

ON THE IMPLEMENTATION AND JUSTICIABILITY OF THE RIGHT TO EDUCATION

Jan De GROOF*

President of the European Association for Education Law and Policy

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

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

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

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

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

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

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

1.1. “Justiciability”

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

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

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

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

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

⁷ SINGH op. cit. para 27.

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

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

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

¹¹ JAMES op. cit. 1.

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

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

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

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

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

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

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

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

1.2. Why is justiciability important?

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

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

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

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

²⁰ SINGH op. cit.

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

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

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

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

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

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

²³ COOMANS op. cit. 428.

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

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

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

²⁷ COOMANS op.cit. 429.

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

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

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

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

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

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

²⁹ LIEBENBERG op. cit. 80.

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

³¹ Sentencia T-534/97.

³² T-255/01.

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

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

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

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

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

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

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

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

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

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

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

⁴¹ Inter-American Court of Human Rights, Case of the *Juvenile Re-education Institute v. Paraguay*, Judgment of 2 September 2004, Series C, No. 112; Case of the *Indigenous Community Yakye Axa v. Paraguay*, Judgment of 17 June 2005, Series C, No. 125; Case of *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146.

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

⁴³ SINGH op. cit. para 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Failure to achieve the millennium goals

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

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

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

⁶³ COOMANS op. cit. 220.

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

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

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

5. Remedial actions

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

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

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

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

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