

# The Right to Compulsory Primary Education, a fundamental human right! (Part II)

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## 1 Introduction

In part I of this article<sup>1</sup> the authors discussed the right to education as it is codified in several global and regional instruments and focused on the right to compulsory primary education. In addition, the authors discussed the connectivity between the right to education and human development, among which the close linkage between education and poverty, education and crime, education and connection and child labour, education and street children. Reference was also made to the numerous global and regional instruments discussing the right to education, moreover the right to compulsory primary education. It is safe to conclude that globally, including in our region the Americas, States have incorporated the right to education in their national legislation and adhere to several global and regional instruments safeguarding the right to education, moreover the right to compulsory primary education. But our region still struggles with developmental issues that impede establishing an effective implementation system for the right to education and/or compulsory primary education.

In this part II the authors will discuss the status of the right to education and in particular the right to compulsory primary education. The authors will present an overview of jurisprudence regarding the place and status of the right to education and/or compulsory primary education. This part will be concluded with a conclusion and recommendation.

## C. Jurisprudence (case law) on the right to Compulsory Primary Education

Bearing in mind the important elements of the right to free and compulsory primary education for all, as explained by General Comment 11 and SGD 4, attention will be given to some landmark court decisions. The respective court decisions confirm that all children (girls and boys) must have access to primary education that is free, equitable and of adequate quality, which is relevant to the child and that promotes the realization of the child's other rights.

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1 SJB 2022/3, pp. 100-115.

Recalling the report<sup>2</sup> and memorandum<sup>3</sup> of the International Law Commission which indicate that decisions of national and international courts are part of recognized sources that can be consulted as evidence of customary international law, the following paragraphs will highlight case law on the Right to Compulsory Primary Education. The cases are retrieved from the ESCR-Net Caselaw Database, which is a database on domestic, regional and international decisions regarding Economic, Social and Cultural Rights.<sup>4</sup> And from the Database of the Center for Justice and International Law (CEJIL): Summaries of Jurisprudence, Right to Education.<sup>5</sup>

### C.I Cases in global perspective

#### C.I.1 *Bandhua Mukti Morcha v. Union of India & Others*

***Bandhua Mukti Morcha v. Union of India & Ors. (1997) 10 SCC 549*** is a ruling by the Supreme Court of India of February 21, 1997. It concerns a public interest litigation case, directed to the State of Uttar Pradesh. The case was filed in an effort to abolish the use of child labor in the carpet industry by seeking the issuing of welfare directives prohibiting child labor under the age of 14 and by providing children access to education. In its ruling the Court noted India's obligations under the Universal Declaration of Human Rights (UDHR) and the Convention on the Rights of the Child to *provide free primary education for all children in the country, and to protect children against economic exploitation. The relevance of this Court decision* is that the Court reaffirmed the right to free and compulsory primary education by all and confirmed that the existence of child labor is incompatible with that right.

#### C.I.2 *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v. Government of Senegal*

***The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v. Government of Senegal, ACERWC, DECISION: N° 003/Com/001/2012*** is a regional court case decision provided by the African Committee of Experts on the Rights and Welfare of the Child on April 15, 2014. This case addresses the plight of as many as 100,000 children (known as *talibés*), who while attending *Qur'anic schools (daaras)* in Senegal, are forced by some instructors to beg in the streets, to secure their own survival and enrich the teachers. The Committee found Senegal accountable for the activities of these schools even though they are non-state entities. The court reasoned *that the State has an obligation to protect the rights of the child which requires measures by the State to ensure that third parties (such as individuals and institutions) do not deprive*

2 A/73/10, pp. 12-116.

3 A/CN.4/710.

4 [https://www.escr-net.org/caselaw/search?search=education&field\\_country\\_tid=All&language=%2A%2A%2ACURRENT\\_LANGUAGE%2A%2A%2A&field\\_thematic\\_focus\\_tid=2415&field\\_forum\\_type\\_value=All&page=1](https://www.escr-net.org/caselaw/search?search=education&field_country_tid=All&language=%2A%2A%2ACURRENT_LANGUAGE%2A%2A%2A&field_thematic_focus_tid=2415&field_forum_type_value=All&page=1).

5 Summaries Jurisprudence\_Education\_1.pdf (cejil.org): [https://cejil.org/wp-content/uploads/pdfs/SummariesJurisprudence\\_Education\\_1.pdf](https://cejil.org/wp-content/uploads/pdfs/SummariesJurisprudence_Education_1.pdf).

*children of their rights*. The Committee found that Senegal has violated numerous provisions of the African Charter on the Rights and Welfare of the Child including the principle of the best interests of the child (Article 4); the rights to survival and development (Article 5), education and health (Article 11 and 14); the prohibition of child labor (Article 15); and the prohibition of forced child begging (Article 29 under b). The Committee has issued several recommendations, including that Senegal needs to ensure that all *daaras* meet basic human rights standards relating to education and *that the State Party provides free and compulsory basic education*. **The relevance of this Court decision** is that the Court reaffirmed the obligation of the State to ensure that also third parties must respect the right to free and compulsory primary education for all, particularly for children. This by meeting all quality standards relevant to enable all children to realize their other rights.

### C.I.3 *R v. East Sussex ex parte Tandy*

***R v. East Sussex ex parte Tandy***. Cited as: [1998] AC 714, [1998] 2 All ER 769, [1998] 2 WLR 884, [1998] 2 FCR 221, is a ruling by the House of Lords, United Kingdom on May 20, 1998. This case concerns the application for judicial review of the decision to reduce the number of hours of home tuition for financial reasons. Furthermore, the local authority obligations under Education Act 1993, the retrogressive measure, and the issue of resource allocations of local authority. According to Section 298 each local education authority (LEA) was required to make arrangements for the provision of suitable education for those children of compulsory school age who, by reason of, amongst other things, illness, might not otherwise receive it. Furthermore, the Section provides that suitable education, 'in relation to a child... means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have....'. In October 1996 the education authority (EA) advised parents of the appellant, a sick child, that, for financial reasons, the maximum number of hours per week of home tuition provided to her would be reduced. The House of Lords held that on a true construction of Section 298, the question of what was suitable education' was to be determined purely with reference to educational considerations and that there was nothing in Section 298 to indicate that the resources available were relevant to that determination. Accordingly, there was no reason to treat the resources of a LEA as a relevant factor in determining what constituted suitable education' for the purposes of Section 298. However, if there was more than one way of providing suitable education, the EA would be entitled to have regard to its resources in choosing between different ways of making such provision. The Court restored the order of the High Court quashing the EA's decision to reduce the number of hours of home tuition provided. **The relevance of this Court decision** is that the Court confirmed that *the State has a legal obligation to guarantee the right to compulsory primary education for every child of compulsory school age without discrimination*. Furthermore, that the provided education by the State must be suitable in accordance with educational considerations and irrespective of the available resources.

*C.I.4 Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors*

***Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors. Cited as: 1993 AIR 217, 1993 SCR (1) 594, 1993 SCC (1) 645, JT 1993 (1) 474, 1993 SCALE (1)290***, is a ruling by the Supreme Court of India on February 4, 1993. This case concerns a Constitutional challenge querying whether the “right to life” in Article 21 of the Constitution of India guarantees a fundamental Right to Education to citizens of India. Furthermore, the role of economic resources in limiting Right to Education, the interplay between Directive Principles and State Policy in the Constitution and Fundamental Rights, and whether the Right to Education includes adult professional education. The case involved a challenge by certain private professional educational facilities to the constitutionality of State laws regulating capitation fees charged by such institutions. The Supreme Court held that the right to basic education is implied by the fundamental right to life (Article 21) when read in conjunction with the Directive Principle on Education (Article 41). The Court ruled that there is no fundamental Right to Education for a professional degree that flows from Article 21. *It held, however, that the passage of 44 years since the enactment of the Constitution had effectively converted the non-justiciable Right to Education of children under 14 into one enforceable under the law.* Quoting Article 13 of the International Covenant on Economic, Social and Cultural Rights, the Court stated that the state’s obligation to provide higher education requires it to take steps to the maximum of its available resources with a view to achieving progressively the full realization of the Right of Education by all appropriate means. **The relevance of this Court decision** is that the *Court confirmed that the right to free and compulsory primary education, as recognized by Article 13 ICESCR, is a fundamental right when read in conjunction with Article 21 of the Indian Constitution and Article 41 of the country’s Directive Principle on Education.* Furthermore, that the Constitution has converted the right to primary education of children under 14 into justiciable right.

*C.I.5 Minister of Basic Education v. Basic Education for All*

***Minister of Basic Education v. Basic Education for All (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA)***, is a ruling by the Supreme Court of Appeal of South Africa on December 2, 2015. This case concerns the delayed textbook deliveries that has plagued public schools in Limpopo, South Africa’s northernmost province for several years. The Department of Basic Education and Limpopo Department of Education appealed a high court decision holding that their failure to ensure timely delivery of textbooks to learners in Limpopo public schools violated the learners’ constitutional rights. The Supreme Court of Appeal held that the appellants (government entities) violated the rights to education, equality, and dignity under the Constitution by failing to provide learners in Limpopo with prescribed textbooks before the academic term commenced. In 2012, seeking to standardize education nationwide, the Department of Basic Education (DBE) began the three-year rollout of a new curriculum which entailed staggered introduction of new textbooks. The government respondents appealed to the Supreme Court of Appeal (SCA) where SAHRC (South African Human Rights Commission) joined BEFA (Basic Education for All organization) and the school

governing bodies in their cross-appeal. The SCA held that the appellants violated the rights to education (Section 29), equality (Section 9), and dignity (Section 10) of the Constitution by failing – in accordance with its obligation to fulfil human rights (Section 7(2) of the Constitution) – to provide learners in Limpopo with prescribed textbooks before the academic term commenced. The SCA rejected the appellants' arguments that: (1) their efforts to provide textbooks had been hampered by lack of cooperation from the schools; (2) budgetary constraints justified the delayed delivery; (3) the petitioners were asking the government to meet a “standard of perfection” not required by Section 29(1)(a) of the Constitution (on the right to a basic education); and (4) the order granted by the lower court violated the doctrine of separation of powers. Relying on the case of *Governing Body of the Juma Masjid Primary School & others v. Essay NO & others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC), para 37, the SCA confirmed that the right to basic education is “immediately realizable” and not subject to progressive realization. In making this decision, the SCA noted *that the right to basic education is both “constitutionally entrenched and statutorily enforced.”* (para. 40). Thus, rather than holding the government to a “lofty’ ideal,” as the appellants argued, the petitioners were simply trying to “hold [it] to the standard it set for itself.” (para. 42). The DBE had set a policy but had faced an obstacle in the latter stages of implementation. As such, the SCA characterized the appellants' arguments about budget constraints and separation of powers as “fallacious” and seemingly “contrived”. **The relevance of this Court decision** is that the Court confirmed the obligation of the State, *to offer free, compulsory and quality primary education*. Furthermore, *that the right to primary education requires immediate and not progressive realization*. The right is constitutionally entrenched and statutorily enforceable.

*C.I.6 Governing Body of the Juma Masjid Primary School v. Juma Masjid Trust*  
***Governing Body of the Juma Masjid Primary School v. Juma Masjid Trust*, [2011] ZACC 13**, is a ruling by the South African Constitutional Court on April 11, 2011. This case concerns the Constitutional Court decision on direct appeal against an order of the High Court authorizing an eviction of a public primary school from private property. The case covered a range of issues, including, the constitutional right to a basic education; application of constitutional rights against private parties; balancing of private interests in property against children's interest in constitutional right to education; and the responsibility of the Municipality to provide a basic education. The Juma Masjid Trust had allowed the Juma Masjid Primary School, a public school, to operate on its private property for an extended period of time. On the received title from the High Court to evict the school, the Constitutional Court held that notwithstanding the constitutional rights at stake, given the history of the dispute and the efforts made by the Trust to secure an agreement acceptable to all, the Trust had acted reasonably in seeking an eviction order from the High Court. Nevertheless, the Constitutional Court determined that the High Court, in granting that eviction order without considering where the children would go, had failed to take adequate account of the best interests of the children as required by the Constitution and of their constitutional right to basic

education. **The relevance of this Court decision** is that the Court *confirmed that the right to free, compulsory and quality primary education is a Constitutional right of children*. Furthermore, *that the right to primary education serves the best interests of the child as recognized by the Constitution*, reasons why the right supersedes the entitlement to evict a primary school from a private property without a proper alternative.

#### C.I.7 *Konrad v. Germany*

***Konrad v. Germany, European Court of Human Rights (ECHR), Application 35504/03, September 11, 2006.*** 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 recognized as a private school by the State. The institution specializes 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. The Court of First Instance acknowledges the parents’ 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. The Court of First Instance dismissed the request of the applicants to be exempted from compulsory school attendance. The Court of Appeals dismissed the appeal of the parents stating among others that 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 ECHR sided with the arguments made by both previous courts arguing among others. “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 also concluded that there was not an issue of discrimination against the parents at hand. 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 realized. In the case of the *Konrads'* this was not applicable. Exemptions were hence granted by the State 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. **The relevance of this Court decision** is that the Court *confirmed that the State has the obligation to provide compulsory primary education to children and that this obligation under circumstances supersedes rights of the parents for freedom of religion and philosophical convictions for their children.*

*C.I.8 Jiménez Alonzo and Jiménez Merina v. Spain*

***Jiménez Alonzo and Jiménez Merina v. Spain, European Court of Human Rights (ECHR), Communication no. 51188/99 Decision on Admissibility, May 25, 2000.***

Father Jiménez informed the headmaster of the State school where his daughter was in the eight-year of compulsory primary and secondary education, that he was against the “sex” education classes his daughter was obligated to attend under the current curriculum of the school. He argued that this obligation is an infringement of his constitutional right to choose, in his capacity of parent, the moral education of his then 13-year-old daughter. His daughter (Pilar Jiménez Merino) did not attend the classes and refused to answer the questions regarding this class at the final examination. Consequently, she failed the examination and had to repeat the school year. Father Jiménez lodged a complaint to the Ministry of Education and Culture, which was rejected. He also unsuccessfully lodged a special appeal to the High Court of Justice and an amparo appeal with the Constitutional court, claiming that the State infringed the constitutional provisions: the right of parent to choose their children’s religious and moral education (article 27 §3); principle of non-discrimination (article 14) and right to a fair trial (article 4). The court declared the appeal inadmissible.

The ECHR reiterates that, according to its case-law, the second sentence of Article 2 is binding on the Contracting States in the exercise of each Right to Education and every function that they undertake in the sphere of education and teaching, including that consisting of the organization 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 realized. 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 regarding 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 behavior. Furthermore, that information did not affect the right of parents to enlighten and advise their children, to exercise with regard to their children’s natural parental functions as educators, or to guide their children on a path in line with the parents’ own religious or philosophical convictions (...). The complaint was rejected as manifestly ill-founded in accordance with Article 35 § 3 of the Convention. **The relevance of this Court decision** is that it reiterates that the right to education as a fundamental right, belongs to everyone and its implementation is within the exclusive domain of contracting States which is essential for the preservation of the democratic society.

*C.I.9 Timishev v. Russia, European Court of Human Rights*  
***Timishev v. Russia, European Court of Human Rights (ECHR), application no. 55762/00 and 55974/00, Judgement of December 13, 2015.*** Since 15 August 1996 the applicant has been living in Nalchik as a forced migrant. Between September 1998 and May 2000, the applicant’s nine-year-old son and seven-year-old daughter attended School no. 8 in Nalchik. On 24 December 1999 the applicant received compensation for the property he had lost in the Chechen Republic. In exchange for the 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. On 1 September 2001 the applicant’s son and daughter went to school but were refused admission because the applicant could not produce his migrant’s card. 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. On 1 November 2000 the Nalchik City Court dismissed the applicant's complaint as unsubstantiated. 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 ECHR 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.<sup>6</sup>

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.

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. 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. There has therefore been a violation of Article 2 of Protocol No. 1. **The relevance of this Court decision** is that a denial of the right to education is not tolerated by the Convention and Protocol No. 1 and this right for

6 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.

children cannot be made conditional on the residence status of their parents. The right to education is undoubtedly guarantees access to elementary education/primary education, which is of *primordial* importance for a child's development.

*C.I.10 Folgero and others v. Norway*

***Folgero and others v. Norway, European Court of Human Rights (ECHR), Application No. 15472/02, Judgement of June 20, 2007.*** 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". Instruction in the Christian faith has been part of the Norwegian school curriculum since 1739. The applicants allege violation of article 2 of Protocol N° 2. The parent applicants complained both under Article 9 of the Convention and under the second sentence of Article 2 of Protocol No. 1 on account of the refusals by the domestic authorities to grant their children full exemption from the compulsory KRL<sup>7</sup> subject dealing with Christianity, Religion and Philosophy taught during the ten-year compulsory schooling in Norway.

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 No. 1. 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.

The ECHR reiterated the general principles as stated in several of its previous decisions, discussing the interpretation of Article 2 of the Protocol No. 1 in conjunction with other relevant national and international rules and regulations. The Court argues that 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. 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.

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

7 KRL stands for Christianity, religion and philosophy, in reference of "kristendoms-kunnskap med religions- og livssynsorientering" by its acronym in Norwegian.

indoctrination not respecting the applicant parents' religious and philosophical convictions and thereby had transgressed the limit implied by Article 2 of Protocol N° 1. Notwithstanding 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 No. 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 No. 1. **The relevance of this Court decision** is that the right to primary education is once again accepted as an obligation of the contracting State party and that even though implementing this right falls within the domain of the State, the execution must take place with due consideration of other rights and of the purpose of the right to education for among others the pluralism in education which is essential for the preservation of the democratic society in which children need to live and develop.

*C.I.11 D.H. and others v. the Czech Republic*

*D.H. and others v. the Czech Republic, European Court of Human Rights (ECHR), Application No. 57325/00, Judgement of November 13, 2007.* The ECHR concluded that in this case there has been a violation of Article 14 of the Convention, read in conjunction with Article 2 of Protocol No. 1. Under the education system of the Czech Republic, children belonging to the minority and ethnic group of Roma, living in the State, were placed in special school to complete their compulsory primary education. Under the education system the determination was not in conformity with the general principles issued by the Court in its case law and Article 14 of the Convention and Article 2 of Protocol No 2. **The relevance of this Court decision** is that the right to primary education for children must be offered by the contracting State parties in a non-discriminatory manner.

*C.I.12 Cyprus v. Turkey*

*Cyprus v. Turkey, European Court of Human Rights (ECHR), Application no. 25781/94, Judgement of May 10, 2001.* After concluding their primary education in Greek-Cyprus, children were obligated, when reaching the age of 12 years, to continue their education at a Turkish or English-language school in the north. The ECHR concluded that there has been a violation of article 2 of Protocol no. 1 in respect of Greek-Cypriots living in northern Cyprus in so far as no appropriate secondary school facilities were available to the children. **The relevance of this Court decision** is that a State party has the obligation to also provide for a realistic opportunity to children, after concluding their primary education, to continue with their secondary education.

## C.II Cases in regional perspective

### C.II.1 General remarks

The Americas as a region comprises Latin-America, the Caribbean, Canada and the United States of America. The key regional hard and soft law instruments are treaties, declarations, resolutions, advisory opinions, guidelines, principles, Plan of Actions, case law. As part of international law, regional law also has a normative objective and comprises hard law and soft law. To meet the normative objective, regional law also includes secondary norms that prescribe how primary rules are to be made, interpreted, and applied. Furthermore, secondary law prescribes the institutions through which both kinds of rules are implemented. Secondary law forms the background of a legal system that shapes many international interactions and contributes to defining the very notion of an international actor. Several regional hard law and soft law instruments are discussed in part I of the article.<sup>8</sup>

Based on the applicable regional law, OAS Member States must guarantee the provision of compulsory primary education, free of costs, to all without discrimination. This obligation must be seen in the context of the Right to Education as a multiplier right. This right unlocks other rights when guaranteed and precludes the enjoyment of all human rights and perpetuates poverty when denied.<sup>9</sup> For this reason OAS Member States are obliged to realize the Right to Education, depending on the level, either immediately or progressively.

In light of these obligations, M.G. Margerin refers to the proposal by the Inter-American Commission to complement the Right to Education “4-A” framework proposed by the former U.N. Special Rapporteur on the Right to Education, Katarina Tomasevski, with a fifth “A”. This would add the element of accountability to the initial elements of available, accessible, acceptable, and adaptable. According to Margerin these intersecting frameworks assist policymakers and advocates in evaluating whether and how a state is fulfilling the Right to Education in each of its defining characteristics.<sup>10</sup>

In the regional legal systems of the OAS, Member States have the immediate obligations to provide compulsory primary education that is free to all, without discrimination on any basis, and to ensure that all persons within their jurisdictions receive equal protection under the law. This obligation was reiterated in the *Decision C-376/10 of the Colombian Constitutional Court*. Based on Article 13 of the Protocol of San Salvador, the Court found that Colombia has an obligation to guarantee compulsory, free and accessible education. According to the Court this obligation to guarantee free compulsory primary education is unequivocal and immediate. Furthermore, this ruling is consistent with paragraph 51 of General Comment No. 13 on the levels of legal obligations imposed on State Parties to the International Covenant on Economic Social and Cultural Rights (ICESCR).

8 See section II.B. Regional Instruments of this article, page 110 et al. SJB 2022 no. 3.

9 Katarina Tomasevski, *Human Rights Obligations in Education: The 4-A Scheme*, Nijmegen: Wolf Legal Publishers (WLP) 2006. p. 47.

10 Marselha Gonçalves Magarin, *The Right to Education: A Multi-Faceted Strategy for Litigating before the inter-American Commission on Human Rights*, The Human rights Brief. Center for Human Rights and Humanitarian Law, Volume 17, Issue 3 (2010), p. 23.

OAS Member States have the obligation to progressively realize the right to secondary and higher education, within the parameters of the concept of “reasonable time” contemplated by the inter- American human rights system.<sup>11</sup> This means that while the right to free and compulsory primary education is of immediate effect, States must progressively realize the right to secondary and higher education, using the maximum available resources. “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 the Right to Education as defined by regional and international law. The progressive nature of the obligation does not mean that economic, social and cultural rights are unenforceable. This was also confirmed by the *Decision C-376/10 of the Colombian Constitutional Court*. Also based on Article 13 Protocol of San Salvador, the Court reasoned that Colombia has an obligation to guarantee compulsory, free and accessible education. According to the Court this obligation is of a progressive nature in the case of secondary and higher-level education. General Comment No. 13 on the levels of legal obligations imposed on the State Party by the ICESCR also confirms in paragraph 59 that the obligation to progressive realization of the Right to Education relates to the right to secondary and higher education and not to the right to free compulsory primary education.

As indicated in previous sections the Right to Education is vitally important because it is a ‘multiplier’ right: Its realization both advances the right to equality and enhances other related rights and freedoms.

The Robert F. Kennedy Center for Justice & Human rights prepared a report for the thematic hearing before the Inter-American Commission on Human Rights in 2008.<sup>12</sup> The report provides the following viewpoints on the importance of realizing the Right to Education for in particular marginalized populations and populations with vulnerabilities, in this case Afro-descendants and Indigenous peoples. According to K. TOMASEVSKI the Right to Education functions as a multiplier, enhancing all rights and freedoms when it is guaranteed while jeopardizing them all when it is violated.<sup>13</sup> States must provide to persons within their jurisdictions the Right to Education free of discrimination of any kind. As an obligation *erga omnes*, the principle of non-discrimination “binds all States and gives rise to effects with regard to third parties, including individuals”.

The report refers to the Advisory Opinion OC-18/03 of the Inter-American Court of Human Rights of September 17, 2003, in which the Court stated that in compliance with the non-discrimination obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. This translates, for example, into

11 See Suárez Rosero Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, at para. 72 (Nov. 12, 1997), available at [http://www.wcl.american.edu/humright/hracademy/corteidh/seriecpdf\\_ing/seriec\\_35\\_ing.pdf?rd=1](http://www.wcl.american.edu/humright/hracademy/corteidh/seriecpdf_ing/seriec_35_ing.pdf?rd=1); see also American Convention, *supra* note 4, at art. 26; Protocol of San Salvador, *supra* note 6, at arts. 13(3)(b)-(c); Convention of Belém do Pará, *supra* note 10, at art. 8(b); OAS Charter, *supra* note 10, at art. 49.

12 Robert F. Kennedy Center for Justice & Human Rights, *Right to Education of Afro-descendants and Indigenous Peoples in the Americas: Achieving Dignity and Equality for All*, rfkcenter.org, 2008, p.46.

13 <https://en.unesco.org/news/what-you-need-know-about-right-education>.

the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminates against a specific group of persons because of their race, gender, color or other reasons.<sup>14</sup> The report continues by stating that non-discrimination is a prerequisite to the enjoyment by all, of the Right to Education. Moreover, the realization of the Right to Education for marginalized communities has the long-term potential to diminish the discrimination that they routinely face. Education helps develop tolerance, appreciation, and respect for difference. A meaningful education, defined as education that is available, accessible, acceptable, and adaptable, and for which there are appropriate mechanisms to hold the government accountable, is essential to transcending poverty. It is, moreover, fundamental to the ability of everyone to participate in and contribute to all economic, social, cultural, civil, and political aspects of society.

The Robert F. Kennedy Center for Justice & Human Rights also highlights paragraphs 1 and 13 of General Comment nr. 13 where the Committee on Economic, Social and Cultural Rights confirms that the Right to Education is both itself a fundamental human right and an essential means to promote several other rights and freedoms. However, the Right to Education is complicated in the case of Afro-descendant and indigenous peoples because State- provided education is generally constructed through and measured by non- indigenous standards, values, and philosophies.<sup>15</sup> When education is used as a means of assimilation, the rights of minority groups are often negatively impacted. For such groups, however, the Right to Education is an essential means to preserve and strengthen their cultural identity”.<sup>16</sup>

The report points out that, in line with Article 13 paragraph 2 of the Protocol of San Salvador and Article 23 paragraph 2 of the American Convention, obtaining an education provides otherwise marginalized individuals with the tools needed to rise out of poverty and participate more fully in their communities and governments. Fulfilling the Right to Education is linked to the realization of the right to food, as granted by Article 12 of the Protocol of San Salvador, and the right to health, as granted by Article 10 of the Protocol of San Salvador, by giving people the economic foundations to access proper nutrition and health care. The Right to Education, for example, directly enhances the right to health when an educational system incorporates health education into its curriculum, as provided for by Article 10 paragraph 2 of the Protocol of San Salvador.

The Inter-American Court of Human Rights rendered an Advisory Opinion OC-17/2002 on the interpretation of the Articles 8 and 25 of the American Convention, with the aim of determining whether the special measures set forth in Article 19 of that same Convention establish “limits to the good judgment and

14 Advisory Opinion OC-18/03, para. 103.

15 The Coolangatta Statement on Indigenous Peoples' Rights in Education, World Indigenous Peoples' Conference on Education, Hilo, Hawaii, 6 August 1999.

16 Fons Coomans, Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realization, in *Human Rights in Education, Science and Culture: Legal Developments and Challenges* 183, 185 (Yvonne Donders & Vladimir Volodin eds., 2007).



discretion of the States” with respect to children, and it also requested that the Court express general and valid criteria on this matter in conformance to the framework of the American Convention.<sup>17</sup> The Advisory Opinion OC-17/2002 reaffirms that children are subjects entitled to rights, not only objects of protection. Furthermore, that children’s development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children’s lives. Respect for life, regarding children, encompasses not only prohibitions, but also the obligation to adopt the measures required for children’s existence to develop under decent conditions. And finally, that true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments.

### *C.II.2 Decision C-376/10 of the Colombian Constitutional Court*

**Decision C-376/10 of the Colombian Constitutional Court**, is a ruling by the Colombian Constitutional Court on November 1, 2009. This case concerned a Constitutional claim regarding Law 115 of 1994, which regulates the national education law; Obligation of the Colombian State to guarantee the Right to Education; Fundamental nature of the Right to Education of minors; Providing free education as an unequivocal obligation which must be immediately enforced with respect to primary education. The plaintiffs argued that Law 115 of 1994 did not comply with international human rights standards by allowing for the option to charge fees on primary education (sect. 183). The Court found the contested law unenforceable, considering that fees May not be applied to official primary education, but only to secondary and higher education levels. Furthermore, charging fees in the primary education level could become a barrier to accessing the education system. In its review of the case, the Court included a list of the instruments and comments by international human rights treaty bodies establishing Colombia’s obligation to guarantee a compulsory, free and accessible education.<sup>18</sup> According to such international instruments and comments, the State has the unequivocal, immediate obligation to guarantee free primary education, while in the case of secondary and higher-level education, the obligation is of a progressive nature. The Court also restated the fundamental nature of the Right to Education, which applies, according to its own case law, to all persons younger than 18, as well as the hierarchy of children’s rights over the rights of others, as established in the Constitution. **The relevance of this Court decision** is that the Court reaffirmed that the State has a legal obligation to immediate realization of the right to compulsory primary education. Furthermore, that the Right to

17 Inter-American Court of Human Rights Advisory Opinion OC-17/2002, of August 28, 2002, requested by the Inter-American Commission on Human Rights. *Juridical Condition and Human Rights of the Child*, para. 1.

18 Universal Declaration of Human Rights (art. 26), International Covenant of Economic, Social and Cultural Rights (art. 13), Protocol of San Salvador (art. 13), Committee of Economic, Social and Cultural Rights (General Comments 11 and 13), Committee of Economic, Social and Cultural Rights (Comments for Colombia), UN Human Rights Commission, Office of the High Commissioner for Human Rights.

Education must be implemented without access barriers, reasons why it must be offered complete free from fee charges.

### C.II.3 *Settlement agreement between ACIJ and the Autonomous City of Buenos Aires*

**Settlement agreement between ACIJ and the Autonomous City of Buenos Aires, concerning case 23360/0 of 2008**, is a ruling by the Superior Tribunal of Justice of the City of Buenos Aires on February 9, 2011. This case concerns a settlement agreement reached and signed between ACIJ and the City of Buenos Aires Government to ensure that an adequate number of places are available in public schools in order to fulfill the rights to education and equality. In 2006, *Asociación Civil por la Igualdad y la Justicia* (ACIJ), an organization member of the ESCR-Net, filed an amparo action against the Government of the City of Buenos Aires. The purpose of the action was to have the Court order the Government to comply with its existing constitutional obligation to ensure and finance access to early education. The case centered on violations of the Right to Education and to equality, as well as the principle of personal autonomy. Thousands of children were being left out of the public school system, while the schoolwork's budget was being underspent (as between 2002 and 2005 average spending had been 32.3% below budget). The case was decided favorably in the first and second instances, with the courts acknowledging the rights to education and personal autonomy, and the advantages of early education. The courts recognized that the State had violated its obligations and that the underspending of budget allocations violated the obligation to exhaust all available resources. When the case reached the Superior Tribunal of Justice, the parties reached a settlement agreement. Under the agreement, the Government promised to execute building plans to address the lack of vacant places and to allocate sufficient resources to implement its constitutional obligation regarding early childhood education in each budget plan. **The relevance of this Court decision** is that the first and second instance courts confirmed the right to free, compulsory and quality primary education. Furthermore, that the State has a legal obligation to guarantee full and non-discriminatory enjoyment of the right, by ensuring the availability of public schools through allocation of sufficient resources.

### C.II.4 *Luke Gannon by his next friends and guardians, et al. v. State of Kansas*

**Luke Gannon by his next friends and guardians, et al. v. State of Kansas, 298 Kan. 1107, 319 P.3d 1196 (2014) [Gannon I]; 303 Kan. 682, 368 P.3d 1024 (2016) [Gannon II], --- Kan. ---, --- P.3d --- (2016) 2016 Kan. LEXIS 300 [Gannon III]**, is a ruling by the Supreme Court of the State of Kansas on March 2, 2017. This case focused on whether school funding by the State of Kansas was equitable and adequate, as required under the relevant state Constitutional provisions regulating the provision of education. Upon finding violations in connection with the equitable distribution of funds and the adequacy of such funds to ensure constitutionally required education, the State of Kansas was required to review and adjust its education funding. This required implementing action by the state legislature, with a continued supervisory role for the state Supreme Court. In 2010, four Kansas school districts, 31 students, and their guardians sued the State of

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Kansas alleging those cuts in public school budgets beginning in 2009 had left schools inadequately funded and that portions of the funding were inequitably distributed, in violation of Article 6 of the Kansas Constitution (regulating education provision), state statutes, and due process and equal protection clauses of the Kansas and United States Constitutions. Compliance with the *equity* requirement meant “school districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.” In March 2017, the Kansas Supreme Court issued a ruling on the *adequacy* of school funding. Regarding implementation, this was deemed inadequate given the state failure to provide approximately a quarter of K-12 (from kindergarten to 12<sup>th</sup> grade) students with basic reading and math skills, and because significant groups of “harder-to-educate” children or students, were left behind. The Court found that the evidence showed insufficient test results to be related to funding levels. **The relevance of this Court decision** is that the Court confirmed the right to free, compulsory and quality primary education. Furthermore, that the State has a legal obligation to guarantee full and non-discriminatory enjoyment of the right, by ensuring the availability of public schools through allocation of sufficient resources.

*C.II.5 The Girls Yean and Bosico v. The Dominican Republic*

***The Girls Yean and Bosico v. The Dominican Republic, Inter-American Court of Human Rights (IACtHR), Judgement of 8 september 2005.*** This case concerns a petition submitted to the Inter-American Commission on Human Rights (IACHR) alleging violation of rights to nationality and education of girls of Haitian descent born in the Dominican Republic. Right to nationality is considered a way to have civil and political rights acknowledged. Therefore, petitioners claimed that the Dominican Republic should respect its obligation to the right to non-discrimination in granting the girls the nationality.

Precautionary measures were requested to prevent deportation and to guarantee the Right to Education of a girl in school age. The petitioners claimed that, since their nationality was not acknowledged, the girls were exposed to the imminent threat of being expelled from the country and, lacking an identity document, could not attend school. The IACHR adopted precautionary measures to prevent the girls’ deportation and to guarantee that Bosico could continue going to school and referred the case to the Inter-American Court of Human Rights.

The IACtHR stated that the cases in which the victims of human rights violations are children are particularly serious. The prevalence of the child’s superior interest<sup>19</sup> 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.<sup>20</sup>

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

19 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.

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

group.<sup>21</sup> In view of the above, the Court did not rule on the alleged violation of Article 19 of the American Convention in isolation, but included in its decision also the examination of the other articles that are relevant to this case. 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.

It is worth noting that, according to the child's right to special protection embodied in Article 19 of the American Convention, interpreted in light of the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development.

The Court observes that the violation of the right to nationality of the Yean and Bosico girls, 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.

Finally, the Court requested the State to guarantee access to free elementary education for all children regardless of their background or origin. The Court considered that this obligation is a consequence of the special protection children are entitled to. **The relevance of this Court decision** is that the Court confirmed the right to free, compulsory and quality primary education, to be implemented without discriminatory access barriers. Furthermore, that the State has a legal obligation to guarantee all children access to free elementary education regardless of their nationality, background, social status or origin.

#### *C.II.6 Campaign for Fiscal Equity et al. v. State of New York et al*

***Campaign for Fiscal Equity et al. v. State of New York et al.* 719 N.Y.S.2d 475**, is a ruling by the Supreme Court of New York on January 9, 2001. This case concerns the challenge of state school funding system on the basis of the Education Article of the New York Constitution (Article XI § 1). The case addressed a range of issues including, the constitutional right to a sound basic education, adequacy of school funding, budgetary allocations, and the nature of remedies. In 1993, the Campaign for Fiscal Equity, as well as several students and their parents, filed a complaint asserting that New York State's educational financing scheme. According to the complaint the educational financing scheme fails to provide public school students in New York City, an opportunity to obtain a sound basic education. This constitutes a violation of the state Constitution. In later proceedings the Court of Appeals clarified that basic education should also cover the skills needed to sustain competitive employment and to acquire higher education. The Court noted that

21 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.

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accomplishing this requires minimally adequate physical facilities, and basic learning resources, as well as being taught up-to-date curricula by adequately trained teachers. The decision of the State Supreme Court in relation to the Education Article was subsequently upheld in 2003 by the Court of Appeals which issued a tri-partite remedial order that required the State to determine the cost of providing a sound basic education in New York City, reform the current system to ensure adequacy of funding for all schools and establish a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education. **The relevance of this Court decision** is that the Court confirmed the right to free, compulsory and quality primary education. Furthermore, that the State has a legal obligation to guarantee full and non-discriminatory access to quality education, which requires the allocation of sufficient resources to minimally ensure the availability of adequate physical facilities, basic learning resources and adequately trained teachers who can provide teaching based on up-to-date curricula.

*C.II.7 Xákmok Kásek Indigenous Community v. Paraguay*

***Xákmok Kásek Indigenous Community v. Paraguay, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgement of August 24, 2010.*** In this case these indigenous groups were denied access to their ancestral lands and members of the communities were living in very bad conditions. With regard to the right to education the court argued among other as follows. According to international standards, States have the obligation to guarantee access to free basic education and its sustainability.<sup>22</sup> In particular, when it comes to satisfying the right to basic education of indigenous communities, the State must promote this right from an ethno-educational perspective.<sup>23</sup> This means taking positive measures to ensure that the education is culturally acceptable from an ethnically differentiated perspective. 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. In addition, the State does not provide any type of program to prevent students from abandoning their studies. 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. 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

22 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".

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

spheres of cultural life and more importantly, seriously affects their hopes for the future and their ability to effectively enjoy their own culture”.<sup>24</sup>

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, 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. As can be observed from these examples of inter-American case. 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. Right to Education 42 the highest national jurisdictions granting effectiveness to this social right; at times even directly and not only in connection with civil and political rights.

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, Articles 10 (Right to Health), 11 (Right to a Healthy Environment), 12 (Right to Food) and 13 (Right to Education). **The relevance of this Court decision** is that the Court confirmed the right to free, compulsory and quality primary education for everyone living in the State, specifically for groups living in very poor conditions and circumstances, among which indigenous communities.

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



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### C.II.8 *T Suarez Perata v. Ecuador*

***Suarez Perata v. Ecuador, Inter-American Court of Human Rights, Judgement of May 21, 2013.*** In this case the court discussed the issue of justiciability of the economic, social and cultural rights, stating among others...”.....The 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”<sup>66</sup> of the Inter-American Court, which has “competence with respect to matters relating to the fulfillment of the commitments made by the State Parties” to the Pact of San José. In several judgements the Inter-American Court expressly recognized that it is competent to examine direct violations of economic, social and cultural rights in light of Article 26 of the Pact of San José.

The interpretation by the Inter-American Court, adopted unanimously, 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.

In this regard, the Inter-American Court has indicated on previous occasions 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 Treaties. When making an evolutive interpretation, the Court has given special relevance to comparative law, and has therefore used domestic laws or the case law of domestic courts when analyzing specific disputes in contentious cases.

The Inter-American Court cannot remain on the sidelines of the contemporary debate on the fundamental social rights – 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. 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. **The relevance of this court decision** is that the right to education, as an economic, social and cultural right, evolved into an enforceable fundamental right of this category.

#### D. The implementation of the right to (free) compulsory primary education in O.A.S. Member States

Authors of this article participated in a research among OAS Member States regarding the implementation of compulsory primary education in the region. A questionnaire was developed and submitted through the secretariat of the Inter-American Juridical Committee (IAJC) to all OAS Member States. In general, the questionnaire seeks to collect data at member States level. Sought information is whether member States are party to international and regional instruments safeguarding the Right to Education and if so to how many. Also sought is information on whether the Right to Education is guaranteed in the Constitution and to name specific laws regarding (compulsory) primary education in case they are adopted by a member State. Furthermore, the related ages to compulsory education per member State, the availability of special education or inclusive education for children, and whether primary education is equally provided throughout the State, in the interior as well for specific groups and communities. Ultimately what the State's view is on the importance of compulsory primary education.

Only 13 States submitted their questionnaire to the IAJC. The IAJC is hereby given the opportunity to have an oversight of the developments in this area: education, one that is not only extremely vital to the livelihood of a State, but one that has suffered even more due to the corona pandemic.

All respondent States answered yes to the question: **Is primary education compulsory in the State?** This certifies that these member States acknowledge the importance of education to children in the prime stage of their life, hereby acknowledging and accepting the importance of primary education for the State itself.

All respondents indicated that their Constitution guarantees the Right to Education. Furthermore, they all stated that specific laws regarding (compulsory) primary education, have been adopted and that special education or inclusive education is provided for children. Against that backdrop, respondent States listed several laws guaranteeing primary education ranging from kindergarten to high school education.

On the matter of primary education compulsory ages, the response varies depending on each member State, from the upper age limits of 11, 12, 15, 16, 17, and 18 years. But also, the ranges of lower and upper age limits of 5 to 15 years, 3 to 18 years, 6 to 12 years, and 5 to 16 years. As lower age limit, the ages of 3, 4 and 5 are also reported. It is worth mentioning that these lower age limits connect seamlessly with Early Childhood Development Programs (ECD P).<sup>25</sup> All respondent States stated that the right is implemented by a governmental body. Of those, ten respondents require mandatory school attendance, and 9 respondent States

25 ECD: Healthy development in the early years (particularly birth to three), provides the building foundations for educational achievements, economic productivity, responsible citizenship, lifelong health, strong communities and successful parenting of the next generation. <https://developingchild.harvard.edu/guide/What-is-early-childhood-development-a-guide-to-the-science>.

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threatens with sanctions in case of non-compliance. A total of eight respondents indicated that they offer compulsory primary education completely free of charge. But all respondent States expressed that primary education is compulsory and equally provided throughout their jurisdictions. This is the result of the view held by all respondent states that compulsory primary education is of great importance. States expressed importance in relation to human development, advancement of all other human rights and the close connectivity with human development and prosperity.

On the matter of connectivity between the level of implementation of the right to compulsory primary education and socio-economic developments such as street children, crime rates, illiteracy and poverty, several respondent States indicated that they do not have the sought data readily available. Several States indicated that they are not unaware of a possible connectivity.

It is important to notice that the socio-economic status of the parents is of huge importance, since this has an impact on how these parents abide by the right to compulsory primary education. If parents are poorly educated, are struggling to maintain their head above the poverty line, they will most likely not understand the importance of giving their children the opportunity to receive an education to break through the cycle poverty, social injustice, crime, etc. Children are often kept out of school and are instructed to assist the family with the selling of small goods, to “make ends meet”.

## E. Conclusions and recommendations

### *E.I Conclusions*

The study concludes that the Right to Education, in principle an economic, social and cultural right, must be considered as evolving towards being a fundamental human right. As set out with this study, **Compulsory Primary Education**, falls in the cluster of immediate realization obligations. Due to which, this cluster of the Right to Education must be recognized as a fundamental human right.

As seen in the various court decisions presented above, when dealing with the immediate realization obligations, claims of financial constraints are subject to strict scrutiny. Affording the right to **Compulsory Primary Education** to children and youth, does no longer depend on the goodwill of States but is rather a mandatory obligation for States based on jurisprudence customary, international and regional law.

States will have to comply with this obligation irrespective of possible economic, financial, social and cultural constrains they might encounter in the implementation of this human right to children. The State will have to take the necessary measures to make sure that no child is kept out of school and that every child is given the opportunity to attend school with the purpose of breaking through the cycle of poverty and social inequality.

### *E.II Recommendations*

States must be given the opportunity to guarantee that the right to Compulsory Primary Education is implemented correctly, by securing availability and access for all on the territory of the State.

To achieve the goal to guarantee that the right to compulsory primary education is afforded to all children, OAS member States must adopt specific programs to inform and educate its constituents, in particular members of specific groups and communities (indigenous, maroons, children with disabilities, children in the interior, children living in poverty, etc.)

Assistance from the international community, international and regional organizations in implementing the right to compulsory primary education must be provided to the States that are in need of that assistance. This assistance is currently needed because of the disruptive consequences for the education systems in OAS Members States, due to the corona pandemic.