGUERITE-BOURGEOYS,
SUPREME COURT OF CANADA, 2006

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1. Background

The case was about a 12 years old boy, Gurbaj Singh Multani who attended a school in Quebec, Canada. He and his father Balvar Singh Multani are orthodox Sikhs, so the boy believed that his religion required him to wear a kirpan¹ at all times.

The case started in 2001, when Gurbaj accidentally dropped the kirpan he was wearing under his clothes in the yard of the school he was attending. The school board – as a kind of first instance – sent his parents a letter in which, as reasonable accommodation, it authorized their son to wear his kirpan with certain conditions to ensure that it was sealed inside his clothing. Gurbaj and his parents agreed to this arrangement.

The governing board of the school refused to ratify the agreement on the basis that wearing a kirpan at the school violated art. 5 of the school's Code de vie (code of conduct) which prohibited the carrying of weapons. The school board's council of commissioners upheld this decision and told Gurbaj and his parents that he could wear a symbolic kirpan in the form of a pendant or one made of a material which is harmless.

The father filed in the Superior Court a motion for a declaratory judgment to the effect that the council of commissioners' decision was of no force or effect. The Superior Court granted the motion (2002), declared the decision to be null, and authorized Gurbaj to wear his kirpan under certain conditions.² The Superior Court

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¹ A kirpan is a religious object that resembles a dagger and must be made of metal. So actually it can be seen as a kind of a weapon.

² These conditions are the following:
– that the kirpan be worn under his clothes;

noted that the need to wear a kirpan was based on a sincere religious belief held by Gurbaj Singh and that there was no evidence of any violent incidents involving kirpans in Quebec schools.

The next instance, the Court of Appeal set aside the Superior Court's judgment and restored the council of commissioner's decision (2004). The judge also concluded that the decision in question infringed Gurbaj's freedom of religion, but held that the infringement was justified for the purposes of s. 1 of the Canadian Charter of Rights and Freedoms³ and s. 9.1 of Quebec's Charter of human rights and freedoms⁴. The judge considered that the council of commissioners' decision was motivated by a pressing and substantial objective: to ensure the safety of the school's students and staff. There was a direct and rational connection between the prohibition against wearing a kirpan to school and the objective of maintaining a safe environment. According to the decision, the kirpan was a dangerous object, and the concerns of the school board were not merely hypothetical. Allowing it to be worn, even under certain conditions, would have obliged the school board to reduce its safety standards and would have resulted in undue hardship. The judge stated that she was unable to convince herself that safety concerns were less serious in schools than in courts of law or in airplanes.

2. The decision of the Supreme Court

In the procedure of the Supreme Court, the main question of the dispute was the compliance of the commissioners' decision with the requirements of the Canadian Charter of Rights and Freedoms, especially the requirement of freedom of religion.

Because the council of commissioners' decision was an administrative law decision based on legislation (*Code de vie*), the standard of review could have been the standard of reasonableness (which was applied by the Court of Appeal) but the Court applied the principles of constitutional justification and held the administrative law standard of review as not relevant. *Deschamps and Abella JJ*

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- that the kirpan be carried in a sheath made of wood, not metal, to prevent it from causing injury;
 - that the kirpan be placed in its sheath and wrapped and sewn securely in a sturdy cloth envelope, and that this envelope be sewn to the guthra;
 - that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being complied with;
 - that the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; and
 - that in the event of a failure to comply with the terms of the judgment, the petitioner would definitively lose the right to wear his kirpan at school.

³ “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

⁴ “In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.”

who wrote concurring reasons to the decision of the Supreme Court argued that the Court should address the issue of justification under s. 1 of the Canadian Charter of Rights and Freedoms only where a complainant is attempting to overturn a normative rule as opposed to a decision applying that rule and not on the decision itself but this argument was rejected. One argument was to avoid the dissolving of constitutional law standards into administrative law standards. Another one was that judicial review may involve a constitutional law component and an administrative law component and the administrative law standard of review is not applicable to the constitutional component of judicial review. The main question was the compliance of the commissioners' decision with the requirements of the Canadian Charter and not the decision's validity from the point of view of administrative law.

A s. 1. analysis can be used when there is a conflict of fundamental rights but in this case, the Court did not at the outset had to reconcile two constitutional rights, as only freedom of religion was in issue as a fundamental right and on the other side there were the safety concerns. Even like this, the Court held that s. 1. analysis was the most appropriate one to decide this case. According to this the infringement is reasonable and can be demonstrably justified in a free and democratic society if the legislative objective is sufficiently important to warrant limiting a constitutional right and the means chosen by the state authority is proportional to the objective in question. The proportionality analysis has three stages: it must be considered whether the decision has a rational connection with the objective, the infringement can be justified (minimal impairment test) and the deleterious and salutary effects must also be measured.

The Court stated that freedom of religion was not an absolute right, it had internal limits and it could be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others. Nevertheless, the interference with Gurbaj's freedom of religion was neither trivial nor insignificant, as it had deprived him of his right to attend a public school. The infringement of Gurbaj's freedom of religion could not be justified under s. 1 of the Canadian Charter of Rights and Freedoms. Although the council's decision to prohibit the wearing of a kirpan was motivated by a pressing and substantial objective (to ensure a reasonable level of safety at the school), and although the decision had a rational connection with the objective, it has not been shown that such a prohibition minimally impairs Gurbaj's rights. The absolute prohibition against wearing a kirpan did not fall within a range of reasonable alternatives. The risk of Gurbaj using his kirpan for violent purposes or of another student taking it away from him was very low, especially if the kirpan was worn under conditions such as were imposed by the Superior Court. The Court also stated that Gurbaj had never claimed a right to wear his kirpan to school without restrictions and there were many objects in schools that could be used to commit violent acts and that were much more easily obtained by students, such as scissors, pencils and baseball bats. The evidence also revealed that not a single violent incident related to the presence of kirpans in schools had been reported. Although it was not necessary to wait for harm to be done before acting, the existence of concerns relating to safety must be unequivocally established for the infringement

of a constitutional right to be justified. Nor did the evidence support the argument that allowing Gurbaj to wear his kirpan to school could have a ripple effect.

Lastly, the argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict was not only contradicted by the evidence regarding the symbolic nature of the kirpan, but was also disrespectful to believers in the Sikh religion and did not take into account Canadian values based on multiculturalism. Religious tolerance was a very important value of Canadian society, the very foundation of the Canadian democracy.

A total prohibition against wearing a kirpan to school undermined the value of this religious symbol and sent students the message that some religious practices did not merit the same protection as others. Accommodating Gurbaj and allowing him to wear his kirpan under certain conditions demonstrated the importance that the Canadian society attached to protecting freedom of religion and showed respect for its minorities. The deleterious effects of a total prohibition thus outweighed its salutary effects.

3. Outcomes

Prior to *Multani*, the approach of the courts to judicial review of Charter questions was inconstant but this case established a rigorous test: an impugned administrative decision that affects Charter rights must be held to the same standard as is a law that affects Charter rights. However, this approach was short-lived. A new framework for analysis was established in *Doré v Barreau du Québec* (2012).⁵ In this decision, the Court cited the critical academic commentary of *Multani* which generally argued that the use of a strict s. 1. analysis reduced administrative law to having a formal role in controlling the exercise of discretion. Instead of this, *Doré* suggests that judges should respect the perspectives of administrative officials and reasonableness review shifts the focus to asking whether an administrative official has provided an adequate justification for the outcome.⁶

In *Multani*, the Court referred the Canadian values based on multiculturalism which has been translated into legal principle by s. 27 of the Canadian Charter of Rights

⁵ Alexander PLESS: Judicial Review and the Charter from *Multani* to *Doré*. *Working Paper Series*, University of Ottawa, November 2013. 4–5. https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2362924 With *Doré*, the standard of review for an administrative tribunal's decision is "reasonableness". According to the decision, "when applying Charter values in the exercise of statutory discretion, an administrative decision-maker must balance Charter values with the statutory objectives by asking how the Charter value at issue will best be protected in light of those objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives".

⁶ Matthew LEWANS: Administrative Law, Judicial Deference, and the Charter. *Constitutional Forum constitutionnel*, Volume 23, Number 2, 2014. 19–32., especially 28. https://ejournals.library.ualberta.ca/index.php/constitutional_forum/article/viewFile/21938/16372

and Freedoms, although did not give legal affect to the term.⁷ Still, this case is an important part of understanding multiculturalism in Canada which contains a broad range of policies and programs adopted by governments in response to diversity. One of the tools used by multiculturalism is the policy of exempting minorities from the application of certain rules and regulations, like from rules banning the carrying of dangerous weapons in public. These exemptions are typically justified on the grounds that the law disproportionately impacts individuals because their religious or cultural affiliations.⁸ In Multani, the core question was the possibility of exemption from safety rules: the appellate court privileged the fears of non-Sikh students and staff above the religious beliefs of orthodox Sikhs, implying that those fears were more empirical than religious belief, even when assessed primarily in terms of perception rather than actual fact, the Supreme Court however, rejected the argument that the kirpan posed a threat to school safety, especially when sheathed, and concluded that prohibiting the kirpan from school premises excessively infringed Gurbaj's religious rights. The Court privileged a particular cultural sensibility as rightfully dominant. With this, it emphasized tolerance and pluralism as core Canadian values that school boards have an obligation to promote.⁹

The Multani case was also part of the unfolding "reasonable accommodation" debate in Canada: not much time after the decision some commentators have pointed this debate as evidence of growing polarization. People, the media and political parties were talking about "excessive" accommodations of minorities, they called for a new, tougher approach to immigrants and minorities.¹⁰ After the Multani decision, 94 percent of French-speaking Quebecers and 79 percent of non-French speaking Quebecers were opposed. The people were disappointed because the leading judge of the decision, Justice Louise Charron was a Franco-Ontarian but she took a position in favour of Canadian values based on multiculturalism and religious tolerance (as a

⁷ Joan SMALL: Multiculturalism, Equality, and Canadian Constitutionalism. In: Stephen TIERNEY (ed.): *Multiculturalism and the Canadian Constitution*. Toronto, UBC Press Vancouver, 2007. 196–211., especially 208. According to s. 27 the Charter shall be interpreted in a manner consistent with the preservation and enhancement of multicultural heritage of Canadians. S. 27 states rather a value than a binding rule, it is in most cases ignored by the Court, if it has some role, it is in the interpretation of s. 15 (equality guarantee) which must be interpreted so as to accommodate distinctions that are permitted by s. 27. SMALL op. cit. 198., 200.

⁸ Michael MURPHY: *Multiculturalism: A Critical Introduction*. Abingdon, Routledge, 2012. 39. However, there is a disagreement in the academics over whether exemptions support or undermine the principle of equality. Some think that exemptions can be justified as a means of according equal consideration and respect to the identity-related differences of individuals from minority background. Others think that just because a rule has a disproportionate impact for some people, the rule itself is not unfair and an exemption must not be granted, rather the disadvantage created by the law and the purpose of the law must be weighed and sometimes the legitimacy of the law should be questioned rather than granting an exemption. MURPHY op. cit. 40–41.

⁹ Valerie STOKER: Zero Tolerance? Sikh Swords, School Safety, and Secularism in Québec. *Journal of the American Academy of Religion*, Vol. 75, Issue 4, Dec. 2007. 814–839., especially 835.

¹⁰ *The Current State of Multiculturalism in Canada and Research Themes on Canadian Multiculturalism 2008–2010*. <http://www.cic.gc.ca/english/pdf/pub/multi-state.pdf> 16.

core element of multiculturalism) as the very foundation of the Canadian democracy. Gurbaj as a boy, was kept from school for five months over his wearing of a kirpan. Then he won the right at Quebec Superior Court, so he returned to his public school and got shouted at by 300 people – some told him “Go home, Paki”. He gave an interview in 2013, when he considered leaving Quebec. There was a proposed bill, the Quebec Charter of Values, trying to end the Quebec controversy on reasonable accommodation. The Charter would have banned the wearing of conspicuous religious symbols in the public-sector workforce and Gurbaj Multani was wearing not only a kirpan but also a turban.¹¹ In the end, the bill died as of the 2014 elections.

After the decision, a few years later, a research program was launched, focused on diversity and education, the outcomes were published in 2014. One of the core questions was, how the elementary school students in New Brunswick might respond to the case that was before the Supreme Court. The result was surprising. Most of the students didn't know the labels “turban” or “hijab”. None of them could name the religion that might require these as part of its followers' adherence to their faith. Instead, they suggested that perhaps the boy wearing the turban was having a bad hair day and just didn't want to show his hair. They didn't know what a kirpan was and ideas about safety trumped any right to wear a kirpan, even if the kirpan itself was perfectly safe. For the students, diversity was something that was foreign. The students really saw no reason to accommodate difference because they didn't understand what it was. Most of the students simply didn't understand that a turban is not just a hat, that in some religions, material expressions of one's religious faith are an integral part of one's identity. Although learning outcomes related to diversity were key components of the New Brunswick social studies curriculum, so they were learning about it in school. The author (Associate Professor of Social Studies Education in the Department of Elementary Education at the University of Alberta) fortunately also found some good points: although the students did not demonstrate an understanding for reasonable accommodation, they were not hostile to the idea, their minds were open, they were willing to discuss it and some even tried to come up with possible solutions.¹²

¹¹ <https://goo.gl/YLG7k6>

¹² Carla L. PECK: *Hope for Canadian Multiculturalism*. <http://www.cca-ace.ca/education-canada/article/hope-canadian-multiculturalism>

HUNGARY'S NEW CODE ON ADMINISTRATIVE COURT PROCEDURES

As a framework for the justiciability of educational rights

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1. Introduction

1.1. Educational rights and administrative court procedures

Though principally adherent to the sphere of constitutional law, the justiciability of educational rights is closely connected to administrative court procedures. Administrative law is applied constitutional law – as the German dictum puts it¹. Thus, it is important to search for the right procedural framework for the enforcement of educational rights and other basic rights. This was also an important perspective of the preparatory work and the codification process of the recently enacted Code on Administrative Court Procedure. This article aims at highlighting those features of the Code, which are connected with the questions of the justiciability of educational rights through administrative court procedures and to give insights to the dilemmas arising in the codification process. These main features, which are able to bring modifications to the present system of remedies, are the scope of judicial protection, the standing, the actions granted by law and the respondent decisions of courts, as well as the special procedures against the omissions of administrative bodies. To highlight the changes, the present situation will also be presented shortly.

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¹ Formulated by Fritz WERNER: *Verwaltungsrecht als konkretisiertes Verfassungsrecht*. *Deutsches Verwaltungsblatt*, 1959. 527.; and frequently used by German scholars, cf. Eberhard SCHMIDT-ASSMANN: *Das allgemeine Verwaltungsrecht als Ordnungsidee*. Berlin–Heidelberg, Springer, ²2006. 10.; or Rainer PITSCHAS: *Neues Verwaltungsrecht im reflexiven sozialen Rechtsstaat*. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Sectio Iuridica*, Vol. LIV., 2013. 34.

1.2. The long way to the Hungarian Code on Administrative Court Procedure

After the Communist takeover, administrative jurisdiction was abolished in 1949 according to the principles of the unity of power and the unity of the judiciary. In some – very few – administrative matters, however, the possibility of access to ordinary courts remained: the Administrative Procedure Act allowed for judicial review in five categories of cases, but which were of marginal importance. The administrative court procedure was then regarded as a special type of administrative procedure and therefore governed by the Administrative Procedure Act. It was only in 1972 that Chapter XX, entitled ‘Review of administrative decisions’ was inserted into the Code of Civil Procedure (CCP). Thus, the administrative court procedure was conceived as a special civil process and therefore fell within the jurisdiction of civil justice.

In December 1990, the Constitutional Court found the enumerative regulation of the administrative acts which can be brought before court unconstitutional, and smashed the rules regulating access to court, and obliged Parliament to find a lawful solution by 31 March 1991.² As these three months didn’t allow for sufficient time for in-depth preparation, the law 1991: XXVI. on the extension of access to court in administrative matters was enacted to provisionally grant access to court against authoritative administrative decisions in general. The extension included certain further decisions by local self-government bodies and also created the possibility for special regulations opening access to justice in other administrative decisions. These latter two categories are important in respect of educational rights, as the local self-government were at that time responsible for the provision of educational public services, thus the maintenance of schools. The head of the territorial government office could bring annulment actions against the decisions of local government as a maintaining organ. With the other extension, the Public Education Act opened access to court against the most significant school decisions causing unlawful harm: after filing an appeal to the maintaining organization of the school, the judicial review of the appellate decision was made possible.³

The new constitution, enacted in 2011, the Basic Law of Hungary allowed in Article 25 for certain ‘groups of affairs’ – in particular for administrative and for labour disputes – the creation of specialized courts.⁴ But instead of setting up independent administrative courts, the legislator simply created so called ‘administrative and labour courts’, which meant, that the administrative judges were transferred from ordinary courts to the already existent labour courts, which are situated at the lowest level of the judiciary.⁵ No changes were made to the administrative court procedure at that time. In the beginning of 2015, the Hungarian government adopted the concept

² Decision Nr. 32/1990. (XII. 21.) AB of the Constitutional Court.

³ §§ 37–40 of the Public Education Act.

⁴ On the changes of the constitutional framework of legal protection against administration cf. Krisztina ROZSNYAI: Änderungen im System des Verwaltungsrechtsschutzes in Ungarn. *Die Öffentliche Verwaltung*, vol. 65, 2013/9. 335–342.

⁵ The administrative and labour courts started to function on 1st of January 2013.

of the codification of the new CCP. It was at this point, that it also decided not to regulate administrative court procedures as a special civil procedure. The minister of justice was ordered to start codification work in respect of the rules of administrative court procedures. The concept for the codification was adopted in May 2015 by the government and subsequently, the draft of the Code was presented to the public on 31 March. The draft law was passed at the end of September to the Parliament.⁶

The codification work was centered around the principle of effective judicial protection. Four directions of effectivity have been identified: on the one hand, the granting of subjective legal protection complemented by elements of objective control of legality, on the other hand the granting of seamless judicial protection, against all forms of administrative action, thirdly the effectivity in time, and fourth the effectivity as regards the procedural equality of arms.

2. Main features of the administrative court procedure connected to the justiciability of educational rights

2.1. Widening the scope of judicial protection

As we can see, at present, judicial protection is ensured generally only against concrete authoritative decisions of authorities brought in administrative procedures. Of course, time has already proven that not all administrative court procedures fit into this framework, which resulted in the creation of special procedures, like the so-called 'non-contentious administrative judicial procedures', which can be filed against omissions in administrative procedures of administrative authorities and some procedural decisions, like the decision of stay of an administrative procedure or its ending without deciding on the merits. This led to a fragmentation of the rules on administrative court procedures. There are at present numerous special rules that widen the scope of judicial protection. To mention only the Public Education Act, administrative courts review the decisions of the maintaining organ of the school concerning unlawful acts of the school. The decisions of local self governments (still responsible for some public services in the field of education, like education in kindergartens) can be sued by the county government office which is responsible for the supervision of local governments.

According to the new Code, all administrative activity of administrative organs, which is regulated by administrative law, can be reviewed by court. Activity is the action and the omission of action which is aimed at producing or factually produces legal consequences, i.e. changes the legal situation of a person. Thus, it does not matter anymore, if the concrete action of an administrative organ was governed by the Act on Administrative Procedures, neither if it was an authority or an

⁶ The Parliament enacted the code on 6th December, but the President of State referred it to the Constitutional Court because of some elements of the regulation of the competence of courts. After the decision of the Constitutional Court, the draft was altered accordingly and enacted on 20 February 2017.

administrative organ without exercising authoritative powers. By this change, the activity of administrative organs in the field of service provision can also be subject to review by administrative courts. In the field of service provision, administrative organs exercise numerous activities which can be deemed as administrative activity governed by administrative law, either in connection with the maintenance of institutions providing public services, like public education, or in connection with administrative contracts by which administrative organs organize (mostly by outsourcing) the provision of public services. In both cases, there will be numerous decisions or omissions, which alter the legal situation of individuals.

During the codification process questions arose whether the activity of public service providers, (and this way also schools and other institutions providing educational public services) should be directly susceptible to judicial review. But it seemed to be more appropriate to first give the maintaining organ the possibility for review, as most disputes can be solved this way more easily. Also, this would have given rise to quite many conceptual questions connected to the basic questions of the notion of public service, which would have placed the Hungarian judiciary and legislation under too heavy pressure.

Another important direction of the widening of the scope of judicial protection is the reviewability of the normative acts of non-legislative nature issued by administrative organizations. It is not hard to convey that these acts issued by the maintaining organization regulating the functioning of public institutions providing public services can also have strong impact on the position of users of public services. School rules for example can contain rules which are in connection with the acceptability of education. These normative regulations, which are not legislative instruments, can – according to the rules of the Code – be brought before court in connection with individual acts, which apply these regulations. This ensures the seamlessness of judicial protection. Of course, this will not make void the functioning of ombudsmen, as there are numerous situations where there are no individual acts flowing from these regulations or they do not directly infringe rights or legal interests. This possibility can also in the long run foster the creation of rules of norm setting of administrative organs, like the rules contained in the model rules of ReNEUAL⁷ or in the Administrative Procedure Act of 1946 of the United States.⁸

2.2. Standing

The other crucial element of justiciability in general is the question of standing: who is allowed to ask for review, who can bring his plea before court? In this respect, the Code makes the rules concerning authoritative decisions to a fully general rule:

⁷ The ReNEUAL Model Rules on EU Administrative Procedure, Book II., at <http://www.reneual.eu/>

⁸ For a comparison of the two sets of rules cf. Anna FORGÁCS: Administrative Rule-Making based on the ReNEUAL Model Rules. In: Balázs GERENCSÉR – Lilla BERKES – András Zs. VARGA (eds.): *Current Issues of the National and EU Administrative Procedures (the ReNEUAL Model Rules)*. Budapest, Pázmány Press, 2015. 441–446.

Any person who invokes an immediate infringement of his or her right or legitimate interest, can file an action for review. Besides this group, public bodies invoking an infringement within their area of responsibility also have standing, as well as authorities supervising autonomous organizations (like local governments, minority councils or professional self-regulating bodies, chambers)⁹. The law may also grant standing to civil organizations defending common interests or human rights. Latter possibility has a growing importance in relation to collective litigation, in respect of administrative court procedures mostly in cases of environmental protection and consumer protection¹⁰, but could also be a forceful instrument for the enforcement of educational rights.¹¹ The Code thus gives a general possibility to grant standing to civil organizations, but the legislator of the special field – in this case responsible for education – has to gauge this possibility.

A question highly connected to standing is the possibility of taking part in administrative court procedures by third parties. Those persons and organizations who have standing, also have the possibility to take part as third parties in administrative court procedures. They enjoy almost the same rights as the parties, with exception of the withdrawal of the action.

3. Actions ad decisions

3.1. Types of action

The widening of access to courts through this general formulation of administrative activity needs several types of actions, as the traditional annulment action against decisions is not able to cover all sorts of pleas. The mandatory action makes it possible to ask the court to order the administration to perform, or to refrain from performing, for example in relations in connection with administrative contracts. A very important part of unlawfulness of administration resorts from the non-fulfillment of positive obligations posed on administrative organs. The Code will thus also provide for an action against omission. And of course, there are also situations, where we face factual deeds which cannot be annulled, but only deemed unlawful. For these cases, the Code makes possible for the court to pronounce a declaratory decision, given that an other type of decision could be brought. Of course, the plaintiff has to prove that he has a special interest in having the court declare an activity unlawful. The declaration of the unlawfulness of the custodial disposition of the police by

⁹ Cf. István HOFFMAN: The Legal Status of the Procedure of Legal Supervision of the Hungarian Local Governments: An International and Historical Outlook. In: GERENCSÉR–BERKES–VARGA (2015) op. cit. 373–384.

¹⁰ Cf. Krisztina ROZSNYAI: Public Participation In Administrative Procedures: Possibilities And Recent Developments In Hungary. *Curentul Juridic*, vol. 58., no. 3. (2014) 50–66.

¹¹ At least this is a possible interference from the civil court procedures led by civil organisations against ethnic segregation in Hungary, e.g. the case underlying EBH 2015. P.6. of the Curia (April 22, 2015), or *Case Horvath and Kiss v. Hungary*, ECLI:CE:ECHR:2013:0129JUD001114611.

the administrative court for example will be a precondition for filing an action for compensation.

The diversification of the types of actions necessitates the diversification of procedural rules: the Code is therefore divided into a general part containing the general rules on courts and on the procedure of the first instance court, on its decisions, on the rules of remedies, with view to annulment actions. These general rules are followed by rules on the special procedures before administrative courts, among which we can find the mandatory procedure, the omission procedure or the procedures for the execution of court decisions.

3.2. Decisions

The types of decisions correspond to the types of actions, of course: there are annulment decisions, mandatory decisions, omission judgements and declaratory judgements, and of course some types of judgements corresponding to special procedures. As a new field, the judgments in connection with administrative contracts will get a systematic regulation. As there are no general substantive rules on administrative contracts, this may lead to the evolvement of such substantive rules, which would be very important pertaining service provision contracts. These are very often used in the field of education, because – as a counter-tendency to the nationalization of educational public service provision, i.e. transferring responsibilities from local governments to the central government¹² – churches and minority self-government organs take over more and more schools.

In the field of annulment decisions, the court can either annul or reform the decision of the administration if it is found unlawful. Borders of these possibilities constitute on one hand the procedural errors that did not have an effect on the merits of the case, and on the other hand decisions implying a margin of appreciation. In latter cases, the court can only review the compliance by the administrative authority with the limits and objective of the power, and with other rules which govern the exercise of discretion exercise of powers, as well as the procedural aspects of the decision making process, but does not conduct a separate assessment of the expediency of a discretionary decision. The possibility to reform administrative decisions (i.e. to remove the contested decision and decide the merits of the case) is not a new feature, but as long as at present the court can only reform decisions if it is given reformatory powers by the special legislator, according to the rules of the Code this will be a general possibility of the court, if the nature of the case makes this possible and the facts of the case are clear and all relevant data is available for the decision. The nature of the case only allows reformation, if the court does not engage by it in an exercise of the discretionary power in the place of the administrative authority. Reformatory powers can help ending administrative disputes in reasonable time, as in lots of cases

¹² Cf. István HOFFMAN – János FAZEKAS – Krisztina ROZSNYAI: Concentrating or Centralising Public Services? The Changing Roles of the Hungarian Inter-municipal Associations in the last Decades. *Lex localis – Journal of Local Self-Government*, vol. 14., no. 3. (2016) 461–467.

the removal of the contested administrative act and the new procedure would cause harm to the plaintiff through the time still needed to get a new final decision in his case.

3.3. Interim relief

Of course, the dimension of time of judicial protection is also very important. If the court can only grant protection with its final decisions that will in numerous cases – in the field of education this is extremely true – be not effective. As Rec(2004)20 formulates this in connection with the effectiveness of judicial protection: “The tribunal should be competent to grant provisional measures of protection pending the outcome of the proceedings.”¹³ It is thus very important to give the court sufficient means to stop administrative action in advance of the judgment. The Code sets forth a set of tools of interim relief. At the one hand, the court can give suspensory effect to the administrative action, which cannot be performed until the judgement is delivered. This is presently also available in a narrower form, as the setting out of the execution of administrative decisions. As the filing of an action does not have an automatic suspensory effect, this is a very important tool. As in educational cases the suspensory effect of the filing of an action is often granted by law, in this field, the inverse tool of the court to lift the suspensory effect of the filing of the action will be used also quite often. There are of course cases, where the mere prohibition of acting will not provide for effective protection. The judge has therefore also the possibility to order interim measures, in the scope of the judgement, like for example making a public service he was denied access to by the administration available to the plaintiff for the duration of the procedure. The taking of evidence in advance is the tool completing the system. When deciding on granting interim relief, the judge has to ponder *periculum in mora* and strike a fair balance between private and public interests.

4. Omissions of administrative bodies

4.1. The scope of omission procedures

The omission procedure will hopefully be an apt instrument in issues connected with positive obligations flowing from the right to education. An omission is the absence of the performance of an action prescribed by law, which can be sued before courts in an omission procedure. The court only pronounces that there is an obligation prescribed by law, which the administrative organ responsible for it did not come after. According to the rules of the Code, the administrative organ is obliged in this case to carry out the action by law. As the Code makes suable the duties not only of

¹³ Recommendation Rec (2004)20 of the Committee of Ministers of the Council of Europe to member states on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies).

authoritative action, but also of service provision, there was need for a differentiated regulation of the omission decision of the court. Against omissions in administrative authoritative procedures, i.e. the omission of issuing an authoritative decision (mostly permits), the above-mentioned non-contentious administrative court procedures are already a functioning means. Other types of obligations, in connection for example with service provision, today are almost not enforceable. Only the local government office responsible for the legal supervision of local governments can bring omissions outside authoritative procedures before court at present. The code will guarantee access to justice also against all types of omissions for all persons and organization with standing. As this field is a very large one, with different types of obligations, varying in their conditionality or finality, the Code had to strike a balance to ensure access to courts and the non-engulfment of courts, which would render access to court practically ineffective. It thus differentiates among omissions according to the criteria, whether there is a time limit given by law for the performance of an obligation: in former, there are mainly the authoritative decisions and decisions in internal appellate procedures. Obligations outside of this area seldom are bound to a time limit. In these cases, the court has a margin of appreciation: if there is no overriding reason relating to the public interest or to the interests of the plaintiff, no omission has to be stated.

4.2. Enforcement of omission decisions

Another important field of the non-fulfillment of positive obligations is that of the non-execution of judicial decisions. There are two types of judicial decisions, where court enforcement mechanisms do not work: these are the judgements ordering the repeating of procedures and the omission judgements, according to which the administrative organ has to fulfill the obligations stated to be omitted by court. At present, there are only tools for protection against such omissions in the field of judicial decisions ordering the reiteration of authoritative procedures, but these are lengthy and complicated procedures. According to the new rules, the court will have several possibilities, if the plaintiff signalizes the non-fulfillment of its judgment. After asking for clarification from the administrative organ, if the clarification is not satisfactory, the court can impose a fine on the administration. The fine is not the unique tool for achieving the fulfillment: the court may also order another administrative organ or – according to the type of omission, of course – the supervisory authority to perform the duty in replacement. If these tools are not possible, the courts can order provisional measures until the administrative organ fulfills its obligations flowing from the judgement. In case of a repetitive omission, the fining of the leader of the administrative organ is also possible, which is deemed to be an effective measure against obstruction of administration in cases where the other tools in the hand of the judge do not work.

5. Closing remarks

By enhancing the effectiveness of judicial protection against administration, the Code will provide a good framework for a strong judicial review. The general rule of access to court, the differentiated system of actions and decisions form a system that fosters autonomy of judges and the broadening of the horizon of their judicial work. The aspects of human rights will be able to appear more frequently, and this will hopefully lead to a systematic case law which has more and more links to constitutional case law and will also foster the dialogue between administrative courts and the constitutional court. The judiciary will have an important role of interpreting the rules of the Code in accordance with its aim to guarantee effective judicial protection and to exercise substantive control of legality over the administration enforcing both its negative and positive obligations. As there are numerous new institutions and rules regarding judicial review, it will be a great and important challenge to interpret the new rules autonomously, proactively not allowing the present case law to hinder the improvements envisaged by the Court.

ONE MILLION ASYLUM SEEKERS IN GERMANY (2015/16)

The Role of the Civil Society in their Education and Training

Ingo RICHTER

President of Irmgard Coninx Foundation)

1. Introduction

In the first days of September 2015, approximately 3,000 refugees were stranded here in Budapest at the railway station waiting for the chance to get to Austria or Germany. The German Chancellor, Angela Merkel, made a lonely decision, to let them in. She decided to admit them into Germany and have them registered. Although, according to the Dublin regulations of the EU, the registration had to be done here in Hungary, or elsewhere, prior to entering the EU.

We all know what happened next: The decision of Chancellor Merkel was understood as an invitation to come to Germany. In the Balkans, in Syria, in the other Arabic states and in North Africa, they believed they would be welcomed in Germany. Meanwhile, the hauler gangs made them believe this too and profited from it. From September 2015 to August 2016, more than 1 million people arrived in Germany and asked for asylum or recognition as a refugee of war.

They were there and had to be registered, fed, housed, cared for, distributed, transported, etc., and their applications for asylum had to be processed. Nobody was prepared for that. And then, Frau Merkel made the famous statement: “Wir schaffen das” – “We will manage.”

The famous and effective German administration was not prepared to manage this, and without the massive intervention of the German Civil Society organizations, the problem would not have been solved.

As we talk here about the role of the Civil Society for the awareness, advocacy and accountability of the Right to Education, I will report about the German experience in the refugee crisis last year.

Let me begin with some personal experiences in Berlin, where I live. Here are some snap shots:

1. Our son, a journalist, lives with his family – three little daughters – in downtown Berlin. In the first days of September, when the refugees arrived, they had to wait for hours in long lines to get registered. So, where were they to sleep? Neighbours were asked to give them a bed for a night. My son and his family did. Twice, late at night, after midnight, some tired young refugees came, had some food, and slept on mattresses for a couple of hours before they left to cue up again.
2. Our neighbour, a professor of education, some 100 kilos of weight, put together some of his old suits and coats and brought them to the clothing store for refugees. But, the mostly young refugees, were too slender for those clothes.
3. A friend of ours, a member of the green party, who organized the help for refugees in Berlin, asked for 200 lunch boxes and some skateboards for the kids. So, we bought 200 plastic lunch boxes for 1€ each and some used skateboards and brought them to the school for refugees.
4. Another friend, a former teacher, had taught a course “German for Foreigners” to American students at the university for many years. She wanted to teach German to the refugees at a school for adults where there was an urgent demand for teachers. But, she was not hired by the administration who admitted only those teachers who completed a three-week special training for adult language learning in Würzburg.
5. My wife and I wanted to “adopt” – so to speak – a family with children in order to help them to get through the registration process. No, such kind of so called “adoption” or “sponsorship” was allowed by law. This could only be done informally.
6. There was the case of another friend who runs a small factory for marmalade production in the countryside. She employs 25 seasonal workers from Poland. Last autumn, she asked 25 asylum seekers in a nearby home to help her. The mayor refused because they had no working permit. She just said: “I don’t care.”
7. Another woman, in the South German countryside, where unemployment is very low, managed to find jobs for 19 refugees who lived in a nearby shelter. These refugees had nothing to do. She just called employers again and again until they resigned and employed everybody. The last one, a 30 year old computer engineer from Nigeria, a Muslim, took a job as an apprentice with a butcher where he produces pork sausages.
8. I, myself, tried to become a legal guardian for a couple of unaccompanied young refugees who could not ask for asylum themselves because they were minors. Although, I am a law professor who has taught family law for years, I was not permitted to without a special training for legal guardians, and the money for that training had run out.

I could go on with these kind of stories for hours, but I will not. They show that the German Civil Society was, in fact, able to create a friendly climate, a “Willkommenskultur” as we call it, to welcome more than one million refugees in

only one year. It was a challenge and nobody thought that the German Civil Society would be able to do that. There were some bureaucratic barriers, and there was some local resistance too, but finally, the Civil Society succeeded and overcame both the resistance and the bureaucratic barriers.

Nevertheless, as you will have read in the papers, there were demonstrations against the refugees and against Frau Merkel. A new anti-refugee movement was founded and it was very successful. A right wing anti-European political party turned against the Chancellor's refugee politics and collected up to 15% of the vote. Asylum homes were set on fire and Neo-Nazi gangs and refugee groups fought in the streets at some places. There was a growing security and criminal problem, and, yes, some of the refugees turned out to be terrorists sent by the Islamic State.

The society was split, and nobody knew whether it would become a wound in the society which cannot be healed. Only time and integration will heal that wound, and integration means education, vocational training and jobs. Therefore, I will now talk in a more systematic way on the function of the Civil Society in providing education, training and jobs for the refugees. I will follow our usual 3 A – scheme of awareness, advocacy and accountability.

2. Awareness of the Civil Society for the right to education of refugees.

Thesis: Within the German Civil Society, there is a high awareness for the fact that education and training are absolutely necessary for the integration of the refugees into the German society and that this is in the interest of the society, but, even Civil Society actors are not aware of the fact that the refugees have a right to education and training.

2.1. Information

The information level of the German public on the refugee problem is very high. For at least six months, the refugee numbers were top news. And, when Angela Merkel came under attack this spring, the refugee problem again was in the news. The media ran front stories about demonstrations, about local conflicts over the housing of the refugees, and about the sexual assaults on German girls as in Cologne on New Year's Eve. The administration regularly issues the relevant data about the arrivals of refugees and the processing of their asylum applications. Big Civil Society organizations, like the welfare organizations, distribute information about the so called refugee crisis too. One could say that there is even too much information on the refugee problem. But, the information is targeted at the social cohesion, at the upcoming social conflicts and at the possible consequences for the political system. There is no information on the fact that the refugees have a right to education in Germany and that this right is guaranteed by international law.

2.2. Communication

All over Germany last winter, the refugee crisis was the main party talk. Everybody gave his or her opinion. The social networks were full of divergent attitudes and, if somebody came up with a particular view, whether in favor or not for Frau Merkel's refugee policy, a "shit storm" came over him or her with hundreds and thousands of tweets leaving the author completely helpless. Journalists and politicians particularly came under attack in the networks. It was a communication of the deaf. Nobody listened anymore to what the other had to say. The right of speech does not imply the duty to listen. Communication about the right to education and training for refugees is therefore absolutely necessary. It must be made clear that the right to education under international law is a right and not a privilege granted in the interest of the society. Particularly, the lawyers must speak up and explain the international law. Therefore, this spring our journal "Youth and Education Law" (Recht der Jugend und des Bildungswesens) organized a conference for lawyers and administrators in order to facilitate the communication between them on the legal aspects of the refugee problems in education.

2.3. Documentation

The existing information on the refugees and the asylum seekers must be documented. Such a documentation can be a source for further information and communication. On the internet, you will find a lot of information on asylum laws and on the procedures, and it is very complicated to sort them out, even for lawyers like me. Unfortunately, the legal regulations on education and training are not well documented. Although, compared to the immigration and asylum laws, they are quite simple. Therefore, we will document the papers of the conference which I mentioned above in our journal.

2.4. Institutionalization

Germany Civil Society is well organized. The freedom of association as in article 9 I of our constitution guarantees the founding and funding as well as the activities of the associations. Therefore, we have a lot of NGOs which articulate private and public interests. The rights of the religious associations (art. 4) and of the trade unions (art. 9 III) to act as NGOs are protected as well. They all are very active in public life, but they do not have standing in court litigation, except for the environmental NGOs. And, we have NGOs that particularly fight for the rights of migrants and asylum seekers, as e.g. a NGO called "Pro Asyl" and others. However, there is no NGO which has the right to education and training of refugees as a focus. Therefore, it is time to found and fund an NGO under the name of "Refugees' Right to Education." On the European level, this could be a task for ELA.

3. Civil Society Advocacy for the Right to Education and Training of Refugees.

Thesis: The right to education as a fundamental right is not laid down in the German Constitution, although the constitution can be interpreted in the sense that there is a fundamental right to education. As Germany is a federal state, the right to education has been granted in the state school laws. The Civil Society should fight for the Constitutionalization of the right to education as a fundamental right on the federal level.

Federal integration law. In order to cope with the refugee problem this summer – that is one year after the beginning of the massive immigration wave – the federal parliament passed the new integration law. This does not mention the right to education for refugees. As the federation has no say in school education, the integration law only regulates labor market problems. It namely asks all refugees to participate in: an integration course of approximately 700 hours, 100 hours of general information, 600 hours German language course that is nearly half a year. In addition, it asks the refugees to participate in community work, called “Flüchtlingsintegrationsmaßnahmen” if the local communities provide for such work, but education and training are not included in this. It also supports the vocational training of apprentices, if the refugees fulfill the training conditions and find a trainee position (333€ per month) or a one year vocational preparation course (310€ per month).

Civil Society organizations must advocate for the implementation of the right to education and training on the federal level, particularly for the access of refugees to vocational training, and for the additional education and training within the community work programs.

3.1. State School Law

Children under 6 years of age in Germany have the right to preschool education and compulsory schooling begins at age 6. According to international law, to go to school is a human right, not only for nationals, but also for foreigners beginning the first day of their stay in the country. There is no waiting period. Nevertheless, fourteen of the German states provide for schooling of refugee children only after six months and two states after three months. The reason given is the uncertainty of residence. Indeed, it takes a couple of weeks to distribute the refugees in the country and to assign permanent homes to them. But, this is no reason to deny the right to education to the children. We must realize that thousands of young men, 14 -18 years of age, live in camps for six months just doing nothing! Civil Society organizations must insist on the fulfillment of the state obligation to provide for schooling beginning the very first day refugees and their children are in the country. (When I was a refugee myself from Pomerania to Lower Saxony in the spring of 1945, I had to go to school as a first grader during our three-week temporary stay in a Saxonian town which every day was bombed by the allied forces.)

After the waiting period, the refugee children have to attend classes which euphemistically are called “Welcome Classes.” This means, as long as they do not

know enough German to follow the instruction in regular classes, they are segregated in order to properly learn German. In Berlin, e.g. there are 530 welcome classes with nearly 6,000 children. When they know enough German, these kids should go to the regular classes. But, who knows when? And, one can doubt that segregation is better for language learning than integration. In these classes, there are refugee children from many countries of the world together who do not meet their German counterparts, and that is not a good condition for integration. The Civil Society organizations should keep an eye on these segregated classes and promote the transfer of the children into the regular classes.

3.2. Higher Education Law

In German constitutional law, there is a right of access to the university which can be restricted for qualification reasons and exceptionally also for capacity reasons. But, it is the right of equal access, and therefore, this right is also a right of the refugees, if they fulfill the study requirements. And there is also art. 13 al.2 c of the ICESCR which asks the states to make higher education accessible to everybody on an equal basis, particularly free of tuition. In Germany, it is up to the universities to decide on the access of refugees to the universities. They did so at once last autumn, granting the status of the so called "guest students" to the refugees who fulfilled the requirements, and this was done before their applications for asylum were decided upon. As guest students, the refugees are entitled to the German study grants. I do not have any data on the numbers of guest students and not of the refugees who were registered as regular students. The Civil Society organizations, particularly the university administration and the students' unions, should report on this.

3.3. Lobbying

There are two big NGOs which try to promote the interest in social welfare and in children's rights. One is called "Deutscher Verein für öffentliche und private Fürsorge" founded more than 130 years ago at the times of the "Kaiser" which is an interesting organization insofar as it tries to lobby for private as well as for the public interest in welfare. This is in fact an organization of the local communities and the so called "Big Five" and these are the Protestant Church, the Catholic Church, the Jewish Community, the labour unions and a "mixed club" of welfare organizations. The Muslim welfare organizations were not included. The second organization is the so-called "National Coalition for the Rights of the Child" founded after the ratification of the UN Convention of the Rights of the Child (CRC). Both organizations should try to promote the right to education and training by lobbying for the implementation of this right. Particularly, the "National Coalition" must have an interest in this subject because the German handling of the right to education as of art. 28 of the CRC will be under review of the UN Children's Commission shortly.

3.4. Litigation

To my knowledge, up to now, there are no cases. German courts until now did not hand down decisions on the right to education and training of refugees, and to my knowledge, the German administration has not been sued because of the three to six month waiting period. Also, the “Welcome Classes” and the segregation of children on the basis of their language competencies have not come under legal attack. The Civil Society organizations should try to make a case and bring it to court, whether it is because of the illegal waiting period or the problematic segregation in “Welcome Classes.” Then, the administrative courts will have to decide on the right to education and training of refugees or transfer the case to the German Constitutional Court or the European Court for Human Rights. I tried to put together a dossier, but I could not find an NGO to help me to build a suitable case.

4. Accountability for the Right to Education of Refugees.

Thesis: Accountability becomes a big problem when public services are outsourced under very difficult conditions such as the refugee crisis last year. Nevertheless, the Civil Society has a right and a duty to hold public as well as private organizations accountable for the fulfillment of the right to education and training.

4.1. National Reporting

The refugees in Germany are registered by the local administration, e.g. the local communities, where they arrive. Then, they are distributed to the various states according to the population of the states. Their applications for asylum or recognition as refugees of war are sent to the Federal Migration Agency (Bundesamt für Migration und Flüchtlinge – BAMF). In case of recognition, a residence is assigned to the refugees; they now have a right to stay there for a limited time and they receive a work permit. Basically, they have the freedom of movement. In the case of rejection of the asylum, the refugees should be deported to their country of origin, but mostly this is not the case because they get the so called secondary protection under European law. In the case of rejection, the asylum seeker can sue the government and many of them do so, with the help of Civil Society lawyers. The BAMF, the federal migration agency, reports regularly on its decisions; therefore, the information is very good.

The local communities, which are responsible for that housing and the social aid to refugees, mostly outsource their duties to private agencies, because they do not have the administrative means to fulfill these themselves. In this case, there is a great variety of contractors, e.g. charities, welfare organizations as well as private profit-oriented businesses. In this case, reporting and control very often are deficient, and Civil Society organizations have to take over the control and ask for accountability. In fact, up to now, there is no effective control and accountability. As the NGOs themselves can be contractors, they monitor themselves, so to speak.

The state educational administration is responsible for the accountability in the case of the right to education as far as the schools are concerned. They fulfill their

duty and do report regularly but very often they lack the data because the collection of the relevant data is in the hand of the schools and the local communities.

The federal labor administration is accountable for the vocational training, particularly for the integration and language courses. These, too, are outsourced and difficult to control for the same reasons as in the case of the local communities.

As we have so many different agencies on the federal, the state and the local level, not regarding the welfare organizations and the private business, Germany urgently needs a central reporting system for the refugee politics and particularly the right to education and training. However, it does not exist. Therefore, seven foundations founded an expert organization (Sachverständigenrat Deutscher Stiftungen für Integration und Migration) in order to organize the reporting. Their bi-annual report is the best source for the accountability of the right to education in Germany.

4.2. International reporting

The German government, under the CRC, has to report every five years to the Secretary General of the United Nations on the implementation of the right to education laid down in art. 28 of the CRC as well as on all the other children's rights. It did so for the last time in 2010, long before the present refugee crisis, and the concluding observations of the Children's Commission date from the year 2012. They cannot be very effective for the implementation of the right to education in the present refugee crisis. Nevertheless, the Civil Society organizations, particularly the National Coalition for the Rights of the Child, are prepared to deliver the so called "shadow report" which will be taken into account by the children's commission when they report on Germany for the next time. The same is true for the Human Rights Council of the United Nations which is responsible for the implementation of the ICCPR and the ICESCR. Their reporting comes too late to be effective, not to speak about the other problems which arise within these international bodies.

4.3. Evaluation

One million refugees within one year, 25% under age 18, which is school age. This was, and still is, an extraordinary challenge for the German Civil Society. 250,000 students had to be integrated into the school system, and many thousands in the preschool system and Higher Education and Vocational Training. They all have the right to education and training under international law and this right must be fulfilled by the federation and the states. It is still too early to ask for an evaluation, to ask and answer the question if the German Civil Society did fulfill this right and how it coped with the enormous difficulties. Now, it is time to discuss the question of whether a European Association, like ELA, should be prepared to take over such a task if it is asked to do so by the German government. It would be worthwhile!

THE ROLE OF INTERNATIONAL HUMAN RIGHTS MECHANISMS IN STRENGTHENING JUSTICIABILITY OF THE RIGHT TO EDUCATION IN THE RUSSIAN FEDERATION¹

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The right to education is a universally recognised human right. Article 26 of the Universal Declaration of Human Rights proclaims the right of everyone to education.² Article 13 of the International Covenant on Economic, Social and Cultural Rights recognises the right to education and sets out its main dimensions with the view of their progressive realisation.³ Apart from these two most obvious standards, other universal human rights instruments also reflect a certain aspect of the right to education. Although they are often neglected, they are indispensable for a comprehensive analysis of all dimensions of this right. For instance, the International Covenant on Civil and Political Rights contains non-discrimination provisions that are essential for the provision of education on the basis of equality of all.⁴ These provisions correspond to UNESCO Convention against Discrimination in Education.⁵

¹ This article is an updated, reduced and reworked version of my dissertation awarded LLM Exeter Club annual prize for the best LLM dissertation at the University of Exeter 2012/13. I am most grateful to Dr Ana Beduschi and Mr Michael Sanderson from the Law School of University of Exeter whose expert advice and insightful comments have led to innumerable improvements of the original version. The errors that remain are, of course, my own.

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² UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR).

³ International Covenant on Economic, Social and Cultural Rights (adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966) (ICESCR).

⁴ International Covenant on Civil and Political Rights (adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966) (ICCPR). See arts. 20(2), 24(1), 26.

⁵ UN Educational, Scientific and Cultural Organisation, Convention Against Discrimination in Education (adopted by UNESCO General Conference on 14 December 1960) (CADE).

International Convention on the Elimination of All Forms of Racial Discrimination contains a prohibition of race-related discrimination of the right to education and the urge to combat prejudices through education.⁶ Convention on the Elimination of All Forms of Discrimination against Women comprises numerous provisions on equal rights of men and women in education,⁷ while Convention on the Rights of the Child calls for recognition of the right to education of all children including those with disabilities, and for elimination of violence, exploitation and drug addiction through educational measures.⁸ Furthermore, International Convention on the Rights of Persons with Disabilities urges governments to ensure ‘inclusive education system at all levels and life long learning’ for people with disabilities,⁹ while International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families specifically mentions children of migrant workers and their ‘basic right of access to education on the basis of equality of treatment with nationals of the State concerned’.¹⁰ The Convention also establishes the right to education of migrant workers themselves and of members of their families.¹¹

According to the OHCHR since the adoption of the UDHR in 1948, ‘all UN Member States have ratified at least one core international human rights treaty, and 80 per cent have ratified four or more’.¹² The right to education is, thus, truly universally recognised and has been shaped in all its complexity by the binding acquis of international human rights treaties. Not only the right to education is globally endorsed, but it is also widely represented in binding regional conventions.¹³ Moreover, the right to education is mentioned in the overwhelming majority – 90 per cent – of the world’s constitutions.¹⁴ With such worldwide recognition one may

⁶ International Convention on the Elimination of All Forms of Racial Discrimination (adopted by General Assembly Resolution 2106 (XX) of 21 December 1965) (CERD). See paras 5(e)(v) and 7.

⁷ Convention on the Elimination of All Forms of Discrimination against Women (adopted by the United Nations General Assembly 18 December 1979) (CEDAW), arts 10, 14(2)(d), 16(1)(e).

⁸ Convention on the Rights of the Child (adopted by General Assembly Resolution 44/25 of 20 November 1989) (CRC). See art 23, arts 28, 29, arts 19, 32, 33.

⁹ International Convention on the Rights of Persons with Disabilities (adopted by General Assembly Resolution A/RES/61/177 of 20 December 2006) (CRPD), art 24.

¹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted by General Assembly resolution 45/158 of 18 December 1990) (CMW), art 30.

¹¹ See arts 43 (1)(a) and 45 (1)(a).

¹² ‘Human Rights Bodies’, www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx

¹³ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950, art 2 of the Protocol 1 (Paris 20 March 1952) as amended by Protocol No. 11; Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163, arts 7 (1) and (3), 10 (1), 15 (1), 17 (1)(a) and (2), 30 (a); American Convention on Human Rights ‘Pact of San Jose, Costa Rica’ (B-32), arts 12 (4), 26; African Charter on Human and Peoples’ Rights (‘Banjul Charter’), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art 17.

¹⁴ Comparative Constitutions Project, directed by Professors Zachary ELKINS, Tom GINSBURG, and James MELTON, www.comparativeconstitutionsproject.org. See also, Jan DE GROOF: Legal Framework for

assume that the right to education is universally realised and the situation with the protection is just as ideal.

However, the reality is different. Today 57 million children throughout the world still do not have access to schools.¹⁵ These are children involved in illegal labour and soldier children, girls who were forced to marry at an early age or dropped out of school due to early pregnancy, children of refugees and asylum seekers, children belonging to ethnic, national, linguistic, cultural minorities, indigenous peoples, victims of trafficking and slavery.¹⁶ 774 million adults are still illiterate.¹⁷ Schools are still destroyed in military conflicts,¹⁸ while corruption still devours lumps of educational budgets.¹⁹

From these devastating examples a conclusion can be drawn that inadequacy of efforts made by individual states and international community as a whole to respect, protect and fulfil the right of everyone to education is indeed a worldwide problem. And although both provision of education and protection of the rights of people within state's jurisdiction clearly belong to the competence of a sovereign state,²⁰ the significance of unified effort taken through international cooperation and supranational mechanisms of monitoring and protection of human rights should not be underestimated.²¹

In fact, the role that international human rights mechanisms play in strengthening the sense of accountability of states for respecting, protecting and fulfilling human rights of people within their jurisdiction is tremendous. The whole plethora of methods from dialogue, awareness raising and capacity-building to monitoring of compliance with binding human rights instruments and supranational judicial review – all count towards reinforcing national systems of realisation and protection of human rights. After all, the peoples of the world have united for the purpose of reaffirming 'faith in fundamental human rights, in the dignity and worth of the human person'.²² Moreover,

Freedom of Education. In: Charles L. GLENN – Jan DE GROOF (eds.): *Balancing Freedom, Autonomy, and Accountability in Education*. Volume 1. Oisterwijk, Wolf Legal Publishers, 2012. 25.

¹⁵ Global Education First, the UN Secretary-General's Global Initiative on Education, www.globaleducationfirst.org/malaladay.html

¹⁶ See for example a film prepared by the Office of the United Nations Special Envoy for Global Education, <http://educationenvoy.org>

¹⁷ International Literacy Day 2013: Literacy Rates are Rising, but Women and Girls Continue to Lag Behind, (UNESCO Institute for Statistics, Paris 30 August 2013). www.uis.unesco.org/literacy/Pages/data-release-map-2013.aspx?SPSLanguage=EN

¹⁸ Abed Rahim KHATIB: Islamic School was Destroyed During Israeli Military Offensive, in Gaza. *Demotix*, 30 December 2009. www.demotix.com/photo/214324/islamic-school-was-destroyed-during-israeli-military-offensive-gaza-214324

¹⁹ Transparency International: Global Corruption Report: Education. <http://blog.transparency.org/tag/global-corruption-report-education>

²⁰ See 'General Legal Obligations' and 'Specific Legal Obligations' in the CESCR General Comment No. 13 on the Right to Education adopted at the Twenty-first session of the Committee, E/C.12/1999/10 of 8 December 1999, arts 43–57.

²¹ ICESCR art 2 (1).

²² Charter of the United Nations (signed on 26 June 1945 in San Francisco) (UN Charter). Preamble.

the goal of 'promotion of the economic and social advancement of all peoples' is intended to be reached through employment of 'international machinery'.²³

As a matter of illustration it is worth mentioning the so called '4A' concept that originated from within the UN mechanism. It was proposed in 1999 by the first Special Rapporteur on the right to education Katarina Tomaševsky and was later duplicated in the ICESCR General Comment No. 13.²⁴ This test, due to its clarity and logical, systemic nature, became a framework for state reporting under ICESCR. Through the reporting procedure and General Comments cited throughout international and domestic case law this scheme was adopted by domestic legislation to define normative content of the right to education.²⁵

The purpose of this paper is twofold. I will aim, first, to reveal how international human rights mechanisms contribute to shaping normative content of the right to education that can be effectively enforced through available system of judicial and quasi-judicial protection. In order to render precision to the paper and considering its limits I will choose examples from a particular domestic jurisdiction – Russian Federation. Second, I will focus on demonstrating how these mechanisms can be used to indicate and address inadequacies of implementation of the internationally recognised right to education and to bridge existing gaps of protection of this right.

The structure of this paper reflects its aims and purposes. The first section is dedicated to exploration of existing definitions of justiciability as a legal concept. It will particularly focus on challenges of justiciability of economic, social and cultural rights. The second section will in greater detail analyse the applicability of different concepts of justiciability to the right to education disaggregated by dimensions of the right to education at both international and domestic levels.

This structure will support the main argument of this paper: the idea that justiciability of the right to education in its various dimensions can be positively affected by the practice of international human rights mechanisms.

²³ Ibid.

²⁴ These are Availability, Accessibility, Acceptability and Adaptability of education, CESCR General Comment No. 13, para 6. See Katarina TOMAŠEVSKI: Preliminary report of the Special Rapporteur on the right to education (adopted at the Fifty-fifth session of the UN Commission on Human Rights, E/CN.4/1999/49 of 13 January 1999). Para 50.

²⁵ See for example *Tarantino and Others v. Italy* (Applications nos. 25851/09, 29284/09 and 64090/09, Judgment of 2 April 2013) notes 2, 4, 16, 32, 33; Constitutional Court of the Russian Federation Ruling on Admissibility No. 476-O of 16 November 2006 on *Borodina* claim; Constitutional Court of the Russian Federation Ruling on Merits No. 5-P of 15 May 2006. In Russian domestic legislation the 4A scheme is reproduced in some provisions of the Federal Law No. 273-FZ of 29 December 2012 'On Education in the Russian Federation' (Federal Law on Education): availability is ensured by public responsibility in education (arts 5(5), 6-9); accessibility is guaranteed in arts 3(1)2, 5(3), 5(5)1, 28(6)1, 41(1)8; acceptability is implied in arts 2(29); 9(1)1, 10(1)1, 11); adaptability is ensured in arts 2(1)1, 2(1)27, 3(1)7, 11(1)3.

1. Defining Justiciability

This section will explore the definition of the term justiciability in its dual nature as a judicial tool and a legal doctrine.²⁶ I will briefly mention the former concept as it is very technical and geographically specific, moreover, its application to a civil law jurisdiction, such as Russia, is not uncontroversial. I will elaborate in more detail on the latter understanding of justiciability since it will lead me to adoption of a working definition for the purposes of this paper.

1.1. Justiciability as a Judicial Tool

Considering purposes and limitations of this paper, this section will only briefly outline the concept of justiciability as a judicial tool. This concept refers, in a very technical sense, to a procedural decision of a court on admissibility of a matter for adjudication.²⁷ As summarised by Fallon lawsuits have three stages: first, the court determines justiciability, second, if the suit is justiciable, the court rules on the merits and, finally, determines the remedy.²⁸ Thus in common law jurisdictions justiciability is often understood as a statement of assessment,²⁹ synonymous to that of admissibility of a case.

Galloway cites a practical toolset for basic analysis of justiciability: ‘the What, the When, and the Who’ justiciability test.³⁰ According to Galloway, the What refers to crossing the threshold of adversity and non-collusion, it also aims at interception of political questions (such as ‘disposition of nuclear armaments, national security, foreign relations and the distribution of scarce public resources,’³¹ the latter being, arguably, one of the challenges of judicial protection of economic, social and cultural rights). The When implies meeting the requirements of ripeness, mootness and necessity, while the Who refers to the doctrine of legal standing.³²

²⁶ Thomas BARTON: Justiciability: a Theory of Judicial Problem Solving. *B.C. L. Rev.*, vol. 24, (1982–1983) 505.

²⁷ Robert S. SUMMERS: Justiciability. *The Modern Law Review*, vol. 26, no. 5, (1963) 581.; Erwin SPIRO: Justiciability. *Comp. & Int’l L.J. S. Afr.*, vol. 15, (1982) 206. (regards justiciability as antimony of substantive law); Sisay Alemahu YESHANEW: The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia. *Afr. Hum. Rts. L. J.*, vol. 8, (2008) 273.

²⁸ Richard H. FALLON, Jr.: The Linkage between Justiciability and Remedies: And Their Connections to Substantive Rights. *Virginia Law Review* vol. 92, (2006) 633–634.

²⁹ Geoffrey MARSHALL: Justiciability. In: A. G. GUEST (ed.): *Oxford Essays in Jurisprudence: a Collaborative Work*. Oxford, 1961. 267.

³⁰ Russell W. GALLOWAY: Basic Justiciability Analysis. *Santa Clara L. Rev.* vol. 30, (1990) 912.

³¹ B.V. HARRIS: Judicial Review, Justiciability and the Prerogative of Mercy. *Cambridge L. J.*, vol. 62, (2003) 631–634.

³² GALLOWAY op. cit. 912. See also Erwin CHEREMINSKY: A Unified Approach to Justiciability. *Conn. L. Rev.* vol. 22, (1989–1990) 677. On the doctrine of legal standing see also R. Craig WOOD – George Lange SOURCE: The Justiciability Doctrine and Selected State Education Finance Constitutional Challenges. *Journal of Education Finance*. vol. 32, no. 1, (2006) 1.; Maxwell L. STEARNS: Standing Back from the Forest: Justiciability and Social Choice. *California Law Review*, vol. 83, no. 6, (1995)

Generally speaking, it is easy to agree with Harris who expresses his discomfort 'about the courts deciding the limits of their own competence' – a situation akin to one being a judge in his or her own case.³³ Considering lack of consistency in application of the 'What. When. Who' test leading to failures of justiciability, a more solid legislative approach is needed to narrow down the margin of discretion given to the courts in order to guarantee equal access to a unified standard of justice in a democratic manner.

1.2. Justiciability as a Legal Doctrine

As a legal doctrine justiciability is explained in two different ways: in its narrow sense, as an ability of a right or its certain dimension to be brought before a competent court and in a wider sense, as a complex system of guarantees comprising domestic, regional and international mechanisms derived from ratified obligations of the state and designed to protect a certain right in a certain country.

1.2.1. Justiciability in a Narrow Sense, as an Ability to be Brought before the Court

Traditional definition of justiciability has a direct connection with the ability of a matter to 'be properly brought before a court and [to be] capable of being disposed judicially'.³⁴ Other definitions of justiciable imply being 'appropriate for or subject to court trial' or being able to be 'settled by law or a court of law'.³⁵ Justiciable law is understood as 'capable of being determined by a court of law' or 'liable to be brought before a court for trial; subject to jurisdiction'.³⁶

According to the doctrinal sources, 'justiciable' means 'liable to be tried in a court of justice; subject to jurisdiction';³⁷ 'peculiarly suited for judicial solution',³⁸ it is also explained as property of a right of being 'amenable to judicial review'.³⁹ A right is therefore justiciable if it is 'subject to test and remedy in the judicial system of

1309.; Jonathan R. SIEGEL: Theory of Justiciability. *Tex. L. Rev.*, vol. 86, (2007–2008) 73.; Charles H. KENNEDY: Government Suits against In-Service Conscientious Objectors Who Have Received Educational Benefits: An Examination of Justiciability and Damages. *The University of Chicago Law Review*, vol. 42, no. 4, (1975) 749.; Lawrence GERSCHWER: Informational Standing under NEPA: Justiciability and the Environmental Decisionmaking Process. *Columbia Law Review*, vol. 93, no. 4, (1993) 996.

³³ HARRIS op. cit. 638.

³⁴ *Black's Law Dictionary*. West Group, 92009.

³⁵ *Random House Kernerman Webster's College Dictionary*. K Dictionaries Ltd., 42010.; *The American Heritage Dictionary of the English Language*. Houghton Mifflin Company, 42009.

³⁶ *Collins English Dictionary – Complete and Unabridged*. HarperCollins Publishers, 52003.

³⁷ SPIRO op. cit. 206.

³⁸ SUMMERS op. cit. 530.

³⁹ GUSTAVO AROSEMENA: Balancing the Right to a Remedy and the Needs of Governance: The Doctrine of Limitation of Rights as a Framework for the Development of Domestic Remedies for Economic, Social and Cultural Rights. *Tilburg L. Rev.*, vol. 15, (2010–2011) 15.

courts and tribunals'.⁴⁰ In this narrow sense justiciability is thus synonymous with enforceability or enforcement.⁴¹

All these definitions, when read in synthesis, despite their apparent unanimity, leave some fundamental questions unanswered: is justiciability a property of a *right* or does it have to do with the ability of the *legal system* to protect the right? From another angle, is it a property of a *right* or of a certain *decision* implementing / violating the right or perhaps it is a characteristic of a *dispute*?⁴² Is it a property of a *right* or of a *legal norm* endorsing it? How can the gap be explained between being *able* to be brought before court and being *appropriate* for such action?⁴³ Which authority is capable of deciding the latter or setting criteria for the former? How can one definition accommodate the ability of a matter to be settled both *by law* and by the *action of a court* when these are two separate processes involving independent authorities?

All these questions lead to a conclusion that existing understanding of justiciability as a synthetic doctrinal concept referring to the capacity of a matter (a right, a law endorsing the right, a decision implementing the right, or a dispute over a violation of a right) to be able (or appropriate) to be brought before the court (or being settled by the court) – is quite vague and can be interpreted in many different ways depending on the legal system and legal tradition.

Stepping aside from jurisprudence-related doctrine is the interpretation of justiciability suggested by the International Commission of Jurists. In the Commission's report 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'.⁴⁴ The definition provided by the Commission has two significant differences from those analysed above. First, it reduces justiciability of a right to justiciability of a claim; and second, it widens the scope of application of justiciability as, pursuant to the definition, the remedy can be claimed before any independent and impartial body, not necessarily a court of justice. Additionally, it renders justiciability a certain preventive function ('likely to occur').

Despite this broader interpretation, the Commission's definition still applies only to remedial justice and excludes from the notion of justiciability any implications of guarantees ensuring better realisation of a right.

⁴⁰ John VEIT-WILSON: No Rights Without Remedies: Necessary Conditions for Abolishing Child Poverty. *Eur. J. Soc. Sec.*, vol. 8, (2006) 317.

⁴¹ Jose Ricardo CUNHA: Human Rights and Justiciability: a Survey Conducted in Rio De Janeiro. *Int'l J. on Hum Rts.*, vol. 3 SUR (2005) 133.

⁴² Chris FINN: The Justiciability of Administrative Decisions: A Redundant Concept? *Fed. L. Rev.*, vol. 30, (2002) 239.

⁴³ On the dichotomy of legal and extra-legal justiciability and the difference between matters that are 'proper' for decision by court and 'capable' of being adjudicated see Peter Gordon INGRAM: Justiciability. *Am. J. Juris.*, vol. 39, (1994) 353.

⁴⁴ International Commission of Jurists: Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability (ICJ, Geneva, 2008) 6 (emphasis added).

The concept of justiciability has evolved with time. While in mid-XX century it used to be viewed as ‘the very foundation of the judicial function,’⁴⁵ and was only regarded in connection with the actions taken by the courts,⁴⁶ by the end of the century the term received a broader interpretation as a ‘juridical mechanism triggered off by the inadequacies in the enforceability or execution of human rights’.⁴⁷ This definition is truly revolutionary: not only it regards justiciability as a mechanism of protection, rather than an attribute of a right, but it also for the first time goes beyond strictly judicial context of this term, suggesting that juridical is wider than judicial.⁴⁸

1.2.2. Justiciability in a Broader Sense as a System of Guarantees

By this manner the concept of justiciability has evolved from a mere reaction of a court to a certain characteristic of a right or a claim into a mechanism recognising the gaps of protection, analysing their reasons and consequences and elaborating means to address these gaps. The modern concept of justiciability recognises that the capabilities of courts are limited and that, while the courts have the ‘opportunity to oversee the quality of the decision-making procedures used by the executive’, there can be cases when rendering the matter non-justiciable ‘can mean that an illegal decision [...] may survive to perpetrate unfairness’.⁴⁹

Thus, the contemporary understanding of justiciability adopts a somewhat extra-legal, or perhaps even socio-legal approach as it attempts to relate this legal doctrine ‘to what actually happens in practice’.⁵⁰ As reasonably suggested by Barton, ‘justiciability can be fully understood only by adopting a perspective beyond, rather than within, the closed system.’⁵¹ He defines this concept ‘as the many relationships between adjudicative procedures, and the problems such procedures are asked to

⁴⁵ Edwin BORCHARD: Justiciability. *The University of Chicago Law Review*, vol. 4, (1936) 1.

⁴⁶ SUMMERS op. cit. 581.

⁴⁷ Michael K. ADDO: The Justiciability of Economic, Cultural Right. *Commw. L. Bull.*, vol. 14, (1988) 1425.

⁴⁸ On the need to go beyond purely legal definition of justiciability see also Olivier DE SCHUTTER: *International Human Rights Law: Cases, Materials, Commentary*. Cambridge–New York, CUP, 2010. 771.

⁴⁹ HARRIS op. cit. 631–633.

⁵⁰ William TWINNING: Mapping Law: The Macdermott Lecture. *N. Ir. Legal Q.*, vol. 50, (1999) 12., 45. Socio-legal approach differs from doctrinal research in law in that it situates legal phenomena in a broader context, namely, in economic, political and social contexts. See David Maxwell WALKER (ed.): *The Oxford companion to law*. Oxford, Clarendon, 1980. 1098.; Reza BANAKAR – Max TRAVERS (eds.): *Theory and Method in Socio-Legal Research*. Oxford–Portland, Or., Hart Pub., 2005.; Brian Z. TAMANAHA: *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*. Oxford, Clarendon Press, 1997.; Richard A. POSNER: The Present Situation in Legal Scholarship. *Yale L. J.*, vol. 90, (1980–1981) 1113.; Neil SARGENT: The Possibilities and Perils of Legal Studies. *Can. J.L. & Soc.*, vol. 6, (1991) 1.; Alister A. HENSKENS: Legal Education: Black Letter, White Letter or Practical Law. *Newcastle L. Rev.*, vol. 9, (2005–2006) 81.

⁵¹ BARTON op. cit. 507.

resolve. So understood, justiciability offers an original perspective from which the workings, capacities, and limitations of adjudication can be better explored.⁵²

The same – more pragmatic – approach is advocated by Addo, who argues that justiciability ‘presupposes the existence of a review mechanism to determine non-compliance with the terms of the legal regime,’⁵³ thus suggesting that by tackling inadequacies revealed through such mechanism justiciability evolves into a set of guarantees.⁵⁴

This broader understanding of justiciability forms the basis of synthesised working definition of this concept adopted for the purposes of this paper whereby justiciability of a right within the framework of a certain domestic legal order is regarded as a complex characteristic of the respective legal order that allows for systemic employment of international and domestic legal and extra-legal mechanisms with a view to identify, assess and address the inadequacies of recognition, protection and full realisation of the right in question.

1.3. Justiciability of Economic, Social and Cultural Rights: Myths and Challenges

The nature of the existing debate on *whether* economic, social and cultural rights are justiciable in the narrow sense (hereinafter *judicially enforceable*) is precisely summarised by O’Connell.⁵⁵ From the principled side, there are arguments that ‘socio-economic rights are simply not real rights, in any meaningful sense’,⁵⁶ and on somewhat more practical side is the argument that their judicial enforcement is inconsistent with the doctrine of separation of powers.⁵⁷

In a nutshell, the first argument refers to the ‘special nature’ of economic, social and cultural rights. By ‘special nature’ of socio-economic rights both the doctrine and the practice understand their ‘fundamental difference’ from civil and political rights derived from their placement in two separate legal instruments: the ICESCR and the ICCPR which was in fact ‘neither an originally-intended nor a necessary separation’.⁵⁸

For the purposes of justifying the unwillingness to adjudicate economic, social and cultural rights both doctrine and jurisprudence insist on identifying these rights

⁵² Ibid. 505.

⁵³ ADDO (1988) op. cit. 1425.

⁵⁴ Michael K. ADDO: *The Legal Nature of International Human Rights*. Leiden–Boston, Martinus Nijhoff Publishers, 2010. 226.

⁵⁵ Paul O’CONNELL: *Vindicating Socio-Economic Rights: International Standards and Comparative Experience*. Abingdon–New York, Routledge, 2012. 9.

⁵⁶ Ibid. 9.

⁵⁷ Some authors set institutional capacity of the courts apart from the separation of powers argument (see Aoife NOLAN – Bruce PORTER – Malcolm LANGFORD: *The Justiciability of Social and Economic Rights: an Updated Appraisal*. *Center For Human Rights And Global Justice, Working Paper* no. 15, New York, 2007. 19.). However, for the purposes of this paper such over-elaboration is hardly justified.

⁵⁸ Eric C. CHRISTIANSEN: *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*. *Colum. Hum. Rts. L. Rev.*, vol. 38, (2006–2007) 344.

as positive rights ‘imposing affirmative obligations’ on the states,⁵⁹ vaguely worded and imprecise,⁶⁰ requiring resources for their implementation,⁶¹ and not even creating immediate obligations, but only an indefinite need to ensure their progressive realisation. All these arguments against justiciability of economic, social and cultural rights have long since been rebutted.⁶²

The second line of argument insists that judicial enforcement of economic and social rights undermines the democratic doctrine of separation of powers by allowing the judiciary to interfere with budget allocation, since the court must engage in prioritising resources by ‘putting a person either in or out of a job, a house or school,’⁶³ – a function belonging to the competence of the executive branch.

However, when one thinks about the doctrine of separation of powers as a holistic concept it is evident that judicial review of executive functions is an essential element of the principle of checks and balances lying in the core of the concept.⁶⁴ If some executive decisions were deemed outside the scope of judicial review it would clearly impede on the principle of equality and fair access to justice. Thus, the position of O’Connell appears fully justified as he insists on reinventing the separation of powers as a ‘dynamic and ongoing interaction between the different branches of government’ where the courts engage not only ‘in an exacting examination of state policies with respect to socio-economic rights’, but also in the ‘normative development of the content [... thereof], drawing where appropriate on international and comparative standards’.⁶⁵

⁵⁹ The negative v. positive dichotomy has been criticised to the effect of regarding ‘each right as having [both] negative and positive aspects’ (CRISTIANSSEN (2006–2007) op. cit. 374., see also NOLAN–PORTER–LANGFORD (2007) op. cit. 7.), the latter implying providing means to fulfil the rights while the former pertaining to the obligation to respect and protect the right on the basis of non-discrimination and appreciation of human dignity.

⁶⁰ NOLAN–PORTER–LANGFORD (2007) op. cit. 9.

⁶¹ Ibid. 8.; DE SCHUTTER (2010) op. cit. 743.

⁶² See for the overview of rebutting arguments: Malcolm LANGFORD: The Justiciability of Social Rights: From Practice to Theory. In: Malcolm LANGFORD (ed.): *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*. Cambridge, CUP, 2008. 30. See also: G. J. H. VAN HOOF: The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views. In: P. ALSTON – K. TOMAŠEVSKY (eds.): *The Right to Food*. The Hague, Martinus Nijhoff, 1984. 97., 99. On universality of budgetary implications for implementation of all human rights see Jayme BENVENUTO LIMA Jr.: The Expanding Nature of Human Rights and the Affirmation of their Indivisibility and Enforceability. In: Berma K. GOLDEWIJK – Adalid C. BASPINEIRO – Paulo C. CARBONARI (eds.): *Dignity and Human Rights: the Implementation of Economic, Social and Cultural Rights*. Antwerp–New York, Intersentia, 2002. 58.

⁶³ E. V. VIERDAG: The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights. *Netherlands Yearbook of International Law*, vol. 9, (1978) 103.

⁶⁴ On the function of judicial review see Thomas Henry BINGHAM: *The Rule of Law*. London, Allen Lane, 2010. 61.; Michael VILE: *Constitutionalism and the Separation of Powers*. Oxford, Clarendon Press, 1967. 13.; Thomas O. SARGENTICH: Contemporary Debate About Legislative-Executive Separation of Powers. *Cornell L. Rev.*, vol. 72, (1986–1987) 430., 434.

⁶⁵ O’CONNELL (2012) op. cit. 201.

Practically speaking, the functions of the executive branch boil down to defining minimum core obligations of socio-economic rights and designing plans for their progressive realisation in accordance with principles set out by the legislature pursuant to international obligations of the state. At the same time, the judiciary mechanism focuses on non-compliance with established standards. The question of adequacy of the standard itself, as well as assessment of the extent to which it meets the 'progressive realisation' criteria should be left for external monitoring bodies, such as UN Committee on Economic, Social and Cultural Rights (CESCR).

To summarise, both 'special nature' and 'capacity' arguments appear rather artificial. In this regard the reasoning of Christiansen seems perfectly justified as he concludes that '[t]he nature of the rights themselves is not a legitimate basis for rejecting their justiciability'.⁶⁶ Having said that and adhering to the premise that all human rights are universal, indivisible, interdependent and interrelated,⁶⁷ I will reiterate that the question of *whether* disputes concerning economic, social and cultural rights are capable of being resolved by courts to the same extent as claims concerning other rights is of little relevance for the purposes of present paper. First, because it has long since been affirmatively answered by contemporary scholarship as demonstrated above and, second, it refers to the concept of justiciability in its narrow sense. Although essential for adequate protection, the enforceability of a right amounts only to one of many dimensions of justiciability in the broader sense that would also include all other legal and non-legal mechanisms available within a particular legal order for securing its proper fulfilment.

2. Justiciable Dimensions of the Right to Education at International level and in Russia

Having analysed different approaches that exist to define justiciability as a judicial tool and a legal doctrine in both narrow and broad senses, and having supplemented this analysis by the reference to specificities of justiciability of economic, social and cultural rights I will now proceed with narrowing down the focus of my research to justiciability of the right to education.

In this section I will outline the elements of justiciability of the right to education, its preconditions and challenges, as well as dimensions of the right to education that are part of its justiciable normative content both at the domestic level in Russia and through international protection system.

⁶⁶ CHRISTIANSEN (2006–2007) op. cit. 347.

⁶⁷ Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights on 25 June 1993, endorsed by General Assembly resolution A/CONF.157/23 of 12 July 1993, art 5.

2.1. Preconditions of Justiciability of the Right to Education

International human rights instruments and doctrinal sources describe the right to education in a range of ways: as a self-standing right in its narrow sense,⁶⁸ or in a broader sense as the right to development,⁶⁹ as an empowerment right,⁷⁰ implicit in all other rights,⁷¹ or pigeonholed to one of the three ‘generations’ of human rights;⁷² perceived as a right or a freedom,⁷³ (positive or negative),⁷⁴ as a right to receive education and the right to choose education;⁷⁵ limited by other rights⁷⁶ or reinforced

⁶⁸ Manfred NOWAK: The Right to Education – Its Meaning, Significance and Limitations. *Neth. Q. Hum. Rts.*, vol. 9, (1991) 418.

⁶⁹ UN General Assembly, *Declaration on the Right to Development*, adopted by the General Assembly, 4 December 1986, A/RES/41/128; C. Raj KUMAR: International Human Rights Perspectives on the Fundamental Right to Education – Integration of Human Rights and Human Development in the Indian Constitution. *Tul. J. Int'l & Comp. L.*, vol. 12, (2004) 237.; Philip ALSTON – Mary ROBINSON (eds.): *Human Rights and Development: Towards Mutual Reinforcement*. Oxford–New York, OUP, 2005. 551.; Mesenbet Assefa TADEG: Reflections on the Right to Development: Challenges and Prospects. *Afr. Hum. Rts. L. J.*, vol. 10, (2010) 325.; Mohammed BEDJAOUTI: The Right to Development, in International human rights. In: Philip ALSTON – Ryan GOODMAN (eds.): *Human Rights in Context: Laws, Politics and Morals: Text and Materials*. Oxford, OUP, 2012. 1532.

⁷⁰ CESCR General Comment No. 13 (1999) op. cit. para 1.; UNESCO's Medium-Term Strategy 2002–2007, (31 C/4, para. 62.), UNESCO, Paris. <http://unesdoc.unesco.org/images/0012/001254/125434e.pdf>; Kishore SINGH: The Right to Education: International Legal Obligations. *Int'l J. Educ. L. & Pol'y*, vol. 1, (2005) 103., 107.

⁷¹ Roland WINKLER: The Right to Education according to Article 14 of the Charter of Fundamental Rights of the European Union. *Int'l J. Educ. L. & Pol'y*, vol. 1, (2005) 60., 62.; Gerhard VAN DER SCHYFF: Classifying the Limitation of the Right to Education in the First Protocol to the European Convention. *Int'l J. Educ. L. & Pol'y*, vol. 2, (2006) 153.

⁷² John C. MUBANGIZI: Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context. *Afr. Hum. Rts. L. J.*, vol. 4, (2004) 93.

⁷³ WINKLER (2005) op. cit.; James BREESE: *Freedom and Choice in Education*. RLE Edu K, Routledge, 2012.; Virgil C. BLUM: *Freedom of choice in education*. Westport, Conn., Greenwood Press, 1977.; Charles L. GLENN: *Educational Freedom in Eastern Europe*. Washington, DC, Cato Institute, 1994.; Noel S. ANDERSON – Haroon KHAREM (eds): *Education As Freedom: African American Educational Thought and Activism*. [Lexington Books] 2009. <https://www.ebooks.com/466682/education-as-freedom/anderson-noel-s-khareem-haroon-akom-a-a-banks-ojeya/>

⁷⁴ Ingo RICHTER: The Right to Education as a Constitutional Right. *Int'l J. Educ. L. & Pol'y*, vol. 5, (2009) 5.

⁷⁵ Fons COOMANS – Fried VAN HOOF (eds.): *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 held from 25–28 January 1995 in Utrecht*. [SIM Special, no. 18] Utrecht, 1995. 427.

⁷⁶ Religious freedom: Jan DE GROOF – Gracienne LAUWERS: Nobody Can Be Denied the Right to (an Own Identity in) Education: Legal Bottlenecks in National and International Law concerning the Freedom of Religious Expression: The Case of the Headscarf in Education. *Int'l J. Educ. L. & Pol'y*, vol. 1, (2005) 132.; AnneBert DIJKSTRA – Ben VERMEULEN: Islamic Schools in the Netherlands. *Int'l J. Educ. L. & Pol'y*, vol. 4, (2008) 16.; linguistic rights: Elize KUNG – Pablo MEIX: Legal Status of Languages in Education: The Cases of South Africa and Spain. *Int'l J. Educ. L. & Pol'y*, vol. 6, (2010) 33.

by the principles of non-discrimination and equality.⁷⁷ It is further regarded with disaggregation according to the level of education or organisational form (private⁷⁸ and public⁷⁹) or through the prism of special categories of the subjects of this right (disabled,⁸⁰ minorities,⁸¹ homeless,⁸² women and girls⁸³).

The UN Special Rapporteur on the right to education Kishore Singh in his annual report to the Human Rights Council in June 2013 made a direct link between international recognition of the right to education and justiciability of 'any or all of its dimensions'.⁸⁴ In his statement Singh appeals to the broader understanding of the term justiciability as described in earlier in this paper. By asserting that the right to education is justiciable so long as it is internationally recognised Singh, according to the synthetic analysis of the whole text of the report, implies a complex set of guarantees: from 'existing constitutional or legislative provisions on the right to education' to the possibility 'to have legal recourse before the law courts on the basis of international legal obligations' in case of violations.⁸⁵

This system of guarantees includes quasi-judicial mechanisms of protection,⁸⁶ as well as preventive mechanisms allowing for special attention to vulnerable and marginalised groups.⁸⁷ It also accounts for the capacity of the legal system as a whole to effectively monitor and address gaps of protection or specific factors challenging

⁷⁷ Mark JAFFE – Kenneth KERSCH: Guaranteeing a State Right to a Quality Education: The Judicial-Political Dialogue in New Jersey. *J. L. & Educ.*, vol. 20, (1991) 271.; Brian P. MARRON: Promoting Racial Equality through Equal Educational Opportunity: The Case for Progressive School-Choice. *BYU Educ. & L. J.*, (2002) 53.; Neville HARRIS: Equal Rights in Education in the UK (England). *Int'l J. Educ. L. & Pol'y*, vol. 4, (2008) 4.

⁷⁸ Patricia M. LINES: Private Education Alternatives and State Regulation. *J.L. & Educ.*, vol. 120, (1983) 189.

⁷⁹ Eileen N. WAGNER: Public Responsibility for Special Education and Related Services in Private Schools. *J. L. & Educ.*, vol. 20, (1991) 43.; Tomiko BROWN-NAGIN: Broad Ownership of the Public Schools: An Analysis of the T-Formation Process Model for Achieving Educational Adequacy and Its Implications for Contemporary School Reform Efforts. *J.L. & Educ.*, vol. 27, (1998) 343.

⁸⁰ Alexandra NATAPOFF: Anatomy of a Debate: Intersectionality and Equality for Deaf Children from Non-English Speaking Homes. *J.L. & Educ.*, vol. 24, (1995) 271.

⁸¹ Walter KEMP: Learning Integration: Minorities and Higher Education. *Special Issue Int'l J. Educ. L. & Pol'y*, (2004) 21.

⁸² James H. STRONGE – Virginia M. HELM: Legal Barriers to the Education of Homeless Children and Youth: Residency and Guardianship Issues. *J.L. & Educ.*, vol. 20, (1991) 201.

⁸³ Michael A. REBELL – Anne W. MURDAUGH: National Values and Community Values Part I: Gender Equity in the Schools. *J. L. & Educ.*, vol. 21, (1992) 155.; Jennifer T. SUDDUTH: CEDAW's Flaws: A Critical Analysis of Why CEDLAW is Failing to Protect a Woman's Right to Education in Pakistan. *J. L. & Educ.*, vol. 38, (2009) 563.

⁸⁴ Report of the Special Rapporteur on the right to education, Kishore SINGH: *Justiciability of the Right to Education* presented at the Twenty-third session of the UN Human Rights Council, A/HRC/23/35 of 10 May 2013 para 27.

⁸⁵ SINGH (2013) op. cit. para 27.

⁸⁶ Ibid. para 36–43.

⁸⁷ Ibid. para 54–58.

justiciability, such as lack of awareness of the right, legal, cultural, procedural and financial barriers to full realisation and successful protection of the right.⁸⁸

This important report that features a new broad approach to justiciability is long overdue: the current position of the CESCR expressed in the Committee's General Comments concerning justiciability of economic, social and cultural rights including the right to education is outdated from both doctrinal and practical points of view. The Committee still acts on the premises confirming partial (or conditional) justiciability of economic, social and cultural rights thus lowering the standard of protection of these rights in states parties to the Covenant.⁸⁹

For example, among the appropriate measures the General Comment No. 3 on the nature of state obligations mentions 'provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable'.⁹⁰ The Committee thus admits the possibility that some of the rights endorsed by the Covenant might not, in principle, be considered justiciable. This narrow interpretation of justiciability creates a closed circuit system where the rights must first be considered justiciable (by which authority?) and then judicial remedies should be provided for their protection. However, without legislative provision of appropriate judicial remedies these rights will never become justiciable.

Another example of outdated approach to justiciability featured by CESCR is paragraph 10 of General Comment No. 9 that distinguishes between 'justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration)'.⁹¹ These two definitions appear confusing, because being self-executing is a prerequisite condition for justiciability and not an opposing category as it is implied in paragraph 10 of the Comment.

It is understandable that the Committee will be hesitant about immediate adoption of any daring initiatives due to its institutional and political constraints. First, adoption of a new General Comment or revision / update of an existing one is a complicated time-consuming procedure involving wide consultation with specialised agencies, civil society and academics followed by preparation of a draft for further discussion

⁸⁸ Ibid. paras 74–80.

⁸⁹ The use of CESCR General Comments as a benchmark for the state parties reporting procedure has been established in a number of the Committee's reports, see for example UN Committee on Economic, Social and Cultural Rights: Report on the Thirtieth and Thirty-First Sessions (5-23 May 2003, 10-28 November 2003) E/2004/22 E/C.12/2003/14 (Economic and Social Council Official Records, 2004, suppl no. 2) para 52.

⁹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant), 14 December 1990, E/1991/23 para 5.

⁹¹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant adopted at the 51st meeting on 1 December 1998 (Nineteenth session) E/C.12/1998/24.

by the Committee and interested parties and formal adoption in plenary session.⁹² Considering the time span between plenary sessions (they take place twice a year, in April and November), the fact that the last General Comment was adopted in 2009,⁹³ and that none of the Comments have ever been updated or revised, the lack of intensity in this process suggests inability of this mechanism to accommodate upcoming issues.

Second, political constraints of the Committee's reluctance to immediately adopt new approaches have to do with hyper-sensitivity of the states towards their reporting obligations. Since General Comments are designed 'with a view to assisting States parties in fulfilling their reporting obligations',⁹⁴ all changes will be subject to extreme scrutiny and political negotiations further complicated by the Committee's general inclination to 'work on the basis of the principle of consensus'.⁹⁵ Nevertheless, one can anticipate that the ambitious proposal of the Special Rapporteur to use a broader notion of justiciability will find its way into domestic practice through the Committee's monitoring procedure as it had happened before.⁹⁶

2.2. Justiciable Dimensions of the Right to Education in Russia at the Domestic Level

According to Singh 'justiciability of the right to education [...] has its bases in national legal systems'.⁹⁷ For its effective protection in the framework of domestic justiciability the content of the right must be clearly defined and subjected to judicial and quasi-judicial mechanisms of enforcement.⁹⁸

In the Russian legal system the right to education is recognised on the constitutional level and is further developed in both federal and regional legislation. The right to education is protected by the judicial system and non-judicial mechanisms as well.

Without aiming at providing a full review of education law and policies in Russia, I will outline those fundamental constitutional and legislative provisions that shape the foundation of justiciability of the right to education in Russia. In the following

⁹² Follow-up to the recommendations of the Twenty-fourth meeting of chairpersons of the human rights treaty bodies, including harmonization of the working methods: other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process. Twenty-fifth meeting of chairpersons of the human rights treaty bodies, Geneva, 24–28 June 2013. Item 4 of the provisional agenda, HRI/MC/2013/3 of 22 April 2013, para 15.

⁹³ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/21 of 21 December 2009.

⁹⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), Rules of Procedure of the Committee: Provisional rules of procedure adopted by the Committee at its third session (1989), E/C.12/1990/4/Rev.1 of 1 September 1993, rule 65.

⁹⁵ *Ibid.* Rule 46.

⁹⁶ In 1999 the 4A scheme – Availability, Accessibility, Acceptability and Adaptability of education suggested by the Special Rapporteur on the right to education was adopted by the CESCR General Comment No. 13 as a benchmark of the states' obligations in respect of the right to education.

⁹⁷ SINGH (2013) *op. cit.* para 26.

⁹⁸ YESHANEV (2008) *op. cit.* 273.

three subsections I will describe and evaluate the relevant provisions of the Russian Constitution and basic legislation. I will also list the existing judiciary and non-judiciary mechanisms of protection of the right to education.

2.2.1. Justiciable Dimensions of the Right to Education in Russia as Articulated by Constitutional and Legislative Provisions

It is generally accepted that recognition of a right at the constitutional level is essential for its domestic justiciability.⁹⁹ The relation between constitutional recognition of the right and its justiciability was reiterated by the CESCR in General Comment No. 3:¹⁰⁰

In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information *as to the extent to which* these rights are considered to be justiciable (i.e. able to be invoked before the courts).

By invoking the extent to which the rights recognised by the constitution are considered justiciable the Committee presumes that it's not the question *whether* they are, but only the *extent to which* they are.

In Russia the right of every person to education is ensured by Article 43 (1) of the Constitution.¹⁰¹ In line with international state obligations in the domain of education 'secondary and high vocational education' is generally accessible and provided free of charge 'in state or municipal educational establishments'.¹⁰² The article also places pre-school education under the same standard of accessibility.

Free higher education is guaranteed 'on competitive basis' in a 'state or municipal educational establishment'.¹⁰³ Competitive access and institutional limitations are further complemented on legislative level by an additional condition: only first higher education can be exempt from tuition fees, provided all other requirements met.¹⁰⁴

⁹⁹ ADDO (1988) op. cit. 1428; CHRISTIANSEN (2006–2007) op. cit. 323.; COOMANS (1995) op. cit. 427.; SINGH (2013) op. cit. para 25.; YESHANEW (2008) op. cit. 274.; Salma YUSUF: Rise of Judicially Enforced Economic, Social & Cultural Rights – Refocusing Perspectives. *Seattle J. Soc. Just.*, vol. 10, (2011–2012) 784.; Julia A. SIMON-KERR – Robynn K. STURMT: Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education. *Stan. J. C. R. & C. L.*, vol. 6, (2010) 83., 86.

¹⁰⁰ CESCR General Comment No. 3 (1990) para 6 (emphasis added).

¹⁰¹ Constitution of the Russian Federation adopted by national referendum on 12 December 1993 (Russian Constitution).

¹⁰² Russian Constitution (1993) art 43(2) in conformity with ICESCR art 13(2)b: 'Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education'.

¹⁰³ Russian Constitution (1993) art 43(3) in conformity with ICESCR art 13(2)c: 'Higher education shall be made equally accessible to all, *on the basis of capacity*, by every appropriate means, and in particular by the progressive introduction of free education' (emphasis added).

¹⁰⁴ Federal Law on Education (2012) art 5 (3).

This provision is very controversial: the law does not make clear what, in fact, is considered 'first' higher education: the first finished university degree or the first one applied for and/or enrolled to (considering expulsions, or voluntary abandoning of the course). There is no unified official database of issued diplomas, let alone of enrolled students. Moreover, universities cannot ask for a proof of existing qualifications. Nevertheless, the legislative limitation was considered by the Russian Constitutional Court (RCC) as fully compatible with the Constitution.¹⁰⁵

The Constitution guarantees that 'the basic general education shall be free of charge'. It also imposes responsibility on the parents for ensuring compulsory basic general education for their children:¹⁰⁶ since 2008 all 10 years of schooling are compulsory and free of charge.¹⁰⁷

Russian Constitution was adopted in 1993. Its preparation took place long after the ratification by the Soviet Union of the ICESCR in 1973, and the distinguished members of the Constitutional Council that was called by the President to discuss and edit the project have considered those international standards concerning the right to education that had been already in force.¹⁰⁸

Therefore, the fact that the Constitution does not guarantee directly neither freedom of education and 'liberty of parents [...] to choose for their children schools, other than those established by the public authorities',¹⁰⁹ nor the 'liberty of individuals and bodies to establish and direct educational institutions',¹¹⁰ means that these provisions have been deliberately omitted due to particular political, economic and/or social concerns.

Although the relevant provisions were, nevertheless, included in the acts of subconstitutional educational legislation from their very early drafts,¹¹¹ there is no jurisprudence whatsoever on the issues of parental choice or the right to establish an educational institution. To be sure, there have been cases dealing with freedom

¹⁰⁵ Constitutional Court of the Russian Federation Ruling on Admissibility No. 187-O of 5 October 2001.

¹⁰⁶ Russian Constitution (1993) art 43(4) in terms of established level of compulsory education exceeds the standard set by ICESCR art 14: 'compulsory *primary* education, free of charge' (emphasis added).

¹⁰⁷ Compulsory level of school education was lifted from 9 grades of secondary education to 11 grades of complete general education as per the Federal Law No. 194-FZ of 21 July 2007 'On Amending Certain Legislative Acts of Russian Federation due to Establishment of Compulsory General Education'.

¹⁰⁸ Decree of the President of Russian Federation No. 718 of 20 May 1993 on 'Convocation of the Constitutional Council for the Purpose of Finalising the Project of Constitution of Russian Federation'.

¹⁰⁹ ICESCR art 13(3).

¹¹⁰ ICESCR art 13(4).

¹¹¹ The right to choose forms of education and educational institutions was included into the very first Law on Education No. 3266-1 of 10 July 1992 (1992), as well as the possibility to establish private educational institutions, art 12(3).

of religious education,¹¹² however the right to establish religious schools is protected by specific legislation.¹¹³ Another case tangentially related to the freedom of school choice is the Supreme Court 2011 ruling on territorial accessibility of education, but it has more implications on accessibility of public schools than on free choice of schools in general.¹¹⁴

Therefore, we can conclude that although constitutional recognition is generally connected to guarantees of stronger justiciability,¹¹⁵ in some cases the lack of relevant constitutional provisions does not necessarily lead to non-justiciability of a certain right or legitimate interest. In this situation adjudication of the claim will invoke other constitutional provisions and will lead to indirect justiciability. For example, although the right to establish a private educational institution is not directly mentioned in Russian Constitution, it is implicit in other provisions, namely, Article 34 on freedom of economic activities, Article 35 on the right of private property, Article 44 on academic freedom.

As to summarise, justiciable dimensions of the right to education as set forth by the Russian Constitution and educational legislation comprise a comprehensive codified system. This system consists of general entitlements that are common for all levels and forms of education: non-discrimination,¹¹⁶ general availability and accessibility of education,¹¹⁷ obligation of public authorities to ‘establish appropriate socio-economic conditions conducive to obtaining education and progressive widening of educational choices throughout life’,¹¹⁸ guarantees of language choice as appropriate,¹¹⁹ guarantees of secular nature of education in public educational institutions,¹²⁰ freedom of choice in education (including the right to form the contents of one’s educational program,¹²¹ etc. It also includes specific entitlements for particular categories of participants of education process: such as the right of public school pupils to use textbooks and teaching aids during the course of their studies without payment¹²² or the right of

¹¹² On Russian case law concerning establishment of religious educational institutions see Maria SMIRNOVA: Freedom of Conscience and the Right to Education in Russia – a Secular Country of Cultural and Religious Diversity. In: Charles RUSSO (ed.): *International Perspectives on Education, Religion and Law*. Abingdon, Routledge, 2014. 181–194.

¹¹³ Federal Law No. 125-FZ of 26 September 1997 ‘On Freedom of Conscience and Religious Associations’.

¹¹⁴ Supreme Court of the Russian Federation in its Ruling No. 5-G11-106 of 15 June 2011 confirmed that any regional law establishing priority access to enrolment to the first grade of school for children living in close proximity to the relevant institutions, is to be regarded as a purely organisational measure aimed at meeting the requirements of federal legislation and cannot be assessed as discriminatory or restricting access to education.

¹¹⁵ See, for example, O’CONNELL (2012) op. cit. 7.

¹¹⁶ Federal Law on Education (2012) art 5(2).

¹¹⁷ Ibid. Art 5(3).

¹¹⁸ Ibid. Art 5(4).

¹¹⁹ Ibid. Art 14.

¹²⁰ Ibid. Art 3(1)6.

¹²¹ Ibid. Art 34(1)4–7.

¹²² Ibid. Art 35.

public university students to receive monthly allowance from the relevant budget for academic achievements or as a means of social support.¹²³

These entitlements are numerous, well-defined and relatively detailed, moreover, they are set forth on the legislative (not sub-legal) level: these qualities render particular rights in education susceptible for judicial and non-judicial protection. In the next two sections I will extract those dimensions of the right to education that are protected by judicial and quasi-judicial or administrative methods.

2.2.2. *Justiciable Dimensions of the Right to Education in Russia as per Domestic Case Law*

In Russia '[s]tate protection of the rights and freedoms of man and citizen [... is] guaranteed' by the Constitution.¹²⁴ 'State protection' includes but is not limited to 'judicial protection'¹²⁵ of rights, which involves, inter alia, judicial review of '[d]ecisions and actions (or inaction) of bodies of state authority and local self-government, public associations and officials'.¹²⁶ It is important that the Constitution does not contain any limitation to Article 46 (1) on judicial protection of all rights and freedoms. For example, it could only refer to rights and freedoms recognised by the Constitution and/or current legislation, or limit the application of judicial protection to only *justiciable* rights and freedoms.¹²⁷

Thus, theoretically, all rights and freedoms of all individuals are subject to judicial protection. However, certain limitations can be imposed at the legislative level depending on the type of adjudication, level of the court and type of applicant. For example, the rules of admissibility for judicial review of decisions or actions of state or municipal authorities or civil servants violating the applicant's rights or freedoms are made clear in a dedicated law.¹²⁸ These rules expressly provide that in order to be admissible for judicial review such decisions or actions must constitute a violation of rights and freedoms of the applicant or inhibit their realisation or impose illegal obligations or invoke unjustified responsibility.¹²⁹

The right to education is also adjudicated through administrative, civil and criminal jurisprudence in relevant cases. The vast majority of all decisions (more

¹²³ Ibid. Art 36.

¹²⁴ Russian Constitution (1993) art 45 (1).

¹²⁵ Ibid. Art 46 (1).

¹²⁶ Ibid. Art 46 (2).

¹²⁷ For example, art 37(1) of the Constitution of Ethiopia limits the scope of protection by providing that 'everyone has the right to *bring a justiciable matter* to court', see YESHANEW (2008) op. cit. 277 (emphasis added).

¹²⁸ Federal Law No. 4866-1 of 27 April 1993 'On Judicial Review of Actions and Decisions Violating Rights and Freedoms of Citizens' (Federal Law on Judicial Review).

¹²⁹ Ibid. Art 2.

than one-fourth) concern health and security issues,¹³⁰ while another significant part relates to physical integrity of students.¹³¹

Other dimensions of the right to education appearing on a common basis before Russian courts include the right to receive proper qualifications;¹³² the right to access to free pre-school education; the right to combine work and study; the right to receive education in one's native language.¹³³ Less common are cases involving expulsion and enrolment;¹³⁴ equal treatment and fair assessment of knowledge;¹³⁵ non-discrimination in education on the basis of income and social origin and other.¹³⁶

The limits of this paper do not provide for discussion of all of these categories in great detail, therefore, I will pick the most salient cases whereby the dimensions of the right to education have been significantly amended or altered and if the outcome of the case is still relevant according to the newest legislation.

One of the challenges of Russian education system is ensuring adequate availability of pre-school education. For years it has been a serious problem with thousands of parents nationwide not being able to secure a place in a nursery for children under 6.6 years old. Lack of places has often led to creation of a virtual 'queue' parents had to sign into from the moment their child was born. Effectively, this situation has led to the expansion of corrupt practices aimed at securing a place in the queue when it 'appeared' to be full.

Understandably, the right to be put in the queue or a right to keep a certain place on the queue was not supported by any legislative provisions, therefore, was not enforceable. By adopting respective legislation the government would have confirmed that the constitutional obligation to ensure availability of pre-school education to all eligible children has not been fulfilled. The Constitutional Court would have

¹³⁰ Primorsky Krai Regional Court decision No. 33-10985 of 20 December 2010, on failure of a school to comply with fire safety regulations due to budget cuts. The court prioritised public safety and ruled on liability of the local authorities to install necessary equipment. Similar decisions: Leningradskaya Oblast Regional Court ruling No. 33-5318/2010 of 3 November 2010; Primorsky Krai Regional Court ruling No. 33-2282 of 16 March 2010.

¹³¹ Moskovskaya Oblast Regional Court ruling No. 33-21461/2010 of 9 November 2010 on liability of a school for injuries received by a student during the time he was under care of the institution. Similar decision: Supreme Court of Khakassia Republic No. 33-1485/2009.

¹³² Kirovskiy District Court decision of 24 September 2009 on non-pecuniary damages for delayed issuance of a diploma.

¹³³ Constitutional Court of Russian Federation Ruling on Merits No. 16-P of 16 November 2004, on equal status of Russian language and official language of a federal subject (republic) in educational process. Similar decisions: Constitutional Court of Russian Federation Ruling on Merits No. 88-O-O of 27 January 2011; Supreme Court of Russian Federation Ruling No. 20-GO9-6 of 29 April 2009.

¹³⁴ See, for example, Saint-Petersburg City Court Cassation Ruling No. 3112 of 9 March 2011, on expulsion for plagiarism or Saint-Petersburg City Court Ruling No. 10622 of 4 August 2010, on expulsion for drug dealing and consumption.

¹³⁵ Supreme Court of Russian Federation Ruling No. 69-G10-14 of 22 December 2010, on equal payment for holders of similar qualifications.

¹³⁶ On the analysis of the cases see Vladimir V. NASONKIN: The Constitutional Right to Education in Russian Jurisprudence: Searching for Balance between Private and Public Interests. *Yearbook of Russian Educational Legislation*, vol. 6, (2011) 153.

immediately invalidated such a provision. Moreover, in the majority of cases the courts ruled that the existence of the queue *per se* is just an organisational measure and not an indication of failure to provide access to free pre-school education.¹³⁷

Thus, without due legislative and judicial support those parents who were not able to secure a place in the kindergarten for their children could only justify their claims by appealing to the obligation of public authorities to provide access to free pre-school education. Some claims were successful and the courts confirmed illegal inaction of municipal authorities in not creating enough spaces for all children of relevant age entitled to free pre-school education and residing in the territory governed by these authorities.¹³⁸ Now in most of the regions transparent online mechanisms of registration for pre-school education have been introduced to decrease corruption in this sphere and improve visibility of and access to the right to pre-school education.¹³⁹

Quality of education is a significant dimension of the right to education as one of the major characteristics defining its acceptability.¹⁴⁰ The mode of adjudicating quality education in Russia is rather formalised and straightforward and is based on evaluating of, first, conditions in which education is provided against those benchmarks that are set in the license issued to a particular educational institution and, second, contents of education against requirements of state educational standard of the relevant level, as stipulated in its certificate of state accreditation.

In a selection of cases the following inadequacies were recognised as violations of the right to quality education for the purposes of claim validity:¹⁴¹

- formal qualifications of teachers are not matching the requirements for teaching profession;
- textbooks are used that are not included in the list of textbooks and teaching materials approved by the Ministry of Education and Science¹⁴² for use in educational process in accredited educational institutions of the appropriate level;
- in-class and extra-curriculum workload exceeds the normative, while the number of hours for compulsory subjects is significantly lower than envisaged by the standard;

¹³⁷ On queue-free access to pre-school education see Permsky Krai Court Ruling No. 33-9598/2010 of 2 November 2010; Moskovskaya Oblast Regional Court Ruling No. 33-15552 of 10 August 2010.

¹³⁸ Cassation Ruling of Perm Krai Court No. 33-6889 of 11 July 2011.

¹³⁹ See among many others examples from Moscow: http://ec.mosedu.ru/norm_docs/; Tatarstan Republic: <https://uslugi.tatar.ru/cei>; Bashkortostan Republic: <https://edu-rb.ru>; Chelyabinsk: www.sadiki74.ru; Lipetsk: http://lipetskcity.ru/lipetsk/menu.php?i=3&page=page_3.5.1.3.10.php&text_pod_menu=pic57

¹⁴⁰ As expressly referred to by CESCR General Comment No. 13 (1999) para 6(c).

¹⁴¹ Federal Arbitrage Court of North-Western District Decision No. A56-26788/2007 of 17 June 2008.

¹⁴² See for example the Order of the Ministry of Education and Science of Russian Federation No. 1067 of 19 December 2012 'On Approval of Federal List of Textbooks Recommended (Allowed) to Use in Educational Process in State-Accredited Educational Institutions Implementing Educational Program of General Education in 2013/14 Academic Year'.

- the classes are overcrowded;¹⁴³
- there are no pre-drafted plans of fire safety and evacuation and no fire extinguishing equipment, premises of the educational institution do not correspond to the requirements of physical safety (no fence around the territory, no CCTV).¹⁴⁴

2.2.3. Dimensions of the Right to Education in Russia that Are Protected through Non-Judicial Methods

Special Rapporteur on the right to education in his report also highlights the importance of 'quasi-judicial mechanisms such as local administrative bodies, national human rights institutions, such as ombudspersons or human rights commissions' for enhancing the protection of the right to education on domestic level.¹⁴⁵ As suggested by Yeshanew '[s]uch institutions ensure the justiciability of human rights through quasi-judicial procedures.'¹⁴⁶

Among the authorities responsible for addressing violations of the right to education in Russia with inquisitorial rather than adversarial functions one will find the Federal Service for Supervision in Education and Science with a mandate to consider individual complaints under the relevant procedure established by the law.¹⁴⁷ Most of the claims concern social benefits, enrolment and expulsion, illegal actions of administration of educational institutions and education authorities, resolution of conflict situations between participants of education process, award of qualifications and other issues.¹⁴⁸

The statistics of these complaints are, indeed, very indicative. Of 8,763 complaints filed in 2012 twelve per cent were passed on to the Federal Service from the Administration of the President and nearly the same number – from the Ministry of Education and Science. It means that public awareness of the system of protection of the right to education is very low and victims of violations keep sending claims to the

¹⁴³ Okoneshnikovsky District Court of Omskaya Oblast Decision of 4 February 2010.

¹⁴⁴ Other cases on safety of educational process as a characteristic attributable to its quality include, inter alia, Supreme Court of Russian Federation Ruling No. 58-G02-38 of 26 November 2002; Supreme Court of Russian Federation Ruling No. 56-G03-6 of 20 May 2003; Federal Arbitrage Court of Uralskiy District Decision No. A76-5435/2009-50-80; Federal Arbitrage Court of Povolzhsky District Decision No. A55-10197/2008 of 11 November 2008; Supreme Court of Karelia Republic Cassation Ruling No. 33-3527/2011 of 29 November 2011; Moscow Oblast Court Ruling No. 33-24297; Vologodsky Oblast Court Cassation Ruling No. 33-5036/2011 of 2 November 2011.

¹⁴⁵ SINGH (2013) op. cit. para 30., 36.

¹⁴⁶ YESHANEW (2008) op. cit. 289.

¹⁴⁷ Regulations on the Federal Service for Supervision in Education and Science, approved by the Government Decree No. 594 of 15 July 2013, para 5.32. Such claims are filed in accordance with the Federal Law No. 59-FZ of 2 May 2006 'On the Procedure Concerning Consideration of Communications of Citizens of Russian Federation'.

¹⁴⁸ Information on complaints filed by public in 2012 (Federal Service for Supervision in Education and Science, 2012. http://obrnadzor.gov.ru/common/upload/obrashcheniya_grazhdan_2012_g.pdf

authorities that have the highest profile in media and not to those directly responsible for consideration of such claims.

Response normally provided by the Federal Service includes several types of actions, such as explanation or clarification of the relevant law to the claimant, passing the issue on to the regional authority or to the competent federal authority, such as the Public Prosecutor Office, initiating field checks, or court proceedings.

Public Prosecutor Office is another example of extra-judicial protection of the right to education. This office is very active in extra-judicial protection of the right to education through consideration of individual claims and initiating field checks on the basis of complaints received.¹⁴⁹ This office has a direct effect on wider justiciability of the right to education due to its mandate to act immediately in case of detection of a violation and to bring an administrative action against the violator as per specialised article of the Code of Administrative Offenses (violation of the right to education),¹⁵⁰ be it a state (federal or regional) or local (municipal) authority, or management of an educational organisation.¹⁵¹

Examples when Public Prosecutor Office takes action against violations of the right to education are numerous. Some of the recent violations acted upon concerned, for instance, lack of due care on the part of local authorities failing to provide heating in a public nursery;¹⁵² failure of local education authorities to provide free textbooks for public schools and charging parents instead;¹⁵³ violations of established procedures of enrolment to a program of higher education (obligatory paid preparatory classes ensuring access to a university);¹⁵⁴ closure of rural schools without proper democratic procedure of obtaining consent of the majority of residents of the village and without organising transport access of the children to other schools,¹⁵⁵ failure of local authorities to ensure record of migrant children not receiving compulsory education and provide access to compulsory education to these children accordingly¹⁵⁶ etc.

¹⁴⁹ Federal Law No. 2202-1 of 17 January 1992 'On Public Prosecution Office of Russian Federation', arts 10, 21 (2), 27.

¹⁵⁰ Code of Administrative Offenses of Russian Federation No. 195-FZ of 30 December 2001, art 5.57 (1).

¹⁵¹ Federal Law 'On Public Prosecution Office' art 26.

¹⁵² 'Prosecutor's Office of Kurgan Region Provided Remedy for Violated Rights to Accessible and Free Pre-School Education', 29 August 2013. www.kurganproc.ru/index.php?option=com_content&view=article&id=4560:2013-08-29-06-25-20&catid=38:news-c&Itemid=166; 'In Sverdlovsk Region the Prosecutor's Office Protects Children's Rights to Accessible Preschool Education', 22 January 2014. www.genproc.gov.ru/smi/news/genproc/news-84587/

¹⁵³ 'Prosecutor's Office in Komi Republic Takes Action to Secure Constitutional Rights of Citizens for Free Education', 16 September 2013. www.prockomi.ru/news/index.php?ELEMENT_ID=5357

¹⁵⁴ 'Prosecutor's Office Disclosed Violations of the Right of Citizens to Higher Professional Education', 6 February 2012. <http://udmproc.ru/news/show/prokuraturoj-vyavleny-narusheniya-prav-grazhdan-na-vysshee-professionalnoe-obrazovanie>

¹⁵⁵ 'Prosecutor's Office in the Court Asserted the Rights of Ust'-Kamchatsky Children to Education: Local Administration's Decisions on Closure of Two Schools Were Deemed Illegal', 24 April 2013. <http://severdvr.ru/news/show/?id=71085>

¹⁵⁶ 'Kineshma City Prosecutor's Office Disclosed Violations of the Rights to Education of Migrant Children', 27 May 2013. <http://prokuratura.ivanovo.ru/кинешемской-городской-прокуратурой-16/>

Public prosecutors in the regions are quite efficient in terms of providing immediate extra-judicial remedy for violations of the right to education. Their interventions result in readmitting expelled students;¹⁵⁷ providing free textbooks to pupils of public schools;¹⁵⁸ opening of final two classes of compulsory schooling for a group of children insufficient for a full class,¹⁵⁹ and so forth.

Field checks conducted by the General Prosecutor's Office on the account of implementation of the priority national project 'Education' in 2012 revealed more than 80,000 violations of the right to education and management of education activities, including misappropriation of funds allocated for equipment of public schools, reconstruction and renovation of public school premises, failure to remunerate class leaders, to provide access to distance learning for disabled children, or to filter out restricted Internet content of pornographic or extremist nature.¹⁶⁰

Among other non-judicial mechanisms of redress the Commissioner for Human Rights in the Russian Federation,¹⁶¹ a National Human Rights Institution with ECOSOC status A,¹⁶² plays a very important role. Annually, it considers nearly 200 claims concerning the right to education.¹⁶³ The Russian Civic Chamber plays a similar role.¹⁶⁴ Its functions include, inter alia, facilitation of 'coordination between the socially significant interests of citizens of Russia, NGOs, and national and local authorities, in order to resolve the most important problems of economic and social

¹⁵⁷ 'In the City Bolshoy Kamen after a Prosecutor's Intervention 85 Illegally Expelled Children Were Readmitted to the Programs of Non-Formal Learning', 13 May 2013. <http://prosecutor.ru/news/prokuratura-zato-bolshoykamen/2013-05-13--2.htm>

¹⁵⁸ Sergey KUZBASSKY: Non-Free Right to Education: Authorities of Udmurtia Do Not Provide Textbooks. *Gazeta* No. 33, (1144) 4 September 2013. <http://netreforme.org/news/nebesplatnoe-pravo-na-obrazovanie-vlasti-udmurtii-uchebniki-ne-dayut/>

¹⁵⁹ 'Prosecutor Asserted the Right of Children to Continue Education in the 10th Grade in their 'Own' School', 6 September 2013. <http://udmproc.ru/news/show/prokuror-otstoyal-pravo-detej-prodolzhit-obuchenie-v-10-klasse-v-svoej-rodnoj-shkole>

¹⁶⁰ 'General Prosecutor's Office Analysed the Realisation of Rule of Law in the Process of Implementation of the Priority National Project 'Education'', 25 February 2013. <http://genproc.gov.ru/smi/news/genproc/news-81254/>. Priority National Project 'Education' started on 5 September 2005 to address the most sensitive areas of Russian education system: class leaders, school lunches, school buses, revelation and support of best teachers and gifted children, education of military officers, see the Project's page on the Ministry of Education and Science website: <http://минобрнауки.рф/проекты/пнпо>

¹⁶¹ Acting on the basis of Russian Constitution (1993) art 103 (e); Federal Constitutional Law No.1-FKZ of 26 February 1997 'On the Commissioner for Human Rights of Russian Federation'.

¹⁶² International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Chart of the Status of National Institutions Accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, accreditation status as of 11 February 2013. www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf

¹⁶³ Report of the Commissioner For Human Rights in the Russian Federation on Consideration of claims in 2012. http://ombudsmanrf.org/images/stories/word/prilogenie_doc_2012.doc

¹⁶⁴ Acting on the basis of Federal Law 'On the Civic Chamber of the Russian Federation' No. 32-FZ of 4 April 2005.

development, to ensure national security, and to defend the rights and freedoms of citizens of Russia'.¹⁶⁵ With regard to the right to education such defence is included in the mandate of the Council's Commission on Development of Education.¹⁶⁶

These examples demonstrate how non-judicial methods of redress for violations of the right to education in Russia contribute to strengthening of inquisitorial justiciability at the domestic level. Although the thematic issues of complaints filed with the authorities briefly listed above are similar to those that appear in the courtroom, some elements of the right to education are only present in non-judicial proceedings. For example, violence in education connected with violation of human dignity, religious rights in education and corrupt practices comprise, perhaps, the main areas of divergence. These types of misconduct are highly latent and rarely reach courtroom. However, since non-judicial authorities do have, in most cases, the right to initiate checks and investigations, some of the latent cases tend to be disclosed through these procedures. Furthermore, engagement with these extra-judicial procedures does not require any special legal knowledge, nor payment of fees, decisions of these authorities take immediate effect. Therefore, cases that require instant reaction of authorities are most likely to appear before a public prosecutor or a regional supervision authority than before a court.

2.3. International Justiciability of the Right to Education

According to Addo the two levels of justiciability – domestic and international – differ from the perspective of both institutional capacity and procedural basis. Domestic justiciability is '*usually* undertaken by the courts of law', while at the level of international law 'judicialism [...] is not always necessary'. From the procedural point of view the former type – adversarial justiciability – is achieved, as suggested by the term, through a dispute of opposing parties, whereas the latter – inquisitorial justiciability – proceeds mainly through an enquiry mechanism of a monitoring (treaty) body.¹⁶⁷

Regional systems of international protection of human rights are, by and large, more substantially and procedurally elaborated and are generally considered more effective than universal enquiry mechanisms.¹⁶⁸ Among them the European Court of Human Rights, the 'crown jewel of the world's most advanced international system

¹⁶⁵ See the information of the Council's official website: www.oprf.ru/en

¹⁶⁶ On the activities of the Commission see: www.oprf.ru/1449/1512

¹⁶⁷ ADDO (1988) op. cit. 1426.

¹⁶⁸ ADDO (2010) op. cit. 226. For assessment and analysis of regional human rights mechanisms see also, inter alia, Takele Soboka BULTO: The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights. *U. Tas. L. Rev.*, vol. 29, (2010) 142.; Tara J. MELISH: 'Justice vs. Justiciability?': Normative Neutrality and Technical Precision, the Role of the Lawyer in Supranational Social Rights Litigation. *N.Y.U. J. Int'l L. & Pol.*, vol. 39, (2006–2007) 385.

for protecting civil and political liberties',¹⁶⁹ is perhaps the most prominent and, effectively, the only adversarial tool of international redress for Russian citizens.

According to Ingram, in relation to international law 'justiciability' is defined as the 'quality of being capable of *being considered legally* and determined by the application of *legal principles* and techniques'.¹⁷⁰ We can see that this definition is much more generous in terms of application – there are no institutional or procedural restrictions whatsoever, moreover, there is no reference to formalised legal norms, on the contrary, according to this definition, a matter would be considered internationally justiciable if legal 'principles' can be applied to resolve it.¹⁷¹

A somewhat narrower approach is taken by scholars to define international justiciability with reference to a particular mechanism. For example, with respect to ICESCR justiciability is defined as the possibility for domestic courts to 'take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant'.¹⁷²

Whatever the approach, the capacity of a right to be protected on the international level is not as important *per se* as in its connection with those limitations of economic, social or political nature that undermine the right's justiciability. The limitations can also be substantial in essence. As researched in great detail by Marcus, justiciability of human rights at international level differs in scope not only for different types of rights (civil and political or socio-economic), but also for different state obligations (respect, protect and fulfil).¹⁷³ According to Marcus violations of obligations to *respect* economic, social and cultural rights were more successful in being addressed by both judicial and quasi-judicial bodies at supranational level, whereas the obligations to protect or fulfil still 'resist international judicial scrutiny' due to their well-known 'positive and progressive aspects'.¹⁷⁴

¹⁶⁹ Laurence R. HELFER: Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. *Eur J Int Law*, vol. 19, no. 1, (2008) 125.

¹⁷⁰ INGRAM (1994) op. cit. 354 (emphasis added).

¹⁷¹ For the definition of legal principles and the way they differ from legal rules and standards see, *inter alia*, Ronald M. DWORKIN: *The Model of Rules*. Yale Law School, 1967.; H. L. A. HART: *The concept of law*. 2nd ed., Oxford, OUP, 1997.; Joseph RAZ: *Legal Principles and the Limits of Law*. *Yale L. J.*, vol. 81, (1971–1972) 823.; Thomas R. KEARNS: *Rules, Principles, and the Law*. *Am. J. Juris.*, vol. 18, (1973) 114.

¹⁷² Leyla CHOUKROUNE: Justiciability of Economic, Social, and Cultural Rights: The UN Committee on Economic, Social and Cultural Rights: Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights. *Colum. J. Asian L.*, vol. 19, (2005–2006) 31.

¹⁷³ On political limitations of supranational human rights mechanisms see, for example, David MARCUS: The Normative Development of Socioeconomic Rights through Supranational Adjudication. *Stan. J. Int'l L.*, vol. 42, (2006) 53., 68.

¹⁷⁴ As asserted by Marcus the practice of international human rights tribunals supports this conclusion as the ECJ is clear on the issue that 'obligations to fulfil are beyond its judicial competence' while the ECHR has addressed positive obligations only when overlapping domestic norms provide legal cover, see MARCUS (2006) op. cit. 87.

In Russia ‘international treaties and agreements [...] constitute] a component part of its legal system’.¹⁷⁵ They do not require incorporation; they have precedence over national law in cases of legal collision and are directly referred to by domestic courts even at the lowest levels,¹⁷⁶ as recommended by the CESCR.¹⁷⁷ Thus it can be argued that all dimensions of the right to education recognised at the international level and confirmed through international case law are potentially justiciable in Russia through direct reference to the treaties and their interpretation.

In Russia the right of everyone to appeal to ‘international bodies for the protection of human rights and freedoms, if all the existing internal state means of legal protection have been exhausted’ is guaranteed by Constitution.¹⁷⁸ Traditionally, the work of the European Court of Human Rights is referred to under this provision. However, the only two cases on the right to education in Russia that have been considered by the court do not provide much material for analysis.¹⁷⁹

It should be noted that this constitutional norm does not limit the possibilities of Russian citizens exclusively to adversarial international protection, but also includes, potentially, quasi-judicial procedures, such as treaty monitoring bodies and complaints procedures.

Treaty bodies monitoring procedures directly affect justiciability of the right to education at domestic level by giving highly compelling, albeit not binding, recommendations to improve legal, judicial and organisational guarantees of its protection.¹⁸⁰ However, they do not *per se* provide a forum for appealing decisions

¹⁷⁵ Russian Constitution (1993) art 15(3).

¹⁷⁶ See, for example, Tomsk Regional Court Appellate Decision No. 33-2696/2012 of 26 October 2012, concerning arrears in the payment of wages.

¹⁷⁷ CESCR expressed their concern, *inter alia*, with poor referencing to the text of the Covenant by national courts, see para 301, Committee on Economic, Social and Cultural Rights: *Report on the Thirtieth and Thirty-First Sessions* (5-23 May 2003, 10-28 November 2003) E/2004/22 E/C.12/2003/14. Economic and Social Council Official Records, 2004. Supplement No. 2.

¹⁷⁸ Russian Constitution (1993) art 46(3).

¹⁷⁹ In *Timishev v. Russia* (Applications nos. 55762/00 and 55974/00, final judgment of 13 March 2006) the Court held that the applicant’s children were unlawfully denied the right to education provided for by domestic law due to the fact that the right to education was made conditional on the registration of their parents’ residence (para 66). In *Catan and Others v. Moldova and Russia* (Applications nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012) Russia was held accountable for the violation of the applicants’ rights to education on the contested territory of Transdnistria due to the fact that Russia exercised effective control over that territory by virtue of its continued military, economic and political support (para 150).

¹⁸⁰ See for example highly detailed concluding observations of the Committee on the Rights of the Child in the 2005 Russian report adopted at the 40th Session of CRC (12 - 30 September 2005) No. CRC/C/125/Add.5. The Committee has produced recommendations: on the right of children to take part in the administration of education (para 88) and forming of its contents (para 92) including through freedom of association (para 103); human rights (paras 90, 262) and patriotic (para 260) education at schools; prohibition from ‘physical and mental’ violence in education and protection of children from it (paras 168-170); administrative liability of parents for non-fulfilment of their responsibilities to provide education to their children (para 168); ‘educational colonies’ (para 178) and ‘corrective colonies’ (para 290) as specific detain facilities for juvenile criminals, ‘compulsory

taken at domestic level. In other words, for the purpose of this research, a victim of violation of the right to education cannot directly apply to a treaty body to remedy the violation, but in the long run cumulative effect of similar violations communicated through NGOs or expert mechanisms may give rise to an action from a treaty body that may, in turn, affect the situation on the ground.

Some of the treaty bodies have established their own complaints procedures allowing for consideration of individual communications from victims of violations of human rights enshrined in the relevant treaties.¹⁸¹ The most relevant procedure for the right to education would be the one envisaged by the Optional Protocol to ICESCR allowing consideration of individual complaints.¹⁸² However, since the Protocol only entered into force on 5 May 2013 and Russia is not among the countries that ratified it by now, there are no relevant cases to cite. Similarly, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure has not yet entered into force, and Russia is also not among the state parties.¹⁸³

As opposed to treaty bodies individual complaints, complaint procedure of the Human Rights Council, as established by the Institution-Building Resolution 5/1 to replace the previously existing 1503 procedure,¹⁸⁴ is strictly confidential and only concerns 'consistent patterns of gross and reliably attested violations of all human

educational measures' as alternative to detention (para 292); compulsory basic general education (para 247); home education for children who cannot attend general education schools regularly (because of long-term illness, family circumstances, etc.) (para 251); the right to be instructed in one's national language (paras 254, 368); right to education of internally displaced persons and registration of migrant children with the view to providing them with access to education (para 278); access to schools in Chechen Republic (paras 286--287).

¹⁸¹ Such procedures have been established under Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 United Nations, Treaty Series 171 (ratified by Russia on 1 October 1991); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 6 October 1999, 2131 United Nations, Treaty Series 83 (ratified by Russia on 28 Jul 2004); Optional Protocol to the Convention on the Rights of Persons with Disabilities adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 (not ratified by Russia); International Convention on the Elimination of All Forms of Racial Discrimination (adopted by General Assembly Resolution 2106 (XX) of 21 December 1965) art 14; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, (1984) 1465 United Nations, Treaty Series 85 (ratified by Russia on 3 Mar 1987) art 22; International Convention for the Protection from Enforced Disappearance, New York, 20 December 2006 Doc.A/61/488. C.N.737.2008. TREATIES-12 of 2 October 2008 (not ratified by Russia) art 31.

¹⁸² Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, 10 December 2008, adopted by General Assembly resolution A/RES/63/117, Doc.A/63/435; C.N.869.2009.TREATIES-34 of 11 December 2009.

¹⁸³ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure adopted at the sixty-sixth session of the General Assembly of the United Nations by resolution 66/138 of 19 December 2011. In accordance with article 19(1) the Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

¹⁸⁴ Economic and Social Council Resolution 1503(XLVIII) of 27 May 1970 on Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms adopted at 1693rd plenary meeting.

rights and all fundamental freedoms' communicated by individuals and / or civil society.¹⁸⁵ A number of individual communications from different countries resulted in serious and immediate action of the Human Rights Council, including passing of country-specific resolutions, urgent debates, establishing of country mandates of special procedures.¹⁸⁶ However, this complaint mechanism still remains a process behind closed doors unavailable for analysis.

Effectively, the complaint procedure is more focused on cooperation with the states aiming at improving a particular human rights situation rather than on resolving individual issues. Thus, it affects the justiciability indirectly, by calling the states to attest their accountability for gross human rights violations and to adopt legislative, judicial and organisational measures accordingly.

As a part of their mandates some special procedures of the Human Rights Council receive communications, for which they are entitled to react with urgent appeals and letters of allegations. The Special Rapporteur on the right to education in his or her work takes into account 'information and comments received from Governments, organizations and bodies of the United Nations system, other relevant international organizations and nongovernmental organizations'.¹⁸⁷

However, the number of communications regarding the right to education sent to the states by the Special Rapporteur remains consistently low. In 2013 only one communication has been sent (compared to an average of 40 for each mandate covering torture, human rights defenders, freedom of expression and freedom of assembly sent in the same period by the respective special procedures). In the previous five years the rate remained consistent: 39 communications on the right to education against an average of 1,100 of the same categories.¹⁸⁸ In the last three years the Special Rapporteur has not sent a single communication to Russia concerning the right to education.¹⁸⁹ However, this situation is in line with general lack of cooperation with this mandate on the part of Russian government.¹⁹⁰

¹⁸⁵ Human Rights Council Resolution 5/1 of 17 June 2007 'Institution-building of the United Nations Human Rights Council', para 85.

¹⁸⁶ For the full list of actions taken by the Council see List of Situations Referred to the Human Rights Council under the Complaint Procedure since 2006. www.ohchr.org/Documents/HRBodies/HRCouncil/SituationsconsideredHRCJan2013.pdf

¹⁸⁷ UN Commission on Human Rights resolution 1998/33 of 17 April 1998, Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems which the Developing Countries Face in their Efforts to Achieve these Human Rights para 6 (a) (i) to (viii).

¹⁸⁸ Communications report of Special Procedures: Communications sent, 1 March 2013 to 31 May 2013; Replies received, 1 May to 31 July 2013, A/HRC/24/21 of 22 August 2013.

¹⁸⁹ See communications reports of Special Procedures 2011–2013: www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx

¹⁹⁰ Special Rapporteur on the right to education has not been able to secure a country visit to Russia for the whole period of time since the mandate's establishment in 1998, and Russia is not listed among the countries that provide standing invitation, see Special Procedures Standing Invitations: www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx

3. Conclusion

It is clear that international cooperation in all multiplicity of its methods – from interactive dialogue, capacity building and awareness-raising to monitoring compliance with international obligations – is a powerful tool that can be used to enhance domestic justiciability of all human rights, including the right to education. Inevitably, the effectiveness of this important instrument is often curtailed by political attitudes. Unwillingness to accord appropriate significance or visibility to recommendations issued by treaty bodies or special procedures is often explained by such categories as ‘national interests’, ‘state sovereignty’, ‘legal culture’, ‘particularities of the legal system’ or even by imperfection of human rights situation in other countries.

Such a defensive attitude does not make allowances for taking into account concrete indications of gaps of protection detected by international experts, whereas a somewhat more pragmatic approach to the results of thorough investigation of the state’s legislation and factual situation would build up political assets of the state and, which is more, be beneficial to its citizens. Although study of these attitudes and their effect on realisation of human rights are not in the ambit of the present research, they deserve a dedicated close attention.