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## Right to Education

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## A. General

1. Education is a fundamental human right and is essential to the existence and prosperity of an open and democratic society. Indeed:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities ( (International Covenant on Economic, Social and Cultural Rights) ICESCR General Comment 13, para. 1).

2. The Supreme Court of the United States noted the importance of education in its landmark decision in the → *Brown v Board of Education of Topeka Case (US)*:

Today, education is perhaps the most important function of state and local governments ... It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education (493).

3. Rights in the field of education are recognized, one way or another, in all modern legal systems. However, the content of the right and its normative status varies from place to place, given historical and social influences, such as culture, language, social stratification, religion, attitude to socio-economic human rights and others.

## B. The Right to Education as a Constitutional Right

4. In the realm of jurisprudence, the right to education is mainly recognized as the socio-economic human right most commonly acknowledged throughout the world. On the international level, a large number of covenants protect the right to education (the most famous of these are the UN's → *Universal Declaration of Human Rights (1948)* (UDHR) Art. 26 and the UN → *International Covenant on Economic, Social and Cultural Rights (1966)* Art. 13). On the national level, the right to education is protected, in various ways, in the constitutions of about 155 countries, and about 80 per cent of the world's constitutions guarantee the right to education or aspire to protect it (Heymann, Raub and Cassola 135). Obviously the level of protection varies from country to country. On one side of the spectrum are constitutions in which the right to education is non-justiciable (justiciability) and is mentioned only as an aspiration or a directive principle of state policy. This was the situation in India until 2002 (Feasley 27; Sripathi and Thiruvengadam 149) and Pakistan until 2010 (Ullah 337). Today this low level of protection can be found, for example, in the Constitutions of Lesotho (Arts 28 and 25) and The Netherlands (Arts 23 and 120; Coomans 429–430). On the other side of the spectrum are constitutions in which the right to education is justiciable and with wide scope (Coomans), such as constitutions guaranteeing free education at all levels, including higher education. The Constitution of Afghanistan, for example, states: 'Education is the right of all citizens of Afghanistan, which shall be offered up to the B.A. level in the state educational institutes free of charge by the state' (Art. 43; Foreman-Murray 149). Between these poles there are various forms of constitutional protection of the right to education. These include the right to → *primary education*, secondary education, higher education, compulsory education, free education at different levels and equal education, as well as educational protections for specific vulnerable groups based on gender, disability status, socio-economic status, ethnicity, religion or linguistic group, and combinations of the different forms of protection as mentioned (Heymann, Raub and Cassola 135–137). Moreover, there are constitutions that establish budgetary regulations regarding education (public finance). For example, according to Indonesia's

Constitution: 'The state shall prioritize the budget for education to a minimum of 20% of the State Budget and of the Regional Budgets to fulfil the needs of implementation of national education' (Art. 31; Manan 2015, 56–57). In another example the Philippine Constitution states: 'The State shall assign the highest budgetary priority to education' (Art. XIV, Section 5(5); Coomans 433–434).

**5.** It is important to emphasize that we can glean partial insights into protection of the right to education through an examination of educational provisions in national constitutions: First, in federations, constitutional protection of the right to education can be found at the state level rather than in the federal constitution. For example, in the United States Constitution, there is no clause that contains an explicit guarantee of the right to education, and the US Supreme Court, in *San Antonio Indep Sch Dist v Rodriguez*, declined to recognize a fundamental federal right to education (Feasley 9; Foreman-Murray 136; Imoukhuede (2011) 48). Hence, protection of the right to education in the United States remains at state level. In practice the constitutions of each of the 50 states have clauses regarding education, and as a result, there are 50 different jurisdictions regarding the right to education in the United States (Eastman 2; Hubsch 1343–1347).

**6.** Second, even in countries where there is no explicit provision regarding the right to education or where the right to education is a directive principle of state policy, there is a tendency for the courts to interpret this right as an implied justiciable fundamental right that is an integral part of other constitutional rights. As mentioned earlier, until 2002 the right to education in India was non-justiciable and was a directive principle of state policy. Nevertheless, in 1992 the Supreme Court of India, in a landmark decision in *Mohini Jain v Karnataka*, interpreted the right to education as a necessary condition for fulfilment of the right to life and human dignity (dignity and autonomy of individuals) under Art. 21 of the Indian Constitution:

Right to life is the compendious expression for all those rights which the Court must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Art. 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.

**7.** Later, in *Unni Krishnan v State of Andhra Pradesh*, the Supreme Court confirmed the decision in *Mohini Jain v Karnataka* (page 661; Feasley 27; Sripathi and Thiruvengadam 149; Coomans 430). In 2002, the Constitution of India was amended to read, 'The State shall provide free and compulsory education to all children of the age of six to fourteen years' (Art. 21A).

**8.** Likewise, Israel does not have an explicit constitutional provision regarding the right to education. In *Rubinstein v The Knesset*, the → *Supreme Court of Israel (Beit HaMishpat HaElyon)* gave a ruling similar to that of the Indian Supreme Court, stating that the right to education is part of the right to human dignity incorporated in the Israeli Basic Law on Human Dignity and Liberty (Barak 804).

**9.** In general, divergent aspects of education are subsumed under the inclusive heading 'education' or 'the right to education'. The prevalence of this heading continues, even today, to be the source of conceptual confusion. A careful reading of the articles referring to education in constitutions (and international conventions) leads to the conclusion that the right to education encompasses three elemental rights that should be distinguished from one another—the right to receive education, the right to choose education and the right to equitable education—along with the feature of compulsory education, the obligation to attend school. These rights can either complement each other or clash, depending on the context (Barak 804). This multi-dimensional approach to the right to education, which considers it a bundle of rights, is consistent with the approach of the ICESCR, which emphasizes the 4-A right to education framework—availability, accessibility, acceptability and adaptability (ICESCR General Comment 13, para. 6).

## C. The Right to Receive Education

### 1. Nature and Scope

**10.** The right to receive education is precisely that—the individual's right to receive education and educational services that are funded by the state. This is a positive right; it assigns to the state the 'duty to perform', that is, to provide and fund education. For instance, in a famous decision, C-376/10, the → *Constitutional Court of Colombia (Corte Constitucional de Colombia)* ruled in 2010 that a statute that allows the option to charge fees for primary education in public schools is unconstitutional. This positivism associates the right to receive education with an entire family of second-generation → *social rights*. However, it should be noted that the approach of progressive realization of socio-economic rights within available state resources does not necessarily apply to the right to education. Recently the Constitutional Court of South Africa held, in *Juma Musjid Primary School v Essay*, that the right to basic education under Art. 29 of the South African Constitution, unlike other socio-economic rights, is immediately realizable and enforceable, and that any limitation of this right must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom', according to the general limitations clause (Skelton 2). This is also the case in Israel (Barak 816). However, even when there is a strong constitutional protection for the right to education, budget considerations can limit the realization of right. For instance, as mentioned, the Philippine Constitution states: 'The State shall assign the highest budgetary priority to education'. In practice acts provide automatic appropriations for debt service which are higher than the budget for education. In *Guigona Jr v Carague* the question arose whether or not the automatic appropriation for debt service is unconstitutional. The Supreme Court ruled that the allocation to the national debt is constitutional, and that 'Congress (the legislator) in the Philippines must have the power to respond to 'the imperatives of the national interest and ... the attainment of other state policies or objectives'. What was at stake in the view of the Court was 'the very survival of our economy'. Although 'the Constitution mandates that the highest budgetary priority be given to education, it does not follow that the hands of Congress are so hamstrung' as to deprive it of its power to respond to economic and financial challenges' (Coomans 433).

**11.** The right to receive education also embodies peripheral rights such as the right to adequate infrastructure in educational institutions. In 2012 the Supreme Court of India, in *Environmental and Consumer Protection Foundation v Delhi Administration*, ordered that all schools, private and public, must provide toilet facilities for boys and girls, drinking water facilities and sufficient classrooms, and appoint teaching and non-teaching staff, within six months. This judgment demonstrates the broad deployment of the right to receive education, which can be impacted not only by the failure to provide education, but also by the failure to provide adequate facilities in educational institutions.

**12.** The right to receive education thus encompasses three possible levels of implementation: primary or basic education, secondary education and higher education. The majority of national constitutions, about 80 per cent in the world, protect at least the right to receive free basic education (Heymann, Raub and Cassola 135). Examples of national constitutions that grant free basic education: South Africa's Constitution Art. 29(1); Ireland's Constitution Art. 42(4); Spain's Constitution Art. 27(4); Switzerland's Constitution Arts 19 and 62; Belgium's Constitution Art. 24; Italy's Constitution Art. 34(2); Finland's Constitution Art. 16(1); Japan's Constitution Art. 26(3); Poland's Constitution Art. 70(2); Luxembourg's Constitution Art. 23; Taiwan's Constitution Art. 160(1)). In several Western welfare states (social or welfare state) as well as in those subscribing to the socialist-communist tradition (Seite: *5socialism*; Seite: *5communism*) and in several constitutions from recent years, the right to receive education includes the right to free higher education. For examples of constitutions that guarantee free higher education see: Art. 13 of the Preamble to France's fourth Constitution 1946; Greece's Constitution Art. 16(4); Portugal's

Constitution Art. 74(2); Russia's Constitution Art. 43(3); Armenia's Constitution Art. 35; Haiti's Constitution Art. 208; Egypt's Constitution Art. 21; Afghanistan's Constitution Art. 43; Tunisia's Constitution Art. 39.

## 2. Justifications

**13.** Several justifications can be adduced for recognizing the right to receive education. The first is that education provides the foundations for individual autonomy and the right to liberty and human dignity (dignity and autonomy of individuals). According to this argument, there are strong and well-defined interests underlying an individual's right to receive state-provided education because in modern society, education is essential for the existence and realization of liberty. Without education, liberty declines in value (Berlin liii). Education likewise meets two conditions for human dignity. On one level, the right to education relates to human dignity in its extrinsic sense. In meritocracies, such as those found in Western societies, a person's extrinsic dignity is considerably affected by educational accomplishments because the amount of education obtained represents the primary measure for assessing the person's worth, capabilities and potential to succeed in numerous areas of daily life. The role of education in the construction of a person's status in contemporary society follows from this condition. Moreover, education—but especially higher education—is often the only hope a person has to overcome the barriers of an economically disadvantaged background. Stated simply, education is a fundamental instrument of social mobility (Friedman 172). On the second level, the right to education relates to human dignity in its intrinsic sense. We cannot ignore the decisive contribution of education to personal development and individual self-esteem, to a sense of inner value and individual worth (Rawls (1971) 101; Rawls (1999) 166).

**14.** The second justification for the right to education is that education is elemental for the realization of basic civil and political rights. This argument has often been raised in US judicial decisions (*School District of Abington Township, Pennsylvania v Schempp*; *Wisconsin v Yoder*). For instance, people have an interest in receiving education because education is necessary for freedom of expression. If freedom of expression is necessary for democracy, the furtherance of truth and the exchange of ideas in 'the free market of ideas', education is a necessary condition for the realization of this right. Education is, after all, the main vehicle for the accumulation of knowledge and the formation of ideas. Without education, the marketplace of ideas characterizing democratic regimes would be emptied of its goods (Bitensky 600–1). A similar argument can be made with respect to the right to vote: an individual has a strong interest in receiving education because it is one of the conditions guaranteeing realization of the basic right to vote.

**15.** The third justification is embedded in utilitarian considerations: education benefits not only the individual, but all of a nation's other citizens and residents. Considered from this perspective, allocation of funds to education represents an investment in human resources that promotes a nation's economic prosperity and social well-being, among other social goals, which is expressed in rising levels of culture, decreased crime rates, prevention of sexually transmitted diseases, and decreased poverty. Those who lack an education not only deprive themselves of their own rights and humanity, but also jeopardize their community's legitimate interests.

**16.** Finally, we can justify the recognition of social rights, especially the right to receive education, with other perspectives, primarily neo-Aristotelian and communitarian. Claims for provision of the means to facilitate individual self-realization within a network of community relations by influencing the character of that community, demand that every person recognizes his or her own inherent capabilities, such as the skills acquired in the course of primary and secondary education. Communitarian approaches express an integrated perspective holding that community membership rests on three levels of rights that are conceived of as complementary: civil rights, political rights and socio-economic and cultural rights (especially the right to education).

### **3. Aspects of the Right**

#### **(a) A Human or Civic Right**

**17.** Because education is a pre-condition for the exercise of basic human rights—individual autonomy, human dignity and freedom—the right to receive education is a universal human right, not limited to a nation’s citizens. The courts in many countries have recognized that the right to education is intrinsic, part of the individual’s humanity and that this right is therefore to be granted to all citizens (including the poor, prisoners or other persons living on the margins of society) as well as non-citizens. In a famous case, *Plyler v Doe*, the US Supreme Court invalidated a law that denied children of illegal immigrants the right to education in the public school system (immigration).

#### **(b) The Child’s Right to Receive Education**

**18.** International law as well as national laws in most of the countries has determined that any person can be eligible to receive education. However, the primary person eligible for this right is usually a child. A recently evolving trend defines the child’s right to education within the broader framework of Seite: 7 rights of children (Eekelaar 172–173).

#### **(c) The Adult’s Right to Receive Education**

**19.** Recognition of people’s enduring interest in education and training and the continuing need to update knowledge in order to keep pace with life’s changes justify extending the right to receive education to adults (Hodgson 179–181). A person’s interest in receiving a basic education that provides people with the fundamental capacities to survive in modern society is quite powerful, particularly among adults who, as breadwinners, carry the weight of the responsibility for caring for themselves and their families.

**20.** In general, we should differentiate between the two main instances in which an adult (a person 18 years of age or older) is eligible to receive education. The first instance involves adults who were prevented from receiving a basic education when they were children, for example, due to conditions of incarceration (see, eg, Art. 160(2) of Taiwan’s Constitution: ‘All citizens above school age who have not received elementary education shall receive supplementary education free of charge and shall also be supplied with books by the Government’). An additional example is adults who emigrated from a country that does not provide appropriate basic education.

**21.** The second instance involves adults who refrained from taking advantage of the right to a basic education (primary and secondary) but become interested in receiving either education provided by a state university or other forms of higher education. (This refers particularly to occupational training beyond vocational high school. See, eg, Art. XIV, Section 2(5) of the Philippines’ Constitution: ‘[The state shall] provide adult citizens, the disabled, and out-of-school youth with training in civics, vocational efficiency, and other skills’.) Higher education is the key opening the door to social integration. Several modern Western states have therefore found access to higher education to be worthy of inclusion among other constitutional rights to education. This right often includes free higher education. Yet, exceptions notwithstanding, the majority of countries throughout the world are unwilling to recognize the individual’s right to subsidized or fully funded higher education, and only eight per cent of constitutions in the world guarantee free higher education (Heymann, Raub and Cassola 135).

#### **(d) Group Rights**

**22.** An additional aspect of the right to receive education from the state involves the support given to private schools in general and to private schools run by minority groups in particular. The right to receive support for these schools rests on the right of individuals or groups to influence the

educational content transmitted to their children (group rights). This feature links the positive right to receive education with the negative right to select and influence the curriculum. The ensuing linkage results from the fact that major aspects of the right to influence the curriculum are ineffective without state assistance in their implementation. Thus, for example, the right to establish private schools is rarely realized without state financial support. Rights to education granted by law to minority groups on the basis of culture, religion, language or nationality are similarly meaningless without state support (Tamir 434).

## D. The Right to Choose Education

### 1. Nature and Scope

**23.** Articles devoted to education as found in international covenants and national constitutions include, among other things, arrangements meant to guarantee the individual's right to choose education (see Art. 26(3) UDHR and Arts 13(3) and 13(4) ICESCR, as well as South Africa's Constitution Arts 29(2), 29(3); Spain's Constitution Arts 27(3), 27(6); Ireland's Constitution Art. 42(2); Germany's Basic Law Arts 7(2), 7(4); and Poland's Constitution Art. 70(3)). This right, negative in essence, belongs to the first-generation family of rights—civic and political rights. This right may stem from fundamental rights, such as liberty, even when the right to education is not explicitly enshrined in the constitution. This is the case, for example, in the United States. In several instances, the US Supreme Court ruled that parents have a fundamental constitutional right to direct the education of their children (Dumas, Gates and Schwarzer 68; Wagner). In *Pierce v Soc'y of Sisters*, the US Supreme Court famously noted:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations (535).

**24.** That is, whenever the right to choose education is made available to a person (a child or parents), the exercise of that right denies other entities the power to intervene with that choice or to attempt to influence the curriculum. However, those who choose to receive an education in the state-run public school system should accept limitations posed by the state in this system. For example, in many cases courts have accepted that the prohibition on religious dress, symbols and practices is reasonable, 'based on the legitimate interest in upholding secularism and maintaining religious neutrality in educational institutions in order to protect the rights and freedoms of others, and recognizing religious diversity' (Squelch 17 and the following case law: *R (on the Application of Begum) v Headteacher and Governors of Denbigh High School*; *Classroom Crucifix Case*; *Engel v Vitale*; (secularism). Under the broad umbrella of the right to choose education can be found:

- the parental right to choose a school or recognized educational track in the state-run public school system (see, eg, Spain's Constitution Arts 27(3), 27(6); Estonia's Constitution Art. 37(3));
- the parental right to send children to private schools and to establish new private schools as alternatives to the state-run public school system (for examples of constitutions that guarantee the right to establish private schools, see Germany's Basic Law Art. 7(4); Spain's Constitution Art. 27(6); Macedonia's Constitution Art. 45; Poland's Constitution Art. 70(3); Ghana's Constitution Art. 25(2));
- the parental right to teach children at home (home schooling, which has already been

recognized as a constitutional right, for example, in Ireland's Constitution Art. 42(2) and Denmark's Constitution Art. 76);

- a person's right to obtain higher education, usually resting on capability and skills (see, eg, the Belarus Constitution Art. 49; Moldova's Constitution Art. 35(7)); right to academic freedom in institutions of higher learning. This right is also mentioned in articles elaborating the right to choose education. Academic freedom is an important item because it ensures the variety that expands the individual's range of options (see, eg: Spain's Constitution Art. 27(10); Poland's Constitution Art. 70(5); Finland's Constitution Art. 16(3); Macedonia's Constitution Art. 46; Romania's Constitution Art. 32(6); Paraguay's Constitution Art. 79(2); the Constitution of the Philippines Art. XIV, section 5(2); Egypt's Constitution Art. 21).

## 2. Justifications

**25.** Two major rationales underlie the right to choose education. The first is that as we noted earlier, people have a powerful interest in receiving education, and thus a powerful interest in determining the curriculum taught. By exercising influence on the curriculum, individuals take advantage of the opportunity to affect their environments—cultural, linguistic (what languages will be spoken in their community), professional (what profession they will practise in the future) and other. This right to affect one of the core mechanisms activated when constructing one's self-identity, prospects and personality flows from the constitutional rights of individual autonomy and freedom.

**26.** The second rationale for recognizing the right to choose education rests on the fact that education is one condition for perpetuating those aspects of culture considered requisite for an individual's realization of freedom, human dignity and self-identity. The right to choose an educational stream is therefore crucial for the preservation of the culture and uniqueness of minority groups (religious, linguistic or other).

## 3. The Child's Right to Choose Education

**27.** As children are the primary beneficiaries of education, they have the strongest natural interest in choosing the type of education to receive. The right to choose an educational track and curriculum is nonetheless delegated to parents because children are generally incapable of foreseeing the long-term implications of their decisions. True choice is therefore considered to lie beyond children's reach, and thus it is warranted to give parents the right to choose an educational track and curriculum. However, when children are adamant about the type of education they wish to receive, parents are obliged to consider their thoughts and preferences (*Wisconsin v Yoder* 241–246; *Binford* 351–352).

## 4. The Parental Right to Choose Education

**28.** The function of parents as guardians of their children endows them with specific rights and duties. We may nonetheless ask whether any justification exists for awarding parents the right to choose education for their children rather than delegating this function to the state. The arguments supporting the liberal stance address either the child's interests or the parents' interests.

**29.** The first argument is the child's interests. To reiterate, the child has a powerful interest in obtaining an appropriate education, which implies that the child also has a strong interest in determining the educational track and curriculum that deliver that education. However, given that children lack any real capacity to make decisions concerning their own status and future—and thus their educational requirements—another entity must be found to take on such tasks. In the liberal tradition, the child's family (ie, parents) is considered the most suitable entity to fulfil these obligations (Barry 202). The natural ties of love and concern that exist between parents and



children motivate parents to want the best for their children, and consequently they are prepared to do their utmost to obtain it. Parents are not simply stakeholders who see their children as instruments to promote their own objectives (even if those objectives are inspirational, such as knowledge, religion or social justice). Stated differently, parents, more than any other entities, will probably be guided by their perception of their children's best interests when choosing an educational framework. This is the position, and perhaps the only position, that is in keeping with the basic assumptions that underlie the concept of human dignity. This line of argument legitimates granting parents' rights and freedom of action in connection with their legally stipulated guardianship duties. Freedom of action itself embraces the right of parents to exercise their judgement in all matters pertaining to the child's education: what school to attend, the educational philosophy of the school and what will be taught. In *Troxel v Granville*, the US Supreme Court famously noted that 'the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court' (page 65).

**30.** The second argument is parental interests. Parents have strong interests, distinct from those of their children, in retaining the right to influence the curriculum taught to their children. The first factor behind this right is asset oriented and is based on the human and material capital parents invest when rearing their children, which grants them the right to have their children educated as they see fit. The extent of this argument is, however, limited, because in the modern welfare state, the public's parallel right to determine the content and structure of education is recognized on the basis of its alleged (economic) contribution to raising children, which often is not less than that of parents. The second factor behind this right is the need to protect children from state arbitrariness: the right of parents to determine their children's future counterbalances the dangers arising from state use of education as a medium for indoctrination. Parental rights therefore also reinforce pluralism.

**31.** In sum, when the issue is viewed from a liberal perspective, it is advisable to divide the responsibility for a child's education between parents and the formal state-run education system. The various arguments we have discussed support the position that the obligation of parents to be involved in their children's education should be accompanied by the right to choose an educational track or at least to mitigate the system's impact by exercising influence on the curriculum. From this perspective, the role of the state is narrowed to preventing parents from abusing their power over their children, which is expressed in the prohibition on corporal punishment and the prohibition on choosing an educational track that will impede the child's integration into the larger society.

## **5. The Right of (Religious, Ethnic or Cultural) Minority Groups to Influence Curricula**

**32.** We have shown that the right to choose a child's education generally rests with parents. However, in some instances, realization of this right is determined by the relationship between parents and the national, religious or cultural minority to which they belong. Minority groups are known to have an interest in establishing private schools in which a curriculum focusing on the group's distinguishing characteristics—religion, language, culture, customs and so forth—is taught. Justification for setting up such schools therefore hinges on the group's desire to preserve those characteristics. However, according to liberal philosophy as well as practice, a group has no legal right to act in place of parents with respect to the decision to send children to these special or any other (public or private) schools. For this right to be transferred, agreement must be obtained from the parents. That is, considered from a formal perspective, minority group rights do not contradict parental rights because only parents are entitled to have the last word on the subject. However, formal parental rights have limited practical impact when confronted with minority group practices or beliefs. In the majority of cases where parental preferences contradict those of the group, no genuine choices are available if the parents wish to remain within their natural environment and

familiar cultural framework. In many instances, the only genuine option available involves acting on the parental right to exit the group, a costly act from the standpoint of the family and the individual. Considered in this light, it soon becomes clear that in the majority of such cases, the effective balance of power regarding the choice of educational curricula swings towards the minority group rather than towards the legal-formal rights of the parents.

## E. The Right to Equal Education

**33.** A person's right to equal education is derived from the general principle of individual equality. Many constitutions stipulate the 'right to equal education' in addition to principle of individual equality (Heymann, Raub and Cassola 135–136; see, eg, Art. 29 of South Africa's Constitution; Art. 44(2) of Macedonia's Constitution; Art. 26 of Japan's Constitution; Art. 70(4) of Poland's Constitution; Art. 24(4) of Belgium's Constitution; Art. 16(1) of Singapore's Constitution; Art. 159 of Taiwan's Constitution). The reason for the targeted, formal protection of the right to equal education is that inequality is demonstrably one of the most common problems in education (De La Vega). The US Supreme Court noted in its landmark decision in *Brown v Board of Education*:

Such an opportunity [of an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms ... does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does ... To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone (493–494).

**34.** Significantly, the right to equal education—like the principle of universal equality—is not a mechanical but a substantive right. In order to achieve equal education, variance must be accepted as a governing constraint. This means that many more resources must be allocated to the underprivileged, children with special needs requiring special types of education (see, eg, Art. 16(2) of Finland's Constitution; Art. 74(2) of Portugal's Constitution; Art. 59(1) of Albania's Constitution; Art. 45(3) of China's Constitution; Art. 63 of Croatia's Constitution; Art. 38(3) of Italy's Constitution; Art. 17(3) of Malta's Constitution; Art. 52(2) of Slovenia's Constitution) and sectors formerly suffering discrimination in educational institutions (Art. 29(2)(c) of the South African Constitution). One of the many aspects of substantive equality in education is the practice of awarding special rights to minority groups to preserve their culture and traditions, eg, studying the minority's language in addition to a country's official language or allocating additional hours for study of the minority's traditions (see, eg, Art. 53(5) of Ukraine's Constitution; Art. 26(2) of Russia's Constitution; Art. 16(2) of Singapore's Constitution; Art. 37(4) of Estonia's Constitution; Art. 34(2) of Slovenia's Constitution; Art. 30(1) of India's Constitution; Art. 75(17) of Argentina's Constitution; Art. 77(2) of Paraguay's Constitution). Especially important in this context is the unequal education resulting from a federal structure in which different levels of government award either special or supplemental rights or educational autonomy to specified regions (Art. 23 Canadian Charter of Rights and Freedoms, 1982; Reaume 1989).

## F. Compulsory Education - The Obligation to Attend School

### 1. Nature and Scope

**35.** Compulsory education generally refers to two dimensions: first, school attendance for the purpose of receiving education over a fixed period of time (number of years) (see, eg: Art. 112 of Latvia's Constitution; Art. 44(3) of Macedonia's Constitution; Art. 27(7) of Spain's Constitution; Art.

34(2) of Italy's Constitution; Art. 16(3) of the Greek Constitution); second, the specific curriculum determined by the state (Philippines' Constitution Art. XIV, section 3) or requirements introduced by the educational framework, such as the obligation to wear a school uniform.

**36.** Compulsory education allegedly hinders the exercise of individual rights (in this case, the right to receive and the right to choose education). Laws that mandate compulsory primary or secondary school education violate the rights of parents (or children) uninterested in school attendance for the stipulated or any period of time. Moreover, compulsory education obliges the student to learn designated subjects at the same time that it limits the individual's freedom to choose the curriculum to be learned.

## **2. Justifications**

**37.** Compulsory education has become a cornerstone of social and cultural attitudes toward education internationally, as indicated by the concept's incorporation into the national traditions of the majority of the world's countries. The near universality of compulsory education informs our search for the grounds explaining the phenomenon. It can be argued that compulsory education is rationalized by reasons of general welfare. We have shown that general welfare can be employed as a self-sufficient reason to award the right to receive education because, beyond the benefits gained by any particular individual, education benefits all a nation's citizens and residents. In like manner, the public good also provides grounds for the imposition of compulsory education. To meet society's needs, skills and professions must be inculcated; the same can be said for the common values essential to creation of social cohesion. In democratic societies, renewing awareness of common values, even among educated persons, contributes to the maintenance of a democratic regime. Yet, compulsory education contains the potential to violate individual freedom in general and rights to education in particular; it is therefore incumbent upon us to examine this issue from the perspective of human rights.

**38.** With respect to the right to receive education, compulsory education can be defended on two grounds; the first is paternalism. The right to receive education is so crucial that it justifies imposition of compulsory education. Paternalism is more persuasive as a motive when the subject is a child still unable to make vital decisions. Yet, the paternalism argument dwindles in salience when the person taking advantage of the right to receive education is an adult capable of making decisions.

**39.** Second, imposition of compulsory education is also grounded in the need to protect the child from her parents. This argument demands recognition of the child as an autonomous entity, independent of her parents. Viewed from this perspective, compulsory education is meant to protect the child's right to receive education in the presence of short-sighted parents or guardians, who wish to deny the child enjoyment of that right. In other words, recognition of the child's autonomy makes it plain that compulsory education is not targeted at the child, the right's holder, but at her parents (and in rare cases, her guardians or employers). By imposing compulsory education, the legislature in effect reiterates and institutionalizes the parents' duty to guarantee that their children attend school even if doing so contradicts the parents' wishes. The respective legislation is therefore positive in character as it ascribes the responsibility to realize the right to specific entities, in this case, a child's parents.

## **G. Conclusion**

**40.** The right to education is one of the most important fundamental human rights. From a comparative overview, we can draw several common characteristics of the different constitutional arrangements: (a) the right to education is protected, in various ways, in the vast majority of the world's constitutions. This constitutional protection endows right to education with a firm normative status that reinforces the status of education within national political agendas and strengthens its

position relative to other competing interests; (b) the right to education is a bundle of rights: the right to receive education, the right to choose education and the right to equitable education. Integration of the different rights could lead to reconciliation or conflict between the various rights that come under the heading 'right to education'; (c) the right to education belongs to several generations of Human Rights, as Nowak noted: 'the right to education is probably the only right that reveals aspects falling under all three [Human Right] generations' (Nowak 196), Among all the socio-economic rights, the right to education (in its broadest sense) has won the greatest protection in national constitutions, which is well warranted; and (d) in countries where there is no explicit provision regarding the right to education or where the right to education is a directive principle of state policy, there is a tendency for the courts to interpret this right as an implied justiciable fundamental right that is an integral part of other constitutional rights (such as the right to life and human dignity). In this way courts move from a declarative approach to the right to education to an operative one, which gives remedies for right's infringement.

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