



## **THE RIGHT TO EDUCATION**

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- I. Instrument References
  - A. UDHR, Art. 26
  - B. CESCR, Arts. 13 & 14
  - C. Comm. ESCR, GC 13
  - D. CRC, Arts. 28 & 29 (191 states)
  - E. CERD, Art. 7
  - F. UNESCO Convention Against Discrimination in Education
  - G. Vienna Declaration and Programme of Action, Part I (33) & Part II (80) (171 states)
  - H. World Declaration on Education for All (1990) (155 states)
  - I. Plan of Action for the United Nations Decade for Human Rights Education
  - J. ECHR, Prot. 1, Art. 2
  - K. ACHR, Protocol of San Salvador, Art. 13
  - L. ACHPR, Art. 17, 25
  - M. CIS, Art. 27
  - N. AL, Art. 34
  - O. Other–Special Rapporteur for Education
- II. Historical Context
  - A. Church dominance of education and morals until the early 19<sup>th</sup> century
  - B. Rights of parents overpowering rights of children–perpetuation of bigotry [John Stuart Mill, *On Liberty* (Pelican Classics, 1974), p. 175; Jean-Jacques Rousseau, *Emile* (aim of education is the liberation of the child)]
  - C. State socialization through public school systems–Nazi Germany
    1. State duty to educate in contrast to individual right to receive education was first explicitly established in the 1936 Soviet Constitution, Art. 121.
- III. Education and its interrelatedness with and indivisibility from other rights [Comm.ESCR, GC 13 (1) (“indispensable means of realizing other human rights”)]
  - A. Education relies on other rights–freedom of assembly, association, expression, information.
  - B. Education is relied upon by other rights
    1. Civil and Political Rights–Freedom of information, expression, assembly, and association; the right to vote and to be elected; equal access to public service, fair trial, etc.
    2. Economic, Social, and Cultural Rights–Right to work, equal pay for equal work, right to form trade unions, to take part in cultural life, to enjoy the benefits of science, etc.

- IV. Levels of Education
  - A. Primary education—first level of education. Generally from 1<sup>st</sup> grade to between 5<sup>th</sup> and 10<sup>th</sup> grade.
  - B. Secondary education—second level of education. Generally from between 6<sup>th</sup> grade and 13<sup>th</sup> grade. This includes “technical and vocational education.” [CESCR, Art. 13 (2) (b); Comm.ESCR, GC 13 (15) & (16); CRC, Art. 13 (1) (b) & (d)]
  - C. Tertiary education--university level of education
  - D. Fundamental education—simply attaining “basic learning needs” by anyone, irregardless of age (e.g. adult education). [Comm.ESCR, GC 13)]
- V. Education as a Right—“right with a compulsory element” (Nordic) or “right with a duty” (Chinese)
  - A. Right of Education
    - 1. All human beings are entitled to education
      - a. State has positive obligations to respect, protect, and fulfill (facilitate and provide) education. [CESCR, Art. 13 (2); Comm.ESCR, GC 13 (50); Valsamis v. Greece, 24 EHRR 294, para. 27 (“positive obligations on the part of the state”)]
      - b. States must cooperate internationally to eliminate ignorance and illiteracy and spread knowledge and teaching methods. [CRC, Art. 28 (3)]
      - c. The test of any education program is “the best interests of the student.” [Comm.ESCR, GC 13 (7)]
    - 2. Educators are entitled to academic freedom (this includes private schools) [Comm.ESCR, GC 13 (38-40); see CCPR, Art. 15 (“freedom indispensable for scientific research and creative activity”)]
      - a. This includes the material conditions of the teaching staff. [CESCR 13 (2) (e); Comm.ESCR, GC 13 (27)]
    - 3. Parents (guardians of students) are entitled to determine the substance of their child’s education.
  - B. Duty of Education—All human beings have a duty to attain education. Primary education is required. [UDHR, Art. 26 (1), CESCR, Art. 2 (a); CRC, Art. 28 (1) (a)]
    - 1. States have a positive duty to “take measures” to achieve attendance. [CRC, Art. 28 (1) (e)]
- VI. Issues in education
  - A. Economic access to education [Comm.ESCR, GC 13 (6) (b)]
    - 1. Free primary education [CESCR, Arts. 13 (2) (a) & 14; Comm.ESCR, GC 13 (8-10) & (51); CRC, Art. 28 (1) (a)]
      - a. State parties to the CESCR which do not have free and compulsory education agree to establish, within two years of becoming a state party, a plan to progressive realize it within a reasonable number of years. [CESCR, Art. 14; Comm.ESCR, GC 13 (25)]
      - b. “For millions of people throughout the world, the enjoyment of the right to education remains a distant goal [and], in many cases, this goal is becoming increasingly remote.” Comm.ESCR, GC 13 (2)
    - 2. Free fundamental education [CESCR, Art. 13 (2) (d); Comm.ESCR, GC 13 (21-24)]

3. Progressive introduction of free education at secondary and tertiary levels [CESCR, Arts. 13 (2) (b) & (c), Comm.ESCR, GC 13 (11-14); CRC, Art. 28 (1) (b)]
- B. Physical access to education—education must be within safe physical reach, either geographically convenient or via modern technology. [Comm.ESCR, GC 13 (6) (b)]
- C. Sufficient length of compulsory education
1. There is no explicit length requirement for compulsory education, but it should be approximately five to seven years, as a minimum. [CESCR, Art. 2 (a)]
- D. Substance of School Curriculum
1. Fulfillment of human dignity (substantive person). [UDHR, Art. 26 (2); CESCR, Art. 13 (1) (enable participation in a free society); Comm.ESCR, GC 13 (59) (consistent with CESCR); CRC, Arts. 12-15 (child with own views and freedoms of expression/association); CRC, Arts. 29 (1) (a) & (d) and Comm.RC, GC 1 (12) (prepare a responsible life in a free society)]
    - a. Comm.ESCR, GC 13 (1)—“a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”
  2. Education *about/in* human rights, including understanding and tolerance (this leads to furthering the UN and to peace). [UNC, Art. 1 (3); UDHR, Art. 26 (2); CESCR, Art. 13 (1) (“strengthen the respect for HR . . . promote understanding, tolerance, and friendship . . . and further the activities of the UN”); CRC, Art. 29 (1) (b) & (e) (respect for environment); ACHPR, Art. 25; OAS Prot. of San Salvador, Art. 13; Vienna Declaration, Para. 33]
  3. Develop respect for parents. [CRC, Art. 29 (1) (c)]
  4. Develop respect for cultural values (including the child’s own culture, the culture where the child is living, and other cultures). [CRC, Art. 29 (1) (c); MD, Art. 4 (4); ACHPR, Art. 17 (3)]
  5. Moral Issues in School Curriculum
    - a. Instruction in religion at a public school is a rights violation.
      - (1) Kjeldsen, Busk, Madsen and Pedersen Case (ECHR 23/1976)—“the state is forbidden to pursue an aim of indoctrination.”
    - b. Instruction *in* religion at a public school is not a rights violation when exemptions or alternatives are available. [Comm.ESCR, GC 13 (28)]
      - (1) Angelini v. Sweden, (ECHR 10491/1983)—religious instruction on a particular state religion is not a violation as long as there are exceptions available.
    - c. Instruction *about* religion at a public school need not have exemptions or alternatives. [Comm.ESCR, GC 13 (28), see also HRC, GC 18]
      - (1) Hartikainen v. Finland, (HRC 40/1978, decided under CCPR, Art. 18 (4) on freedom of belief)—a required course in Finland about various religions and religious principles

did not infringe on freedom of belief when the instruction was given in “a neutral and objective way and respects the convictions of parents.”

- (2) Kjeldsen, Busk, Madsen and Pedersen Case (ECHR 23/1976)–in Denmark, required teaching on sex education throughout a number of courses was not a violation of ECHR, Prot. 1, Art. 2 because it dealt with the moral issues in a very general way and in no way attempted to indoctrinate or advocate a specific type of sexual behavior. The information was presented in “an objective, critical and pluralistic manner.”
- (3) Valsamis v. Greece (ECHR 2187/1993)–the case involved compulsory attendance at a school parade away from the school grounds and outside of school hours in order to mark the national day in Greece. A student who was a Jehovah’s Witness refused to attend claiming the parade violated her (and her parents’) pacifist views. She was punished by the school. The majority held that the parade did not advocate anything contrary to pacifism and didn’t find a violation.

- 6. Education *about* minorities
  - a. States “should” encourage knowledge about minorities [CRC, Art. 29 (1) (c); MD, Art. 4 (4)]

E. Balancing Right to Education with the Rights of Parents Regarding their Children [CESCR, Art. 13 (3); CRC, Art. 5 (parents are “to provide . . . appropriate direction and guidance”); ECHR, Prot. 1, Art. 2]–the main purpose of this provisions, as reflected from the preparatory discussions to the UDHR, was the historical context of Nazi socialization of bigotry in the pre-war German schools.

- 1. Education Venue
  - a. The choice of education venue belongs primarily to parents. [UDHR, Art. 26 (3), CESCR, Art. 13 (2)]
  - b. Home schooling and private schooling are allowed, but must still fulfill minimum requirements (the problem is monitoring this for fulfillment). [CESCR, Art. 13 (3) & (4); Comm.ESCR, GC 13 (28-30); CRC, Art. 29 (2)]
  - c. No schooling is not an allowable alternative. [CESCR, Art. 13 (3) (must choose schooling, but not between school and no school)]
- 2. Education Substance
  - a. Parents have the freedom of educating their children religiously and morally. [CESCR, Art. 13 (3); ECHR, Prot. 1, Art. 2]
  - b. Parents’ freedom is limited by constraints of promoting understanding and tolerance. [See CESCR, Art. 13 (1) & (4); Comm.ESCR, GC 13 (4) (“educational objectives reflect the fundamental purposes and principles of the UN as enshrined in Articles 1 and 2 of the Charter”); CRC, Art. 29 (2)]

F. Discipline of Children at Schools

1. States have an affirmative duty to “take all appropriate measures” to ensure that discipline does not violate the human dignity of children. [CRC, Art. 28 (2)]
    - a. Campbell and Cosans v. United Kingdom (ECHR 48/1982)–requiring students to submit to corporal punishment without an educational alternative is a denial of the right to education.
  2. Corporal punishment is inconsistent with human rights law which protects the dignity of the individual. [Comm.ESCR, GC 13 (41)]
- G. Equal Access to Education through Non-discrimination [UDHR, Art. 26 (“equal access to all”); CCPR, Art. 26; CDESCR, Art. 2 (2) “in light of” UNESCO Convention against Discrimination in Education; Comm.ESCR, GC 13 (6) (b), (19) & (31); CRC, Art 2 (1), 28 (1) (“equal opportunity”) & 28 (1) (c) (“basis of capacity”)]
1. Non-discrimination applies fully and immediately, not being subject to progressive realization or the availability of resources. [Comm.ESCR, GC 13 (31) & (43); CERD, Art. 7; see CCPR, Art. 18 & 4 (2) (non-derogable)]
  2. Non-discrimination applies to all school age persons in the territory of a state party, including non-nationals and those without legal status. [Comm.ESCR, GC 13 (34); Refugee Conv. (refugees also entitled to education)]
  3. Difference between Secondary and Higher Education–secondary education must be “generally available and accessible to all” while higher education must be “equally accessible to all, on the basis of capacity.” Higher education has the additional element of capacity of potential students, which “should be assessed by reference to all their relevant expertise.” [Comm.ESCR, GC 13 (19)]
    - a. Access to higher education can be conditional on certain qualifications. [Glasewska v. Sweden (EcommHR 11655/85)]
  4. Gender Distinction in Admission–all-boys and all-girls schools are not a HR violation as long as there is equality in choice, opportunity, facilities, and quality.
  5. Special Measures (temporary)
    - a. States *must* take special measures where discrimination exists. [Comm.ESCR, GC 13 (55) (“gender”) & (59)]
    - b. Special measures are not a HR violation in education if they are adopted to bring about de facto equality, they do not maintain unequal or separate standards and are discontinued when the objective is achieved. [HRC, GC 18 (13) (legitimate purpose with reasonable and objective criteria); Comm.ESCR, GC 13 (32); CERD, Art. 1 (4) & 2 (2); MD, Art. 8(3)]
  6. Blom v. Sweden (HRC 191/1985)–it is not discrimination for a state which does offer a free education alternative to deny additional benefits to a parent who does not wish to use the free system.
  7. Belgian Linguistics Case (ECHR 6/1968)–it was discrimination for Belgium to refuse to provide a French-language school in a unilingual

Dutch area when Dutch-language schools existed in unilingual French areas.

8. USA Legal System

- a. Regents of the University of California v. Bakke—race and ethnicity can be considered in the application process, but specific quotas are not allowed. Admissions programs must be “narrowly tailored” to injure as few people as possible.
- b. Grutter v. Bolinger—special measures are still necessary in America, but “we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” The appellate court (prior to the U.S. Supreme Court) had not addressed the issue of special measures, but held that a ethnically diverse student body has its own benefits.

H. Instruction *about* a Language/Instruction *in* a Language

1. Minorities—states are obliged to provide the opportunity to learn *about* a mother tongue and to be instructed *in* a mother tongue. [MD, Art. 4 (3)]
2. Belgian Linguistics Case (ECHR 6/1968)—no right to be taught in language of parents’ choice at public school (but lack of that language of instruction cannot be discriminatory).
3. Cyprus v. Turkey (ECHR 25781/1994)—discontinuing the language of instruction when there are students requesting that language and it was integrally part of the territory is a violation of rights.
4. Meyer v. Nebraska (262 U.S. 390 at 401-403 (1923))—an affirmative law stating the language requirement for all schools, public or private, is an unconstitutional. violation of rights to education even though there might be a legitimate reason for the law.