

Tools for the
Protection of
Human Rights

Summaries of
Jurisprudence

RIGHT TO
EDUCATION



Campaña
Latinoamericana
por el Derecho
a la Educación

CEJIL

*SUMMARIES OF
JURISPRUDENCE*

*Right to
Education*

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Centro por la Justicia y el Derecho Internacional
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Summaries of Jurisprudence / Right to Education

Compiled by Celina Giraudy

Center for Justice and International Law - CEJIL, 2014.

208 p.; 24 x 17 cm.



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We are especially grateful to the

Danish International Development Agency for the support they provided in the production of this book



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PRESENTATION

The Center for Justice and International Law and the Latin American Campaign for the Right to Education (CLADE for its Spanish acronym) are proud to present a new addition to the series *Tools for the Protection of Human Rights: Summaries of Jurisprudence*. The focus of the present publication is the Right to Education.

On this occasion, and in accordance with our institutional objectives, we have joined forces to identify and compile the main decisions made by the regional tribunals related to the right to education. With this publication, we hope to contribute to making the main standards produced by international bodies accessible as well as to distribute them amongst those who work in this thematic area, thereby facilitating their appropriation in order to improve the defense and protection of the right to education.

This volume includes judgments of the Inter-American Court of Human Rights, the European Court of Human Rights, the African Committee of Experts on the Rights and Welfare of the Child and the UN's Human Rights Committee, which provide knowledge on the way these bodies have dealt with the different dimensions of the right to education and how they have interpreted the scope of protection.

Additionally, some United Nations documents that offer conceptual elements on the specific content and scope of the right to education were included as annexes.

Finally, we would like to offer our sincere thanks for the invaluable contributions of all those who have made the publication of this book possible: Santiago Featherston, Laura Durin, Marta Mato who were involved in various stages of the production of this publication during their internships in CEJIL's regional office in Buenos Aires; Federico Espeche, Stefania Sánchez Rojo, Luciana Veneziale whose practicum experiences in translation were carried out as part of the established internship agreement between CEJIL and the Fundación Universidad de Belgrano (Argentina) and the Technical-Scientific Translator Nancy Piñeiro

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*Inter-American Court
of Human Rights*

*Case of the
Girls Yean and Bosico v.
Dominican Republic*

*Preliminary Objections, Merits,
Reparations and Costs*

*Judgment of
September 8, 2005*



[...]

I. INTRODUCTION OF THE CASE

1. On July 11, 2003, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the Court an application against the Dominican Republic (hereinafter “the Dominican Republic” or “the State”), originating from petition No. 12,189, received by the Secretariat of the Commission on October 28, 1998.

2. The Commission submitted the application based on Article 61 of the American Convention, for the Court to declare the international responsibility of the Dominican Republic for the alleged violation of Articles 3 (Right to Juridical Personality), 8 (Right to a Fair Trial), 19 (Rights of the Child), 20 (Right to Nationality), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection) of the American Convention, in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of the children Dilcia Oliven Yean and Violeta Bosico Cofi¹ (hereinafter “the children Dilcia Yean and Violeta Bosico”, “the Yean and Bosico children”, “the children Dilcia and Violeta”, “the children” or “the alleged victims”), with regard to the facts that have occurred and the rights that have been violated since March 25, 1999, the date on which the Dominican Republic accepted the contentious jurisdiction of the Court.

3. In its application, the Commission alleged that the State, through its Registry Office authorities, had refused to issue birth certificates for the Yean and Bosico children, even though they were born within the State’s territory and that the Constitution of the Dominican Republic (hereinafter “the Constitution”) establishes the principle of *ius soli* to determine those who have a right to Dominican citizenship. The Commission indicated that the State obliged the alleged victims to endure a situation of continued illegality and social vulnerability, violations that are even more serious in the case of children, since the Dominican Republic denied the Yean and Bosico children their right to Dominican nationality and let them remain stateless persons until September 25, 2001. According to the Commission, the child Violeta Bosico was unable to attend school for one year owing to the lack of an identity document. (...)

[...]

1 On March 25, 1999, the date on which the State accepted the Court’s contentious jurisdiction, Dilcia Yean was 2 years old and Violeta Bosico was 14 years old.

VIII. *PROVEN FACTS*

109. The Court considers proven the facts that form part of the background and context of this case which it is considering in the exercise of its competence. These facts are described below:

Background

Social context

109.1. The first important migrations of Haitians towards the Dominican Republic took place in the first third of the twentieth century when around 100,000 persons went to work on the sugar plantations in that country. The Dominican mills were originally in the hands of private companies and, later, most of them were transferred to the control of the State Sugar Council (CEA). Many Haitian migrants went to live permanently in the Dominican Republic, formed a family in that country, and now live there with their children and grandchildren (second and third generation Dominicans of Haitian origin) who were born in and live in the Dominican Republic.³⁰

109.2. Most of the Haitians and Dominicans of Haitian origin in the Dominican Republic live in conditions of poverty in areas known as “bateyes,” which consist of settlement of agricultural workers located around the sugar cane plantations.³¹ There

30 Cf. National Coalition for Haitian Rights, “Beyond de Bateyes – Haitian Immigrants in the Dominican Republic”, 1996 (file of attachments to the application, attachment 9, folios 819 to 821 and 829 to 831); Human Rights Watch, “Personas Ilegales - Haitianos y Dominico-Haitianos en la República Dominicana.” New York: 2002, (file of attachments to the brief with requests and arguments, attachment 19, folios 310 to 320); Marco Scuriatti, “Background Papers – A review of the Haitian Immigrant Population in the Dominican Republic.” In: World Bank, “Dominican Republic Poverty Assessment: Poverty in a High-Growth Economy (1986 – 2000),” volume II, 2001, pp. 81 to 83, and Bridget Wooding and Richard Moseley-Williams, “Inmigrantes haitianos y dominicanos de ascendencia haitiana en la República Dominicana.” Santo Domingo, the Dominican Republic: Cooperación Internacional para el Desarrollo y el Servicio Jesuita a Refugiados y Migrantes, 2004, pp. 1 to 103.

31 Cf. National Coalition for Haitian Rights, “Beyond de Bateyes – Haitian Immigrants in the Dominican Republic,” 1996 (file of attachments to the application, attachment 9, folio 820); United Nations, Human Rights Committee, Comments by the Government of the Dominican Republic on the Concluding Observations of the Human Rights Committee, UN Doc. CCPR/CO/71/DOM/Add.1, 28 May 2002, para. 42; United Nations,

are few basic public services in these places and the roads are not maintained so that, during the rainy season, communication between the bateyes and the towns can be cut for several days.³²

[...]

The children Dilcia Yean and Violeta Bosico

109.6. Dilcia Yean was born on April 15, 1996, in the “local health center,” in the Municipality of Sabana Grande de Boyá, Province of Monte Plata, the Dominican Republic.³⁶

United Nations Development Programme, Human Development Office of the Dominican Republic, Informe Nacional de Desarrollo Humano 2005 – Hacia una inserción mundial incluyente y renovada, pp. 119 to 144, and Bridget Wooding and Richard Moseley-Williams, “Inmigrantes haitianos y dominicanos de ascendencia haitiana en la República Dominicana,” Cooperación Internacional para el Desarrollo y el Servicio Jesuita a Refugiados y Migrantes, Santo Domingo, the Dominican Republic, 2004, pp. 1 to 103.

32 Cf. National Coalition for Haitian Rights, “Beyond de Bateyes – Haitian Immigrants in the Dominican Republic,” 1996 (file of attachments to the application, attachment 9, folios 852 to 861); World Bank, “Dominican Republic Poverty Assessment: Poverty in a High-Growth Economy (1986 – 2000),” volume I, 2001, pp. 44 to 55; Marco Scuriatti, Background Papers – A review of the Haitian Immigrant Population in the Dominican Republic. In: World Bank, Dominican Republic Poverty Assessment: Poverty in a High-Growth Economy (1986 – 2000), volume II, 2001, pp. 84 to 85, and United Nations, Human Rights Committee, Comments by the Government of the Dominican Republic on the Concluding Observations of the Human Rights Committee, UN Doc. CCPR/CO/71/DOM/Add.1, 28 May 2002, para. 46.

36 Cf. extract from the birth certificate of the child Dilcia Oliven Yean issued on September 25, 2001, by the Central Electoral Board, Civil Status Registry Office of the First Circumscription of the National District of the Dominican Republic (file of attachments to the application, attachment 14, tome IV, folio 2105); certificate of declaration of the birth of the child Dilcia Oliven Yean issued on September 25, 2001, by the Civil Status Registry Office of the First Circumscription of the National District, Santo Domingo, the Dominican Republic (file of attachments to the application, attachment 14, tome IV, folio 2113; file of attachments to the brief with requests and arguments, attachment 14, folio 90, and file of attachments to the answer to the application, attachment 18, folio 43), and official report of the birth of the child Dilcia Yean issued on March 5, 1997, by the “local health center” of Sabana Grande de Boyá, Monte Plata, Secretariat of State for Health and Social Assistance, the Dominican Republic (file of attachments to the application, attachment 3, folio 98; file of attachments to the brief with requests and arguments, attachment 7, folio 48, and file of attachments to the answer to the application, attachment 19, folio 45).

She grew up in this municipality and, in 2003, attended the Alegría Infantil School.³⁷ Her mother is Leonidas Oliven Yean, of Dominican nationality.³⁸ Her father is Haitian and is not in communication with his daughter.³⁹ Her maternal grandparents are Dos Oliven, Haitian, and Anita Oliven Yean.⁴⁰ Dilcia Yean is of Haitian origin through her father and her maternal grandfather.

37 Cf. MUDHA report on the visit to the next of kin of the children Dilcia Yean and Violeta Bosico on April 9, 2003 (file of attachments to the brief with requests and arguments, tome I, folio 389).

38 Cf. extract from the birth certificate of the child Dilcia Oliven Yean issued on September 25, 2001, by the Central Electoral Board, Civil Status Registry Office of the First Circumscription of the National District of the Dominican Republic (file of attachments to the application, attachment 14, tome IV, folio 2105); birth certificate of Leonidas Oliven Yean issued on October 9, 1978, by the Central Electoral Board, the Dominican Republic (file of attachments to the brief answering the application, attachment 1, folio 2), and identity card number 090-0002085-0, of Leonidas Oliven Yean issued on January 29, 1994, by the Central Electoral Board, the Dominican Republic (file of attachments to the application, attachment 3, folios 102 and 103). In the statement made by Leonidas Oliven Yean on February 3, 2005, authenticated by Marcelino de la Cruz Nuñez, she clarified that she is known as "Nany" (file of preliminary objections and possible merits and reparations, tome III, folio 905).

39 Cf. statement made by Leonidas Oliven Yean on June 25 or July 9, 1999, before Katherine A. Fleet, in Batey Enriquillo, Sabana Grande de Boyá (file with attachments to the application, attachment 14, tome III, folios 1752 to 1756; file with attachments to the brief with requests and arguments, attachment 34, folios 411 to 415, and file of attachments to the brief answering the application, attachment 15, folios 31 and 32).

40 Cf. extract from the birth certificate of Leonidas Oliven Yean issued on September 10, 2001, by the Central Electoral Board, in Sabana Grande de Boyá, the Dominican Republic (file of attachments to the application, attachment 9, folio 697, and file of attachments to the answer to the application, attachment 8, folio 17); birth certificate of Leonidas Oliven Yean issued on October 9, 1978, by the Central Electoral Board, the Dominican Republic (file of attachments to the brief answering the application, attachment 1, folio 2); birth certificate of Rufino Oliven Yean issued on November 30, 1974, by the Central Electoral Board, the Dominican Republic (file of attachments to the brief answering the application, attachment 2, folio 4), and birth certificate of Julio Oliven Yean issued on October 9, 1978 by the Central Electoral Board, the Dominican Republic (file of attachments to the brief answering the application, attachment 3, folio 6).

109.7. Violeta Bosico was born on March 13, 1985, in the Dominican Republic.⁴¹ Her mother is Tiramén Bosico Cofi, of Dominican nationality.⁴² Her father is Delima Richard, of Haitian nationality, and he is not in communication with his daughter.⁴³ Her maternal grandparents are Anol Bosico, who is Haitian, and Juliana Cofi.⁴⁴ Violeta Bosico is of Haitian origin through her father and maternal grandfather.

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- 41 *Cf.* extract from the birth certificate of the child Violeta Bosico Cofi issued on September 25, 2001, by the Central Electoral Board, Civil Status Registry Office of the First Circumscription of the National District of the Dominican Republic (file of attachments to the application, attachment 14, tome IV, folio 2104); certificate of declaration of the birth of the child Violeta Bosico Cofi issued on September 25, 2001, by the Civil Status Registry Office of the First Circumscription of the National District, Santo Domingo, the Dominican Republic (file of attachments to the application, attachment 14, tome IV, folio 2112; file of attachments to the brief with requests and arguments, attachment 15, folio 91, and file of attachments to the answer to the application, attachment 35, folio 105), and birth certificate of Violeta Bosico Cofi issued on March 3, 1997, by the auxiliary Mayor of Batey Las Charcas, Office of the Auxiliary Mayor, Section Juan Sánchez, Sabana Grande de Boyá, the Dominican Republic (file of attachments to the application, attachment 3, folio 94; file of attachments to the brief with requests and arguments, attachment 8, folio 49, and file of attachments to the answer to the application, attachment 24, folio 55).
- 42 *Cf.* extract from the birth certificate of the child Violeta Bosico Cofi issued on September 25, 2001, by the Central Electoral Board, Civil Status Registry Office of the First Circumscription of the National District of the Dominican Republic (file of attachments to the application, attachment 14, tome IV, folio 2104); birth certificate of Tiramén Bosico Cofi issued on October 27, 1956, by the Civil Status Registrar of Sabana Grande de Boyá, the Dominican Republic (file of attachments to the brief answering the application, attachment 28, folio 69); identity card of Tiramén Bosico Cofi issued by the Central Electoral Board, the Dominican Republic (file of attachments to the application, attachment 3, folio 95), and identity card, number 090-0013606-0 of Tiramén Bosico Cofi issued by the Central Electoral Board, the Dominican Republic (file of attachments to the application, attachment 9, folios 620 and 621).
- 43 *Cf.* additional statement made by the child Violeta Bosico Cofi before Hillary Ronen on July 31, 2001, in Batey Palavé, Santo Domingo, the Dominican Republic (file of attachments to the brief with requests and arguments, attachment 27, folios 393 to 396), and statement of Tiramén Bosico Cofi made before Katherine A. Fleet on July 11, 1999, in Palavé, Manoguayabo, the Dominican Republic (file of attachments to the application, attachment 4, folios 376 to 387; file of attachments to the brief with requests and arguments, attachment 4, folios 28 to 39, and file of attachments to the brief answering the application, attachment 25, folios 57 to 60).
- 44 *Cf.* extract from the birth certificate of Tiramén Bosico Cofi issued on September 10, 2001, by the Civil Status Registrar of Sabana Grande de Boyá, the Dominican Republic (file of attachments to the application, attachment 9, folio 622, and file of attachments to the final arguments brief of the State, attachment 13, folio 3873), and birth certificate of Tiramén Bosico Cofi issued on October 27, 1956, by the Civil Status Registrar of Sabana Grande de Boyá, the Dominican Republic (file of attachments to the brief answering the application, attachment 28, folio 69).

109.8. Violeta Bosico lived with her mother and siblings in Batey Las Charcas, until 1992, when she went to live with her sister, Teresa Tucent Mena, in Batey Verde, also called Batey Enriquillo. In 1993, she moved, together with her sister to Batey Palavé, outside Santo Domingo, where she lives now. Violeta Bosico has grown up in the Dominican Republic, attended the Palavé School and, in 2005, went to secondary school.⁴⁵

109.9. Owing to their Haitian ancestry, the children Dilcia Yean and Violeta Bosico, form part of a vulnerable social group in the Dominican Republic.⁴⁶

45 Cf. statement made by the child Violeta Bosico Cofi, authenticated on February 2, 2005, by Marcelino de la Cruz Nuñez (file of preliminary objections and possible merits and reparations, folios 892 to 893bis, and file of attachments to the final arguments brief of the State, attachment 33, folios 3944 and 3945); statement made by the child Violeta Bosico Cofi on August 8, 1999, before Katherine A. Fleet, in Batey Palavé, Manoguayabo, the Dominican Republic (file of attachments to the application, attachment 6, folios 446 to 457, and file of attachments to the brief with requests and arguments, attachment 24, folios 370 to 381); additional statement made by the child Violeta Bosico Cofi before Hillary Ronen on July 31, 2001, in Batey Palavé, Santo Domingo, the Dominican Republic (file of attachments to the brief with requests and arguments, attachment 27, folios 393 to 396); statement made by Teresa Tucent Mena, authenticated on February 2, 2005, by Marcelino de la Cruz Nuñez (file of preliminary objections and possible merits and reparations, tome III, folios 899 to 900); statement made by Teresa Tucent Mena on August 8, 1999, before Katherine A. Fleet, in Palavé, Manoguayabo, the Dominican Republic (file of attachments to the application, attachment 4, folios 358 to 367; file of attachments to the brief with requests and arguments, attachment 25, folios 382 to 388); statement made by Tiramén Bosico Cofi before Katherine A. Fleet on July 11, 1999, in Palavé, Manoguayabo, the Dominican Republic (file of attachments to the application, attachment 4, folios 376 to 387; file of attachments to the brief with requests and arguments, attachment 4, folios 28 to 39, and file of attachments to the brief answering the application, attachment 25, folios 57 to 60); certification issued on November 6, 2003, by Amada Rodríguez Guante, Director of the Palavé Basic School (file of attachments to the final arguments brief of the State, attachment 28, folio 3934), and Basic Education diploma of Violeta Bosico issued on July 1, 2004, by the National Education Council, the Dominican Republic (file of attachments to the final arguments brief of the State, attachment 30, folio 3938). With regard to the name of Teresa Tucent Mena, the child Violeta Bosico's sister, it was noted that her last name is "Tucent Mena" and not "Tuseimena", as she herself indicated in the statement she made on February 2, 2005, authenticated by Marcelino de la Cruz Nuñez. For the effects of this judgment, the last name "Tucent Mena" will be used, even though the parties and several documents refer to the last name "Tuseimena," in the understanding that both names refer to the same person.

46 Cf. National Coalition for Haitian Rights, "Beyond de Bateyes – Haitian Immigrants in the Dominican Republic," 1996 (file of attachments to the application, attachment 9, folios 809 to 875); Human Rights Watch, "Personas Ilegales" - Haitianos y Dominicano-Haitianos en la República Dominicana. New York: 2002, (file of attachments to the brief with requests and arguments, attachment 19, folios 310 to 320); United Nations, Committee on

[...]

The education of the child Violeta Bosico

109.34. During her early years, Violeta Bosico was admitted to school without a birth certificate. In 1991, Violeta entered primary school in Batey Las Charcas. In 1994, having interrupted her studies, she returned to school and began to attend the Palavé School up until third grade.⁷³

109.35. In September and October 1998, when trying to enroll for fourth grade, the State did not allow Violeta Bosico to enroll in day school because she did not have a birth certificate.⁷⁴ For the 1998-1999 school year, the child had to enroll in the school for

the Rights of the Child, Examination of the Reports presented by the States Parties under Article 44 of the Convention. Concluding Observations of the Committee on the Rights of the Child. The Dominican Republic. UN Doc. CRC/C/15/Add.150, of 21 February 2001, para. 22; Bridget Wooding and Richard Moseley-Williams, "Inmigrantes haitianos y dominicanos de ascendencia haitiana en la República Dominicana." Santo Domingo, the Dominican Republic: Cooperación Internacional para el Desarrollo y el Servicio Jesuita a Refugiados y Migrantes, 2004, pp. 1 to 103; World Bank, "Dominican Republic Poverty Assessment: Poverty in a High-Growth Economy (1986 – 2000)," volume I, 2001, pp. 50 to 53, and Marco Scuriatti, "Background Papers – A review of the Haitian Immigrant Population in the Dominican Republic"; In: World Bank, Dominican Republic Poverty Assessment: Poverty in a High-Growth Economy (1986 – 2000), volume II, 2001, pp. 84 and 85.

73 Cf. statement made by the child Violeta Bosico Cofi on August 8, 1999, before Katherine A. Fleet in Batey Palavé, Manoguayabo, the Dominican Republic (file of attachments to the application, attachment 6, folios 446 to 457, and file of attachments to the brief with requests and arguments, attachment 24, folios 370 to 381); statement made by Tiramen Bosico Cofi made before Katherine A. Fleet n July 11, 1999, in Palavé, Manoguayabo, the Dominican Republic (file of attachments to the application, attachment 9, folios 612 to 619; file of attachments to the brief with requests and arguments, attachment 4, folios 28 to 39, and file of attachments to the answer to the application, attachment 25, folios 57 and 60), and testimony of Amada Rodríguez Guante given before the Inter-American Court during the public hearing held on March 14, 2005.

74 Cf. statement made by the child Violeta Bosico Cofi on August 8, 1999, before Katherine A. Fleet in Batey Palavé, Manoguayabo, the Dominican Republic (file of attachments to the application, attachment 6, folios 446 to 457, and file of attachments to the brief with requests and arguments, attachment 24, folios 370 to 381); additional statement made by the child Violeta Bosico Cofi before Hillary Ronen on July 31, 2001, in Batey Palavé, Santo Domingo, the Dominican Republic (file of attachments to the brief with requests and arguments, attachment 27, folios 393 to 396), and statement of Teresa Tucent Mena on August n8, 1999, before Katherine A. Fleet (file of attachments to the application, attachment 4, folios 358 to 367; file of attachments to the brief with requests and arguments, attachment 25, folios 382 to 388).

adults during the evening, which is for those over 18 years of age. She attended fourth and fifth grades there.⁷⁵

109.36. The main purpose of evening school is to teach adults to read and write and they adopt a “compressed” type of education, in which pupils do two grades in one year. This method makes fewer demands than day school. Most of those attending the evening session are from 20 to 30 years of age; exceptionally, there are adolescents. The classes in the evening are shorter, usually two and a half hours a day, and there is no break.⁷⁶

109.37. In 2001, Violeta Bosico reverted to attending school during the day, completed sixth grade, and was enrolled for seventh grade in day school.⁷⁷

75 Cf. statement made by Genaro Rincón Miesse on August 9, 1999, before Katherine A. Fleet, in Gazcue, Santo Domingo, the Dominican Republic (file of attachments to the brief with requests and arguments, attachment 2, folio 18); statement made by Amada Rodríguez Guante before the Inter-American Court during the public hearing held on March 14, 2005; certification issued on November 6, 2003, by Amada Rodríguez Guante, Director of the Palavé Basic School (file of attachments to the final arguments brief of the State, attachment 28, folio 3934); additional statement made by the child Violeta Bosico Cofi before Hillary Ronen on July 31, 2001, in Batey Palavé, Santo Domingo, The Dominican Republic (file of attachments to the brief with requests and arguments, attachment 27, folios 393 to 396), and statement of Teresa Tucent Mena on August 8, 1999, before Katherine A. Fleet (file of attachments to the application, attachment 4, folios 358 to 367; file of attachments to the brief with requests and arguments, attachment 25, folios 382 to 388).

76 Cf. statement made by the child Violeta Bosico Cofi, authenticated on February 2, 2005, by Marcelino de la Cruz Nuñez (file of preliminary objections and possible merits and reparations, tome III, folios 892 and 893, and file of attachments to the State’s brief with final arguments, attachment 33, folio 370 to 381); statement made by the child Violeta Bosico Cofi on August 8, 1999, before Katherine A. Fleet in Batey Palavé, Manoguayabo, the Dominican Republic (file of attachments to the application, attachment 6, folios 446 to 457, and file of attachments to the brief with requests and arguments, attachment 24, folios 370 to 381); statement made by Genaro Rincón Miesse on August 9, 1999, before Katherine A. Fleet, in Gazcue, Santo Domingo, the Dominican Republic (file of attachments to the brief with requests and arguments, attachment 2, folio 18), and testimony of Amada Rodríguez Guante given before the Inter-American Court during the public hearing held on March 14, 2005.

77 Cf. additional statement made by the child Violeta Bosico Cofi before Hillary Ronen on July 31, 2001, in Batey Palavé, Santo Domingo, the Dominican Republic (file of attachments to the brief with requests and arguments, attachment 27, folios 393 to 396), and Basic Education diploma of Violeta Bosico issued by the Palavé Center on July 1, 2004 (file of attachments to the final arguments brief of the State, attachment 30, folio 3938).

[...]

IX. VIOLATION OF ARTICLES 19, 20, 24, 3 AND 18 OF THE AMERICAN CONVENTION IN RELATION ARTICLE 1.1 THEREOF (RIGHTS OF THE CHILD, RIGHT TO NATIONALITY, RIGHT TO EQUAL PROTECTION, RIGHT TO JURIDICAL PERSONALITY, RIGHT TO A NAME, AND OBLIGATION TO RESPECT RIGHTS)

Arguments of the Commission

110. With regard to Article 19 of the American Convention, the Commission indicated that:

[...]

- c) The State did not comply with its obligation to ensure the right to education, since the child Violeta was prevented from enrolling in day school because she had no birth certificate.

[...]

Arguments of the representatives

115. With regard to Article 19 of the American Convention, the representatives indicated that:

- a) Given the legal incapacity and vulnerability of the children Dilcia and Violeta, the State had a special obligation, required by their status as minors under Article 19 of the Convention, to adopt measures of protection to ensure their rights to nationality, juridical personality, education, the family and judicial protection. The arbitrary and inconsistent impediments to which the State subjected the children in their efforts to obtain the documentation constitute a direct violation of the rights embodied in Article 19 of the American Convention, in relation to Article 1(1) thereof, and
- b) Article 19 of the Convention requires special protection measures to be taken to guarantee the right of children to education, owing to their specific situation of vulnerability and because this right cannot be protected without special assistance from the family, society and the State. The right to education is one of the rights protected by Article 26 of the American Convention.

[...]

Considerations of the Court

125. Article 20 of the American Convention establishes that:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

126. Article 24 of the American Convention stipulates that:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

127. Article 19 of the American Convention stipulates that:

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

128. Article 3 of the American Convention establishes that:

Every person has the right to recognition as a person before the law.

129. Article 18 of the American Convention stipulates that:

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

130. Article 1(1) of the American Convention establishes that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[...]

134. This Court has stated that the cases in which the victims of human rights violations are children are particularly serious.⁸⁶ The prevalence of the child's superior interest

86 Cf. Case of the "Street Children" (Villagrán Morales). Judgment of November 19, 1999. Series C. No. 64 para. 146; the Case of Gómez Paquiyauri Brothers. Judgment of July 8, 2004. Series C. No. 64, para. 162, and Case of Bulacio. Judgment of September 18, 2003. Series C No. 100, para. 133.

should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case refers to children.⁸⁷ Moreover, the State must pay special attention to the needs and the rights of the alleged victims owing to their condition as girl children, who belong to a vulnerable group.⁸⁸

135. In view of the above, the Court will not rule on the alleged violation of Article 19 of the American Convention in isolation, but will include its decision in this regard together with the examination of the other articles that are relevant to this case.

[...]

167. Bearing in mind that the alleged victims were children, the Court considers that the vulnerability arising from statelessness affected the free development of their personalities, since it impeded access to their rights and to the special protection to which they are entitled.

169. In this regard, the United Nations Committee on the Rights of the Child expressed its deep concern "at the discrimination against children of Haitian origin born in the territory [of the Dominican Republic] or belonging to Haitian migrant families, especially their limited access to housing, education and health services, and note[d] in particular the lack of specifically targeted measures to address this problem." The Committee, specifically in relation to birth registration, indicated that "in particular, concern [was] expressed about the situation of children of Haitian origin or belonging to Haitian migrant families whose right to birth registration has been denied in the State [... and, as a] result of this policy, those children have not been able to enjoy fully their rights, such as to access to health care and education."¹⁰⁴

170. The United Nations Commission on Human Rights, through an independent expert, issued a report entitled "Human rights and extreme poverty," in which it referred to the situation of Haitians in the Dominican Republic as follows:

87 Cf. *Juridical Status and Human Rights of the Child*, (...), paras. 56, 57 and 60.

88 Cf. United Nations, Committee for the Elimination of All forms of Discrimination against Women, General Recommendation No. 24, on the application of Article 12 of the Convention on the Elimination of all Forms of Discrimination against Women.

104 Cf. United Nations, Committee on the Rights of the Child, Examination of the Reports presented by the States Parties under Article 44 of the Convention. Concluding Observations of the Committee on the Rights of the Child. The Dominican Republic. UN Doc. CRC/C/15/Add.150, of 21 February 2001, paras. 22 and 26.

The issue of racism [...] is sometimes manifested among Dominicans themselves, but above all it is evident towards Haitians or those of Haitian origin whose families have, at times, been established for several generations and who continue entering the country. [...] There are very few Haitians, even those who have been living in the Dominican Republic since 1957, [...] who obtain naturalization. This is the strongest discrimination that the independent expert has met throughout her mission. The authorities are very aware of this problem [...]. The fact that Haitians do not have legal existence in the Dominican Republic is based on a deep-rooted phenomenon of lack of recognition [...]¹⁰⁵

171. Considering that it is the State's obligation to grant nationality to those born on its territory, the Dominican Republic must adopt all necessary positive measures to guarantee that Dilcia Yean and Violeta Bosico, as Dominican children of Haitian origin, can access the late registration procedure in conditions of equality and non-discrimination and fully exercise and enjoy their right to Dominican nationality. The requirements needed to prove birth on Dominican territory should be reasonable and not represent an obstacle for acceding to the right to nationality.

172. The Court finds that, owing to the discriminatory treatment applied to the children, the State denied their nationality and left them stateless, which, in turn, placed them in a situation of continuing vulnerability that lasted until September 25, 2001; in other words, after the date on which the Dominican Republic accepted the Court's contentious jurisdiction.

173. The Court considers that the Dominican Republic failed to comply with its obligation to guarantee the rights embodied in the American Convention, which implies not only that the State shall respect them (negative obligation), but also that it must adopt all appropriate measures to guarantee them (positive obligation),¹⁰⁶ owing to the situation of extreme vulnerability in which the State placed the Yean and Bosico children, because it denied them their right to nationality for discriminatory reasons, and placed

105 Cf. United Nations, Commission on Human Rights, "Human rights and extreme poverty," report presented by the independent expert on the question of human rights and extreme poverty, A. M. Lizin, under Resolution 2002/30 of the Commission on Human Rights. Addition: Mission to the Dominican Republic. UN Doc. E/CN.4/2003/52/Add.1, paras. 8 to 13.

106 Cf. the Case of "Children's Rehabilitation Institute." Judgment of September 2, 2004. Series C No. 112, para. 158; the Case of Gómez Paquiyauri Brothers, *supra*, para. 129, and the Case of the 19 Tradesmen. Judgment of July 5 2004. Series C. No. 109, para. 153.

them in the impossibility of receiving protection from the State and having access to the benefits due to them, and since they lived in fear of being expelled by the State of which they were nationals and separated from their families owing the absence of a birth certificate.

174. The Court finds that for discriminatory reasons, and contrary to the pertinent domestic norms, the State failed to grant nationality to the children, which constituted an arbitrary deprivation of their nationality, and left them stateless for more than four years and four months, in violation of Articles 20 and 24 of the American Convention, in relation to Article 19 thereof, and also in relation to Article 1(1) of the Convention, to the detriment of the children Dilcia Yean and Violeta Bosico.

[...]

185. In addition to the above, the Court considers that the vulnerability to which the children were exposed as a result of the lack of nationality and juridical personality was also reflected, in the case of the child Violeta Bosico, by the fact that she was prevented from attending day school at the Palavé School during the 1998-1999 school year. It was precisely because she had no birth certificate that she was forced to study at evening school, for individuals over 18 years of age, during this period. This fact also exacerbated her situation of vulnerability, because she did not receive the special protection, due to her as a child, of attending school during appropriate hours together with children of her own age, instead of with adults (...). It is worth noting that, according to the child's right to special protection embodied in Article 19 of the American Convention, interpreted in light of the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development.

186. The Court observes that the violation of the right to nationality of the Yean and Bosico children, the situation of statelessness in which they were kept, and the non-recognition of their juridical personality and name, denaturalized and denied the external or social projection of their personality.

187. Based on the above, the Court considers that by depriving the children of their nationality, the Dominican Republic violated the rights to juridical personality and to a

name embodied in Articles 3 and 18 of the American Convention, in relation to Article 19 thereof, and also in relation to Article 1(1) of the Convention, to the detriment of the children Dilcia Yean and Violeta Bosico.

[...]

XIV. OPERATIVE PARAGRAPHS

260. Therefore,

THE COURT,

[...]

DECLARES:

Unanimously that:

[...]

2. The State violated the rights to nationality and to equal protection embodied, respectively, in Articles 20 and 24 of the American Convention, in relation to Article 19 thereof, and also in relation to Article 1(1) of the Convention, to the detriment of the children Dilcia Yean and Violeta Bosico, in the terms of paragraphs 131 to 174 of this judgment.

3. The State violated the rights to a name and to juridical personality embodied, respectively, in Articles 3 and 18 of the American Convention, in relation to Article 19 thereof, and also in relation to Article 1(1) of the Convention, to the detriment of the children Dilcia Yean and Violeta Bosico, in the terms of paragraphs 131 to 135 and 175 to 187 of this judgment.

[...]



*Inter-American Court
of Human Rights*

*Xákmok Kásek Indigenous Community
v. Paraguay*

Merits, Reparations, and Costs

*Judgment of
August 24, 2010*



I. INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On July 3, 2009, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”), in accordance with Articles 51 and 61 of the Convention, submitted an application against the Republic of Paraguay (hereinafter “the State” or “Paraguay”), based on which the instant case was commenced. The initial petition was lodged before the Commission on May 15, 2001, and, on February 20, 2003, the Commission approved Report N° 11/03,² declaring the petition admissible. Subsequently, on July 17, 2008, it approved Report on Merits N° 30/08,³ under Article 50 of the Convention, which included specific recommendations for the State. The State was notified of this report on August 5, 2008. On July 2, 2009, after examining several reports forwarded by the State and the corresponding observations made by the petitioners, the Commission decided to submit the case to the jurisdiction of the Court, “because it considered that the State had not complied with the recommendations made in the Report on Merits.” (...)

2. The application relates to the State’s alleged international responsibility for the alleged failure to ensure the right of the Xákmok Kásek Indigenous Community (hereinafter “the Xákmok Kásek Indigenous Community,” “the Xákmok Kásek Community,” “the Indigenous Community,” or “the Community”) and its members’ (hereinafter “the members of the Community”) to their ancestral property, because the actions concerning

2 In Admissibility Report N° 11/03, the Commission concluded that it had competence to examine the petition presented by the petitioners and that it was admissible pursuant to Articles 46 and 47 of the Convention. Based on the factual and legal arguments, and without prejudging the respective merits in, considered the petition admissible with regard to the alleged violation of Articles 2, 8.1, 21, and 25 (Domestic Legal Effects, Right to Fair Trial, Right to Property and Right to Judicial Protection) of the American Convention and 1.1 (Obligation to Respect Rights) thereof, based on possible failure to comply with the obligation to adopt domestic legal provisions, to the detriment of the Xákmok Kásek Community of the Enxet-Lengua People and its members.

3 In Merits Report N° 30/08, the Commission concluded that the State had not complied with the obligations imposed by Articles 21 (Right to Property), 8.1 (Right to Fair Trial [Judicial Guarantees]), and 25 (Judicial Protection), all in relation to Articles 1.1 and 2 of the American Convention, to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members. Moreover, in application of the *iure novit curia* principle, the Commission concluded that the State of Paraguay had not complied with the obligations imposed by Article 3 (Right to Juridical Personality), 4 (Right to Life), and 19 (Rights of the Child), all in relation to Articles 1.1 and 2 of the American Convention, to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.

the territorial claims of the Community were being processed since 1990 “and had not yet been decided satisfactorily.” According to the Commission, “[t]his has meant that, not only has it been impossible for the Community to access the property and take possession of their territory, but also, owing to the characteristics of the Community, that it has been kept in a vulnerable situation with regard to food, medicine and sanitation that continuously threatens the Community’s integrity and the survival of its members.”

[...]

VII. RIGHT TO LIFE (ARTICLE 4.1 OF THE AMERICAN CONVENTION)

[...]

186. The Court has indicated that the right to life is a fundamental human right, the full enjoyment of which is a precondition for the enjoyment of all the other human rights.¹⁹² If this right is not respected, all the other rights are meaningless. Therefore, restrictive notions with regard to this right are not admissible.¹⁹³

[...]

189. In the instant case, on June 11, 1991,¹⁹⁸ and on September 22, 1992,¹⁹⁹ INDI officials verified the situation of special vulnerability of the members of the Community because they did not have title to their land. On November 11, 1993, the indigenous leaders repeated to the IBR that their land claim was a priority because “they [were] living

192 Cf. Case of the “Street Children” (Villagrán Morales and et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C N° 63, para. 167, para. 144; Case of Montero Aragorn et al. (Retén de Catia) v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of July 5, 2006, Series C. N° 150, para. 63, and Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs. Judgment of July 4, 2007. Series C N° 166, para. 78.

193 Cf. Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits, supra, para. 144; Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela, supra, para. 63, and Case of Zambrano Vélez et al. v. Ecuador, supra, para. 78.

198 Cf. Handwritten record of an on-site inspection of the Xákmok Kásek Community made on June 11, 1991, in relation to the land claimed (file of appendices to the application, appendix 3, tome II, folio 790), and report of on-site visit made by Pastor Cabanellas, supra note 62, folios 791 to 794).

199 Cf. Report on the expanded on-site visit on September 22, 1992, supra note 62, folios 883 and 884).

in extremely difficult and precarious conditions and [did] not know how long they [could] hold out.”²⁰⁰

[...]

191. On April 17, 2009, the President of the Republic and the Ministry of Education and Culture, issued Decree N° 1830,²⁰³ declaring a state of emergency in two indigenous communities,²⁰⁴ one of them the Xákmok Kásek Community. The pertinent part of Decree N° 1830 indicates that:

Due to situations beyond their control, these Communities are deprived of access to the traditional means of subsistence related to their pre-colonial identity, within the territories claimed as part of their ancestral territories, [...] [and this] hampers the normal way of life of the said communities [...] owing to the absence of minimum and essential food and medical care, which is a concern of the Government that requires urgent response [...].

[Consequently, it ordered that]

The [INDI], together with the National Emergency Secretariat and the Ministry of Public Health and Social Welfare take the necessary measures to immediately provide medical care and food to the families that are members of [the Xákmok Kásek Community] until the conclusion of the legal and administrative procedures regarding the legalization of the land claimed as part of the its traditional habitat.²⁰⁵

192. In brief, in this case the domestic authorities knew of the existence of a situation of real and immediate risk to the life of the members of the Community. Consequently, this gave rise to certain State obligations of prevention – under the American Convention (Article 4 in relation to Article 1.1) and under its own domestic law (Decree N° 1830) – that obliged it to take the necessary measures that could reasonably be expected, to prevent or avoid this risk.

200 Communication of the Community addressed to the IBR President of November 11, 1993, *supra* note 65 (file of appendices to the application, attachment 5, folio 2351).

203 *Cf.* Decree N° 1830 of April 17, 2009 (file of attachments to the answer to the application, attachment 7, folios 3643 to 3646).

204 The said Decree N° 1830 of April 17, 2009, *supra* note 203, also refers to the Kelyenmagategma Community of the Enxet and Y’ara Marantu People.

205 *Cf.* Decree N° 1830, *supra* note 203.

[...]

1.4. Education

209. With regard to access to educational services, the Commission noted that the Inter-American Commission's Rapporteur on the Rights of Indigenous Peoples had "verified the precarious conditions of a school attended by around 60 boys and girls from the Community." He indicated that the "the school is approximately 25 [m2] in size, without a roof that is adequate to provide protection from the rain; there is no floor and no desks, chairs, or educational materials." The Rapporteur also indicated that "the children are increasingly failing to attend school due to lack of food and water." The representatives endorsed the facts alleged by the Commission and added that the children "are taught in Guaraní and Spanish, rather than in Sanapaná or Enxet, which are the languages of the members of the Community.

210. The State indicated that it had provided "teaching materials and school meals [through] the Ministry of Education," and that it planned "to build a school in the Community's settlement once the land titling procedures had been completed." It affirmed that it had provided "additional furniture" to the Dora Kent de Eaton Elementary School.²⁴⁹ In addition; the body of evidence reveals that, on October 26, 2009, a training workshop was organized for teachers working in the schools in several communities, including Xákmok Kásek. Also, the National Directorate for Indigenous School Education has concluded that "the teachers say they need to continue their training, and to work on the recovery of the language and the revitalization of the culture."²⁵⁰

211. According to international standards, States have the obligation to guarantee access to free basic education and its sustainability.²⁵¹ In particular, when it comes to satisfying the right to basic education of indigenous communities, the State must promote

249 The State noted that it had provided 23 individual student desks, 23 student chairs, a teacher's desk, a teacher's chair, and a cupboard (file of attachments to the answer to the application, tome VIII, attachment 1.6, folio 3323).

250 Cf. Report on the Indigenous Teacher Training Workshop of October 26, 2009, submitted to the General Directorate of Indigenous School Education and forwarded to the Inter-American Court of Human Rights (file of attachments to the answer to the application, attachment 1.6, folios 3324 to 3328).

251 See Article 13.3.a of the Protocol of San Salvador in the Area of Economic, Social, and Cultural Rights, which states that "primary education should be compulsory and accessible to all without cost."

this right from an ethno-educational perspective.²⁵² This means taking positive measures to ensure that the education is culturally acceptable from an ethnically differentiated perspective.²⁵³

212. In the instant case, Maximiliano Ruiz, a teacher in the Community, indicated that there are “85 students [...] most of whom [belong to the] Sanapaná [ethnic group]; but the program of the Ministry of Education is taught.” He indicated that the children abandon school owing to their situation. Maximiliano Ruiz acknowledged that the State provided “school meals,” but indicated that they were provided sporadically and not on a monthly basis.

213. From the evidence gathered, the Court observes that, although some conditions of the State’s provision of education have improved, the facilities for the education of the children are inadequate. The State itself provided a series of photographs in which it can be seen that classes take place under a roof, with no walls, in the open air.²⁵⁴ In addition, the State does not provide any type of program to prevent students from abandoning their studies.

214. In short, this Court emphasizes that the assistance provided by the State under Decree N° 1830 of April 17, 2009, has been insufficient to overcome the conditions of special vulnerability of the Xákmok Kásek Community verified in the decree.

215. The situation of the members of the Community is closely tied to its lack of its lands. Indeed, the absence of possibilities for the members to provide for and support themselves, according to their ancestral traditions, has led them to depend almost exclusively on State actions and be forced to live not only in a way that is different from their cultural patterns, but in squalor. This was noted by Marcelino López, Community leader, who said, “[i]f we have our land, then everything else will improve and, above all, we will be able to live openly as indigenous people; otherwise, it will be very difficult to survive.”²⁵⁵

252 Cf. ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, Article 27.1.

253 Cf. United Nations, Committee on Economic, Social and Cultural Rights. General Comment N° 13, December 8, 1999, E/C.12/1999/10, para. 50.

254 Cf. Photographs of Elementary School N° 11531 (file of attachments to the State’s final arguments, tome X, folio 4415).

255 Testimony of Marcelino López before a notary public (merits file, tome II, folio 645).

216. On this point, it should be noted that, as the United Nations Committee on Economic, Social and Cultural Rights has said, “in practice, poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to effectively enjoy their own culture.”²⁵⁶

217. Consequently, the Court declares that the State has not provided the basic services to protect the right to a decent life of a specific group of individuals in these conditions of special, real and immediate risk, and this constitutes a violation of Article 4.1 of the Convention, in relation to Article 1.1 thereof, to the detriment of all the members of the Xákmok Kásek Community.

[...]

XIII. OPERATIVE PARAGRAPHS

337. Therefore,

THE COURT

[...]

DECLARES,

[...]

By seven votes to one, that:

3. The State violated the right to life, established in Article 4.1 of the American Convention, in relation to Article 1.1 thereof, to the detriment of all the members of the Xákmok Kásek Community, in the terms of paragraphs 195, 196, 202 to 202, 205 to 208 and 211 to 217 of this judgment.

[...]

²⁵⁶ United Nations, Committee on Economic, Social and Cultural Rights. General Comment N° 21, December 21, 2009, E/C.12/GC/21, para. 38.



*Inter-American Court
of Human Rights*

Suárez Peralta v. Ecuador

*Concurring opinion of Judge
Eduardo Mac-Gregor Poisot*

*Judgment of
May 21, 2013*



[...]

III. THE WAY TO INTERPRET ARTICLE 26 OF THE AMERICAN CONVENTION FOR THE DIRECT JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

33. (...) [T]he direct justiciability of economic, social and cultural rights, derives from the American Convention itself, the instrument at the core of the inter-American system that constitutes the main object of “application and interpretation”⁶⁶ of the Inter-American Court, which has “competence with respect to matters relating to the fulfillment of the commitments made by the States Parties”⁶⁷ to the Pact of San José.

34. When considering the scope of the right to health, it is necessary to make an interpretative re-evaluation of Article 26 of the American Convention, the only article of this treaty that refers to “the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires,” based on the fact that the Inter-American Court exercises full jurisdiction over all the articles and provisions, which include this provision of the Convention.

35. Furthermore, Article 26 forms part of Part I (State Obligations and Rights Protected) of the American Convention and, therefore, the general obligations of the States established in Articles 1.1 and 2 of the Convention are applicable to it, as recognized by the Inter-American Court itself in the *Case of Acevedo Buendía v. Peru*.⁶⁸ Nevertheless, there is an apparent interpretative conflict between the scope that should be given to Article 26 of the Pact of San José, and Article 19.6 of the Protocol of San Salvador, which limits the justiciability of the economic, social and cultural rights to certain rights only.

66 Cf. Article 1 of the Statute of the Inter-American Court of Human Rights, approved by the OAS General Assembly in October 1979.

67 Cf. Article 33 of the American Convention on Human Rights.

68 *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”) v. Perú. Preliminary Objection, Merits, Reparations and costs. Judgement of November 24, 2009 Series C N° 198, paras. 16, 17 and 100.*

A) The apparent conflict between the Pact of San José and the Protocol of San Salvador

36. From my perspective, an interpretative development of Article 26 of the Pact of San José is required in the case law of the Inter-American Court, and this could open new possibilities for making economic, social and cultural rights effective, in both their individual and collective dimensions. Moreover, in the future new content could be established through evolutive interpretations that enhance the interdependent and indivisible nature of human rights.

37. In this regard, I consider opportune the call made some months ago by the very distinguished judge Margarette May Macaulay — from the Inter-American Court's previous composition — in her concurring opinion in the *Case of Furlan and family members v. Argentina*⁶⁹ regarding the updating of the normative meaning of this treaty-based precept. The former judge indicated that the Protocol of San Salvador "does not establish any provision intended to restrict the scope of the American Convention."⁷⁰ In addition, she stated that:⁷¹

[...] when interpreting the Convention [and the Protocol of San Salvador], a systematic interpretation of the two treaties should be made, taking their purpose into account. In addition, the Vienna Convention requires an interpretation in good faith of the terms of Article 26, as made previously to determine the scope of the textual reference to the said article in relation to the OAS Charter and its relationship to Articles 1.1 and 2 of the Convention. This interpretation in good faith requires recognizing that the American Convention does not establish distinctions when indicating that its jurisdiction covers all the rights established from Article 3 to Article 26 of the Convention. Furthermore, Article 4 of the Protocol of San Salvador establishes that no right recognized or in force in a State may be restricted or infringed by international instruments, under the pretext that the said Protocol does not recognize it or recognizes it to a lesser degree. Lastly, the Vienna Convention declares that an interpretation should not lead to a manifestly absurd or unreasonable result. In this regard, the conclusion that the Protocol of San Salvador limits the scope of the Convention would lead to the absurd consideration that the American Convention could have certain effects for the States Parties to

69 *Case of Furlan and family members v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgement of August 31, 2012 Series C N° 246.*

70 Concurring opinion of Judge Margarette May Macaulay in the *Case of Furlan vs. Argentina*, (...).

71 *Idem.*

the Protocol of San Salvador while having a different effect for the States that are not a party to this Protocol.⁷²

38. Judge Macaulay specified that it was incumbent on the Inter-American Court to update the normative meaning of Article 26 as follows:⁷³

[...] what matters is not the subjective intention of the delegates of the States at the time of the Conference of San José or during the discussion of the Protocol of San Salvador, but the objective intention of the text of the American Convention, taking into account that the interpreter's obligation is to update the normative meaning of the international instrument. Moreover, it is not possible to discredit the explicit content of the American Convention using a historical interpretation, based on the hypothetical intention that the delegates who adopted the Protocol of San Salvador would have had with regard to the Convention.

39. Besides the above, some arguments additional to this interpretation of the relationship between the American Convention and the Protocol of San Salvador can be considered concerning the Court's competence to examine direct violations of economic, social and cultural rights in light of Article 26 of the Pact of San José.

40. First, it is essential to establish the importance of taking into account the literal interpretation of Article 26 with regard to the competence established to protect *all the rights* established in the Pact of San José, which include the rights established in Articles 3 through 26 (Chapter II: "Civil and political rights, and Chapter III: "Economic, social and cultural rights"). As I have already mentioned, the Inter-American Court recognized this expressly in the judgment en el case of *Acevedo Buendía et al. v. Peru*.⁷⁴

(...) Furthermore, it is pertinent to note that even though Article 26 is contained in Chapter III of the Convention, entitled "Economic, Social and Cultural Rights," it is also located in Part I of the said instrument, entitled "State Obligations and Rights Protected" and, therefore, is subject to the general obligations contained in Articles 1.1 and 2 mentioned in Chapter I (entitled "General Obligations"), as well as Articles 3 to 25 indicated in Chapter II (entitled "Civil and Political Rights").

72 Only 15 States have ratified the Protocol of El Salvador. Source: <http://www.cidh.oas.org/Basicos/basicos4.htm>.

73 Concurring opinion of Judge Margarette May Macaulay in the *Case of Furlan v. Argentina*, *supra*, para. 9.

74 *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, para. 100.

41. This interpretation by the Inter-American Court, adopted unanimously,⁷⁵ constitutes a fundamental precedent for the direct justiciability of economic, social and cultural rights, by stating that, when dealing with the rights that can be derived from Article 26, it is possible to apply the general obligations of respect, guarantee, and adaptation contained in Articles 1.1 and 2 of the American Convention. (...)

42. Now, none of the articles of the Protocol of San Salvador make any reference to the scope of the general obligations referred to in Articles 1.1 and 2 of the American Convention. If the Pact of San José is not being amended expressly, the corresponding interpretation should be the least restrictive as regards its scope. In this regard, it is important to stress that the American Convention itself establishes a specific procedure for its amendment.⁷⁷ If the Protocol of Salvador had been intended to annul or amend the scope of Article 26, this should have been established explicitly and unequivocally. The clear wording of Article 19.6 of the Protocol does not permit inferring any conclusion with regard to the literal meaning of the relationship between Article 26 and Articles 1.1 and 2 of the American Convention, as the Inter-American Court has recognized.⁷⁸

43. Differing positions have arisen with regard to the interpretation of Article 26 and its relationship with the Protocol of San Salvador.⁷⁹ In my opinion, the principle of the most favorable interpretation must be applied not only with regard to the substantive aspects of the Convention, but also as regards procedural aspects related to the attribution of competence, provided that a real and specific conflict in interpretation exists. If the Protocol of San Salvador had expressly indicated that it should be understood that Article 26 was no longer in force, the interpreter could not reach the opposite conclusion. However, no article of the Protocol refers to the reduction or limitation of the scope of the American Convention.

75 With separate opinions of Judge Sergio García Ramírez and Judge *ad hoc* Victor Oscar Shiyin García Toma.

77 American Convention: "Article 76(1) Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General."

78 Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, para. 100.

79 Cf., in alphabetical order, among others, Abramovich, Víctor and Rossi, Julieta, "La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos," in *Revista Estudios Socio-Jurídicos*, year/vol. 9, Special N°, Universidad del Rosario, Bogotá, 34-53; Burgorgue-Larsen, Laurence, and Úbeda de Torres, Amaya, in particular Chapter 24 written by the first author: "Economic and social rights," *The Inter-American Court of Human Rights. Case Law and Commentary*, New York, Oxford University Press, 2011, pp. 613-639; Cavallaro, James L. and Brewer, Stephanie Erin "La función del litigio in-

44. To the contrary, one of the articles of the Protocol indicates that this instrument should not be interpreted in order to disregard other rights in force in the States Parties, which include the rights derived from Article 26 within the framework of the American Convention.⁸⁰ Moreover, in the terms of Article 29.b) of the American Convention, a restrictive interpretation of the rights is not permitted.⁸¹

teramericano en la promoción de la justicia social," in *Sur. Revista Internacional de Derechos Humanos*, N° 8, 2008, pp. 85- 99; Cavallaro, James L. and Schaffer, Emily, "Less as More: rethinking Supranational Litigation of Economic and Social Rights in the Americas," in *Hastings Law Journal*, N° 56, N° 2, 2004, pp. 217-281; Cavallaro, James and Schaffer, Emily, "Rejoinder: Finding Common Ground to Promote Social Justice and Economic, Social and Cultural Rights in the Americas," in *New York University Journal of International Law and Politics*, N° 39, 2006, pp. 345-383; Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos" in Eduardo Ferrer Mac-Gregor and Arturo Zaldívar Lelo de Larrea (coords.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho*, Mexico, UNAM-Marcial Pons-IMDPC, 2008, volume IX: "Derechos humanos y tribunales internacionales," pp. 361-438; Melish, Tara J., *La Protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos*, Quito, CDES, Yale Law School, 2003, pp. 379-392; by the same author: "Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas," in *New York University Journal of International Law and Politics*, N° 39, 2006, pp. 171-343; by the same autor: "Counter-Rejoinder. Justice vs. justiciability?: Normative Neutrality and Technical Precision, The Role of the Lawyer in Supranational Social Rights Litigation," in *New York University Journal of International Law and Politics*, N° 39, 2006, pp. 385-415; Parra Vera, Oscar, *Justiciabilidad de los derechos económicos, sociales y culturales ante el Sistema Interamericano*, Mexico, CNDH, 2011; Pelayo Moller, Carlos María. El "mínimo vital" como estándar para la justiciabilidad de los derechos económicos, sociales y culturales. *Revista Methodos*, Federal District Human Rights Commission, N° 3, 2012, pp. 31-51; Ruiz-Chiriboga, Oswaldo, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties. Non-enforceability of Economic, Social and Cultural Rights in the Inter-American System*, *op. cit. supra* 39; Uprimny, Rodrigo, and Diana Guarnizo, "¿Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana," in Eduardo Ferrer Mac-Gregor and Arturo Zaldívar Lelo de Larrea (coords.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho*, Mexico, UNAM-Marcial Pons-IMDPC, 2008, volume IV: "Derechos fundamentales y tutela constitucional," pp. 361-438; and Urquilla, Carlos, *La justiciabilidad directa de los derechos económicos, sociales y culturales*, San José, IIDH, 2009.

80 Protocol of San Salvador: "Article 4. *Inadmissibility of Restrictions*. A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree."

81 *Cf. Case of the "Mapiripán Massacre," v. Colombia. Judgement of September 15, 2005. Series C N° 134*, paras. 188.

45. Thus, this – apparent – problem must be resolved based on a systematic, teleological and evolutive interpretation that takes into account the most favorable interpretation to ensure the best protection of the individual and the object and purpose of Article 26 of the American Convention regarding the need to truly guarantee economic, social and cultural rights. In the presence of a conflict in interpretation, prevalence should be given to a systematic interpretation of the relevant norms.

46. In this regard, the Inter-American Court has indicated on previous occasions⁸² that human rights treaties are living instruments, the interpretation of which must keep up with the times and current living conditions. Furthermore, it has also affirmed that this evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, and also in the Vienna Convention on the Law of Treaties⁸³. When making an evolutive interpretation, the Court has given special relevance to comparative law, and has therefore used domestic laws⁸⁴ or the case law of domestic courts⁸⁵ when analyzing specific disputes in contentious cases.

82 Cf. *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999.

83 Cf. *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99, October 1, 1999. Series A N° 16, para. 114, and *Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs*. Judgement of February 24, 2012. Series C N° 239, para. 83.

84 In the *Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs*. Judgment of April 3, 2009. Series C N° 196, para. 148, the Court took into account for its analysis that it noted: “that a significant number of States Parties to the American Convention have adopted constitutional provisions expressly recognizing the right to a healthy environment.”

85 In the *Case of Heliodoro Portugal v. Panama, Preliminar Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C N° 186 and the *Case of Tiu Tojín v. Guatemala. Merits, reparations and costs*. Judgment of November 26, 2008. Series C N° 190, the Inter-American Court took into account judgments of the domestic courts of Bolivia, Colombia, Mexico, Panama, Peru and Venezuela on the non-prescription of permanent offenses such as forced disappearance. In addition, in the *Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 22, 2009. Series C N° 202, the Inter-American Court used the rulings of constitutional courts of the countries of the Americas to support its definition of the concept of forced disappearance. Other examples are the *Case of Atala Riffo and daughters, supra*, and the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C N° 245.

47. It is clear that the Inter-American Court cannot declare the violation of the right to health under the Protocol of San Salvador, because this can be observed from the literal meaning of its Article 19.6. However, it is possible to understand the Protocol of San Salvador as one of the interpretative references concerning the scope of the right to health protected by Article 26 of the American Convention. In light of the human rights *corpus juris*, the Additional Protocol throws light on the content that the obligations of respect and guarantee should have in relation to this right. In other words, the Protocol of San Salvador *provides guidance* on the application corresponding to Article 26 together with the obligations established in Articles 1.1 and 2 of the Pact of San José.

48. The possibility of using the Protocol of San Salvador in order to define the scope of the protection of the right to health contained in Article 26 of the American Convention is not unfamiliar to the case law of the Inter-American Court; neither is the use of other international sources or the OAS Progress Indicators in Respect of Rights Contemplated in that Protocol, in order to define different State obligations in this regard. Indeed, the Inter-American Court performed this exercise in the *Case of the "Children's Rehabilitation Institute" v. Paraguay*, in which it expressly stated that, in order to establish the content and scope of Article 19 of the Pact of San José, it would take into consideration the Convention on the Rights of the Child and the Protocol of San Salvador, because these international instruments formed part of a very comprehensive international *corpus juris* for the protection of the child.⁸⁶

49. In the same way, in the *Case of the Yakye Axa Indigenous Community v. Paraguay*, when analyzing whether the State had created the conditions that increased the difficulties of access to a decent life of the members of the Community and whether, in that context, it had adopted the appropriate positive measures, the Court chose to interpret Article 4 of the American Convention in light of the international *corpus juris* on the special protection required by members of indigenous communities. Among other provisions, it mentioned Article 26 of the Pact de San José, and Articles 10 (Right to Health), 11 (Right to a Healthy Environment), 12 (Right to Food), 13 (Right to Education) and 14

86 *Case of the "Children's Rehabilitation Institute," Preliminar Objections, Merits, Reparations and Costs.* Judgement of September 2, 2004, Series C Nº 112, para. 148. Similarly, the *Case of the Yean and Bosico Girls, Judgement of September 8, 2005.* Series C Nº 130, para. 185. In my opinion, implicit in the concept of the *corpus juris* is the interdependence and indivisibility of the rights of which it is composed. Regarding the indicators, see Abramovich, Víctor and Pautassi, Laura (comps.), *La medición de derechos en las políticas sociales*, Buenos Aires, Editores del Puerto, 2010.

(Right to the Benefits of Culture) of the Protocol of San Salvador (on Economic, Social and Cultural Rights), and the pertinent provisions of ILO Convention N° 169. The Court also noted the observations of the United Nations Committee on Economic, Social and Cultural Rights in its General Comment N° 14.⁸⁷

50. The Case of the Xákmok Kásek Indigenous Community v. Paraguay is another example of a matter in which the Inter-American Court made an even more thorough analysis in order to determine that the assistance provided by the State with regard to the access to and quality of water, food, and health and education services had been insufficient to overcome the situation of special vulnerability of the Community. When determining this, the Inter-American Court evaluated the provision of each of these services in a separate section, in light of the main relevant international standards and the measures adopted by the State, using the General Comments of the United Nations Committee on Economic, Social and Cultural Rights.⁸⁸

[...]

56. As can be observed from these examples of inter-American case law, it has been the reiterated practice of the Inter-American Court to use international instruments and sources other than the Pact of San José to define the content and even to expand the scope of the rights established in the American Convention and to stipulate the obligations of the States,⁹⁵ since the said international instruments and sources form part of a very comprehensive international corpus juris on the matter; also using the Protocol of San Salvador. The possibility of using the Protocol of San Salvador to give content and scope to the economic, social and cultural rights derived from Article 26 of the American Convention, in relation to the general obligations established in Articles 1 and 2 of this instrument, is viable in the way in which the Inter-American Court has been using them to provide content to many treaty-based rights using treaties and sources other than

87 Cf. *Case of the Yakye Axa Indigenous Community, Merits, Reparations and Costs, Judgement of June 17, 2005, Series C N° 125*, para. 163; *mutatis mutandi*, *Case of the Sawhoyamaya Indigenous Community, Merits, Reparations and Costs. Judgement of March 29, 2006, Series C N° 146*, para. 155, and *Case of the Xákmok Kásek Indigenous Community, Merits, Reparations and Costs. Judgement of August 24, 2010, Series C N° 14*, paras. 215 and 216.

88 Cf. *Case of the Xákmok Kásek Indigenous Community*, *supra*, paras. 215 and 216, paras. 194 to 217. Citing the following: U.N. Committee on Economic, Social and Cultural Rights (CESCR).

95 For example, *The Progress Indicators in Respect of Rights Contemplated in the Protocol of San Salvador*, OEA/Ser.LXXV.2.1, Doc 2/11 rev.2, December 16, 2012, could also be used.

the Pact of San José. Thus, it could also use the Protocol of San Salvador, together with other international instruments, to establish the content and scope of the right to health protected by Article 26 of the American Convention.

B) Articles 26 and 29 of the American Convention in light of the pro persona principle

[...]

58. Considering that, in its evolutive case law, the Inter-American Court has already explicitly accepted the justiciability of Article 26 (...) ⁹⁸, in my opinion, the Inter-American Court now needs to resolve several aspects of this article, which poses the difficult future task of deciding three distinct questions relating to: (i) what rights does it protect; (ii) what type of obligations arise from those rights, and (iii) what are the implications of the principle of progressiveness. Evidently, my intention is not to try and decide these questions in this individual opinion. My desire is merely to establish a basis that could serve as a reflection for future developments of the case law of this Inter-American Court.

59. Different positions exist with regard to the rights protected by Article 26 of the American Convention. Some people consider that this article constitutes a mere programmatic norm, without any type of effectiveness in itself. We do not find this conception adequate in view of the spirit of the Convention, which is inspired by the absence of hierarchy among the rights, as revealed by its Preamble, and by the need for all its provisions to have practical effects.

60. In addition, the said argument would be an evident step backward from the progressiveness that Article 26 itself expressly establishes for the States and that, of necessity, also applies to the Inter-American Court itself, because inter-American case law has already recognized the possibility of ruling on the contents of this article as indicated in the preceding paragraph, and has also recognized the full validity of all the provisions of the Pact of San José, precisely when deciding on the State's argument concerning its lack of competence *ratione materiae* in relation to Article 26 of the Pact of San José. ⁹⁹

98 *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, paras. 92 to 106, particularly paras. 99 to 103; the last paragraph, *in fine*, indicates: "it should be stated that regressiveness is justiciable when economic, social and cultural right are at issue."

99 *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, para. 16.

[...] the Court must take into account that the instruments accepting the optional clause concerning obligatory jurisdiction (Article 62.1 of the Convention) suppose the acknowledgement by the States that submit them of the Court's right to decide any dispute relating to its jurisdiction.¹⁰⁰ In addition, the Court has indicated previously that the broad terms used in the wording of the Convention indicate that the Court exercises full jurisdiction over all its articles and provisions¹⁰¹. (Underlining added)

61. Another interpretative position in relation to Article 26 is addressed at granting full effectiveness to economic, social and cultural rights. This school of thought is the one that, for some time, has been defended by an important sector of legal doctrine in order to accord this treaty-based article normative nature, as the Inter-American Court did in the *Case of Acevedo Buendía v. Peru* in 2009, constituting a firm step in that direction, and abandoning the precedent of the 2005 *Case of the Five Pensioners v. Peru*¹⁰².

62. For some, the rights protected by Article 26 of the American Convention are those derived from the economic, social, educational, scientific and cultural norms contained in the OAS Charter, without any possibility of referral to the American Declaration.¹⁰³ Once it has been determined that a rights is implicit in the Charter and, therefore, included in Article 26, it can then be interpreted with the aid of the American Declaration or of other human rights treaties in force in the respective State.¹⁰⁴ On the other hand, it is also affirmed that, in addition to the *pro persona* principle, in order to know which rights are derived from the goals established in the OAS Charter, it is necessary to resort to other

100 Cf. *Case of Ivcher Bronstein v. Perú. Competence*. Judgement of September 24, 1999. Series C Nº 54, paras. 32 and 34; *Case of Heliodoro Portugal, supra*, para. 23, and *Case of García Prieto et al. v. El Salvador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2007. Series C Nº 168, para. 38.

101 Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, Judgment June 26, 1987. Series C Nº 1, para. 29, and *Case of the 19 Tradesmen v. Colombia. Preliminary objection*. Judgment of June 12, 2002. Series C Nº 93, para. 27.

102 Regarding the critiques of this judgment, see, for example, Courtis, Christian, "Luces and sombras. La exigibilidad de los derechos económicos, sociales y culturales en la sentencia de los "Cinco Pensionistas" de la Corte Interamericana de Derechos Humanos," in *Revista Mexicana de Derecho Público*, Nº 6, ITAM, Law Department, Mexico, 2004.

103 Abramovich, Víctor, and Rossi, Julieta, "La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos", *Estudios Socios Jurídicos*, Bogotá, Special Nº 9, April 2007, pp. 46 and 47.

104 *Ibidem*, p. 48.

international instruments, such as the American Declaration, constitutional texts, and the work of international monitoring mechanisms.¹⁰⁵

63. Regarding the possible integration of the OAS Charter with the American Declaration on the Rights and Duties of Man, it is pertinent to take into account Advisory Opinion OC-10/89 “Interpretation of the American Declaration on the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights”, of July 14, 1989, especially paragraphs 43 and 45:

43. Hence it may be said that by means of an authoritative interpretation, the Member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

[...]

45. For the Member States of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1.2.b) and 20 of the Commission’s Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that, to this extent, the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

64. I consider that another possible means of interpretation, in keeping with the latter position, would be to consider the relationship of Articles 26 and 29 of the Pact of San José with the *pro persona* principle. Indeed, based on the norms established in Article 29 of the American Convention, none of the provisions of the Convention may be interpreted in the sense of limiting the enjoyment and exercise of any right or freedom that may be recognized under the laws of any of the States Parties, or under any other convention to which one of the said States is a party, or to exclude or limit the potential effects of the American Declaration of the Rights and Duties of Man and other international acts

105 With certain variations, see Courtis, Christian, “La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos,” *op. cit. supra* note 79; and Melish, Tara J., “El litigio supranacional de los derechos económicos, sociales y culturales: avances y retrocesos en el Sistema Interamericano,” in *Memorias del seminario internacional sobre derechos económicos, sociales y culturales*, Mexico, Foreign Affairs Secretariat, pp. 173 to 219; by the same author, *La Protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos*, *op. cit. supra* note 79.

of the same nature (such as the Universal Declaration of Human Rights) that, in the same way as the American Declaration, establish social rights without distinction from civil and political rights.

65. These rules of interpretation established in Article 29 of the American Convention should also be interpreted. If we read these criteria pursuant to the *pro persona* principle, the interpretation of Article 26 should not only not limit the enjoyment and exercise of the rights established in the laws of the States Parties, which include the Constitution of these States, or the rights established in other conventions, but these laws and conventions must be used to ensure *the highest degree of protection*. Hence, in order to know what rights are derived from the economic, social, educational, scientific and cultural norms contained in the OAS Charter (in the terms set out in Article 26 of the American Convention), in addition to abiding by its text, recourse could be had to domestic laws and to other international instruments, including the American Declaration.¹⁰⁶ Likewise, Article 25 of the American Convention establishes the right of the individual to an effective recourse “for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention [...]”¹⁰⁷

66. In other words, a possible way to interpret Article 26 of the American Convention would lead to finding that a literal interpretation of this article is not sufficient, and neither are the criteria established in Article 29 of the Pact of San José, but rather, first, the latter article must be interpreted in accordance with the *pro persona* principle. Once this has been done, it is possible to understand that, according to the said Article 29, the economic, social and cultural rights established in other laws, including the Constitutions of the States Parties and the American Declaration,¹⁰⁸ are incorporated into Article 26 in order to interpret and develop it.

106 Cf. OC-10/89 “Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,” of July 14, 1989, paras. 43 and 45.

107 Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment February 2, 2001. Series C N° 72, para. 141 (dismissal of employees); *Case of the “Five Pensioners,” supra*, paras. 116 to 121 (pensions), and *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of August 6, 2008. Series C N° 184, para. 163 (electoral laws).

108 Even the Universal Declaration of Human Rights, because Article 29(d) of the American Convention establishes that no provision of the Convention shall be interpreted as: “excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other *international acts of the same nature* may have”; and the Universal Declaration, owing to its essence, has the same nature as the American Convention.

67. On some occasions, the Inter-American Court itself has used the basic national laws and different international instruments to give increased content and context to civil rights by means of the interpretation of Article 29(b) of the American Convention. Thus, for example, article 44 of the Constitution of the Republic of Colombia (fundamental rights of the child), together with different international instruments and the American Convention, were used in the *Case of the "Mapiripán Massacre" v. Colombia*.¹⁰⁹

153. The content and scope of Article 19 of the American Convention must be defined, in cases such as this, taking into consideration the pertinent provisions of the Convention on the Rights of the Child,¹¹⁰ in particular articles 6, 37, 38 and 39, and of Protocol II Additional to the Geneva Conventions, because these instruments and the American Convention form part of a very comprehensive international *corpus juris* for the protection of children that States must respect.¹¹¹ Added to this, in application of Article 29 of the Convention, the provisions of article 44 of the Constitution of the Republic of Colombia must be taken into consideration.¹¹²

68. As we have indicated previously, the *pro persona* principle implies, *inter alia*, making the most favorable interpretation for the effective enjoyment and exercise of the fundamental rights and freedoms, which, also, prevents using other international instruments

109 *Case of the "Mapiripán Massacre," supra*, para. 153, and *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs*. Judgement of August 31, 2001, Series C N° 79, para. 148.

110 Ratified by Colombia on January 28, 1991, and entering into force on February 27, 1991.

111 Cf. *Case of the "Children's Rehabilitation Institute," supra*, para. 148; *Case of the Gómez Paquiyauri Brothers. Merits, reparations and costs*. Judgment of July 8, 2004. Series C N° 110, para. 166; *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgement of November 19, 1999. Series C N° 63, para. 194, and *Legal Status and Human Rights of the Child, Advisory Opinion OC- 17/02*, para. 24.

112 Cf. Article 44 of the Constitution of the Republic of Colombia: "The fundamental rights of the child are: life, physical integrity, health and social security, a balanced diet, name and nationality, to have a family and not be separated from it, love and care, education and culture, recreation and freedom of expression. They shall be protected against any form of abandon, physical or moral violence, kidnapping, sale, sexual abuse, economic or labor exploitation, and hazardous work. They shall also enjoy the other rights embodied in the Constitution, in the laws and in the international treaties ratified by Colombia. The family, society and the State have the obligation to assist and protect the child in order to ensure his or her comprehensive and harmonious development and the full exercise of his or her rights. Anyone may require the competent authority to ensure compliance with the foregoing and to punish offenders.

to restrict the rights of the American Convention.¹¹³ The Inter-American Court has indicated:¹¹⁴

51. With respect to the comparison between the American Convention and the other treaties already mentioned, the Court cannot avoid a comment concerning an interpretation suggested by Costa Rica in the hearing of November 8, 1985. According to this argument, if a right recognized by the American Convention were regulated in a more restrictive way in another international human rights instrument, the interpretation of the American Convention would have to take those additional restrictions into account for the following reasons:

“If it were not so, we would have to accept that what is legal and permissible on the universal plane would constitute a violation in this hemisphere, which cannot obviously be correct. We think rather that with respect to the interpretation of treaties, the criterion can be established that the rules of a treaty or a convention must be interpreted in relation to the provisions that appear in other treaties that cover the same subject. It can also be contended that the provisions of a regional treaty must be interpreted in the light of the concepts and provisions of instruments of a universal character. (Underlining in original text)

It is true, of course, that it is frequently useful – and the Court has just done this – to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.¹¹⁵

52. The foregoing conclusion clearly follows from the language of Article 29 which sets out the relevant rules for the interpretation of the Convention. Paragraph b) of Article 29 indicates that no provision of the Convention may be interpreted as

“restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”

113 See the separate opinion in the *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2010. Series C Nº 220, para. 38.

114 Advisory Opinion OC-5/85. November 13, 1985. Series A Nº 5, concerning *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)* paras. 51 and 52.

115 Cf. Inter-American Court. “Other Treaties” subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A Nº 1. Other treaties used.

Hence, if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.

69. In any case, whatever the interpretation we accord to Article 26 of the American Convention, there are, as we have seen, several valid and reasonable lines of interpretation and argument that lead us to grant direct justiciability to economic, social and cultural rights, and that the Inter-American Court could eventually admit on future occasions. Based on the presumption, let me reiterate, that the Inter-American Court already took this step of accepting the justiciability of the rights derived from Article 26 of the Pact of San José in the important precedent of the *Case of Acevedo Buendía v. Peru*.

70. The second question is the type of obligations that States have under Article 26 of the Convention. According to this article, States “undertake to adopt measures” to achieve progressively the full realization of the economic, social and cultural rights “subject to available resources.” Here, the question is to clarify what this measures consists of.

71. Once again, we refer to the precedent of the *Case of Acevedo Buendía et al. v. Peru*, which considered the nature of the obligations derived from Article 26 of the Pact of San José, and which dealt with the failure to comply with the payment of pension equalizations, which, according to the Inter-American Court — with its preceding composition — violated the rights to property and to judicial protection established in Articles 21 and 25 of the American Convention, although not Article 26, because, in the Inter-American Court’s opinion, that article requires economic and technical measures subject to available resources, which was not the case. Thus, the Court considered that this was a different type of obligation and, therefore, found that the said provision of the Convention had not been violated.¹¹⁶ Nevertheless, the Inter-American Court established clearly that “regression is justiciable when economic, social and cultural rights are involved,”¹¹⁷ which left open the possibility of further development of its case law in the future.

116 *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”), supra*, Series C N° 198, paras. 105 and 106.

117 *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”), supra*, para. 103.

72. Furthermore, it should not be forgotten that the Inter-American Court has indicated that, in addition to regulating the progressive development of social rights, in light of Article 26 of the American Convention, a systematic interpretation of this article includes applying to economic, social and cultural rights the obligations of respect and guarantee¹¹⁸ derived from Articles 1.1 and 2 of the Pact of San José.

[...]

V. *IN CONCLUSION: TOWARDS THE FULL JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN SYSTEM*

97. More than three decades after the entry into force of the American Convention, discussions continue on the nature and scope of the economic, social and cultural rights referred to in the only article included in its Chapter III: Article 26. It is my understanding that this article of the Convention needs to be interpreted in light of our times and in accordance with the relevant advances in international human rights law, and in constitutional law. Indeed, regarding the former, it is sufficient to indicate that a few days before the Judgment to which this separate opinion refers was handed down, the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights entered into force,¹⁸¹ and this represents a real potential opening towards the justiciability of these rights under the universal system.

98. Furthermore, the progress made in the area of social rights within the States Parties to the Pact of San José is undeniable. The necessary evolutive interpretation of Article 26 of the American Convention must also be derived from the full recognition in many Constitutions of the protection of the right to health as a social right, which represents a regional trend. And this trend can also be appreciated in the evolution of the case law of

118 *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, para. 100: "even though Article 26 is found in chapter III of the Convention, entitled "Economic, Social and Cultural Rights," it is also located in Part I of the said instrument, entitled "State Obligations and Rights Protected" and, therefore, is subject to the general obligations contained in Articles 1.1 and 2."

181 Resolution A/RES/63/117 adopted on 10 December 2008 by the UN General Assembly, which entered into force on May 5, 2013. Ecuador is one of the 10 countries that have ratified it. The signatories undertake to recognize the competence of the Committee on Economic, Social and Cultural Rights to examine communications from individuals or groups who affirm that there has been a violation of the International Covenant on Economic, Social and Cultural Rights.

the highest national jurisdictions granting effectiveness to this social right; at times even directly and not only in connection with civil and political rights.

99. In this individual opinion, I have tried to defend an interpretation that attempts to grant primacy to the normative value of Article 26 of the American Convention. It has been said – with some reason – that the Inter-American Court should not ignore the Protocol of San Salvador;¹⁸² neither should it ignore Article 26 of the Pact of San José; it should interpret it in light of both instruments. In this understanding, the Additional Protocol is not able to reduce the normative value of the American Convention if this objective is not expressly stated in that instrument in relation to the obligations *erga omnes* established in Articles 1 and 2 of the American Convention, general obligations that apply to all rights, even economic, social and cultural rights, as the Inter-American Court has explicitly recognized.¹⁸³

100. The evolutive interpretation referred to seeks to grant real efficacy to inter-American protection in this area, the effectiveness of which is minimal 25 years after the adoption of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and almost 15 years after its entry into force. And this calls for an interpretation addressed at establishing the greatest practical effects possible for the inter-American norms as a whole, as the Inter-American Court has been doing with regard to civil and political rights.

[...]

103. Social citizenship has made significant progress throughout the world and, *evidently, in the countries of the American continent. The “direct” justiciability of economic, social and cultural rights* constitutes not only a viable interpretative and argumentative option in light of the actual inter-American *corpus juris*; the Inter-American Court, as the jurisdictional organ of the inter-American system, has the obligation to move in this direction of social justice, because it has competence with regard to *all the provisions* of the Pact of San José. The effective guarantee of economic, social and cultural rights is an alternative that would open up new possibilities in order to achieve transparency and the full realization of rights, without artifices and directly, and thus acknowledge what the Inter-American Court has been doing indirectly or in connection with the civil and political rights.

182 Ruiz-Chiriboga, Oswaldo, *op. cit. supra*, note 39, p. 160.

183 *Cf. Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”), supra*, para. 100.

104. Ultimately, the objective is to recognize what the Inter-American Court and the highest national jurisdictions are, in fact, doing, taking into account the *corpus juris* on national, inter-American and universal social rights, which would also constitute a greater and more effective protection of the fundamental social rights, with clearer obligations for the States Parties. All this is in keeping with current signs of the full effectiveness of human rights (in the national and international spheres), without any categorization or distinction between them, which is particularly important in the Latin American region where, regrettably, high rates of inequality persist, significant percentages of the population live in poverty and even in extreme poverty, and there are still numerous forms of discrimination against the most vulnerable.

105. The Inter-American Court cannot remain on the sidelines of the contemporary debate on the fundamental social rights¹⁸⁵ — which has a long history in the reflection on human rights — and which are the motive for continuing change in order to achieve their full realization and effectiveness in the constitutional democracies of our times.

106. Given the dynamic scenario in this regard at the domestic level and within the universal system, it can be anticipated that, in the future, the Inter-American Commission, or the presumed victims or their representatives may cite more forcefully eventual violations of the guarantees of economic, social and cultural rights derived from Article 26 of the American Convention in relation to the general obligations established in Articles 1 and 2 of the Pact of San José. In particular, the presumed victims may cite the said violations owing to their new faculties of direct access to the Inter-American Court, based on the new Rules of Procedure of this jurisdictional organ, in force since 2010.

107. As a new member of the Inter-American Court, it is not my desire to introduce sterile discussions within the inter-American system and, particularly, within its jurisdictional organ of protection. I merely wish to invite reflection on the legitimate interpretative and argumentative possibility of granting direct effectiveness to economic, social and cultural rights, especially in the specific case of the right to health, by means of Article 26 of the Pact of San José — because I am absolutely convinced of this. It represents a latent possibility of advancing towards a new stage in inter-American case law, which is no novelty if we recall that, on the one hand, the Inter-American Commission has understood this

185 In this regard, see: von Bogdandy, Armin, Fix-Fierro, Héctor, Morales Antoniazzi, Mariela and Ferrer MacGregor, Eduardo (coords.), *Construcción y papel de los derechos sociales fundamentales. Hacia un Ius Constitutionale Commune en América Latina*, Mexico, UNAM-IJ-Instituto Iberoamericano de Derecho Constitucional-Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2011.

to be so on several occasions and, moreover, the Inter-American Court itself explicitly recognized the justiciability of Article 26 of the American Convention in 2009.¹⁸⁶

108. In conclusion, after more than 25 years of continuing evolution of inter-American case law, it is legitimate – and reasonable using hermeneutics and treaty-based arguments – to grant full normative content to Article 26 of the Pact of San José, coherently and congruently with the whole inter-American *corpus juris*. This course of action would permit dynamic interpretations in keeping with the times that could lead towards a full, real, direct and transparent effectiveness of all rights, whether civil, political, economic, social or cultural, without hierarchy and categorizations that impede their realization, as revealed by the Preamble to the American Convention, the spirit and ideals of which permeate the whole inter-American system.

Eduardo Ferrer Mac-Gregor Poisot
Judge

186 Cf. *Case of Acevedo Buendia et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, paras. 99-103.

*European Court
of Human Rights*

*Jiménez Alonso y Jiménez Merino
v. Spain*

Communication N° 51188/99

*Decision on the admissibility
of May 25, 2000*



[...]

THE FACTS

The applicants [Mr Alejandro Jiménez Alonso and Pilar Jiménez Merino] are two Spanish nationals, born in 1948 and 1983 respectively. They live in Lamadrid (Santander Province). The first applicant is the father of the second applicant. (...)

[...]

During the school year 1996-97 the second applicant, Pilar Jiménez Merino, then aged 13-14, was in the eighth year of compulsory primary and secondary education (*Enseñanza General Obligatoria*) in a state school of Treceño, a village situated in a rural area of the Cantabria region. The first applicant, her father, was a teacher at the school and her personal tutor during that school year.

In May 1997, (...) the Natural Sciences teacher held classes on human sexuality as part of the "Vital Functions" syllabus. As a teaching aid, the teacher distributed to the pupils a 42-page booklet from a publication edited in 1994 by the Department of Education of the Autonomous Government of the Canary Islands.

The booklet in question comprised the following chapters:

- "Concept of sexuality";
- "We are sexual beings";
- "Body awareness and sexual development";
- "Fertilisation, pregnancy and childbirth";
- "Contraception and abortion";
- "Sexually transmitted diseases and Aids".

[...]

The first applicant, who considered that the contents of the booklet went well beyond the scope of Natural Sciences and contained actual guidelines on sexuality which were contrary to his moral and religious convictions, informed the headmaster of the school that his daughter would not be attending the **sex** education classes. He referred, in his capacity as parent, to his constitutional right to choose his daughter's moral education. The second applicant did not attend the classes in question and refused to answer the questions when she sat the final examination in the subject. Consequently, she failed

the examination and had to repeat the school year. The first applicant then lodged an administrative application with the Ministry of Education and Culture. In a decision of 22 July 1997, the provincial director of the Ministry rejected the application. On 12 December 1997 the applicant lodged a special appeal for protection of fundamental rights with the High Court of Justice (Administrative Division) of Cantabria. (...)

[...]

The first applicant lodged an *amparo* appeal against that judgment with the Constitutional Court. He relied on Article 27 § 3 (right of parents to choose their children's religious and moral education), 14 (principle of non-discrimination) and 24 (right to a fair trial) of the Constitution. In a decision of 11 March 1999, the Constitutional Court declared the appeal inadmissible on the ground that it was manifestly ill-founded (...).

[...]

COMPLAINTS

The applicants complained that both the administrative and judicial decisions dismissing their appeals against the decision (...) infringed Article 2 of Protocol N° 1 to the Convention.

The applicants also complained that the fact that the second applicant had been obliged to sit an end-of-year exam in Natural Sciences despite having passed all her mid-term examinations, (...) constituted a violation of the principle of non-discrimination (...).

[...]

THE LAW

The applicants complained that both the administrative and judicial decisions dismissing their appeals against the decision (...) infringed Article 2 of Protocol N° 1 to the Convention [European of Human Rights].

[...]

The [European Court of Human Rights] reiterates that, according to its case-law, the second sentence of Article 2 is binding on the Contracting States in the exercise of each

and every function that they undertake in the sphere of education and teaching, including that consisting of the organisation and financing of public education. Furthermore, the second sentence of Article 2 must be read together with the first which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching. The second sentence of Article 2 aims in short at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the “democratic society” as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised (...).

The Court also reiterates that the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era. Moreover, the second sentence of Article 2 of the Protocol does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. However, in fulfilling the functions assumed by it in regard to education and teaching, the State must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded (...).

In the instant case the Court notes that the sex education class in question was designed to provide pupils with objective and scientific information on the sex life of human beings, venereal diseases and Aids. (...) That was information of a general character which could be construed as of a general interest and which did not in any way amount to an attempt at indoctrination aimed at advocating particular sexual behaviour. Furthermore, that information did not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents’ own religious or philosophical convictions (...).

(...) [T]he Court notes that the Constitution guarantees [to all natural and legal persons] the right to establish schools in a manner consistent with constitutional principles, and the right to everyone to receive a religious and moral education in accordance with their own convictions. (...) In accordance with the constitutional provisions, there is a wide network of private schools in Spain which coexist with the State-run system of public

education. Parents are thus free to enrol their children in private schools providing an education better suited to their faith or opinions. In the instant case, the applicants have not referred to any obstacle preventing the second applicant from attending such a private school. Insofar as the parents opted for a state school, the right to respect their beliefs and ideas as guaranteed by Article 2 of Protocol N° 1 cannot be construed as conferring on them the right to demand different treatment in the education of their daughter in accordance with their own convictions.

Having regard to the foregoing, the Court considers that this part of the application must be rejected as manifestly ill-founded under Article 35 § 3 of the Convention.

[...]

The Court considers that the fact that the second applicant was obliged to sit an examination in a subject which was part of the school curriculum on account of her deliberate absence from part of the course did not constitute in itself discriminatory treatment contrary to Article 14 of the Convention. It follows that this complaint must be rejected as manifestly ill-founded in accordance with Article 35 § 3 of the Convention.

[...]

For these reasons, the Court unanimously,

Declares the application inadmissible.

[...]



*European Court
of Human Rights*

Lucia Dahlab v. Switzerland

Application N° 42393/98

*Decision on the admissibility of
February 15, 2001*



[...]

THE FACTS

The applicant [Lucia Dahlab], a Swiss national born in 1965, is a primary-school teacher and lives in Geneva (Switzerland). (...)

[...]

The applicant was appointed as a primary-school teacher by the Geneva cantonal government (...) on 1 September 1990 (...).

After a period of spiritual soul-searching, the applicant abandoned the Catholic faith and converted to Islam in March 1991. On 19 October 1991 she married an Algerian national, Mr. A. Dahlab. (...)

The applicant began wearing an Islamic headscarf in class towards the end of the 1990-91 school year, her intention being to observe a precept laid down in the Koran whereby women were enjoined to draw their veils over themselves in the presence of men and male adolescents.

[...]

In May 1995 the schools inspector for the Vernier district informed the Canton of Geneva Directorate General for Primary Education that the applicant regularly wore an Islamic headscarf at school; the inspector added that she had never had any comments from parents on the subject.

[...]

On 23 August 1996 the Directorate General for Primary Education confirmed its previous decision. It prohibited the applicant from wearing a headscarf in the performance of her professional duties on the grounds that such a practice contravened section 6 of the Public Education Act and constituted "an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system".

[...]

COMPLAINTS

1. The applicant submitted that the measure prohibiting her from wearing a headscarf in the performance of her teaching duties infringed her freedom to manifest her religion, as guaranteed by Article 9 of the Convention. [European Convention for the Protection of Human Rights and Fundamental Freedoms]

2. (...) [T]he applicant submitted that the prohibition imposed by the Swiss authorities amounted to discrimination on the ground of sex within the meaning of Article 14 of the Convention, in that a man belonging to the Muslim faith could teach at a State school without being subject to any form of prohibition.

THE LAW

1. (...)

[...]

The Court [European of Human Rights] refers, in the first place, to its case-law to the effect that freedom of thought, conscience and religion, as enshrined by Article 9 of the Convention, represents one of the foundations of a “democratic society” within the meaning of the Convention. In its religious dimension, it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. (...).

The Court further observes that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected (...).

[...]

(...)Having examined the Federal Court’s reasoning on this point, the Court observes that sections 6 and 120(2) of the cantonal Act of 6 November 1940 were sufficiently precise to enable those concerned to regulate their conduct. (...)

The applicant (...) argued that the measure did not pursue a legitimate aim. Having regard to the circumstances of the case and to the actual terms of the decisions of the three relevant authorities, the Court considers that the measure pursued aims that were legitimate for the purposes of Article 9 § 2, namely the protection of the rights and freedoms of others, public safety and public order.

Lastly, as to whether the measure was “necessary in a democratic society,” the Court reiterates that, according to its settled case-law, the Contracting States have a certain margin of appreciation in assessing the existence and extent of the need for interference, but this margin is subject to European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court’s task is to determine whether the measures taken at national level were justified in principle – that is, whether the reasons adduced to justify them appear “relevant and sufficient” and are proportionate to the legitimate aim pursued (...).

Applying these principles in the instant case, the Court notes that the Federal Court held that the measure by which the applicant was prohibited, purely in the context of her activities as a teacher, from wearing a headscarf was justified by the potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils’ parents, and by the breach of the principle of denominational neutrality in schools. In that connection, the Federal Court took into account the very nature of the profession of State school teachers, who were both participants in the exercise of educational authority and representatives of the State, and in doing so weighed the protection of the legitimate aim of ensuring the neutrality of the State education system against the freedom to manifest one’s religion. It further noted that the impugned measure had left the applicant with a difficult choice, but considered that State school teachers had to tolerate proportionate restrictions on their freedom of religion. In the Federal Court’s view, the interference with the applicant’s freedom to manifest her religion was justified by the need, in a democratic society, to protect the right of State school pupils to be taught in a context of denominational neutrality. (...)

[...]

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant’s pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears

to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, (...) having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.

(...) [T]he Court is of the opinion that the impugned measure may be considered justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety. The Court accordingly considers that the measure prohibiting the applicant from wearing a headscarf while teaching was “necessary in a democratic society.”

[...]

2. (...)

[...]

The Court notes in the instant case that the measure by which the applicant was prohibited, purely in the context of her professional duties, from wearing an Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith.

[...]

FOR THESE REASONS, THE COURT, BY A MAJORITY,

Declares the application inadmissible.

[...]



*European Court
of Human Rights*

Cyprus v. Turkey

Application N° 25781/94

*Judgment of
May 10, 2001*



[...]

THE FACTS

[...]

A. General context

13. The complaints raised in this application arise out of the Turkish military operations in northern Cyprus in July and August 1974 and the continuing division of the territory of Cyprus.

(...)

14. A major development in the continuing division of Cyprus occurred in November 1983 with the proclamation of the "Turkish Republic of Northern Cyprus" (the "TRNC") and the subsequent enactment of the "TRNC Constitution" on 7 May 1985.

This development was condemned by the international community. On 18 November 1983 the United Nations Security Council adopted Resolution 541 (1983) declaring the proclamation of the establishment of the "TRNC" legally invalid and calling upon all States not to recognise any Cypriot State other than the Republic of Cyprus.

(...)

15. According to the respondent Government, the "TRNC" is a democratic and constitutional State which is politically independent of all other sovereign States including Turkey, and the administration in northern Cyprus has been set up by the Turkish-Cypriot people in the exercise of its right to self-determination and not by Turkey. (...)

C. THE INSTANT APPLICATION

18. The instant application is the first to have been referred to the Court. The applicant Government requested the Court in their memorial to "decide and declare that the respondent State is responsible for continuing violations and other violations of Articles 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 17 and 18 of the Convention and of Articles 1 and 2 of Protocol N° 1". These allegations were invoked with reference to four broad categories of complaints: alleged violations of the rights of Greek-Cypriot missing persons and their relatives; alleged

violations of the home and property rights of displaced persons; alleged violations of the rights of enclaved Greek Cypriots in northern Cyprus; alleged violations of the rights of Turkish Cypriots and the Gypsy community in northern Cyprus.

[...]

Article 2 of Protocol N° 1:

273. The applicant Government averred that the children of Greek Cypriots living in northern Cyprus were denied secondary-education facilities and that Greek-Cypriot parents of children of secondary-school age were in consequence denied the right to ensure their children's education in conformity with their religious and philosophical convictions. The applicant Government relied on Article 2 of Protocol N° 1, which states:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

[...]

277. The Court notes that children of Greek-Cypriot parents in northern Cyprus wishing to pursue a secondary education through the medium of the Greek language are obliged to transfer to schools in the south, this facility being unavailable in the “TRNC” ever since the decision of the Turkish-Cypriot authorities to abolish it. Admittedly, it is open to children, on reaching the age of 12, to continue their education at a Turkish or English-language school in the north. In the strict sense, accordingly, there is no denial of the right to education, which is the primary obligation devolving on a Contracting Party under the first sentence of Article 2 of Protocol N° 1 (...). Moreover, this provision does not specify the language in which education must be conducted in order that the right to education be respected (...).

278. However, in the Court's opinion, the option available to Greek-Cypriot parents to continue their children's education in the north is unrealistic in view of the fact that the children in question have already received their primary education in a Greek-Cypriot school there. (...) Having assumed [the authorities] responsibility for the provision of Greek-language primary schooling, the failure of the “TRNC” authorities to make continuing provision for it at the secondary-school level must be considered in effect to be a denial of the (...) the right at issue. It cannot be maintained that the provision of second-

ary education in the south in keeping with the linguistic tradition of the enclaved Greek Cypriots suffices to fulfil the obligation laid down in Article 2 of Protocol N° 1, having regard to the impact of that option on family life (...).

279. The Court notes that the applicant Government raise a further complaint in respect of primary-school education and the attitude of the "TRNC" authorities towards the filling of teaching posts. Like the Commission, it considers that, taken as a whole, the evidence does not disclose the existence of an administrative practice of denying the right to education at primary-school level.

280. Having regard to the above considerations, the Court concludes that there has been a violation of Article 2 of Protocol N° 1 in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them.

[...]

FOR THESE REASONS, THE COURT

[...]

11. *Holds* by sixteen votes to one that there has been a violation of Article 2 of Protocol N° 1 in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them.

*European Court
of Human Rights*

Leyla Şahin v. Turkey

Application N° 44774/98

*Judgment of
November 10, 2005*



[...]

THE FACTS

[...]

14. The applicant was born in 1973 and has lived in Vienna since 1999, when she left Istanbul to pursue her medical studies at the Faculty of Medicine at Vienna University. She comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf.

15. On 26 August 1997 the applicant, then in her fifth year at the Faculty of Medicine at Bursa University, enrolled at the Cerrahpaşa Faculty of Medicine at Istanbul University. She says she wore the Islamic headscarf during the four years she spent studying medicine at the University of Bursa and continued to do so until February 1998.

[...]

17. On 12 March 1998, in accordance with the aforementioned circular, the applicant was denied access by invigilators to a written examination on oncology because she was wearing the Islamic headscarf. (...)

[...]

THE LAW

[...]

Article 2 of Protocol N° 1

A. Whether a separate examination of this complaint is necessary

[...]

B. Applicability

131. The applicant alleged a violation of the first sentence of Article 2 of Protocol N° 1, which provides:

“No person shall be denied the right to education.”

[...]

(b) The Court’s assessment

134. The first sentence of Article 2 of Protocol N° 1 provides that no one shall be denied the right to education. Although the provision makes no mention of higher education, there is nothing to suggest that it does not apply to all levels of education, including higher education.

135. As to the content of the right to education and the scope of the obligation it imposes, the Court notes that in the Case “relating to certain aspects of laws on the use of languages in education in Belgium” (“the Belgian linguistic case” (merits), judgment of 23 July 1968, Series A N° 6, pp. 30-31, § 3), it stated: “The negative formulation indicates, as is confirmed by the ‘preparatory work’ (...), that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol. As a ‘right’ does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State.”

136. The Court does not lose sight of the fact that the development of the right to education, whose content varies from one time or place to another according to economic and social circumstances, mainly depends on the needs and resources of the community. However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, the Convention is a living instrument which must be interpreted in the light of present-day conditions (...). While the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no watertight division separating higher education from other forms of education. (...)

137. (...) [I]t would be hard to imagine that institutions of higher education existing at a given time do not come within the scope of the first sentence of Article 2 of Protocol No 1. Although that Article does not impose a duty on the Contracting States to set up institutions of higher education, any State doing so will be under an obligation to afford an effective right of access to them. In a democratic society, the right to education, which

is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol N° 1 would not be consistent with the aim or purpose of that provision. (...)

[...]

142. Consequently, the first sentence of Article 2 of Protocol N° 1 is applicable in the instant case. The manner in which it is applied will, however, obviously depend on the special features of the right to education.

C. Merits

[...]

2. The Court's assessment

(a) General principles

152. The right to education, as set out in the first sentence of Article 2 of Protocol N° 1, guarantees everyone within the jurisdiction of the Contracting States "a right of access to educational institutions existing at a given time", but such access constitutes only a part of the right to education. For that right "to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed" (...). Similarly, implicit in the phrase "No person shall..." is the principle of equality of treatment of all citizens in the exercise of their right to education.

153. The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, without distinction (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 58, § 27).

154. In spite of its importance, this right is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State" (...). Admittedly, the regulation of educational institutions may vary in time and in place, inter alia, according to the needs and resources of the community and the distinctive features of different levels of education. Consequently,

the Contracting States enjoy a certain margin of appreciation in this sphere, although the final decision as to the observance of the Convention's requirements rests with the Court. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of "legitimate aims" under Article 2 of Protocol N° 1 (...). Furthermore, a limitation will only be compatible with Article 2 of Protocol N° 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

155. Such restrictions must not conflict with other rights enshrined in the Convention and its Protocols either (...). The provisions of the Convention and its Protocols must be considered as a whole. Accordingly, the first sentence of Article 2 of Protocol N° 1 must, where appropriate, be read in the light in particular of Articles 8, 9 and 10 of the Convention (...).

156. The right to education does not in principle exclude recourse to disciplinary measures, including suspension or expulsion from an educational institution in order to ensure compliance with its internal rules. The imposition of disciplinary penalties is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils (...).

(b) Application of these principles to the present case

157. By analogy with its reasoning on the question of the existence of interference under Article 9 of the Convention (...), the Court is able to accept that the regulations on the basis of which the applicant was refused access to various lectures and examinations for wearing the Islamic headscarf constituted a restriction on her right to education, notwithstanding the fact that she had had access to the university and been able to read the subject of her choice in accordance with the results she had achieved in the university entrance examination. However, an analysis of the case by reference to the right to education cannot in this instance be divorced from the conclusion reached by the Court with respect to Article 9 (...), as the considerations taken into account under that provision are clearly applicable to the complaint under Article 2 of Protocol N° 1, which complaint consists of criticism of the regulation concerned that takes much the same form as that made with respect to Article 9.

158. In that connection, the Court has already found that the restriction was foreseeable to those concerned and pursued the legitimate aims of protecting the rights and freedoms of others and maintaining public order (...). The obvious purpose of the restriction was to preserve the secular character of educational institutions.

159. As regards the principle of proportionality, the Court found (...) that there was a reasonable relationship of proportionality between the means used and the aim pursued. (...)

[...]

161. Consequently, the restriction in question did not impair the very essence of the applicant's right to education. In addition, in the light of its findings with respect to the other Articles relied on by the applicant (...), the Court observes that the restriction did not conflict with other rights enshrined in the Convention or its Protocols either.

162. In conclusion, there has been no violation of the first sentence of Article 2 of Protocol N° 1.

[...]

FOR THESE REASONS, THE COURT

[...]

2. *Holds*, by sixteen votes to one, that there has been no violation of the first sentence of Article 2 of Protocol N° 1;

[...]

DISSENTING OPINION OF JUDGE TULKENS

[...]

B. The right to education

[...]

15. (...) [A]lthough the Grand Chamber stresses that in a democratic society the right to education is indispensable to the furtherance of human rights (see paragraph 137 of the judgment), it is surprising and regrettable for it then to proceed to deprive the applicant of that right for reasons which do not appear to me to be either relevant or sufficient. The applicant did not, on religious grounds, seek to be excused from certain activities or request changes to be made to the university course for which she had enrolled as a student (...). She simply wished to complete her studies in the conditions that had obtained when she first enrolled at the university and during the initial years of her university career, when she had been free to wear the headscarf without any problem. I consider that by refusing the applicant access to the lectures and examinations that were part of the course at the Faculty of Medicine, she was *de facto* deprived of the right of access to the university and, consequently, of her right to education.

16. [...] I am not entirely satisfied that the reasoning with regard to religious freedom “is clearly applicable” to the right to education. Admittedly, this latter right is not absolute and may be subject to limitations by implication, provided they do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness. (...) The margin of appreciation is narrower for negative obligations and the Court must, in any event, determine in the last resort whether the Convention requirements have been complied with. Lastly, a limitation will only be consistent with the right to education if there is a reasonable relationship of proportionality between the means employed and the aim pursued.

17. What was the position in the instant case? I will not pursue here the debate concerning the right to freedom of religion, but will confine myself to highlighting the additional elements that concerned the proportionality of the limitations that were imposed on the applicant’s right to education.

I would begin by noting that before refusing the applicant access to lectures and examinations, the authorities should have used other means either to encourage her (through mediation, for example) to remove her headscarf and pursue her studies, or to ensure that public order was maintained on the university premises if it was genuinely at risk¹. The fact of the matter is that no attempt was made to try measures that would have had a less drastic effect on the applicant’s right to education in the instant case. My second point is that it is common ground that by making the applicant’s pursuit of her studies conditional on removing the headscarf and by refusing her access to the university if she failed to comply with this requirement, the authorities forced the applicant to leave the country and complete her studies at Vienna University. She was thus left with no alterna-

tive. (...) Lastly, the Grand Chamber does not weigh up the competing interests, namely, on the one hand, the damage sustained by the applicant – who was deprived of any possibility of completing her studies in Turkey because of her religious convictions and also maintained that it was unlikely that she would be able to return to her country to practise her profession owing to the difficulties that existed there in obtaining recognition for foreign diplomas – and, on the other, the benefit to be gained by Turkish society from prohibiting the applicant from wearing the headscarf on the university premises.

In these circumstances, it can reasonably be argued that the applicant's exclusion from lectures and examinations and, consequently, from the university itself, rendered her right to education ineffective and, therefore, impaired the very essence of that right.

[...]

20. I end by noting that all these issues must also be considered in the light of the observations set out in the annual activity report published in June 2005 of the European Commission against Racism and Intolerance (ECRI), which expresses concern about the climate of hostility existing against persons who are or are believed to be Muslim and considers that the situation requires attention and action in the future² Above all, the message that needs to be repeated over and over again is that the best means of preventing and combating fanaticism and extremism is to uphold human rights.

1 See O. De Schutter and J. Ringelheim, "*La renonciation aux droits fondamentaux. La libre disposition du soi et le règne de l'échange*", CRIDHO Working paper series 1/2005.

2 European Commission against Racism and Intolerance, "Annual report on ECRI's activities covering the period from 1 January to 31 December 2004", doc. CRI (2005)36, Strasbourg, June 2005.

*European Court
of Human Rights*

Timishev v. Russia

*Applications N° 55762/00
and 55974/00*

*Judgment of
December 13, 2005*



[...]

THE FACTS

[...]

9. The applicant was born in 1950 and lives in the town of Nalchik, in the Kabardino-Balkar Republic of the Russian Federation. He is a lawyer.

10. The applicant is an ethnic Chechen; he was born in the Chechen Republic and lived there. On 31 December 1994 his property in Grozny was destroyed as a result of a military operation. Since 15 August 1996 the applicant has been living in Nalchik as a forced migrant.

11. In 1997 the applicant applied for registration of his permanent residence in Nalchik. His application was rejected pursuant to the local laws of Kabardino-Balkaria prohibiting former residents of the Chechen Republic from obtaining permanent residence in Kabardino-Balkaria. (...)

[...]

B. Refusal of access to school

22. Between September 1998 and May 2000, the applicant's nine-year-old son and seven-year-old daughter attended School no. 8 in Nalchik.

23. On 24 December 1999 the applicant received compensation for the property he had lost in the Chechen Republic. In exchange for compensation, the applicant had to surrender his migrant's card (...), a local document confirming his residence in Nalchik and his status as a forced migrant from Chechnya.

24. On 1 September 2000¹ the applicant's son and daughter went to school, but were refused admission because the applicant could not produce his migrant's card. The headmaster agreed to admit the children informally, but advised the applicant that they would be immediately suspended if the education department discovered this arrangement.

¹ After the summer break, classes at all Russian schools start on 1 September.

25. On 4 September 2000 the applicant complained to a court about the refusal of the Nalchik Education and Science Department (...) to admit his children to school. The Department replied that, after 24 December 1999, the applicant had had no lawful grounds for remaining in Nalchik and that his requests amounted to an encroachment on the lawful rights of other children because School no. 8 had been severely overcrowded even without his children.

26. On 1 November 2000 the Nalchik City Court dismissed the applicant's complaint as unsubstantiated. (...)

27. On 21 November 2000, on an appeal by the applicant, the Supreme Court of the Kabardino-Balkar Republic upheld the judgment of 1 November 2000.

[...]

THE LAW

[...]

Article 2 of Protocol N° 1

60. The applicant complained under Article 2 of Protocol No. 1 of the domestic authorities' refusal to secure his children's right to education on the ground that he had no registered residence in Nalchik and did not have a migrant's card. The relevant part of Article 2 of Protocol No. 1 reads as follows:

"No person shall be denied the right to education. ..."

A. The parties' submissions

[...]

62. The Government accepted that the right of the applicant's children to education had been unlawfully restricted. Under Russian law, rights and freedoms could not be restricted on account of a person's registered place of residence, and the Education Act guaranteed the right to education irrespective of the place of residence (section 5).

B. The Court's assessment

63. The Court reiterates that, by binding themselves not to “[deny] the right to education” under Article 2 of Protocol No. 1, the Contracting States guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time and the possibility of drawing, by official recognition of the studies which he has completed, profit from the education received (see *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A no. 23, pp. 25-26, § 52, and *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”*, judgment of 23 July 1968, Series A no. 6, pp. 30-32, §§ 3-5).

64. Article 2 of Protocol No. 1 prohibits the denial of the right to education. This provision has no stated exceptions and its structure is similar to that of Articles 2 and 3, Article 4 § 1 and Article 7 of the Convention (“No one shall ...”), which together enshrine the most fundamental values of the democratic societies making up the Council of Europe. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 137, ECHR 2005-XI). This right is also to be found in similar terms in other international instruments such as the Universal Declaration of Human Rights (Article 26), the International Covenant on Economic, Social and Cultural Rights (Article 13), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (e) (v)), and the Convention on the Rights of the Child (Article 28). There is no doubt that the right to education guarantees access to elementary education which is of primordial importance for a child’s development.

65. The Court observes that the applicant’s children were refused admission to the school which they had attended for the previous two years. The Government did not contest the applicant’s submission that the true reason for the refusal had been that the applicant had surrendered his migrant’s card and had thereby forfeited his registration as a resident in the town of Nalchik.

66. As noted above, the Convention and its Protocols do not tolerate a denial of the right to education. The Government confirmed that Russian law did not allow the exercise of that right by children to be made conditional on the registration of their parents’ residence. It follows that the applicant’s children were denied the right to education provided for by domestic law. Their exclusion from school was therefore incompatible with the requirements of Article 2 of Protocol No. 1.

67. There has therefore been a violation of Article 2 of Protocol No. 1.

[...]

FOR THESE REASONS, THE COURT UNANIMOUSLY

[...]

3. *Holds* that there has been a violation of Article 2 of Protocol No. 1;

[...]

*European Court
of Human Rights*

Konrad v. Germany

Application N° 35504/03

*Decision on the admissibility of
September 11, 2006*



THE FACTS

The four applicants are Mr Fritz Konrad, a Swiss and German national born in 1951, Mrs Marianna Konrad, a Swiss national born in 1956, and their children Rebekka, a Swiss and German national born in 1992, and Josua, a Swiss and German national born in 1993. They live in Herbolzheim (Germany) and were represented before the Court by Mr W. Roth and Mr R. Reichert, two lawyers practising in Bonn.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

The applicants belong to a Christian community which is strongly attached to the Bible and reject the attendance of private or State schools for religious reasons. The applicant parents find that school education does not suit their beliefs because of sex education, the appearance of mythical creatures such as witches and dwarfs in fairytales during school lessons and the increasing physical and psychological violence among pupils at school.

They educate their children at home in accordance with the syllabus and materials of the "*Philadelphia School*", an institution based in Siegen which is not recognised as a private school by the State. The institution specialises in assisting devout Christian parents in educating their children at home. The school's syllabus contains both books and materials which are used by State or private schools and materials specially prepared to support the education of religious beliefs. Teaching by parents is supervised by staff trained by the *Philadelphia School*. (...)

The applicant parents applied for their children to be exempted from compulsory primary school attendance and for permission to educate them at home. (...)

[...]

On 11 July 2001 the Freiburg Administrative Court dismissed a request by the applicants for exemption from compulsory primary-school attendance. The court noted that the Basic Law granted the parents both freedom of religion and the right to educate their children with regard to religious and philosophical convictions, which also included the negative aspect of keeping their children away from convictions which would be harmful in their opinion. That freedom, however, was restricted by the State's obligation to

provide education and tuition. Hence compulsory schooling was not a matter for the parents' discretion. The applicant parents' wish to let their children grow up in a "protected area" at home without outside interference could not take priority over compulsory school attendance. Even if the children could be sufficiently educated at home, the State's obligation to provide education under the Basic Law would not be met if the children had no contact with other children. (...) Because of their young age, the applicant children were unable to foresee the consequences of their parents' decision to opt for home education. Therefore, they could hardly be expected to take an autonomous decision for themselves. (...)

On 18 June 2002 the Baden-Württemberg Administrative Court of Appeal dismissed an appeal by the applicants. It found that, even though the applicant parents' right to educate their children included religious education, they were not entitled under the Basic Law to provide the exclusive education of their children. The State's constitutional obligation to provide children with an education was on an equal footing with the parents' right. The court stressed that the decisive point was not whether home education was equally as effective as primary school education, but that compulsory school attendance required children from all backgrounds in society to gather together. (...) The applicant parents could not be permitted to keep their children away from school and the influences of other children. (...)

[...]

THE LAW

[...]

The Court observes that the applicant parents' complaints mainly relate to the second sentence of Article 2 of Protocol N° 1. This provision recognises the role of the State in education as well as the right of parents, who are entitled to respect for their religious and philosophical convictions in the delivery of education and teaching to their children. It aims at safeguarding pluralism in education, which is essential for the preservation of the "democratic society" as conceived by the Convention (see *B.N. and S.N. v. Sweden*, N° 17678/91, Commission decision of 30 June 1993). In view of the power of the modern State, it is above all through State teaching that this aim must be realised (see *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, Series A N° 23, pp. 24-25, § 50).

Furthermore, the second sentence of Article 2 must be read together with the first, which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions (see *B.N. and S.N. v. Sweden*, cited above). Therefore, respect is only due to convictions on the part of the parents which do not conflict with the child's right to education, the whole of Article 2 of Protocol N° 1 being dominated by its first sentence (see *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A N° 48, p. 16, § 36). This means that parents may not refuse a child's right to education on the basis of their convictions (see *B.N. and S.N. v. Sweden*, cited above, and *Leuffen v. Germany*, N° 19844/92, Commission decision of 9 July 1992).

(...) the Court agrees with the finding of the Freiburg Administrative Court that the applicant children were unable to foresee the consequences of their parents' decision to opt for home education because of their young age. As it would be very difficult for the applicant children to take an autonomous decision for themselves at that age, the Court considers that the above principles apply to the present case.

The right to education as enshrined in Article 2 of Protocol N° 1 by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals (...). Therefore, Article 2 of Protocol N° 1 implies the possibility for the State to establish compulsory schooling, be it in State schools or through private tuition of a satisfactory standard (see *Family H. v. the United Kingdom*, N° 10233/83, Commission decision of 6 March 1984, Decisions and Reports 37, p. 105, at p. 108; *B.N. and S.N. v. Sweden*, cited above; and *Leuffen*, cited above). The Court observes in this connection that there appears to be no consensus among the Contracting States with regard to compulsory attendance of primary schools. While some countries permit home education, other States provide for compulsory attendance of State or private schools.

In the present case, the Court notes that the German authorities and courts have carefully reasoned their decisions and mainly stressed the fact that not only the acquisition of knowledge but also integration into and first experiences of society are important goals in primary-school education. The German courts found that those objectives could not be met to the same extent by home education, even if it allowed children to acquire the same standard of knowledge as provided by primary-school education. The Court considers that this presumption is not erroneous and falls within the Contracting States' margin of appreciation in setting up and interpreting rules for their education systems. The Federal Constitutional Court stressed the general interest of society in avoiding the

emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society. The Court regards this as being in accordance with its own case-law on the importance of pluralism for democracy (see, *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 89, ECHR 2003-II).

Moreover, the German courts pointed to the fact that the applicant parents were free to educate their children after school and at weekends. Therefore, the parents' right to education in conformity with their religious convictions is not restricted in a disproportionate manner. Compulsory primary-school attendance does not deprive the applicant parents of their right to "exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions" (...).

It follows that this complaint must be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 and 4 of the Convention.

[...]

The applicants submitted that they were being discriminated against in relation to others who held different religious convictions which did not conflict with compulsory school attendance (...). They also submitted that they were being discriminated against because the applicant children were forced to attend a State school which did not provide religious education. (...)

Moreover, the applicants submitted that they were being discriminated against in relation to families whose children had been exempted from compulsory school attendance on the grounds that the parents worked abroad or were not settled because their professional life required them to move around the country (...).

The Court reiterates that, for the purposes of Article 14, a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. (...)

The Court notes that there exists a difference of treatment between the applicant children and other children who have obtained an exemption from compulsory school atten-

dance “in exceptional circumstances” (...). However, the applicants submitted that such “exceptional circumstances” had been recognised by the school supervisory authorities only in cases in which children were physically unfit to attend school or in which the parents had to move around the country for professional reasons. Such exemptions were granted by the school supervisory authorities because the limited feasibility of school attendance would have caused undue hardship for those children. Those exemptions were hence granted for merely practical reasons, whereas the applicants sought to obtain an exemption for religious purposes. Therefore, the Court finds that the above distinction justifies a difference of treatment.

It follows that this complaint must also be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Declares the application inadmissible.

[...]

*European Court
of Human Rights*

Folgero and others v. Norway

Application N° 15472/02

*Judgment of
June 20, 2007*



[...]

THE FACTS

1. THE CIRCUMSTANCES OF THE CASE

7. The present application was lodged by parents, who are members of the Norwegian Humanist Association (*Human-Etisk Forbund*), and their children, who were primary school pupils at the time of the events complained of in the present case (...)

[...]

9. Norway has a State religion and a State Church, of which 86% of the population are members. Article 2 of the Constitution provides:

“Everyone residing in the Kingdom shall enjoy freedom of religion.

The Evangelical Lutheran Religion remains the State’s official religion. Residents who subscribe to it are obliged to educate their children likewise.”

10. Instruction in the Christian faith has been part of the Norwegian school curriculum since 1739. (...)

[...]

THE LAW

I. Alleged violation of article 2 of protocol N° 2

53. The applicant parents complained both under Article 9 of the Convention and under the second sentence of Article 2 of Protocol N° 1 on account of the refusals by the domestic authorities to grant their children full exemption from the compulsory KRL¹ subject dealing with Christianity, Religion and Philosophy taught during the ten-year compulsory schooling in Norway.

1 Author’s note: KRL, Christianity, religion and philosophy (in reference of “kristendomskunnskap med religions- og livssynsorientering” by its acronym in Norwegian).

54. The Court, (...) considers that the parents' complaint falls most suitably to be examined under Article 2 of Protocol N° 1 (...).

A. Submissions of the parties

1. The applicants

55. The applicants maintained that the KRL subject was neither objective, nor critical nor pluralistic for the purposes of the criteria established by the Court in its interpretation of Article 2 of Protocol N° 1 (...)

[...]

60. The applicants disputed the contention that the KRL subject involved only a few activities that could be perceived as being of a religious nature. The Curriculum, the textbooks that were used in schools and all the information regarding the implementation of the Curriculum indicated that the main object of the subject – to strengthen the pupils' own Christian foundation – was also the main thread in the tuition. The principal intention behind the introduction of the KRL subject had been to secure the religious foundation for the majority of pupils who adhered to Christianity. (...)

[...]

62. (...) The pupils could be exempted from taking part in certain activities, but not from knowing the contents of the activities or tuition in question. They could be exempted from reciting from the Bible, singing songs, performing prayers, etc., but not from knowing what was recited, sung, prayed, etc. The whole idea behind the exemption arrangement had been that it was possible to maintain a mental "separation" between knowledge and participation. It presupposed that one could "learn" the text (...) without being subjected mentally to what constituted or might constitute unwanted influence or indoctrination. However, the evaluations made of the KRL subject had shown that that distinction had not been understood in practice, not even by the teachers. The parents in these applications had explained in their written testimonies how this separation did not function with regard to their children. Thus, partial exemption had not been a possible option for them.

[...]

67. The partial exemption arrangement had not functioned for the applicants, who had tried this option but without it offering a practical remedy for them. (...) They had been heavily burdened by monitoring the tuition, passing on messages, giving reasons, and by frustration and stigmatisation. (...)

[...]

70. The Government stressed that (...) no violation of Article 2 of Protocol N° 1 could be established on account of the absence of a right to full exemption from the KRL subject. (...)

[...]

B. Assessment by the Court

1. General principles

84. As to the general interpretation of Article 2 of Protocol N° 1, the Court has in its case-law (...) enounced the following major principles:

(a) The two sentences of Article 2 of Protocol N° 1 must be interpreted not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, p. 26, § 52).

(b) It is on to the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching. The second sentence of Article 2 of Protocol N° 1 aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the “democratic society” as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised (...).

(c) Article 2 of Protocol N° 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, p. 25, §51). That duty is broad in its extent as it applies not only to the content of education and

the manner of its provision but also to the performance of all the “functions” assumed by the State. The verb “respect” means more than “acknowledge” or “take into account”. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. The term “conviction”, taken on its own, is not synonymous with the words “opinions” and “ideas”. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance (...).

(d) Article 2 of Protocol N° 1 constitutes a whole that is dominated by its first sentence. By binding themselves not to “deny the right to education”, the Contracting States guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time and the possibility of drawing, by official recognition of the studies which he has completed, profit from the education received (...).

(e) It is in the discharge of a natural duty towards their children - parents being primarily responsible for the “education and teaching” of their children - that parents may require the State to respect their religious and philosophical convictions. (...)

(f) Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Valsamis*, judgment of December 18, 1996, Series A, N° 48, p. 2324, § 27).

(g) However, the setting and planning of the curriculum fall in principle within the competence of the Contracting States. (...) [T]he second sentence of Article 2 of Protocol N° 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable (...).

(h) The second sentence of Article 2 of Protocol N° 1 implies on the other hand that the State, (...) must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded (...).

(i) In order to examine the disputed legislation under Article 2 of Protocol N° 1, interpreted as above, one must, (...) have regard to the material situation that it sought and still seeks to meet. Certainly, abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism (see *Kjeldsen, Busk Madsen and Pedersen*, cited above, pp. 27-28, § 54).

2. *Application of those principles to the present case*

85. (...) The question to be determined is whether the respondent State, in fulfilling its functions in respect of education and teaching, had taken care that information or knowledge included in the Curriculum for the KRL subject be conveyed in an objective, critical and pluralistic manner or whether it had pursued an aim of indoctrination not respecting the applicant parents' religious and philosophical convictions and thereby had transgressed the limit implied by Article 2 of Protocol N° 1. In examining this question, the Court will consider, in particular, the legislative framework of the KRL subject as it applied generally at the time when the case stood before the national courts.

[...]

95. (...) [T]he contents and the aims of the KRL subject (...) and other texts forming part of the legislative framework suggest that not only quantitative but even qualitative differences applied to the teaching of Christianity as compared to that of other religions and philosophies. (...)

96. The question then arises whether the imbalance highlighted above could be said to have been brought to a level acceptable under Article 2 of Protocol N° 1 (...)

97. In this connection the Court notes that the operation of the partial exemption arrangement presupposed, firstly, that the parents concerned be adequately informed of the details of the lesson plans to be able to identify and notify to the school in advance those parts of the teaching that would be incompatible with their own convictions and beliefs. (...)

[...]

99. Thirdly, the Court observes that even in the event that a parental note requesting partial exemption was deemed reasonable, this did not necessarily mean that the pupil concerned would be exempted from the part of the curriculum in question.(...)

[...]

102. (...) [N]otwithstanding the many laudable legislative purposes stated in connection with the introduction of the KRL subject in the ordinary primary and lower secondary schools, it does not appear that the respondent State took sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner for the purposes of Article 2 of Protocol N° 1.

Accordingly, the Court finds that the refusal to grant the applicant parents full exemption from the KRL subject for their children gave rise to a violation of Article 2 of Protocol N° 1.



*European Court
of Human Rights*

*D.H. and others
v. The Czech Republic*

Application N° 57325/00

*Judgment of
November 13, 2007*



Procedure

[...]

3. The applicants alleged, inter alia, that they had been discriminated against in the enjoyment of their right to education on account of their race or ethnic origin.

[...]

*THE FACTS***I. THE CIRCUMSTANCES OF THE CASE****A. Historical background**

12. According to documents available on the Internet site of the Roma and Travellers Division of the Council of Europe, the Roma originated from the regions situated between north west India and the Iranian plateau. The first written traces of their arrival in Europe date back to the fourteenth century. Today there are between eight and ten million Roma living in Europe. They are to be found in almost all Council of Europe member States and indeed, in some Central and East European countries, they represent over 5% of the population. The majority of them speak Romani, an Indo-European language that is understood by a very large number of Roma in Europe, despite its many variants. In general, Roma also speak the dominant language of the region in which they live, or even several languages.

13. Although they have been in Europe since the fourteenth century, often they are not recognised by the majority society as a fully-fledged European people and they have suffered throughout their history from rejection and persecution. (...)

14. In the Czech Republic the Roma have national-minority status and, accordingly, enjoy the special rights associated therewith. (...)

[...]

B. Special schools

15. According to information supplied by the Czech Government, the special schools (*zvláštní školy*) were established after the First World War for children with special needs, including those suffering from a mental or social handicap. The number of children placed

in these schools continued to rise (from 23,000 pupils in 1960 to 59,301 in 1988). Owing to the entrance requirements of the primary schools (*základní školy*) and the resulting selection process, prior to 1989 most Roma children attended special school.

16. Under the terms of the Schools Act (Law N° 29/1984), the legislation applicable in the present case, special schools were a category of specialised school (*speciální školy*) and were intended for children with mental deficiencies who were unable to attend “ordinary” or specialised primary schools. Under the Act, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests to measure the child’s intellectual capacity carried out in an educational psychology centre and was subject to the consent of the child’s legal guardian.

17. Following the switch to the market economy in the 1990s, a number of changes were made to the system of special schools in the Czech Republic. These changes also affected the education of Roma pupils. In 1995 the Ministry of Education issued a directive concerning the provision of additional lessons for pupils who had completed their compulsory education in a special school. Since the 1996/97 school year, preparatory classes for children from disadvantaged social backgrounds have been opened in nursery, primary and special schools. In 1998 the Ministry of Education approved an alternative educational curriculum for children of Roma origin who had been placed in special schools. Roma teaching assistants were also assigned to primary and special schools to assist the teachers and facilitate communication with the families. By virtue of amendment N° 19/2000 to the Schools Act, which came into force on 18 February 2000, pupils who had completed their compulsory education in a special school were also eligible for admission to a secondary-school education, provided they satisfied the entrance requirements for their chosen course.

18. According to data supplied by the applicants, which was obtained through questionnaires sent in 1999 to the head teachers of the 8 special schools and 69 primary schools in the town of Ostrava, the total number of pupils placed in special schools in Ostrava came to 1,360, of whom 762 (56%) were Roma. Conversely, Roma represented only 2.26% of the total of 33,372 primary-school pupils in Ostrava. Further, although only 1.8% of non-Roma pupils were placed in special schools, in Ostrava the proportion of Roma pupils assigned to such schools was 50.3%. Accordingly, a Roma child in Ostrava was 27 times more likely to be placed in a special school than a non-Roma child.

According to data from the European Monitoring Centre for Racism and Xenophobia (now the European Union Agency for Fundamental Rights), more than half of Roma children in the Czech Republic attend special schools.

(...)

Lastly, according to a comparison of data on fifteen countries, including countries from Europe, Asia and North America, gathered by the OECD in 1999 and cited in the observations of the International Step by Step Association, the Roma Education Fund and the European Early Childhood Research Association, the Czech Republic ranked second highest in terms of placing children with physiological impairments in special schools and in third place in the table of countries placing children with learning difficulties in such schools. Further, of the eight countries who had provided data on the schooling of children whose difficulties arose from social factors, the Czech Republic was the only one to use special schools. The other countries concerned almost exclusively used ordinary schools for the education of such children.

C. The facts of the instant case

19. Between 1996 and 1999 the applicants were placed in special schools in Ostrava, either directly or after a spell in an ordinary primary school.

20. The material before the Court shows that the applicants' parents had consented to and in some instances expressly requested their children's placement in a special school. Consent was indicated by signing a pre-completed form.

[...]

The decisions on placement were then taken by the head teachers of the special schools concerned after referring to the recommendations of the educational psychology centres where the applicants had undergone psychological tests. The applicants' school files contained the report on their examination, including the results of the tests with the examiners' comments, drawings by the children and, in a number of cases, a questionnaire for the parents.

The written decision concerning the placement was sent to the children's parents. It contained instructions on the right to appeal, a right which none of the applicants exercised.

21. On 29 June 1999 the applicants received a letter from the school authorities informing them of the possibilities available for transferring from special school to primary school. It would appear that four of the applicants (nos. 5, 6, 11 and 16 in the Annex) were successful in aptitude tests and thereafter attended ordinary schools.

[...]

25. (...) [T]he applicants explained that they had been placed in special schools under a practice that had been established in order to implement the relevant statutory rules. In their submission, that practice had resulted in *de facto* racial segregation and discrimination that were reflected in the existence of two separately organised educational systems for members of different racial groups, namely special schools for the Roma and “ordinary” primary schools for the majority of the population. That difference in treatment was not based on any objective and reasonable justification, amounted to degrading treatment and had deprived them of the right to education (as the curriculum followed in special schools was inferior and pupils in special schools were unable to return to primary school or to obtain a secondary education other than in a vocational training centre). Arguing that they had received an inadequate education (...), the applicants asked the Constitutional Court (*Ústavní soud*) to find a violation of their rights, to quash the decisions to place them in special schools, to order the respondents (the special schools concerned, the Ostrava Education Authority and the Ministry of Education) to refrain from any further violation of their rights and to restore the *status quo ante* by offering them compensatory lessons.

26. In their written submissions to the Constitutional Court, the special schools concerned pointed out that all the applicants had been enrolled on the basis of a recommendation from an educational psychology centre and with the consent of their representatives. Furthermore, despite having been notified of the relevant decisions, none of the representatives had decided to appeal. According to the schools, the applicants’ representatives had been informed of the differences between the special-school curriculum and the primary-school curriculum. Regular meetings of teaching staff were held to assess pupils (with a view to their possible transfer to primary school). They added that some of the applicants (nos. 5 to 11 in the Annex) had been advised that there was a possibility of their being placed in primary school.

The Education Authority pointed out in its written submissions that the special schools had their own legal personality, that the impugned decisions contained advice on the right of appeal and that the applicants had at no stage contacted the schools inspectorate.

The Ministry of Education denied any discrimination and noted a tendency on the part of the parents of Roma children to have a rather negative attitude to school work. It asserted that each placement in a special school was preceded by an assessment of the child’s intellectual capacity and that parental consent was a decisive factor. It further noted that there were 18 educational assistants of Roma origin in schools in Ostrava.

[...]

THE LAW

[...]

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 2 OF PROTOCOL N° 1

124. The applicants maintained that they had been discriminated against in that because of their race or ethnic origin they had been treated less favourably than other children in a comparable situation without any objective and reasonable justification. They relied in that connection on Article 14 of the Convention, read in conjunction with Article 2 of Protocol N° 1, which provisions provide as follows:

Article 14 of the Convention

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

Article 2 of Protocol N° 1

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

[...]

C. The Court's assessment

1. Recapitulation of the main principles

175. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (*Willis v. the United Kingdom*, N° 36042/97, § 48, ECHR 2002-IV; and *Okpiz*

v. Germany, N° 59140/00, § 33, 25 October 2005). However, Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (“Case relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (Merits), judgment of 23 July 1968, Series A N° 6, § 10; *Thlimmenos v. Greece* [GC], N° 34369/97, § 44, ECHR 2000-IV; and *Stec and Others v. the United Kingdom* [GC], N° 65731/01, § 51, ECHR 2006-...). The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group (*Hugh Jordan v. the United Kingdom*, N° 24746/94, § 154, 4 May 2001; and *Hoogendijk v. the Netherlands* (dec.), N° 58461/00, 6 January 2005), and that discrimination potentially contrary to the Convention may result from a de facto situation (*Zarb Adami v. Malta*, N° 17209/02, § 76, ECHR 2006-...).

176. Discrimination on account of, inter alia, a person’s ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment (*Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-...; and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-...). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (*Timishev*, cited above, § 58).

177. As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see, among other authorities, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III; and *Timishev*, cited above, § 57).

178. As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court stated in *Nachova and Others* (cited above, § 147) that in proceedings before it there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions. According to

its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

[...]

179. The Court has also recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation – *Aktaş v. Turkey (extracts)*, N° 24351/94, § 272, ECHR 2003-V). In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v. Turkey [GC]*, N° 21986/93, § 100, ECHR 2000-VII; and *Anguelova v. Bulgaria*, N° 38361/97, § 111, ECHR 2002-IV). In the case of *Nachova and Others*, cited above, § 157), the Court did not rule out requiring a respondent Government to disprove an arguable allegation of discrimination in certain cases, even though it considered that it would be difficult to do so in that particular case in which the allegation was that an act of violence had been motivated by racial prejudice. It noted in that connection that in the legal systems of many countries proof of the discriminatory effect of a policy, decision or practice would dispense with the need to prove intent in respect of alleged discrimination in employment or in the provision of services.

180. As to whether statistics can constitute evidence, the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory (*Hugh Jordan*, cited above, § 154). However, in more recent cases on the question of discrimination, in which the applicants alleged a difference in the effect of a general measure or *de facto* situation (*Hoogendijk*, cited above; and *Zarb Adami*, cited above, §§ 77-78), the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations.

Thus, in the *Hoogendijk* decision the Court stated: “[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.”

181. Lastly, as noted in previous cases, the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (Chapman v. the United Kingdom [GC], N° 27238/95, § 96, ECHR 2001-I; and Connors v. the United Kingdom, N° 66746/01, § 84, 27 May 2004).

In Chapman (cited above, §§ 93-94), the Court also observed that there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

2. *Application of the aforementioned principles to the instant case*

182. The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority (see also the general observations in the Parliamentary Assembly's Recommendation N° 1203 (1993) on Gypsies in Europe [...] and point 4 of its Recommendation N° 1557 (2002): 'The legal situation of Roma in Europe', [...]) As the Court has noted in previous cases, they therefore require special protection (see paragraph 181 above). As is attested by the activities of numerous European and international organisations and the recommendations of the Council of Europe bodies (...), this protection also extends to the sphere of education. The present case therefore warrants particular attention, especially as when the applications were lodged with the Court the applicants were minor children for whom the right to education was of paramount importance.

183. The applicants' allegation in the present case is not that they were in a different situation from non-Roma children that called for different treatment or that the respondent State had failed to take affirmative action to correct factual inequalities or differences between them (*Thlimmenos*, cited above, § 44; and *Stec and Others*, cited above, § 51). In their submission, all that has to be established is that, without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.

184. The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (Hugh Jordan, cit-

ed above, § 154; and Hoogendijk, cited above). In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC (...) and the definition provided by ECRI (...), such a situation may amount to “indirect discrimination”, which does not necessarily require a discriminatory intent.

(a) *Whether a presumption of indirect discrimination arises in the instant case*

185. It was common ground that the impugned difference in treatment did not result from the wording of the statutory provisions on placements in special schools in force at the material time. Accordingly, the issue in the instant case is whether the manner in which the legislation was applied in practice resulted in a disproportionate number of Roma children – including the applicants – being placed in special schools without justification, and whether such children were thereby placed at a significant disadvantage.

186. As mentioned above, the Court has noted in previous cases that applicants may have difficulty in proving discriminatory treatment (*Nachova and Others*, cited above, §§ 147 and 157). In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination.

187. On this point, the Court observes that Council Directives 97/80/EC and 2000/43/EC stipulate that persons who consider themselves wronged because the principle of equal treatment has not been applied to them may establish, before a domestic authority, by any means, including on the basis of statistical evidence, facts from which it may be presumed that there has been discrimination (...). The recent case-law of the Court of Justice of the European Communities (...) shows that it permits claimants to rely on statistical evidence and the national courts to take such evidence into account where it is valid and significant.

[...]

188. In these circumstances, the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.

189. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then

shifts to the respondent State, which must show that the difference in treatment is not discriminatory (see, *mutatis mutandis*, *Nachova and Others*, cited above, § 157). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (...), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.

190. In the present case, the statistical data submitted by the applicants was obtained from questionnaires that were sent out to the head teachers of special and primary schools in the town of Ostrava in 1999. It indicates that at the time 56% of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Roma pupils in Ostrava assigned to special schools was 50.3%. According to the Government, these figures are not sufficiently conclusive as they merely reflect the subjective opinions of the head teachers. The Government also noted that no official information on the ethnic origin of the pupils existed and that the Ostrava region had one of the largest Roma populations.

191. The Grand Chamber observes that these figures are not disputed by the Government and that they have not produced any alternative statistical evidence. In view of their comment that no official information on the ethnic origin of the pupils exists, the Court accepts that the statistics submitted by the applicants may not be entirely reliable. It nevertheless considers that these figures reveal a dominant trend that has been confirmed both by the respondent State and the independent supervisory bodies which have looked into the question.

192. In their reports submitted in accordance with Article 25 § 1 of the Framework Convention for the Protection of National Minorities, the Czech authorities accepted that in 1999 Roma pupils made up between 80% and 90% of the total number of pupils in some special schools (...) and that in 2004 "large numbers" of Roma children were still being placed in special schools (...). The Advisory Committee on the Framework Convention observed in its report of 26 October 2005 that according to unofficial estimates Roma accounted for up to 70% of pupils enrolled in special schools. According to the report published by ECRI in 2000, Roma children were "vastly overrepresented" in special schools. The Committee on the Elimination of Racial Discrimination noted in its concluding observations of 30 March 1998 that a disproportionately large number of Roma children were placed in special schools (...). Lastly, according to the figures supplied by the European Monitoring Centre on Racism and Xenophobia, more than half of Roma children in the Czech Republic attended special school.

193. In the Court's view, the latter figures, which do not relate solely to the Ostrava region and therefore provide a more general picture, show that, even if the exact percentage of Roma children in special schools at the material time remains difficult to establish, their number was disproportionately high. Moreover, Roma pupils formed a majority of the pupils in special schools. Despite being couched in neutral terms, the relevant statutory provisions therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools.

194. Where it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases concerning employment or the provision of services, it is not necessary in cases in the educational sphere (see, *mutatis mutandis*, *Nachova and Others*, cited above, § 157) to prove any discriminatory intent on the part of the relevant authorities (see paragraph 184 above).

195. In these circumstances, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. The burden of proof must therefore shift to the Government, which must show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.

(b) *Objective and reasonable justification*

196. The Court reiterates that a difference in treatment is discriminatory if "it has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see, among many other authorities, *Larkos v. Cyprus* [GC], N° 29515/95, § 29, ECHR 1999-I; and *Stec and Others*, cited above, § 51). Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.

197. In the instant case, the Government sought to explain the difference in treatment between Roma children and non-Roma children by the need to adapt the education system to the capacity of children with special needs. In the Government's submission, the applicants were placed in special schools on account of their specific educational needs, essentially as a result of their low intellectual capacity measured with the aid of psychological tests in educational psychology centres. After the centres had made their recommendations regarding the type of school in which the applicants should be placed,

the final decision had lain with the applicants' parents and they had consented to the placements. The argument that the applicants were placed in special schools on account of their ethnic origin was therefore unsustainable.

For their part, the applicants strenuously contested the suggestion that the disproportionately high number of Roma children in special schools could be explained by the results of the intellectual capacity tests or be justified by parental consent.

198. The Court accepts that the Government's decision to retain the special-school system was motivated by the desire to find a solution for children with special educational needs. However, it shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system causes.

199. The Grand Chamber observes, further, that the tests used to assess the children's learning abilities or difficulties have given rise to controversy and continue to be the subject of scientific debate and research. While accepting that it is not its role to judge the validity of such tests, various factors in the instant case nevertheless lead the Grand Chamber to conclude that the results of the tests carried out at the material time were not capable of constituting objective and reasonable justification for the purposes of Article 14 of the Convention.

200. In the first place, it was common ground that all the children who were examined sat the same tests, irrespective of their ethnic origin. The Czech authorities themselves acknowledged in 1999 that "Romany children with average or above-average intellect" were often placed in such schools on the basis of the results of psychological tests and that the tests were conceived for the majority population and did not take Roma specifics into consideration (...). As a result, they had revised the tests and methods used with a view to ensuring that they "were not misused to the detriment of Roma children" (...).

In addition, various independent bodies have expressed doubts over the adequacy of the tests. Thus, the Advisory Committee on the Framework Convention for the Protection of National Minorities observed that children who were not mentally handicapped were frequently placed in these schools "[owing] to real or perceived language and cultural differences between Roma and the majority". It also stressed the need for the tests to be "consistent, objective and comprehensive" (...). ECRI noted that the channelling of Roma children to special schools for the mentally-retarded was reportedly often "quasi-automatic" and needed to be examined to ensure that any testing used was "fair" and that the true abilities of each child were "properly evaluated" (...). The Council of Europe

Commissioner for Human Rights noted that Roma children were frequently placed in classes for children with special needs “without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin” (...).

Lastly, in the submission of some of the third-party interveners, placements following the results of the psychological tests reflected the racial prejudices of the society concerned.

201. The Court considers that, at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment.

202. As regards parental consent, the Court notes the Government’s submission that this was the decisive factor without which the applicants would not have been placed in special schools. In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify an acceptance of the difference in treatment, even if discriminatory, in other words a waiver of the right not to be discriminated against. However, under the Court’s case-law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent (*Pfeifer and Plankl v. Austria*, judgment of 25 February 1992, Series A N° 227, §§ 37-38) and without constraint (*Deweert v. Belgium*, judgment of 27 February 1980, Series A N° 35, § 51).

203. In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children’s futures. It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children’s social and cultural differences and in which their children risked isolation and ostracism and special schools where the majority of the pupils were Roma.

204. In view of the fundamental importance of the prohibition of racial discrimination (see *Nachova and Others*, cited above, § 145; and *Timishev*, cited above, § 56), the Grand Chamber considers that, even assuming the conditions referred to in paragraph 202 above were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest (see, *mutatis mutandis*, *Hermi v. Italy* [GC], N° 18114/02, § 73, ECHR 2006-...).

(c) *Conclusion*

205. As is apparent from the documentation produced by ECRI and the report of the Commissioner for Human Rights of the Council of Europe, the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children: other European States have had similar difficulties. The Court is gratified to note that, unlike some countries, the Czech Republic has sought to tackle the problem and acknowledges that, in its attempts to achieve the social and educational integration of the disadvantaged group which the Roma form, it has had to contend with numerous difficulties as a result of, *inter alia*, the cultural specificities of that minority and a degree of hostility on the part of the parents of non-Roma children. As the Chamber noted in its admissibility decision in the instant case, the choice between a single school for everyone, highly specialised structures and unified structures with specialised sections is not an easy one. It entails a difficult balancing exercise between the competing interests. As to the setting and planning of the curriculum, this mainly involves questions of expediency on which it is not for the Court to rule (*Valsamis v. Greece*, judgment of 18 December 1996, *Reports* 1996-VI, § 28).

206. Nevertheless, whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation (see *Buckley v. the United Kingdom*, judgment of 25 September 1996, *Reports* 1996-IV, § 76; and *Connors v. the United Kingdom*, judgment cited above, § 83).

207. The facts of the instant case indicate that the schooling arrangements for Roma children were not attended by safeguards (...) that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class (see, *mutatis mutandis*, *Buckley*, cited above, § 76; and *Connors*, cited above, § 84). Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a

more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.

208. In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. In that connection, it notes with interest that the new legislation has abolished special schools and provides for children with special educational needs, including socially disadvantaged children, to be educated in ordinary schools.

209. Lastly, since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases.

210. Consequently, there has been a violation in the instant case of Article 14 of the Convention, read in conjunction with Article 2 of Protocol N° 1, as regards each of the applicants.

[...]

FOR THESE REASONS, THE COURT

[...]

2. *Holds* by thirteen votes to four that there has been a violation of Article 14 read in conjunction with Article 2 of Protocol N° 1;

[...]

*European Court
of Human Rights*

Irfán Temel and others v. Turkey

Application N° 36458/02

*Judgment of
March 3, 2009*



[...]

THE FACTS

[...]

5. The applicants were students at various faculties attached to Afyon Kocatepe University in Afyon, Turkey, at the time of the events.

6. On various dates between 27 December 2001 and 4 January 2002 the applicants petitioned the University Rector's Office and requested that Kurdish language classes be introduced as an optional module.

7. Around the same time similar petitions were submitted by students studying at various Universities in Turkey.

[...]

9. On 18 January 2002, relying on Regulation 9 (d) of the Disciplinary Regulations of Higher Education Institutions, the Administrative Board of Afyon Kocatepe University, after having heard the defence submissions of the applicants, suspended them from the university for a period of two terms starting from spring term, except for Mr Pulat, who was suspended for one term after having shown remorse (...).

[...]

12. These decisions were upheld by the Denizli Regional Administrative Court on the ground that none of the arguments advanced by the applicants provided sufficient reasons to set aside the first-instance court's decision.

[...]

15. On 24 October 2002 the Denizli Administrative Court examined the merits of the cases and dismissed them. In its decisions, the court noted, *inter alia*, that the University Rector's Office had received information from the Afyon Governor's Office about the PKK's new strategy of action within the framework of civil disobedience, which included, *inter alia*, petitioning for education in Kurdish.¹ The administration considered therefore that the identical petitions submitted around the same time by the applicants, who were

persistent and threatening in their requests, were part of a planned and organised action contrary to Article 9 (d) of the Disciplinary Regulations of Higher Education Institutions.

16. In December 2003 the Supreme Administrative Court quashed those decisions and remitted the case to the first-instance court.

17. On 12 May 2004 the Denizli Administrative Court adhered to the Supreme Administrative Court's ruling and annulled the disciplinary sanctions against the applicants. (...)

[...]

B. MERITS

1. The parties' submissions

36. The Government, referring particularly to the positive outcome of the administrative proceedings brought by the applicants, submitted that the suspension of the applicants from the university had neither impaired the essence of the right guaranteed by Article 2 of Protocol N° 1 nor amounted to a denial of their right to education.

37. The applicants maintained their allegations. In particular, they submitted that the imposition of a disciplinary sanction for petitioning for the introduction of an optional Kurdish language course – a legitimate and democratic request – had been unjustified and disproportionate and had denied them their right to education for one year. They pointed out that they had already served their disciplinary sanction by the time it had been annulled.

2. The Court's assessment

38. The Court reiterates the basic principles laid down in its judgments concerning Article 2 of Protocol N°1 (...).

39. It further reiterates that access to any institution of higher education existing at a given time is an inherent part of the right set out in the first sentence of Article 2 of Protocol N° 1 and that therefore Article 2 of Protocol N° 1 is applicable in the instant case (see *Mürsel Eren v. Turkey*, cited above, § 41). Indeed, this has not been contested by the parties.

1 The Kurdistan Workers' Party, an illegal armed organisation.

40. The applicants' suspension from the university for either one or two terms, in the Court's view, constituted a restriction on their right to education, notwithstanding the fact that they had been admitted to the university to read the subject of their choice in accordance with the results they had achieved in the university entrance examination (...).

41. In order to ensure that the restrictions which are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they were foreseeable for those concerned and pursued a legitimate aim. (...) [A] limitation will only be compatible with Article 2 of Protocol N°1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (...).

42. In the instant case the Court accepts that there was a legal basis for the restriction, namely Regulation 9 (d) of the Disciplinary Regulations of Higher Education Institutions, and that it was accessible. However, the Court has serious doubts whether the application of this Regulation in the present case served any legitimate aim in Convention terms. Nevertheless, the Court does not deem it necessary to determine the question because, in any event, the key issue to be examined is that of proportionality, i.e. whether a fair balance was struck between the means employed and the aim sought to be achieved.

43. As regards the principle of proportionality, the Court observes that the applicants were subject to a disciplinary sanction for merely submitting petitions which conveyed their views on the need for and the necessity of Kurdish language education and requested that Kurdish language classes be introduced as an optional module, without committing any reprehensible act. (...) [T]he Court finds that, in view of the information contained in the case file, the applicants did not resort to violence or breach or attempt to breach the peace or order in the university.

44. The Court finds therefore that the applicants were sanctioned because of the views expressed in their petitions. For the Court, neither the views expressed therein nor the form in which they were conveyed could be construed as an activity which would lead to polarisation on the basis of language, race, religion or denomination within the meaning of Regulation 9 (d). (...)

45. The Court reiterates that the right to education does not in principle exclude recourse to disciplinary measures, including suspension or expulsion from an educational institution in order to ensure compliance with its internal rules (...). However, such regu-

lations must not injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols (...). In the instant case the applicants were suspended from the university for either one or two terms as a result of the exercise of their freedom of expression.

46. (...) [T]he Court considers that the imposition of such a disciplinary sanction cannot be considered as reasonable or proportionate. Although, it notes that these sanctions were subsequently annulled by the administrative courts on grounds of unlawfulness, regrettably by that time the applicants had already missed one or two terms of their studies and, thus, the outcome of the domestic proceedings failed to redress the applicants' grievances under this head.

47. It follows that there has been a violation of Article 2 of Protocol N° 1 to the Convention.

[...]

FOR THESE REASONS, THE COURT UNANIMOUSLY

[...]

3. *Holds* that there has been a violation of Article 2 of Protocol N° 1;

[...]

*European Court
of Human Rights*

Grzelak v. Poland

Application N° 7710/02

*Judgment of
June 15, 2010*



PROCEDURE

[...]

3. The applicants complained, in particular, about the absence of a mark for “religion/ethics” on the school reports of Mateusz Grzelak

[...]

THE FACTS

[...]

6. The first two applicants, Urszula and Czesław Grzelak, were born in 1969 and 1965 respectively. They are married and live in Sobótka. They are the parents of Mateusz Grzelak (“the third applicant”), who was born in 1991. The first two applicants are declared agnostics.

7. The third applicant began his schooling in primary school N° 3 in Ostrów Wielkopolski in 1998 (at the age of seven). In conformity with the wishes of his parents he did not attend religious instruction. It appears that he was the only pupil in his class who opted out of that subject. Religious instruction was scheduled in the middle of the school day, between various compulsory courses. The school, despite the wish expressed by the first two applicants, did not offer their son an alternative class in ethics. It appears that when other pupils in his class were following religious instruction the applicants’ son was either left without any supervision in the corridor or spent his time in the school library or in the school club.

[...]

9. According to the first two applicants, their son was subjected to discrimination and physical and psychological harassment by other pupils on account of the fact that he did not follow religious instruction. For that reason, in the course of the third year of primary school the applicants moved their son to primary school N° 9 and subsequently to primary school N° 11 in the same town

[...]

12. The Government further maintained that Mr and Mrs Grzelak had requested primary school N° 11 to provide their son with a course in ethics. According to the Government, the headmistress of that school had contacted the Pozna Education Authority (*kuratorium oswiaty*) to establish whether it was possible to provide such a course for an inter-school group. Since that was not possible owing to the lack of sufficient numbers of interested pupils and parents, the school proposed to the third applicant that he participate in alternative classes in the school club or school library. (...)

[...]

19. In September 2004 the third applicant began his secondary education.

20. On 16 July 2009 Mr and Mrs Grzelak complained to the Pozna Education Authority (...) that their son had not been offered a course in ethics at Ostrów Wielkopolski secondary school N° 2. (...) On 27 August 2009 the Council of the Ostrów District dismissed the petition as unfounded. It found that Mateusz Grzelak was the only student in all the schools run by the Ostrów District whose parents wished him to follow a class in ethics. (...)

[...]

THE LAW

[...]

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL N° 1 TO THE CONVENTION

102. The first two applicants complained that the school authorities had not organised a class in ethics for their son in conformity with their convictions. They relied on Article 2 of Protocol N° 1 to the Convention.

[...]

104. The Court reiterates that the general principles concerning the interpretation of Article 2 of Protocol N° 1 were recapitulated in the case of *Folgerø and Others* (...). In that case the Court reviewed under Article 2 of Protocol N° 1 the arrangements for a

compulsory subject in Christianity, Religion and Philosophy taught during the ten years of compulsory schooling in Norway. The model existing in Poland is different in a number of respects. Religious education and ethics are organised on a parallel basis, for each religion according to its own system of principles and beliefs and, at the same time, it is provided that teaching of ethics is offered to interested pupils. Both subjects are optional and the choice depends on the wish of parents or pupils, subject to the proviso that a certain minimum number of pupils were interested in following any of the two subjects. The Court notes that it remains, in principle, within the national margin of appreciation left to the States under Article 2 of Protocol N° 1 to decide whether to provide religious instruction in public schools and, if so, what particular system of instruction should be adopted. The only limit which must not be exceeded in this area is the prohibition of indoctrination (...). The Court observes that the system of teaching religion and ethics as provided for by Polish law (...) falls within the margin of appreciation as to the planning and setting of the curriculum accorded to States under Article 2 of Protocol N° 1.

105. Accordingly, the Court finds that the alleged failure to provide ethics classes does not disclose any appearance of a violation of the rights of the first and second applicants under Article 2 of Protocol N° 1. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

[...]

FOR THESE REASONS, THE COURT

[...]

4. *Dismisses* unanimously the remainder of the claims for just satisfaction.

[...]

*European Court
of Human Rights*

Velyo Velev v. Bulgaria

Application N° 16032/07

*Judgment of
May 27, 2014*



[...]

THE FACTS

[...]

5. The applicant was born in 1977 and lives in Stara Zagora. In 2003 he was convicted of a fraud offence and served a sentence of imprisonment in Stara Zagora prison from 11 February 2003 to 9 August 2004. On 1 October 2004 he was arrested on suspicion of unlawful possession of firearms. Between 29 November 2004 and 20 April 2007 he was detained on remand in Stara Zagora Prison, where he claimed to have been detained with “recidivist” prisoners.

6. As he had never finished his secondary education, the applicant requested to be enrolled in the school operating inside Stara Zagora Prison. In August 2005 he submitted a written request to the Governor of the Stara Zagora Prison, asking to be enrolled in the school for the 2005/06 school year. He received no reply before the school year began on 15 September 2005, so he wrote again to the Governor on 29 September 2005 and also to the Ministry of Education and the Prosecutor’s Office (in Bulgaria, the Prosecutor is the authority competent to oversee the lawful execution of pre-trial and post-conviction detention). The applicant received a letter from the Prosecutor, dated 6 October 2005, which said that the prison administration had taken due account of the possibility for the applicant to study, in view of his previous sentence. The Prosecutor further stated that the applicant’s assertion regarding refused access to education had not been confirmed. The applicant also received a reply, dated 24 October 2005, from the Ministry of Education. The letter stated that individuals deprived of their liberty (*лишени от свобода*) were entitled to continue their education in prison and made no reference specifically to remand prisoners.

7. In the meantime, on 19 October 2005 the applicant sent another request to the Prison Governor, the Ministry of Education and the Appellate Prosecutor. On 26 October 2005 the applicant filed a new request with the Prison Governor, again asking to be enrolled in the prison school for the 2005/06 school year. Referring to the letter of 24 October 2005, the applicant argued that the Ministry of Education had recognised his right to access to education in prison. On 7 December 2005 he received a reply signed by the Head of the Execution of Punishments Directorate of the Ministry of Justice, rejecting his request. The letter stated, *inter alia*, that:

“It was established that [the applicant] has not yet been convicted. Once convicted, he is to be transferred to a prison for recidivists.

The inclusion of recidivists in the educational and work programmes in a prison for non-recidivists would lead to a breach of the requirement that different categories of inmates are to be kept apart and are to participate separately in correctional programmes...”

[...]

12. On 26 September 2006 the Supreme Administrative Court gave a final judgment in respect of the applicant’s complaint about exclusion from the school.

[...]

The Supreme Court concluded that:

“the right to education (whether mandatory or voluntary) is envisaged and regulated in the legislation of the Republic of Bulgaria solely in regard of persons deprived of liberty as a result of a final conviction (*лишени от свобода*) and not in regard of those deprived of liberty pursuant to a measure of remand (*задържане под стража*)”.

[...]

THE LAW

[...]

Article 2 of Protocol No. 1 to the Convention

26. The applicant complained that he was denied access to the school in Stara Zagora Prison, in breach of Article 13 of the Convention and Article 2 of Protocol No. 1 to the Convention. The Court considers that this complaint falls to be examined under Article 2 of Protocol No. 1, which reads as follows:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

[...]

30. The Court commences by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention; they continue to enjoy the right to respect for family life, the right to freedom of expression, the right to practise their religion, the right of effective access to a lawyer or to court for the purposes of Article 6, the right to respect for correspondence and the right to marry. Any restrictions on these other rights require to be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment. [...] In *Hirst v. the United Kingdom* judgment, the Court continued that “[t]here is ... no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction”. This principle applies a fortiori in respect of a person, such as the applicant during the period in question, who has not been convicted and who must, therefore, be presumed innocent.

31. As regards the right to education, while Article 2 of Protocol No. 1 cannot be interpreted as imposing a duty on the Contracting State to set up or subsidise particular educational establishments, any State doing so will be under an obligation to afford effective access to them. Put differently, access to educational institutions existing at a given time is an inherent part of the right set out in the first sentence of Article 2 of Protocol No. 1. [...] This provision applies to primary, secondary and higher levels of education.

32. The Court however recognises that, in spite of its importance, the right to education is not absolute, but may be subject to limitations. Provided that there is no injury to the substance of the right, these limitations are permitted by implication since the right of access “by its very nature calls for regulation by the State”. In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of “legitimate aims” under Article 2 of Protocol No. 1. Furthermore, a limitation will be compatible with Article 2 of Protocol No. 1 only if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Although the final decision as to the observance of the Convention’s requirements rests with the Court, the Contracting States enjoy a certain margin of appreciation in this sphere.

33. It is true that education is an activity that is complex to organise and expensive to run, whereas the resources that the authorities can devote to it are necessarily finite. It is also true that in deciding how to regulate access to education, a State must strike a balance between, on the one hand, the educational needs of those under its jurisdiction and, on the other, its limited capacity to accommodate them. However, the Court cannot overlook the fact that, unlike some other public services, education is a right that enjoys direct protection under the Convention. It is also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions. Indeed, the Court has already had occasion to point out that “[i]n a democratic society, the right to education [...] is indispensable to the furtherance of human rights [and] plays [...] a fundamental role [...].”

[...]

34. [T]he Court [...] recalls that Article 2 of Protocol No. 1 does not place an obligation on Contracting States to organise educational facilities for prisoners where such facilities are not already in place [...]. However, the present applicant’s complaint concerns the refusal to him of access to a pre-existing educational institution, namely the Stara Zagora Prison School. As noted above, the right of access to pre-existing educational institutions falls within the scope of Article 2 of Protocol No. 1. Any limitation on this right had, therefore, to be foreseeable, to pursue a legitimate aim and to be proportionate to that aim (see paragraph 32 above). Although Article 2 of Protocol No. 1 does not impose a positive obligation to provide education in prison in all circumstances, where such a possibility is available it should not be subject to arbitrary and unreasonable restrictions.

35. The Court finds it open to doubt whether the restriction on the applicant was sufficiently foreseeable for the purposes of Article 2 of Protocol No. 1. The relevant legislative framework provided that convicted prisoners aged 16 or older had a right, on request, to be included in educational programmes and that, in the absence of clear rules to the contrary, the provisions regarding convicted prisoners were to apply equally to remand prisoners. The only express provision relating to the rights of remand prisoners to education was to the effect that the prison authorities should “encourage” the participation of remand prisoners in prison educational programmes. [...]

36. The lack of clarity in the statutory framework was reflected in the fact that, during the domestic proceedings and the proceedings before this Court, varied reasons were given by the national authorities for refusing the applicant’s request to enrol in the school.

[...]

37. In addition, during the proceedings before this Court, the Government relied on three different grounds to justify the applicant's exclusion from the school. First, they contended that, as a remand prisoner, it was not appropriate that he should attend school with convicted prisoners. Secondly, they argued that, as a remand prisoner serving an indeterminate period of pre-trial detention, it was inappropriate for him to attend the school which was intended for convicted prisoners serving terms of imprisonment of 12 months or more. Thirdly, they reasoned that since the applicant risked being sentenced as a "recidivist", it would not have been in the interests of the convicted, "non-recidivist" prisoners attending the school for the applicant to have been allowed to attend.

38. For the Court, it is noteworthy that the Government have not supported their arguments with any evidence relating to the conditions applicable in Stara Zagora Prison. The need to protect the applicant by keeping him apart from convicted prisoners, because of his status as a remand prisoner, was not a ground relied on by the prison authorities in rejecting the applicant's requests. Moreover, it was clear from the applicant's many requests to be allowed to attend the school that he had no objection to participating in this activity together with convicted prisoners. In the material before the Court, there is no evidence to show that remand prisoners would have come to any harm within the controlled and supervised environment of the classroom or that remand prisoners were detained separately from convicted or "recidivist" prisoners within Stara Zagora prison and, if so, whether this segregation applied to all aspects of the regime within the prison.

39. The second ground relied on by the Government was the indeterminate nature of detention on remand and the requirement in national law for prisoners to be serving sentences of one year or more before being able to enrol in prison schools. However, the Government have not explained why this was a necessary condition for admission to a prison school. With regard, specifically, to remand prisoners such as the applicant, the Court does not consider that the fact that the ultimate length of their pre-trial detention is uncertain at the start should be used as a justification for depriving them of access to educational facilities, save perhaps in cases where it is clear for some reason that the detention will be of short duration. Moreover, the Government have not provided the Court with any statistical information as regards the availability of resources at the school such as to justify, for example, a policy of concentrating limited resources on those prisoners serving the longest sentences.

40. Finally, with regard to the last ground relied on by the Government, namely the need to keep the applicant apart from other prisoners because of the risk that he would be sentenced as a “recidivist”, the Court does not consider this was a legitimate reason, since during the time in question he was an unconvicted prisoner and entitled to the presumption of innocence.

41. The Court does not, therefore, consider any of the grounds relied on by the Government to be persuasive, particularly as they are unsupported by any evidence relating to the precise modalities of providing access to education at the Stara Zagora prison school. On the other side of the balance must be set the applicant’s undoubted interest in completing his secondary education. The value of providing education in prison, both in respect of the individual prisoner and the prison environment and society as a whole has been recognised by the Committee of Ministers of the Council of Europe in its recommendations on education in prison and on the European Prison Rules. [...]

42. In the instant case the Government provided neither practical reasons, for example based on lack of resources at the school, nor a clear explanation as to the legal grounds for the restriction placed on the applicant. In these circumstances, on the evidence before it, the Court does not find that the refusal to enrol the applicant in the Stara Zagora Prison School was sufficiently foreseeable, nor that it pursued a legitimate aim and was proportionate to that aim. It follows that there has been a violation of Article 2 of Protocol No. 1 in this case.

[...]

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

[...]

2. *Holds* that there has been a violation of Article 2 of Protocol No. 1 to the Convention.

[...]

*The African Committee of Experts
on the Rights and Welfare
of the Child*

*Institute for Human Rights
and Development in Africa and
Open Society Justice Initiative v. Kenya*

Communication N° 002/2009

*Judgment of
March 22, 2011*



SUMMARY OF ALLEGED FACTS

1. On 20 April 2009, the Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (African Committee) received a Communication brought by the Institute for Human Rights and Development in Africa based in the Gambia (and organization with an observer status before the African Committee) and the Open Society Initiative based in New York (the Complainants) on behalf of children of Nubian descent in Kenya.
2. The Complainants allege that the Nubians in Kenya descended from the Nuba mountains found in what is current day central Sudan and were forcibly conscripted into the colonial British army in the early 1900s when Sudan was under British rule. Upon demobilisation, allegedly, although they requested to be returned to Sudan, the colonial government at the time refused and forced them to remain in Kenya.
3. The Complainants allege that the British colonial authorities allocated land for the Nubians (...) but did not grant them British citizenship¹. At Kenyan independence (1963), (...) [Nubians] were consistently treated by the government of Kenya as “aliens” since they, according to the Government, did not have any ancestral homeland within Kenya, and as a result could not be granted Kenyan nationality. (...)
4. A major difficulty in making the right to nationality effective for Nubian children is the fact that (...) parents have difficulty in registering the birth of their children. For instance, the fact that many of these parents lack valid identity documents further complicates their efforts to register their children’s births. (...)
5. In connection to this, the Communication further alleges that while children in Kenya have no proof of their nationality, they have legitimate expectation that they will be recognised as nationals when they reach the age of 18. (...)

[...]

THE COMPLAINT

7. The Complainants allege violation of mainly Article 6, in particular sub-articles (2), (3) and (4) (the right to have a birth registration, and to acquire a nationality at birth), Article 3 (prohibition on unlawful/unfair discrimination) and as a result of these two alleged violations, a list of “consequential violations” including Article 11(3) (equal access to education) and Article 14 (equal access to health care).

[...]

DECISION ON THE MERITS

[...]

Alleged Violation of Article 11(3)

63. The Committee notes that the violation includes an infringement of the rights enshrined especially in Article 11(3) of the African Children's Charter, which provides for the right to education. Ratifying States Parties undertake to take all appropriate measures, with a view to achieving full realisation of this right. Article 11(3) (a) requires in particular the provision of free and compulsory basic education, which necessitate the provision of schools, qualified teachers, equipment and the well recognised corollaries of the fulfilment of this right.

64. The African Commission on Human and Peoples' Rights has emphasised that the failure to provide access to institutions of learning would amount to a violation of the right to education under the African Charter on Human and Peoples' Rights²⁷.

65. The affected children had less access to educational facilities for the fulfilment of their right to free and compulsory primary education than comparable communities who were not comprised of children of Nubian descent. There is de facto inequality in their access to available educational services and resources, and this can be attributed in practice to their lack of confirmed status as nationals of the Republic of Kenya. (...) [They] have been provided with fewer schools and a disproportionately lower share of available resources in the sphere of education, as the de facto discriminatory system of resource distribution in education has resulted in their educational needs being systematically overlooked over an extended period of time. (...) Their right to education has not been effectively recognised and adequately provided for, even in the context of the resources available for this fulfilment of this right.

[...]

1 Although technically speaking "nationality" and "citizenship" do not mean the same thing, the African Committee uses the two notions interchangeably in this decision as they are used in such a manner in the Communication itself.

27 Free Legal Assistance Group and Others v Zaire, Communications No 25/89, 47/90, 56/91, 100/93, para 11.

68. The Committee does not wish to fault governments that are labouring under difficult circumstance to improve the lives of their people. The Government of Kenya has ratified the African Children's Charter earlier than many countries on the continent (...) and more importantly, has made a number of significant progresses in implementing the provisions of the Charter. However, it is worthy of note that the violation complained of has persisted unchecked for more than half a century, thereby prejudicing not just the children in respect of whom the complaint has been brought under this African Children's Charter, but indeed generations preceding them. The implications of the multi-generational impact of the denial of right of nationality are manifest and of far wider effect than may at first blush appear in the case. Systemic under-development of an entire community has been alleged to be the result. (...)

DECISION OF THE AFRICAN COMMITTEE

69. For the reasons given above, the African Committee finds multiple violations of (...) Article 11(3) of the African Children's Charter by the Government of Kenya, and:

1. Recommends that the Government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian decent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality (...).

[...]

4. Recommends that the Government of Kenya to adopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.

[...]

Human Rights Committee

Carl Henrik Blom v. Sweden

Communication N° 191/1985

*Decision of
April 4, 1988*



[...]

1. The author of the communication (initial letter dated 5 July 1985 and further letters dated 24 February 1986 and 19 January 1988) is Carl Henrik Blom, a Swedish citizen, born in 1964. He is represented by legal counsel. He claims to be a victim of violations by the Swedish authorities of article 2, paragraph 3, and article 26 of the International Covenant on Civil and Political Rights in conjunction with article 3, paragraph (c) and article 5, paragraph (b), of the UNESCO Convention against Discrimination in Education of 1960. Article 13 of the International Covenant on Economic, Social and Cultural Rights is also invoked.

2.1. During the school year 1981/82, the author attended grade 10 at the Rudolf Steiner School in Goteborg, which is a private school. According to Decree No. 418 on Study Aid, issued by the Swedish Government in 1973, a pupil of an independent private school can only be entitled to public assistance if he attends a programme of courses which is placed under State supervision by virtue of a governmental decision (...). The governmental decision is taken after consultation with the National Board of Education and the local school authorities.

2.2. The author states that the Rudolf Steiner School submitted an application on 15 October 1981 to be placed under State supervision with respect to grade 10 and above (...). After the local school authorities and the National Board gave a favourable opinion, the decision to place grade 10 and above under State supervision was taken on 17 June 1982, effective as of 1 July 1982, that is for the school year 1982/83 onwards, and not from autumn 1981, as the school had requested.

2.3. On 6 June 1984, the author applied for public financial aid in the amount of SKr 2,250, in respect of the school year 1981 /82. By a decision of 5 November 1984, his application was rejected by the National Board for Educational Assistance on the grounds that the school had not been under State supervision during the school year in question (...). By a decision of 14 February 1985 the Chancellor of Justice declared that the decision of the National Board for Educational Assistance was in accordance with domestic law in force (...).

[...]

2.5. The author's allegation, that the decision not to grant him public assistance was in violation of article 26 of the Covenant, is based on the argument that he was subjected to discrimination as a pupil of a private school. (...)

2.6. The author requests the Committee to condemn the alleged violations of article 2, paragraph 3, and article 26 of the Covenant, to invite the State party to take the necessary steps to give effect to its obligations under article 2, paragraph 3, and to urge the State party to discontinue the alleged discriminatory practices based on the 1973 Study Aid Act. Furthermore, he asks the Committee to urge the Swedish Government to pay him and his class-mates the amount of public assistance due for the school year 1981 /82 with accrued interest according to Swedish law as well as his expenses for legal advice.

[...]

4.1. In its submission dated 8 January 1986, the State party indicates that the 1962 Act on Schools recognizes the existence of private schools independent of the public sector school system. The private schools are, in principle, financially self-sufficient, and there is no legal obligation for the State or local government to provide any financial contribution. However, there are no legal impediments excluding various forms of public support, and in practice most of the private schools are in one way or another supported by local government and, in addition, approximately half of them, including the Rudolf Steiner School, receive State contributions.

4.2. The State party indicates further that, in accordance with regulations set forth in the 1973 Act on Study Aid (studiestodslag 1973:349) and the 1973 Decree on Study Aid (studiestodskungorelse 1973:418), pupils attending schools, whether public or private, may be eligible for various forms of public financial support. As far as is relevant for the consideration of the present case, chapter 1, section 1, of the Decree provides that financial support may be granted to pupils attending public schools or schools subject to State supervision. Consequently, for pupils attending a private school to be eligible for public financial support, the school has to be placed under State supervision. Decision on such supervision is taken by the Government upon application submitted by the school. In the present case, the Rudolf Steiner School applied in October 1981 to have the part of its educational programme corresponding to the gymnasium, that is grades 10 to 12, placed under State supervision. (...) After having considered the application, as well as observations on the application submitted by the Municipal School Administration, the Education Committee of the County of Goteborg and Bohus, and the National Board of Education, the Government on 17 June 1982 granted the application as of 1 July 1982.

4.3. On 5 November 1984, the National Board for Educational Assistance informed the author that financial support for his studies could not be granted on the ground that the

school was not at that time subject to State supervision with respect to the educational programme of grade 10.

[...]

8. On 9 April 1987, the Committee therefore decided that the communication was admissible in so far as it related to alleged violations of the International Covenant on Civil and Political Rights and requested the State party, should it not intend to make a further submission in the case under article 4, paragraph 2, of the Optional Protocol, so to inform the Committee, so as to permit an early decision on the merits.

[...]

10.1. The Human Rights Committee has considered the merits of the communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

10.2. The main issue before the Committee is whether the author of the communication is a victim of a violation of article 26 of the Covenant because of the alleged incompatibility of the Swedish regulations on education allowances with that provision. In deciding whether or not the State party violated article 26 by refusing to grant the author, as a pupil of a private school, an education allowance for the school year 1981/82, whereas pupils of public schools were entitled to education allowances for that period, the Committee bases its findings on the following observation.

10.3. The State party's educational system provides for both private and public education. The State party cannot be deemed to act in a discriminatory fashion if it does not provide the same level of subsidy for the two types of establishment, when the private system is not subject to State supervision. (...) In this connection, the Committee notes that the evaluation of a school's curricula necessarily entails a certain period of time, as a result of a host of factors and imponderables, including the necessity of seeking advice from various governmental agencies. In the instant case the school's application was made in October 1981 and the decision was rendered eight months later, in June 1982. This lapse of time cannot be deemed to be discriminatory, as such. Nor has the author claimed that this lapse of time was attributable to discrimination.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the

facts as submitted do not sustain the author's claim that he is a victim of a violation of article 26 of the International Covenant on Civil and Political Rights.



Annex

*Committee on Economic,
Social and Cultural Rights*

*General Comment N° 5-
Persons with Disabilities*

*Adopted at the
11th session period
1994*



1 The central importance of the International Covenant on Economic, Social and Cultural Rights in relation to the human rights of persons with disabilities has frequently been underlined by the international community.¹ Thus a 1992 review by the Secretary-General of the implementation of the World Programme of Action concerning Disabled Persons and the United Nations Decade of Disabled Persons concluded that “disability is closely linked to economic and social factors” and that “conditions of living in large parts of the world are so desperate that the provision of basic needs for all - food, water, shelter, health protection and education - must form the cornerstone of national programmes”.² Even in countries which have a relatively high standard of living, persons with disabilities are very often denied the opportunity to enjoy the full range of economic, social and cultural rights recognized in the Covenant.

2. The Committee on Economic, Social and Cultural Rights, and the working group which preceded it, have been explicitly called upon by both the General Assembly³ and the Commission on Human Rights⁴ to monitor the compliance of States parties to the Covenant with their obligation to ensure the full enjoyment of the relevant rights by persons with disabilities. The Committee’s experience to date, however, indicates that States parties have devoted very little attention to this issue in their reports. This appears to be consistent with the Secretary-General’s conclusion that “most Governments still lack decisive concerted measures that would effectively improve the situation” of persons with disabilities.⁵ It is therefore appropriate to review, and emphasize, some of the ways in which issues concerning persons with disabilities arise in connection with the obligations contained in the Covenant.

3. There is still no internationally accepted definition of the term “disability”. For present purposes, however, it is sufficient to rely on the approach adopted in the Standard Rules of 1993⁶, which state: “The term ‘disability’ summarizes a great number of different functional limitations occurring in any population ... People may be disabled by

1 For a comprehensive review of the question, see the final report prepared by Mr. Leandro Despouy, Special Rapporteur, on human rights and disability (E/CN.4/Sub.2/1991/31).

2 See A/47/415, paragraph 5.

3 See paragraph 165 of the World Programme of Action concerning Disabled Persons, adopted by the General Assembly by its resolution 37/52 of 3 December 1982 (para. 1).

4 See Commission on Human Rights resolutions 1992/48, paragraph 4 and 1993/29, paragraph 7.

5 See A/47/415, paragraph 6.

6 Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993 (Introduction, para. 17).

physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.”

4. In accordance with the approach adopted in the Standard Rules, this General Comment uses the term “persons with disabilities” rather than the older term “disabled persons”. It has been suggested that the latter term might be misinterpreted to imply that the ability of the individual to function as a person has been disabled.

5. The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant’s provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, in so far as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2 (2) of the Covenant that the rights “enunciated ... will be exercised without discrimination of any kind” based on certain specified grounds “or other status” clearly applies to discrimination on the grounds of disability.

6. The absence of an explicit, disability-related provision in the Covenant can be attributed to the lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant over a quarter of a century ago. More recent international human rights instruments have, however, addressed the issue specifically. They include the Convention on the Rights of the Child (art. 23); the African Charter on Human and Peoples’ Rights (art. 18.4); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 18). Thus it is now very widely accepted that the human rights of persons with disabilities must be protected and promoted through general, as well as specially designed, laws, policies and programmes.

7. In accordance with this approach, the international community has affirmed its commitment to ensuring the full range of human rights for persons with disabilities in the following instruments: (a) the World Programme of Action concerning Disabled Persons, which provides a policy framework aimed at promoting “effective measures for prevention of disability, rehabilitation and the realization of the goals of ‘full participation’ of [persons with disabilities] in social life and development, and of ‘equal-

ity”;⁷ (b) the Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies, adopted in 1990;⁸ (c) the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, adopted in 1991;⁹ (d) the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (hereinafter referred to as the “Standard Rules”), adopted in 1993, the purpose of which is to ensure that all persons with disabilities “may exercise the same rights and obligations as others”.¹⁰ The Standard Rules are of major importance and constitute a particularly valuable reference guide in identifying more precisely the relevant obligations of States parties under the Covenant.

1. GENERAL OBLIGATIONS OF THE STATES PARTIES

8. The United Nations has estimated that there are more than 500 million persons with disabilities in the world today. Of that number, 80 per cent live in rural areas in developing countries. Seventy per cent of the total are estimated to have either limited or no access to the services they need. The challenge of improving the situation of persons with disabilities is thus of direct relevance to every State party to the Covenant. While the means chosen to promote the full realization of the economic, social and cultural rights of this group will inevitably differ significantly from one country to another, there is no country in which a major policy and programme effort is not required.¹¹

9. The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be

7 World Programme of Action concerning Disabled Persons (see note 3 above), paragraph 1.

8 A/C.3/46/4, annex I. Also contained in the Report on the International Meeting on the Roles and Functions of National Coordinating Committees on Disability in Developing Countries, Beijing, 5-11 November 1990 (CSDHA/DDP/NDC/4). See also Economic and Social Council resolution 1991/8 and General Assembly resolution 46/96 of 16 December 1991.

9 General Assembly resolution 46/119 of 17 December 1991, annex.

10 Standard Rules (see note 6 above), Introduction, paragraph 15.

11 See A/47/415, passim.

made available for this purpose and that a wide range of specially tailored measures will be required.

10. According to a report by the Secretary-General, developments over the past decade in both developed and developing countries have been especially unfavourable from the perspective of persons with disabilities: "... current economic and social deterioration, marked by low-growth rates, high unemployment, reduced public expenditure, current structural adjustment programmes and privatization, have negatively affected programmes and services ... If the present negative trends continue, there is the risk that [persons with disabilities] may increasingly be relegated to the margins of society, dependent on ad hoc support."¹² As the Committee has previously observed (General Comment N° 3 (Fifth session, 1990), para. 12), the duty of States parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints.

11. Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasize certain aspects of States parties' obligations. One is the need to ensure that not only the public sphere, but also the private sphere, are, within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities. In circumstances where such protection does not extend beyond the public domain, the ability of persons with disabilities to participate in the mainstream of community activities and to realize their full potential as active members of society will be severely and often arbitrarily constrained. This is not to imply that legislative measures will always be the most effective means of seeking to eliminate discrimination within the private sphere. Thus, for example, the Standard Rules place particular emphasis on the need for States to "take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution".¹³

12. In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with dis-

12 Ibid., paragraph 5.

13 Standard Rules (see note 6 above), Rule 1.

abilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces. Similarly, while it is appropriate for Governments to rely on private, voluntary groups to assist persons with disabilities in various ways, such arrangements can never absolve Governments from their duty to ensure full compliance with their obligations under the Covenant. As the World Programme of Action concerning Disabled Persons states, “the ultimate responsibility for remedying the conditions that lead to impairment and for dealing with the consequences of disability rests with Governments”.¹⁴

2. MEANS OF IMPLEMENTATION

13. The methods to be used by States parties in seeking to implement their obligations under the Covenant towards persons with disabilities are essentially the same as those available in relation to other obligations (see General Comment N° 1 (Third session, 1989)). They include the need to ascertain, through regular monitoring, the nature and scope of the problems existing within the State; the need to adopt appropriately tailored policies and programmes to respond to the requirements thus identified; the need to legislate where necessary and to eliminate any existing discriminatory legislation; and the need to make appropriate budgetary provisions or, where necessary, seek international cooperation and assistance. In the latter respect, international cooperation in accordance with articles 22 and 23 of the Covenant is likely to be a particularly important element in enabling some developing countries to fulfil their obligations under the Covenant.

14. In addition, it has been consistently acknowledged by the international community that policy-making and programme implementation in this area should be undertaken on the basis of close consultation with, and involvement of, representative groups of the persons concerned. For this reason, the Standard Rules recommend that everything possible be done to facilitate the establishment of national coordinating committees, or similar bodies, to serve as a national focal point on disability matters. In doing so, Governments should take account of the 1990 Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies.¹⁵

14 World Programme of Action concerning Disabled Persons (see note 3 above), paragraph 3.

15 See note 8 above.

3. *THE OBLIGATION TO ELIMINATE DISCRIMINATION ON THE GROUNDS OF DISABILITY*

15. Both de jure and de facto discrimination against persons with disabilities have a long history and take various forms. They range from invidious discrimination, such as the denial of educational opportunities, to more “subtle” forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers. For the purposes of the Covenant, “disability-based discrimination” may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights. Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.

16. Despite some progress in terms of legislation over the past decade,¹⁶ the legal situation of persons with disabilities remains precarious. In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties. Such legislation should not only provide persons with disabilities with judicial remedies as far as possible and appropriate, but also provide for social-policy programmes which enable persons with disabilities to live an integrated, self-determined and independent life.

17. Anti-discrimination measures should be based on the principle of equal rights for persons with disabilities and the non-disabled, which, in the words of the World Programme of Action concerning Disabled Persons, “implies that the needs of each and every individual are of equal importance, that these needs must be made the basis for the planning of societies, and that all resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation. Disability policies should ensure the access of [persons with disabilities] to all community services”.¹⁷

16 See A/47/415, paragraphs 37-38.

17 World Programme of Action concerning Disabled Persons (see note 3 above), paragraph 25.

18. Because appropriate measures need to be taken to undo existing discrimination and to establish equitable opportunities for persons with disabilities, such actions should not be considered discriminatory in the sense of article 2.2 of the International Covenant on Economic, Social and Cultural Rights as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective.

4. *SPECIFIC PROVISIONS OF THE COVENANT*

A. Article 3 - Equal rights for men and women

19. Persons with disabilities are sometimes treated as genderless human beings. As a result, the double discrimination suffered by women with disabilities is often neglected.¹⁸ Despite frequent calls by the international community for particular emphasis to be placed upon their situation, very few efforts have been undertaken during the Decade. The neglect of women with disabilities is mentioned several times in the report of the Secretary-General on the implementation of the World Programme of Action.¹⁹ The Committee therefore urges States parties to address the situation of women with disabilities, with high priority being given in future to the implementation of economic, social and cultural rights-related programmes.

B. Articles 6-8 - Rights relating to work

20. The field of employment is one in which disability-based discrimination has been prominent and persistent. In most countries the unemployment rate among persons with disabilities is two to three times higher than the unemployment rate for persons without disabilities. Where persons with disabilities are employed, they are mostly engaged in low-paid jobs with little social and legal security and are often segregated from the mainstream of the labour market. The integration of persons with disabilities into the regular labour market should be actively supported by States.

21. The "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (art. 6.1) is not realized where the only real opportunity open to disabled workers is to work in so-called "sheltered" facilities under substandard conditions. Arrangements whereby persons with a certain category of disability are effectively confined to certain occupations or to the production of certain goods may violate this

18 See E/CN.4/Sub.2/1991/31 (see note 1 above), paragraph 140.

19 See A/47/415, paragraphs 35, 46, 74 and 77.

right. Similarly, in the light of principle 13.3) of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care,²⁰ therapeutic treatment“ in institutions which amounts to forced labour is also incompatible with the Covenant. In this regard, the prohibition on forced labour contained in the International Covenant on Civil and Political Rights is also of potential relevance.

22. According to the Standard Rules, persons with disabilities, whether in rural or urban areas, must have equal opportunities for productive and gainful employment in the labour market.²¹ For this to happen it is particularly important that artificial barriers to integration in general, and to employment in particular, be removed. As the International Labour Organisation has noted, it is very often the physical barriers that society has erected in areas such as transport, housing and the workplace which are then cited as the reason why persons with disabilities cannot be employed.²² For example, as long as workplaces are designed and built in ways that make them inaccessible to wheelchairs, employers will be able to “justify” their failure to employ wheelchair users. Governments should also develop policies which promote and regulate flexible and alternative work arrangements that reasonably accommodate the needs of disabled workers.

23. Similarly, the failure of Governments to ensure that modes of transportation are accessible to persons with disabilities greatly reduces the chances of such persons finding suitable, integrated jobs, taking advantage of educational and vocational training, or commuting to facilities of all types. Indeed, the provision of access to appropriate and, where necessary, specially tailored forms of transportation is crucial to the realization by persons with disabilities of virtually all the rights recognized in the Covenant.

24. The “technical and vocational guidance and training programmes” required under article 6.2 of the Covenant should reflect the needs of all persons with disabilities, take place in integrated settings, and be planned and implemented with the full involvement of representatives of persons with disabilities.

25. The right to “the enjoyment of just and favourable conditions of work” (art. 7) applies to all disabled workers, whether they work in sheltered facilities or in the open labour market. Disabled workers may not be discriminated against with respect to wages or other conditions if their work is equal to that of non-disabled workers. States parties

20 See note 9 above.

21 Standard Rules (see note 6 above), Rule 7.

22 See A/CONF.157/PC/61/Add.10, p. 12.

have a responsibility to ensure that disability is not used as an excuse for creating low standards of labour protection or for paying below minimum wages.

26. Trade union-related rights (art. 8) apply equally to workers with disabilities and regardless of whether they work in special work facilities or in the open labour market. In addition, article 8, read in conjunction with other rights such as the right to freedom of association, serves to emphasize the importance of the right of persons with disabilities to form their own organizations. If these organizations are to be effective in “the promotion and protection of [the] economic and social interests” (art. 8.1.a) of such persons, they should be consulted regularly by government bodies and others in relation to all matters affecting them; it may also be necessary that they be supported financially and otherwise so as to ensure their viability.

27. The International Labour Organisation has developed valuable and comprehensive instruments with respect to the work-related rights of persons with disabilities, including in particular Convention N° 159 (1983) concerning vocational rehabilitation and employment of persons with disabilities.²³ The Committee encourages States parties to the Covenant to consider ratifying that Convention.

C. Article 9 - Social security

28. Social security and income-maintenance schemes are of particular importance for persons with disabilities. As stated in the Standard Rules, “States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities”.²⁴ Such support should reflect the special needs for assistance and other expenses often associated with disability. In addition, as far as possible, the support provided should also cover individuals (who are overwhelmingly female) who undertake the care of a person with disabilities. Such persons, including members of the families of persons with disabilities, are often in urgent need of financial support because of their assistance role.²⁵

23 See also Recommendation N° 99 (1955) concerning vocational rehabilitation of the disabled, and Recommendation N° 168 (1983) concerning vocational rehabilitation and employment of persons with disabilities.

24 Standard Rules (see note 6 above), Rule 8, paragraph 1.

25 See A/47/415, paragraph 78.

29. Institutionalization of persons with disabilities, unless rendered necessary for other reasons, cannot be regarded as an adequate substitute for the social security and income-support rights of such persons.

D. Article 10 - Protection of the family and of mothers and children

30. In the case of persons with disabilities, the Covenant's requirement that "protection and assistance" be rendered to the family means that everything possible should be done to enable such persons, when they so wish, to live with their families. Article 10 also implies, subject to the general principles of international human rights law, the right of persons with disabilities to marry and have their own family. These rights are frequently ignored or denied, especially in the case of persons with mental disabilities.²⁶ In this and other contexts, the term "family" should be interpreted broadly and in accordance with appropriate local usage. States parties should ensure that laws and social policies and practices do not impede the realization of these rights. Persons with disabilities should have access to necessary counselling services in order to fulfil their rights and duties within the family.²⁷

31. Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy. As the Standard Rules state, "persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood".²⁸ The needs and desires in question should be recognized and addressed in both the recreational and the procreational contexts. These rights are commonly denied to both men and women with disabilities worldwide.²⁹ Both the sterilization of, and the performance of an abortion on, a woman with disabilities without her prior informed consent are serious violations of article 10.2.

32. Children with disabilities are especially vulnerable to exploitation, abuse and neglect and are, in accordance with article 10.3 of the Covenant (reinforced by the corresponding provisions of the Convention on the Rights of the Child), entitled to special protection.

26 See E/CN.4/Sub.2/1991/31 (see note 1 above), paragraphs 190 and 193.

27 See the World Programme of Action concerning Disabled Persons (see note 3 above), paragraph 74.

28 Standard Rules (see note 6 above), Rule 9, paragraph 2.

29 See E/CN.6/1991/2, paragraphs 14 and 59-68.

E. Article 11 - The right to an adequate standard of living

33. In addition to the need to ensure that persons with disabilities have access to adequate food, accessible housing and other basic material needs, it is also necessary to ensure that “support services, including assistive devices” are available “for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights”.³⁰ The right to adequate clothing also assumes a special significance in the context of persons with disabilities who have particular clothing needs, so as to enable them to function fully and effectively in society. Wherever possible, appropriate personal assistance should also be provided in this connection. Such assistance should be undertaken in a manner and spirit which fully respect the human rights of the person(s) concerned. Similarly, as already noted by the Committee in paragraph 8 of General Comment N° 4 (Sixth session, 1991), the right to adequate housing includes the right to accessible housing for persons with disabilities.

F. Article 12 - The right to physical and mental health

34. According to the Standard Rules, “States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society”.³¹ The right to physical and mental health also implies the right to have access to, and to benefit from, those medical and social services - including orthopaedic devices - which enable persons with disabilities to become independent, prevent further disabilities and support their social integration.³² Similarly, such persons should be provided with rehabilitation services which would enable them “to reach and sustain their optimum level of independence and functioning”.³³ All such services should be provided in such a way that the persons concerned are able to maintain full respect for their rights and dignity.

30 Standard Rules (see note 6 above), Rule 4.

31 Ibid., Rule 2, paragraph 3.

32 See the Declaration on the Rights of Disabled Persons (General Assembly resolution 3447 (XXX) of 9 December 1975), paragraph 6; and the World Programme of Action concerning Disabled Persons (see note 3 above), paragraphs 95-107.

33 Standard Rules (see note 6 above), Rule 3.

G. Articles 13 and 14 - The right to education

35. School programmes in many countries today recognize that persons with disabilities can best be educated within the general education system.³⁴ Thus the Standard Rules provide that “States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings”.³⁵ In order to implement such an approach, States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers. In the case of deaf children, for example, sign language should be recognized as a separate language to which the children should have access and whose importance should be acknowledged in their overall social environment.

H. Article 15 - The right to take part in cultural life and enjoy the benefits of scientific progress

36. The Standard Rules provide that “States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas. ...States should promote the accessibility to and availability of places for cultural performances and services... ”³⁶ The same applies to places for recreation, sports and tourism.

37. The right to full participation in cultural and recreational life for persons with disabilities further requires that communication barriers be eliminated to the greatest extent possible. Useful measures in this regard might include “the use of talking books, papers written in simple language and with clear format and colours for persons with mental disability, [and] adapted television and theatre for deaf persons”.³⁷

38. In order to facilitate the equal participation in cultural life of persons with disabilities, Governments should inform and educate the general public about disability. In

34 See A/47/415, paragraph 73.

35 Standard Rules (see note 6 above), Rule 6.

36 Ibid., Rule 10, paragraphs 1-2.

37 See A/47/415, paragraph 79.

particular, measures must be taken to dispel prejudices or superstitious beliefs against persons with disabilities, for example those that view epilepsy as a form of spirit possession or a child with disabilities as a form of punishment visited upon the family. Similarly, the general public should be educated to accept that persons with disabilities have as much right as any other person to make use of restaurants, hotels, recreation centres and cultural venues.

Annex

*Committee on Economic,
Social and Cultural Rights*

*General Comment N° 11-
Plans of action for primary education*

*Adopted at the
20th session period
1999*



1 Article 14 of the International Covenant on Economic, Social and Cultural Rights requires each State party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all. In spite of the obligations undertaken in accordance with article 14, a number of States parties have neither drafted nor implemented a plan of action for free and compulsory primary education.

2. The right to education, recognized in articles 13 and 14 of the Covenant, as well as in a variety of other international treaties, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, is of vital importance. It has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.

3. In line with its clear and unequivocal obligation under article 14, every State party is under a duty to present to the Committee a plan of action drawn up along the lines specified in paragraph 8 below. This obligation needs to be scrupulously observed in view of the fact that in developing countries, 130 million children of school age are currently estimated to be without access to primary education, of whom about two thirds are girls.¹ The Committee is fully aware that many diverse factors have made it difficult for States parties to fulfil their obligation to provide a plan of action. For example, the structural adjustment programmes that began in the 1970s, the debt crises that followed in the 1980s and the financial crises of the late 1990s, as well as other factors, have greatly exacerbated the extent to which the right to primary education is being denied. These difficulties, however, cannot relieve States parties of their obligation to adopt and submit a plan of action to the Committee, as provided for in article 14 of the Covenant.

4. Plans of action prepared by States parties to the Covenant in accordance with article 14 are especially important as the work of the Committee has shown that the lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance these children, who may live in abject poverty and not lead healthy lives, are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school enrolment levels for girls and major reductions in child marriages.

5. Article 14 contains a number of elements which warrant some elaboration in the light of the Committee's extensive experience in examining State party reports.

6. *Compulsory*. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasized, however, that the education offered must be adequate in quality, relevant to the child and must promote the realization of the child's other rights.

7. *Free of charge*. The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis. This provision of compulsory primary education in no way conflicts with the right recognized in article 13.3 of the Covenant for parents and guardians "to choose for their children schools other than those established by the public authorities".

8. *Adoption of a detailed plan*. The State party is required to adopt a plan of action within two years. This must be interpreted as meaning within two years of the Covenant's entry into force of the State concerned, or within two years of a subsequent change in circumstances which has led to the non-observance of the relevant obligation. This obligation is a continuing one and States parties to which the provision is relevant by virtue of the prevailing situation are not absolved from the obligation as a result of their past failure to act within the two-year limit. The plan must cover all of the actions which are necessary in order to secure each of the requisite component parts of the right and must be sufficiently detailed so as to ensure the comprehensive realization of the right. Participation of all sections of civil society in the drawing up of the plan is vital and some means of periodically reviewing progress and ensuring accountability are essential. Without those elements, the significance of the article would be undermined.

9. *Obligations.* A State party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available. If the obligation could be avoided in this way, there would be no justification for the unique requirement contained in article 14 which applies, almost by definition, to situations characterized by inadequate financial resources. By the same token, and for the same reason, the reference to “international assistance and cooperation” in article 2.1 and to “international action” in article 23 of the Covenant are of particular relevance in this situation. Where a State party is clearly lacking in the financial resources and/or expertise required to “work out and adopt” a detailed plan, the international community has a clear obligation to assist.

10. *Progressive implementation.* The plan of action must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge, under article 14. Unlike the provision in article 2.1, however, article 14 specifies that the target date must be “within a reasonable number of years” and moreover, that the time-frame must “be fixed in the plan”. In other words, the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan. This underscores both the importance and the relative inflexibility of the obligation in question. Moreover, it needs to be stressed in this regard that the State party’s other obligations, such as non-discrimination, are required to be implemented fully and immediately.

11. The Committee calls upon every State party to which article 14 is relevant to ensure that its terms are fully complied with and that the resulting plan of action is submitted to the Committee as an integral part of the reports required under the Covenant. Further, in appropriate cases, the Committee encourages States parties to seek the assistance of relevant international agencies, including the International Labour Organization (ILO), the United Nations Development Programme (UNDP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children’s Fund (UNICEF), the International Monetary Fund (IMF) and the World Bank, in relation both to the preparation of plans of action under article 14 and their subsequent implementation. The Committee also calls upon the relevant international agencies to assist States parties to the greatest extent possible to meet their obligations on an urgent basis.

Annex

*Committee on Economic,
Social and Cultural Rights*

*General Comment N° 13-
The right to education*

*Adopted at the
21st session period*

1999



*GENERAL COMMENT N° 13:
THE RIGHT TO EDUCATION (ARTICLE 13 OF THE COVENANT)*

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

2. The International Covenant on Economic, Social and Cultural Rights (ICESCR) devotes two articles to the right to education, articles 13 and 14. Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human rights law. The Committee has already adopted General Comment 11 on article 14 (plans of action for primary education); General Comment 11 and the present general comment are complementary and should be considered together. The Committee is aware that for millions of people throughout the world, the enjoyment of the right to education remains a distant goal. Moreover, in many cases, this goal is becoming increasingly remote. The Committee is also conscious of the formidable structural and other obstacles impeding the full implementation of article 13 in many States parties.

3. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this general comment focuses on the normative content of article 13 (Part I, paras. 4-42), some of the obligations arising from it (Part II, paras. 43-57), and some illustrative violations (Part II, paras. 58-59). Part III briefly remarks upon the obligations of actors other than States parties. The general comment is based upon the Committee's experience in examining States parties, reports over many years.

1. Normative content of article 13 Article 13.1 - Aims and objectives of education

4. States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13.1. The Committee notes that these educational objectives reflect the fundamental purposes and principles of the United Nations as enshrined in Articles 1 and 2 of the Charter. For the most part, they are also found in article 26.2 of the Universal Declaration of Human Rights, although article 13.1 adds to the Declaration in three respects: education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups. Of those educational objectives which are common to article 26.2 of the Universal Declaration of Human Rights and article 13.1 of the Covenant, perhaps the most fundamental is that "education shall be directed to the full development of the human personality".

5. The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in article 13.1, as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1), the Convention on the Rights of the Child (art. 29 (1)), the Vienna Declaration and Programme of Action (Part I, para. 33 and Part II, para. 80), and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2). While all these texts closely correspond to article 13.1 of the Covenant, they also include elements which are not expressly provided for in article 13.1, such as specific references to gender equality and respect for the environment. These new elements are implicit in, and reflect a contemporary interpretation of article 13.1. The Committee obtains support for this point of view from the widespread endorsement that the previously mentioned texts have received from all regions of the world.¹

1. The World Declaration on Education for All was adopted by 155 governmental delegations; the Vienna Declaration and Programme of Action was adopted by 171 governmental delegations; the Convention on the Rights of the Child has been ratified or acceded to by 191 States parties; the Plan of Action of the United Nations Decade for Human Rights Education was adopted by a consensus resolution of the General Assembly (49/184).

Article 13.2 - The right to receive an education, some general remarks

6. While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:²

a) *Availability* - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;

b) *Accessibility* - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination);

Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme);

Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13.2 in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education;

2 This approach corresponds with the Committee's analytical framework adopted in relation to the rights to adequate housing and food, as well as the work of the United Nations Special Rapporteur on the right to education. In its General Comment 4, the Committee identified a number of factors which bear upon the right to adequate housing, including "availability", "affordability", "accessibility" and "cultural adequacy". In its General Comment 12, the Committee identified elements of the right to adequate food, such as "availability", "acceptability" and "accessibility". In her preliminary report to the Commission on Human Rights, the Special Rapporteur on the right to education sets out "four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability", (E/CN.4/1999/49, para. 50).

c) *Acceptability* - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13.1 and such minimum educational standards as may be approved by the State (see art. 13.3 and (4));

d) *Adaptability* - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

7. When considering the appropriate application of these “interrelated and essential features” the best interests of the student shall be a primary consideration.

Article 13.2.a - The right to primary education

8. Primary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.³

9. The Committee obtains guidance on the proper interpretation of the term “primary education” from the World Declaration on Education for All which states: “The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community” (art. 5). “[B]asic learning needs” are defined in article 1 of the World Declaration.⁴ While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: “Primary education is the most important component of basic education.”⁵

3 See para. 6.

4 The Declaration defines “basic learning needs” as: “essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning” (art. 1).

5 Advocacy Kit, Basic Education 1999 (UNICEF), section 1, page 1.

10. As formulated in article 13.2.a, primary education has two distinctive features: it is “compulsory” and “available free to all”. For the Committee’s observations on both terms, see paragraphs 6 and 7 of General Comment 11 on article 14 of the Covenant.

Article 13.2.b - The right to secondary education

11. Secondary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.⁶

12. While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities⁷ Article 13.2.b applies to secondary education “in its different forms”, thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages “alternative” educational programmes which parallel regular secondary school systems.

13. According to article 13.2.b, 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”. The phrase “generally available” signifies, firstly, that secondary education is not dependent on a student’s apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all. For the Committee’s interpretation of “accessible”, see paragraph 6 above. The phrase “every appropriate means” reinforces the point that States parties should adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.

14. “[P]rogressive introduction of free education” means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education. For the Committee’s general observations on the meaning of the word “free”, see paragraph 7 of General Comment 11 on article 14.

6 See para. 6.

7 See International Standard Classification of Education 1997, UNESCO, para. 52.

Technical and vocational education

15. Technical and vocational education (TVE) forms part of both the right to education and the right to work (art. 6.2). Article 13.2.b presents TVE as part of secondary education, reflecting the particular importance of TVE at this level of education. Article 6.2, however, does not refer to TVE in relation to a specific level of education; it comprehends that TVE has a wider role, helping “to achieve steady economic, social and cultural development and full and productive employment”. Also, the Universal Declaration of Human Rights states that “[t]echnical and professional education shall be made generally available” (art. 26.1). Accordingly, the Committee takes the view that TVE forms an integral element of all levels of education.⁸

16. An introduction to technology and to the world of work should not be confined to specific TVE programmes but should be understood as a component of general education. According to the UNESCO Convention on Technical and Vocational Education (1989), TVE consists of “all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life” (art. 1.a). This view is also reflected in certain ILO Conventions.⁹ Understood in this way, the right to TVE includes the following aspects:

- a) It enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State party’s economic and social development;
- b) It takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy; and occupational health, safety and welfare;
- c) Provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes;
- d) It consists of programmes which give students, especially those from developing countries, the opportunity to receive TVE in other States, with a view to the appropriate transfer and adaptation of technology;

8 A view also reflected in the Human Resources Development Convention 1975 (Convention N° 142) and the Social Policy (Basic Aims and Standards) Convention 1962 (Convention N° 117) of the International Labour Organization.

9 See note 8.

e) It consists, in the context of the Covenant's non-discrimination and equality provisions, of programmes which promote the TVE of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.

Article 13.2.c - The right to higher education

17. Higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms at all levels.¹⁰

18. While article 13.2.c is formulated on the same lines as article 13.2.b, there are three differences between the two provisions. Article 13.2.c does not include a reference to either education "in its different forms" or specifically to TVE. In the Committee's opinion, these two omissions reflect only a difference of emphasis between article 13.2.b and (c). If higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning; in practice, therefore, both secondary and higher education have to be available "in different forms". As for the lack of reference in article 13.2.c to technical and vocational education, given article 6.2 of the Covenant and article 26.1 of the Universal Declaration, TVE forms an integral component of all levels of education, including higher education.¹¹

19. The third and most significant difference between article 13.2.b and 13.2.c is that while secondary education "shall be made generally available and accessible to all", higher education "shall be made equally accessible to all, on the basis of capacity". According to article 13.2.c, higher education is not to be "generally available", but only available "on the basis of capacity". The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience.

20. So far as the wording of article 13.2.b and 13.2.c is the same (e.g. "the progressive introduction of free education"), see the previous comments on article 13.2.b.

¹⁰ See para. 6.

¹¹ See para. 15.

Article 13.2.d - The right to fundamental education

21. Fundamental education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.¹²

22. In general terms, fundamental education corresponds to basic education as set out in the World Declaration on Education For All.¹³ By virtue of article 13.2.d, individuals “who have not received or completed the whole period of their primary education” have a right to fundamental education, or basic education as defined in the World Declaration on Education For All.

23. Since everyone has the right to the satisfaction of their “basic learning needs” as understood by the World Declaration, the right to fundamental education is not confined to those “who have not received or completed the whole period of their primary education”. The right to fundamental education extends to all those who have not yet satisfied their “basic learning needs”.

24. It should be emphasized that enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and life-long learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.

Article 13.2.e - A school system; adequate fellowship system; material conditions of teaching staff

25. The requirement that the “development of a system of schools at all levels shall be actively pursued” means that a State party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels, but the Covenant requires States parties to prioritize primary education (see para. 51). “[A]ctively pursued” suggests that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour.

¹² See para. 6.

¹³ See para. 9.

26. The requirement that “an adequate fellowship system shall be established” should be read with the Covenant’s non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups.

27. While the Covenant requires that “the material conditions of teaching staff shall be continuously improved”, in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many States parties in recent years. Not only is this inconsistent with article 13.2.e, but it is also a major obstacle to the full realization of students’ right to education. The Committee also notes the relationship between articles 13.2.e, 2 .2, 3 and 6-8 of the Covenant, including the right of teachers to organize and bargain collectively; draws the attention of States parties to the joint UNESCO-ILO Recommendation Concerning the Status of Teachers (1966) and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997); and urges States parties to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role.

Articles 13.3 and 13.4 - The right to educational freedom

28. Article 13.3 has two elements, one of which is that States parties undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.¹⁴ The Committee is of the view that this element of article 13.3 permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression. It notes that public education that includes instruction in a particular religion or belief is inconsistent with article 13.3 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

29. The second element of article 13.3 is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to

¹⁴ This replicates article 18.4 of the International Covenant on Civil and Political Rights (ICCPR) and also relates to the freedom to teach a religion or belief as stated in article 18.1 ICCPR. (See Human Rights Committee General Comment 22 on article 18 ICCPR, forty-eighth session, 1993.) The Human Rights Committee notes that the fundamental character of article 18 ICCPR is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of that Covenant.

“such minimum educational standards as may be laid down or approved by the State”. This has to be read with the complementary provision, article 13 .4, which affirms “the liberty of individuals and bodies to establish and direct educational institutions”, provided the institutions conform to the educational objectives set out in article 13.1 and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in article 13.1.

30. Under article 13.4, everyone, including non-nationals, has the liberty to establish and direct educational institutions. The liberty also extends to “bodies”, i.e. legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in article 13.4 does not lead to extreme disparities of educational opportunity for some groups in society.

Article 13 - Special topics of broad application. Non-discrimination and equal treatment

31. The prohibition against discrimination enshrined in article 2.2 of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. The Committee interprets articles 2.2 and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention N° 169), and wishes to draw particular attention to the following issues.

32. The adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.

33. In some circumstances, separate educational systems or institutions for groups defined by the categories in article 2.2 shall be deemed not to constitute a breach of the Covenant. In this regard, the Committee affirms article 2 of the UNESCO Convention against Discrimination in Education (1960).¹⁵

34. The Committee takes note of article 2 of the Convention on the Rights of the Child and article 3.e of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.

35. Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant.

36. The Committee affirms paragraph 35 of its General Comment 5, which addresses the issue of persons with disabilities in the context of the right to education, and paragraphs 36-42 of its General Comment 6, which address the issue of older persons in relation to articles 13-15 of the Covenant.

15 According to article 2:

“When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of article 1 of this Convention:

The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil’s parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.”

37. States parties must closely monitor education - including all relevant policies, institutions, programmes, spending patterns and other practices - so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.

*Academic freedom and institutional autonomy*¹⁶

38. In the light of its examination of numerous States parties' reports, the Committee has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Accordingly, even though the issue is not explicitly mentioned in article 13, it is appropriate and necessary for the Committee to make some observations about academic freedom. The following remarks give particular attention to institutions of higher education because, in the Committee's experience, staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom. The Committee wishes to emphasize, however, that staff and students throughout the education sector are entitled to academic freedom and many of the following observations have general application.

39. Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.

40. The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate

16 See UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997).

balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.

*Discipline in schools*¹⁷

41. In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual.¹⁸ Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation. Nor should any form of discipline breach other rights under the Covenant, such as the right to food. A State party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by some States parties which actively encourage schools to introduce "positive", non-violent approaches to school discipline.

Limitations on article 13

42. The Committee wishes to emphasize that the Covenant's limitations clause, article 4, is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State. Consequently, a State party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.

2. States parties' obligations and violations. General legal obligations

43. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various

17 In formulating this paragraph, the Committee has taken note of the practice evolving elsewhere in the international human rights system, such as the interpretation given by the Committee on the Rights of the Child to article 28.2 of the Convention on the Rights of the Child, as well as the Human Rights Committee's interpretation of article 7 of ICCPR.

18 The Committee notes that, although it is absent from article 26.2 of the Declaration, the drafters of ICESCR expressly included the dignity of the human personality as one of the mandatory objectives to which all education is to be directed (art. 13.1).

obligations which are of immediate effect.¹⁹ States parties have immediate obligations in relation to the right to education, such as the “guarantee” that the right “will be exercised without discrimination of any kind” (art.2.2) and the obligation “to take steps” (art. 2.1) towards the full realization of article 13.²⁰ Such steps must be “deliberate, concrete and targeted” towards the full realization of the right to education.

44. The realization of the right to education over time, that is “progressively”, should not be interpreted as depriving States parties’ obligations of all meaningful content. Progressive realization means that States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of article 13.²¹

45. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party’s maximum available resources.²²

46. The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

47. The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the

19 See the Committee’s General Comment 3, para. 1.

20 See the Committee’s General Comment 3, para. 2.

21 See the Committee’s General Comment 3, para. 9.

22 See the Committee’s General Comment 3, para. 9.

right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.

48. In this respect, two features of article 13 require emphasis. First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognize, for example, that the “development of a system of schools at all levels shall be actively pursued” (art. 13.2.e). Secondly, given the differential wording of article 13.2 in relation to primary, secondary, higher and fundamental education, the parameters of a State party’s obligation to fulfil (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfil (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfil (provide) in relation to article 13 coincides with the law and practice of numerous States parties.

Specific legal obligations

49. States parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13.1.²³ They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13.1.

50. In relation to article 13.2, States have obligations to respect, protect and fulfil each of the “essential features” (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good

23 There are numerous resources to assist States parties in this regard, such as UNESCO’s Guidelines for Curriculum and Textbook Development in International Education (ED/ECS/HCI). One of the objectives of article 13.1 is to “strengthen the respect of human rights and fundamental freedoms”; in this particular context, States parties should examine the initiatives developed within the framework of the United Nations Decade for Human Rights Education - especially instructive is the Plan of Action for the Decade, adopted by the General Assembly in 1996, and the Guidelines for National Plans of Action for Human Rights Education, developed by the Office of the High Commissioner for Human Rights to assist States in responding to the United Nations Decade for Human Rights Education.

quality for all; fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.

51. As already observed, the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13.2, States parties are obliged to prioritize the introduction of compulsory, free primary education.²⁴ This interpretation of article 13.2 is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States parties.

52. In relation to article 13.2.b-d, a State party has an immediate obligation “to take steps” (art. 2.1) towards the realization of secondary, higher and fundamental education for all those within its jurisdiction. At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.

53. Under article 13.2.e, States parties are obliged to ensure that an educational fellowship system is in place to assist disadvantaged groups.²⁵ The obligation to pursue actively the “development of a system of schools at all levels” reinforces the principal responsibility of States parties to ensure the direct provision of the right to education in most circumstances.²⁶

54. States parties are obliged to establish “minimum educational standards” to which all educational institutions established in accordance with article 13.3 and 4 are required to conform. They must also maintain a transparent and effective system to monitor such standards. A State party has no obligation to fund institutions established in accordance

24 On the meaning of “compulsory” and “free”, see paragraphs 6 and 7 of General Comment 11 on article 14.

25 In appropriate cases, such a fellowship system would be an especially appropriate target for the international assistance and cooperation anticipated by article 2.1.

26 In the context of basic education, UNICEF has observed: “Only the State ... can pull together all the components into a coherent but flexible education system”. UNICEF, *The State of the World's Children*, 1999, “The education revolution”, p. 77.

with article 13.3 and 4; however, if a State elects to make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds.

55. States parties have an obligation to ensure that communities and families are not dependent on child labour. The Committee especially affirms the importance of education in eliminating child labour and the obligations set out in article 7.2 of the Worst Forms of Child Labour Convention, 1999 (Convention N° 182).²⁷ Additionally, given article 2.2, States parties are obliged to remove gender and other stereotyping which impedes the educational access of girls, women and other disadvantaged groups.

56. In its General Comment 3, the Committee drew attention to the obligation of all States parties to take steps, “individually and through international assistance and cooperation, especially economic and technical”, towards the full realization of the rights recognized in the Covenant, such as the right to education.²⁸ Articles 2.1 and 23 of the Covenant, Article 56 of the Charter of the United Nations, article 10 of the World Declaration on Education for All, and Part I, paragraph 34 of the Vienna Declaration and Programme of Action all reinforce the obligation of States parties in relation to the provision of international assistance and cooperation for the full realization of the right to education. In relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education. Similarly, States parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education.

57. In its General Comment 3, the Committee confirmed that States parties have “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels” of each of the rights enunciated in the Covenant, including “the most basic forms of education”. In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13.1; to provide primary education for all in accordance with article 13.2.a; to adopt and

27 According to article 7.2, “(e)ach Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to: (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour” (ILO Convention 182, Worst Forms of Child Labour, 1999).

28 See the Committee’s General Comment 3, paras. 13-14.

implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards” (art. 13.3 and 4).

Violations

58. When the normative content of article 13 (Part I) is applied to the general and specific obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to education. Violations of article 13 may occur through the direct action of States parties (acts of commission) or through their failure to take steps required by the Covenant (acts of omission).

59. By way of illustration, violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address de facto educational discrimination; the use of curricula inconsistent with the educational objectives set out in article 13.1; the failure to maintain a transparent and effective system to monitor conformity with article 13.1; the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take “deliberate, concrete and targeted” measures towards the progressive realization of secondary, higher and fundamental education in accordance with article 13.2.b-d; the prohibition of private educational institutions; the failure to ensure private educational institutions conform to the “minimum educational standards” required by article 13.3 and 4; the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in non-conformity with article 4.

3. Obligations of actors other than states parties

60. Given article 22 of the Covenant, the role of the United Nations agencies, including at the country level through the United Nations Development Assistance Framework (UNDAF), is of special importance in relation to the realization of article 13. Coordinated efforts for the realization of the right to education should be maintained to improve coherence and interaction among all the actors concerned, including the various components of civil society. UNESCO, the United Nations Development Programme, UNICEF, ILO, the World Bank, the regional development banks, the International Monetary Fund and other relevant bodies within the United Nations system should enhance their cooperation for the implementation of the right to education at the national level, with due

respect to their specific mandates, and building on their respective expertise. In particular, the international financial institutions, notably the World Bank and IMF, should pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis.²⁹ When examining the reports of States parties, the Committee will consider the effects of the assistance provided by all actors other than States parties on the ability of States to meet their obligations under article 13. The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to education.

Annex

*Committee on Economic,
Social and Cultural Rights*

*General Comment N° 20-
Non-discrimination in economic,
social and cultural rights*

*Adopted at the
44th session period*

2009



I. INTRODUCTION AND BASIC PREMISES

1. Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.

2. Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

3. The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the "equal and inalienable rights of all" and the Covenant expressly recognizes the rights of "everyone" to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

4. The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and article 7 includes the "right to equal remuneration for work of equal value" and "equal opportunity for everyone to be promoted" in employment. Article 10 stipulates that, inter alia, mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognizes that "primary education shall be compulsory and available free to all" and provides that "higher education shall be made equally accessible to all".

5. The preamble, Articles 1, paragraph 3, and 55, of the Charter of the United Nations and article 2, paragraph 1, of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees,

stateless persons, children, migrant workers and members of their families, and persons with disabilities include the exercise of economic, social and cultural rights,¹ while other treaties require the elimination of discrimination in specific fields, such as employment and education.² In addition to the common provision on equality and non-discrimination in both the Covenant and the International Covenant on Civil and Political Rights, article 26 of the International Covenant on Civil and Political Rights contains an independent guarantee of equal and effective protection before and of the law.³

6. In previous general comments, the Committee on Economic, Social and Cultural Rights has considered the application of the principle of non-discrimination to specific Covenant rights relating to housing, food, education, health, water, authors' rights, work and social security.⁴ Moreover, general comment N° 16 focuses on State parties' obligations under article 3 of the Covenant to ensure equal rights of men and women to the enjoyment of all Covenant rights, while general comments Nos. 5 and 6 respectively concern the rights of persons with disabilities and older persons.⁵ The present general comment aims to clarify the Committee's understanding of the provisions of article 2, paragraph 2, of the Covenant, including the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).

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- 1 See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Convention on the Rights of Persons with Disabilities.
 - 2 ILO Convention N° 111 concerning Discrimination in Respect of Employment and Occupation (1958); and the UNESCO Convention against Discrimination in Education.
 - 3 See general comment N° 18 (1989) of the Human Rights Committee on non-discrimination.
 - 4 The Committee on Economic, Social and Cultural Rights (CESCR), general comment N° 4 (1991): The right to adequate housing; general comment N° 7 (1997): The right to adequate housing: forced evictions (art. 11, para. 1); general comment N° 12 (1999): The right to adequate food; general comment N° 13 (1999): The right to education (art. 13); general comment N° 14 (2000): The right to the highest attainable standard of health (art. 12); general comment N° 15 (2002): The right to water (arts. 11 and 12); general comment N° 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15, para. 1 (c)); general comment N° 18 (2005): The right to work (art. 6); and general comment N° 19 (2008): The right to social security.
 - 5 CESCR, general comment N° 5 (1994): Persons with disabilities; and general comment N° 6 (1995): The economic, social and cultural rights of older persons.

II. SCOPE OF STATE OBLIGATIONS

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.⁶ Discrimination also includes incitement to discriminate and harassment.

8. In order for States parties to “guarantee” that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively.⁷

a) *Formal discrimination*: Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

b) *Substantive discrimination*: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2.⁸ The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

6 For a similar definition see art. 1, ICERD; art. 1, CEDAW; and art. 2 of the Convention on the Rights of Persons with Disabilities (CRPD). The Human Rights Committee comes to a similar interpretation in its general comment Nº 18, paragraphs 6 and 7. The Committee has adopted a similar position in previous general comments.

7 CESCR, general comment Nº 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3).

8 See also CESCR general comment Nº 16.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

10. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:

a) *Direct discrimination* occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

b) *Indirect discrimination* refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

Private sphere

11. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.

Systemic discrimination

12. The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often

involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.

Permissible scope of differential treatment

13. Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

14. Under international law, a failure to act in good faith to comply with the obligation in article 2, paragraph 2, to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation. Covenant rights can be violated through the direct action or omission by States parties, including through their institutions or agencies at the national and local levels. States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.

III. PROHIBITED GROUNDS OF DISCRIMINATION

15. Article 2, paragraph 2, lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category. The express grounds and a number of implied grounds under "other status" are discussed below. The examples of differential treatment presented in this section are merely illustrative and they are not intended to represent the full scope of possible discriminatory treatment under the relevant prohibited ground, nor a conclusive finding that such differential treatment will amount to discrimination in every situation.

Membership of a group

16. In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).

Multiple discrimination⁹

17. Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.

A. Express grounds

18. The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.

Race and colour

19. Discrimination on the basis of “race and colour”, which includes an individual’s ethnic origin, is prohibited by the Covenant as well as by other treaties including the International Convention on the Elimination of Racial Discrimination. The use of the term “race” in the Covenant or the present general comment does not imply the acceptance of theories which attempt to determine the existence of separate human races.¹⁰

9 See para. 27 of the present general comment on intersectional discrimination.

10 See the outcome document of the Durban Review Conference, para. 6: “Reaffirms that all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights; and strongly rejects any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races.”

Sex

20. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights.¹¹ Since the adoption of the Covenant, the notion of the prohibited ground “sex” has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

Language

21. Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment of many Covenant rights, including the right to participate in cultural life as guaranteed by article 15 of the Covenant. Therefore, information about public services and goods, for example, should also be available, as far as possible, in languages spoken by minorities, and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.

Religion

22. This prohibited ground of discrimination covers the profession of religion or belief of one’s choice (including the non-profession of any religion or belief), that may be publicly or privately manifested in worship, observance, practice and teaching.¹² For instance, discrimination arises when persons belonging to a religious minority are denied equal access to universities, employment, or health services on the basis of their religion.

11 See art. 3 of the Covenant, and CESCR general comment N° 16.

12 See also the General Assembly’s Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981.

Political or other opinion

23. Political and other opinions are often grounds for discriminatory treatment and include both the holding and not-holding of opinions, as well as expression of views or membership within opinion-based associations, trade unions or political parties. Access to food assistance schemes, for example, must not be made conditional on an expression of allegiance to a particular political party.

National or social origin

24. "National origin" refers to a person's State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic discrimination in both the public and private sphere in the exercise of their Covenant rights. "Social origin" refers to a person's inherited social status, which is discussed more fully below in the context of "property" status, descent-based discrimination under "birth" and "economic and social status".¹³

Property

25. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement.¹⁴

Birth

26. Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes descent, especially on the basis of caste and

13 See paras. 25, 26 and 35, of the present general comment.

14 See CESCR general comments Nos. 15 and 4 respectively.

analogous systems of inherited status.¹⁵ States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against the dissemination of ideas of superiority and inferiority on the basis of descent.

B. Other status¹⁶

27. The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee’s general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person’s legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.

Disability

28. In its general comment N° 5, the Committee defined discrimination against persons with disabilities¹⁷ as “any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights”.¹⁸ The denial of reasonable accommodation should be included in national

15 For a comprehensive overview of State obligations in this regard, see general comment N° 29 (2002) of the Committee on the Elimination of All Forms of Racial Discrimination on art. 1, para. 1, regarding descent.

16 See para. 15 of the present general comment.

17 For a definition, see CRPD, art. 1: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

18 See CESCR general comment N° 5, para. 15.

legislation as a prohibited form of discrimination on the basis of disability.¹⁹ States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,²⁰ as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.

Age

29. Age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or retraining, and against older persons living in poverty with unequal access to universal old-age pensions due to their place of residence.²¹ In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.

Nationality

30. The ground of nationality should not bar access to Covenant rights,²² e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.²³

19 See CRPD, art. 2: “‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

20 See CESCR general comment N° 5, para. 22.

21 See, further, CESCR general comment N° 6.

22 This paragraph is without prejudice to the application of art. 2, para. 3, of the Covenant, which states: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

23 See also general comment N° 30 (2004) of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens.

Marital and family status

31. Marital and family status may differ between individuals because, inter alia, they are married or unmarried, married under a particular legal regime, in a de facto relationship or one not recognized by law, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependants or a particular number of children. Differential treatment in access to social security benefits on the basis of whether an individual is married must be justified on reasonable and objective criteria. In certain cases, discrimination can also occur when an individual is unable to exercise a right protected by the Covenant because of his or her family status or can only do so with spousal consent or a relative's concurrence or guarantee.

Sexual orientation and gender identity

32. "Other status" as recognized in article 2, paragraph 2, includes sexual orientation.²⁴ States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.²⁵

Health status

33. Health status refers to a person's physical or mental health.²⁶ States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum.²⁷ States parties should also adopt

24 See CESCR general comments Nos. 14 and 15.

25 For definitions, see the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

26 See CESCR general comment N° 14, paras. 12(b), 18, 28 and 29.

27 See the guidelines published by the Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) (2006), "International Guidelines on HIV/AIDS and Human

measures to address widespread stigmatization of persons on the basis of their health status, such as mental illness, diseases such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals to enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

Place of residence

34. The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health-care facilities._

Economic and social situation

35. Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

IV. NATIONAL IMPLEMENTATION

36. In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated. Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures. States parties should regularly assess whether the measures chosen are effective in practice.

Rights, 2006 Consolidated Version". Available online at: http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf.

Legislation

37. Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

Policies, plans and strategies

38. States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and private actors in the area of Covenant rights. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, among other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society. States parties should also adopt appropriate preventive measures to avoid the emergence of new marginalized groups.

Elimination of systemic discrimination

39. States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals

and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

Remedies and accountability

40. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors. Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented. Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights.²⁸

Monitoring, indicators and benchmarks

41. States parties are obliged to monitor effectively the implementation of measures to comply with article 2, paragraph 2, of the Covenant. Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination.²⁹

28 See CESCR general comments Nos. 3 and 9. See also the practice of the Committee in its concluding observations on reports of States parties to the Covenant.

29 See CESCR general comments Nos. 13, 14, 15, 17 and 19, and its new reporting guidelines (E/C.12/2008/2).

