

Human rights obligations:  
making education available, accessible,  
acceptable and adaptable



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Right to education primers no. 3

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Author: Katarina Tomaševski

Graphic Design: Dennis Andersson, Novum Grafiska AB

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## Preface

This is the third publication in the series of Right to Education Primers, which is devoted to elucidating key dimensions of the right to education, the respect of all human rights in education, as well as enhancing human rights through education. Primer No. 1, entitled *Removing Obstacles on the Road to the Right to Education*, has had as the point of departure the need to dismantle prevalent misconceptions which impede effective recognition of the right to education. Primer No. 2 has addressed its cardinal requirement, ensuring free and compulsory education for all, and highlighted the gap between this minimal global human rights norm and reality. It has pointed out that these minimal requirements are not yet in place in at least 58 countries.

This publication summarizes governmental human rights obligations in education, structured into a simple 4-A scheme – making education available, accessible, acceptable and adaptable. Primer No. 4 follows and is devoted to the orientation, contents and methods of education; it is entitled *Human Rights in Education as Prerequisite for Human Rights Education*. The importance of linking governmental human rights obligations with global development finance strategies – encompassing aid and debt relief – is addressed in Primer No. 5. It is entitled *Is the World Bank Moving towards the Right to Education?* It argues that human rights obligations are both individual and collective hence the right to education should be – but is not – recognized in global economic, fiscal, or education strategies. The multitude of issues which have to be described and analyzed is being addressed step-by-step hence five more Right to Education Primers are planned for the year 2001.

This series of publications complements my work within the United Nations as the Special Rapporteur on the right to education of the Commission on Human Rights. The Commission has recently started dealing with economic, social and cultural rights in earnest and this area is not, as yet, widely known. These publications aim to facilitate outreach for the right to education by presenting the essential facets of the process whereby human rights can and should be mainstreamed in education. This entails the full recognition of the right to education, safeguards for human rights and fundamental freedoms in education, and the adaptation of schooling to enhancing human rights through education.

The publications are part of the emerging public access resource centre on the right to education at the Raoul Wallenberg Institute of Lund University. It is being developed to broaden interest for the right to education and to increase knowledge about it by making the essential material available in a systematic manner, free of charge. Alongside publications, this resource centre includes background information needed to map out the international and domestic legal frameworks of the right to education. This encompasses excerpts from the relevant international treaties which guarantee the right to education, information on their ratifications and reservations which delineate international legal commitments for each country, constitutional guarantees of the right to education, information on international and domestic institutions which provide remedy for human rights violations within education, important court cases and decisions of national human rights commissions concerning the right to education and human rights in education. This information will be accessible at [www.right-to-](http://www.right-to-education.org)

education.org. as of 15 March 2001. This website will also include full texts of the publications and they will also be sent to those who cannot access them on-line.

This resource centre is being developed to augment my work as the Special Rapporteur on the right to education of the United Nations Commission on Human Rights. Special Rapporteurs are appointed by the Chairman of the Commission on Human Rights, subsequent to the Commission's decision to create a specific mandate. The particular person's expertise in a specific field, in my case a long track record of working on economic and social rights, the human rights of women and the rights of the child, seemed to have been decisive. My mandate on the right to education was created by the Commission on Human Rights in its resolution 1998/33 of 17 April 1998 and I was appointed in August 1998.

The Commission's decision to appoint a Special Rapporteur on the right to education originated in a widely shared assessment that economic, social and cultural rights had been neglected, if not marginalized. The text of the resolution whereby my mandate was created, typically for economic and social rights, was inexact on the contours of the mandate<sup>1</sup> as a

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<sup>1</sup> The Commission on Human Rights in its resolution 1998/33 of 17 April 1998 mandated me to (i) Report on the status, throughout the world, of the progressive realization of the right to education, including access to primary education, and the difficulties encountered in the implementation of this right; (ii) Promote assistance to Governments for urgent plans of action to secure the progressive implementation of the principle of compulsory primary education free of charge for all; (iii) Focus on gender, in particular the situation and needs of the girl child, and to promote the elimination of all forms of discrimination in education; (v) Develop regular dialogue with actors such as UNESCO or UNICEF, and with financial institutions, such as the World Bank.

consequence of the need to generate and sustain consensus within the Commission. Advancing human rights is a process and the initial definition of an agenda for the future is narrow and cautious, to be broadened and deepened as work progresses. Much work is needed to redress the previous neglect of the right to education. Much too little can be done within the United Nations, where the right to education is one out of very many issues on the agenda, thus the necessity of providing external academic and professional input in the deliberations and evolving policies of the Commission on Human Rights.

My work on the right to education therefore extends far beyond my role as the Special Rapporteur and encompasses research, teaching and training at the Raoul Wallenberg Institute at Lund University. The two are closely linked. Special Rapporteurship is an honorary function, entailing much unpaid work and a great deal of battling to assert and defend the right to education, particularly for all the children who do not know that such a right exists, least of all that they should be enjoying it. The logic of human rights work is that rights are denied and violated hence the essential task is to expose and oppose denials and violations. By no stretch of imagination could one imagine deniers and violators sitting back and applauding. Special Rapporteurs thus continue in their existing jobs so as to remain financially and organizationally independent. Where their professional and academic work can be molded to support their UN work, as my case has fortunately been, much can be done.

Working as a Special Rapporteur encompasses three tracks: annual reports provide a summarized overview of relevant developments worldwide, country missions are carried



out to examine the pattern of problems *in situ*, while obstacles or alleged violations are tackled through correspondence with the respective governments. My three annual and two mission reports (Uganda and England) are available on the homepage of the High Commissioner for Human Rights ([www.unhchr.ch](http://www.unhchr.ch)) in English, French and Spanish, as are resolutions of the Commission on Human Rights and other pertinent documents. My UN reports are also available at [www.right-to-education.org](http://www.right-to-education.org).

UN reports are limited to 28 pages and so a great deal of economizing is needed to cover all pertinent issues; the coverage is necessarily superficial. There is only one annual

report while funding available for missions effectively permits only one every second year. The style in which these reports are written does not facilitate easy reading. Therefore, this series of publications addresses each important dimension of the right to education in turn. The publications are kept short, the multitude of legal information is provided separately so as to facilitate easy reading, and real-life examples are used as much as possible to exemplify the relevance of the human rights approach to education. They are circulated in a limited number of copies to stimulate discussion and invite critical comment. All comments and suggestions are thus welcome.

K. Tomaševski  
Lund, 18 January 2001

## Introduction

A well-established adage posits that no right can exist without a remedy. This truism is sometimes forgotten for economic and social rights, including the right to education, thereby divorcing them from their grounding in law and transforming them into a secular religion. Such experiments are not likely to take root, nor are they likely to be beneficial for the human rights cause, unless the core of human rights is preserved and strengthened – rights entail corresponding obligations and ought to be accompanied by access to remedy for alleged denials and violations.

The conceptual counterpart of human rights are then governmental obligations. Governments are individually obliged to secure human rights for their own population. They cannot be held legally responsible for violating human rights in other countries and international development co-operation is perceived as human-rights promoting, or at worst neutral. It often facilitates the realization of human rights, it is almost never neutral, while it can also harm human rights. On the one hand, governments of developing countries can be pressurized into violating or denying human rights through conditions for development finance. Trade union freedoms of teachers can be denied so as to keep their salaries low and reduce budget deficits. On the other hand, governments could be assisted in promoting and protecting human rights where development finance is designed within the framework outlined by international human rights law. In-between, many policies that are apparently human-rights neutral have significant human rights effects. An example are ceilings on the size of civil service which may inhibit teacher recruitment and

thus jeopardize increased or even sustained access to education. These issues are addressed in *Primer No. 5*; this text is discussing governmental obligations at the domestic level.

The right to education is routinely classified as an economic, social and cultural right; these are often deemed to be lacking remedies and are accordingly treated as quasi-rights or not-quite rights. As a consequence, denials and violations of the right to education are not addressed. This reductionism ruptures the symmetry of law which balances rights and duties, freedoms and responsibilities. Keeping the symmetry, this text concentrates on governmental obligations which stem from the right to education and discusses different types of human rights obligations which distinct facets of the right to education entail. Different from its frequent but erroneous image as being only an economic, social and cultural right, the right to education is also a civil and political rights. Moreover, it straddles individual and collective rights, embodying both.

The firm grounding of the right to education in international and domestic human rights law provides for the clarity and specificity of human rights standards needed for addressing its key dimensions at the global level. International human rights law underpins universality of human rights laying down minimal standards to which all people are entitled. Its requirements are interpreted daily, throughout the world, in the light of the multitude of different situations that arise. Access of children to education may be impeded because they cannot comply with administrative requirements, such as birth or citizenship certificates, or the nearest school is too far away. There is often conflict between parental preferences for their children's education and the rights of the child, exemplified by the

widespread bias against educating girls or children with disabilities. Students' enrollment may be impeded by the closure of universities because of political or financial reasons. An endless variety of real-life issues ceaselessly force domestic courts, human rights commissions, or international human rights bodies to clarify the nature and scope of the right to education through the corresponding governmental obligations.

The right to education is recognized, promoted and protected at all levels – from local to global – and it fully reflects the interplay between the dual processes of globalization and localization which are now taking place. In most federal countries, education pertains to the remit of regional or local authorities and the current trend towards decentralization furthers the localization of education. The parallel process of globalization substantively affects only the uppermost levels of the education pyramid. Primary education remains local and this is unlikely to change. However, the financial impact of globalization affects the whole education pyramid, while its ideological underpinning tends to treat education as an industry,<sup>2</sup> which provides a service that should be traded just like any other, domestically and internationally. The role of the government in education, affirmed in international and domestic human rights law, provides a powerful antidote against the risk of depleting education of remaining a public good and schooling of remaining a public service. The full mobilization of the existing human rights standards for education can neutralize

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<sup>2</sup> Tooley, J. – *The Global Education Industry. Lessons from Private Education in Developing Countries*, International Finance Corporation and Institute of Economic Affairs, Washington D.C. and London, 1999.

negative dimensions of globalization at all levels, thus enabling the human rights community to provide a useful and timely contribution to developments which were, until recently, deemed to lie beyond the reach of human rights safeguards.

The right to education straddles the division of human rights into civil and political, on the one hand, and economic, social and cultural, on the other hand. It embodies them all. Governmental obligation to respect parental freedom of choice or free establishment of schools typifies civil and political contents of the right to education; denials of freedom of and in education are challenged throughout the world.<sup>3</sup>

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<sup>3</sup> The human rights guarantees for religion affirm the freedom of religion but not freedom in religion. The Human Rights Committee has examined the case of a teacher who 'had been engaged in a protracted confrontation with the authorities over his teaching and his employment,' to determine that his rights were violated by constant harassment which made his continued teaching impossible. The background to the case was the denial of his certification by ecclesiastic authorities. A certificate of suitability, issued by the Catholic Church, is needed for any teacher of religion and the Church verifies that religious education is provided in accordance with the precepts of the Catholic Church. The Committee has agreed that the teacher's removal from teaching religion was necessitated by his lack of certificate, which was occasioned by his advocacy of liberation theology. This was beyond the influence of the Committee or the government of the country concerned. However, the Committee has added that he could not be prevented from continuing in public service teaching. (Human Rights Committee – *William Eduardo Delgado Paez v. Colombia*, Communication No. 195/1985, Views of 12 July 1990.) Differently from freedom of religion, the human rights guarantees relating to education affirm both freedom of education (requiring governments to allow non-state schools) and freedom in education (requiring governments to recognize the rights of parents, teachers and learners in education, including their rights to question and challenge school curriculum, textbooks, methods of instruction, rules for school discipline or their administration and enforcement).

Governmental obligation to secure school attendance for all children within the compulsory-age bracket (usually 6–15) has also been litigated as have controversial school voucher schemes, which strive to reduce governmental obligations to providing some financial support to parents in their choice of schooling for their children. This would leave parent-less children without any choice, children of poor parents with very little choice, and reinforce selling education according to the purchasing power of buyers. Governmental obligations have often been judicially tested regarding education for children with disabilities, indigenous or minority children, or children deprived of their liberty, and the courts have affirmed that governments have to ensure access to education for all children. Although resource allocation is litigated the least being widely perceived as an inherently political decision, intrusions into decisions on allocations of public funding have been necessitated by the right to education (for example, governmental obligations to provide transport to school or textbooks free of charge) and rights in education (for example, assistance to learners to overcome linguistic obstacles or learning disabilities).

Moreover, the importance of the right to education reaches far beyond education itself. Many individual rights are beyond the grasp of those who have been deprived of education, especially rights associated with employment and social security. Education operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is effectively guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated.

This publication has been inspired by the need to overcome the mixture of confusion and contention which hampers delineating the right to education as civil, cultural, economic, political and social right. It summarizes governmental obligations corresponding to the right to education in its entirety. While education as a civil and political right has engendered a great deal of domestic and international jurisprudence and its contours are fairly well defined, progress in the vast and heterogeneous category of economic, social and cultural rights cannot be fast and easy because this category was itself a cold-war construct. Consequently, it suffered from distortions which plagued human rights during the Cold War. The notion of economic, social and cultural rights required a reconceptualization after the Cold War had ended, but it was marginalized instead to escape neglect only at the turn of the millennium.

Although the Cold War is over, confusion continues as do attempts to empty economic and social rights of their core substance. These posit, explicitly or implicitly, that economic, social and cultural rights are not justiciable which, were it true, would mean that they are not rights. Such confusion feeds on two features of international human rights law:

- Firstly, international human rights law is not directly applicable in most countries. International human rights standards are, in most countries, transposed into domestic law, and then interpreted and applied. It is thus crucially imports to extract from this rich and diverse material

those issues for which there is global consensus on what constitutes a human rights violation, which problems yield different solutions in interpreting human rights, and also to infer the optimal solutions for rights-based education.

- Secondly, many international human rights treaties dealing with economic, social and cultural rights (with the exception of those generated within the International Labour Organization) were written to preclude their domestic and international litigation. The explicit wording of international human rights treaties which were written during the heat of the Cold War, particularly the International Covenant on Economic, Social and Cultural Rights,<sup>4</sup> constitutes a considerable challenge in necessitating a re-interpretation of economic and social rights adapted to changed circumstances – the imprecision with which governmental obligations have been defined, the corresponding inexactness in definitions of individual rights, the necessity to dissociate governmental human rights obligations from general economic, social or cultural policy, and the systemic nature of problems concerning economic and social rights which casts doubts on the utility of an individual complaint mechanism and points to collective

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<sup>4</sup> The comments of states that are party to the International Covenant on Economic, Social and Cultural Rights on the Draft Optional Protocol, which is aiming to make economic, social and cultural rights susceptible to individual complaints for violations and adjudication by the Committee on Economic, Social and Cultural Rights can be found in U.N. Docs. E/CN.4/1998/84, E/CN.4/1998/84/Add. 1, E/CN.4/1999/112, E/CN.4/1999/112/Add.1, and E/CN.4/2000/49.

or public interest complaints or else a policy review mechanism.

These two features are obviously and closely linked: domestic legal enforcement of a right is the essential prerequisite for its international enforcement and this text therefore focuses on domestic jurisprudence.

Abstract provisions of international human rights treaties or domestic laws tend to be the only guidance available to educationists and they do not really help to infer how specific real-life issues should be addressed. Their interpretation is triggered by the need to apply law to real-life cases and provides useful guidance in clarifying what governments should and should not be doing. Even in countries where education has not been recognized as a right, balancing parental and children's rights with regard to sex education in school, corporal punishment, governmental regulation of private schools, academic freedom for university professors, and many other issues are being litigated.

Court cases are often initiated by individuals who feel that their rights have been violated and demand a remedy. The nature and scope of human rights is then examined through due process of law, whereby substantive issues are defined or clarified. Cases represent bottom-up approach – real-life problems trigger interpretation and application of domestic and international law. Procedural problems and legal technicalities deter non-lawyers and are omitted from this publication. The necessary background will be available at [www.right-to-education.org](http://www.right-to-education.org) in a user-friendly form.

Box 1:  
Conceptual framework

RIGHT TO EDUCATION	AVAILABILITY	<ul style="list-style-type: none"> <li>– fiscal allocations matching human rights obligations</li> <li>– schools matching school-aged children (number, diversity)</li> <li>– teachers (education &amp; training, recruitment, labour rights, trade union freedoms)</li> </ul>
	ACCESSIBILITY	<ul style="list-style-type: none"> <li>– elimination of legal and administrative barriers</li> <li>– elimination of financial obstacles</li> <li>– identification and elimination of discriminatory denials of access</li> <li>– elimination of obstacles to compulsory schooling (fees, distance, schedule)</li> </ul>
RIGHTS IN EDUCATION	ACCEPTABILITY	<ul style="list-style-type: none"> <li>– parental choice of education for their children (with human rights correctives)</li> <li>– enforcement of minimal standards (quality, safety, environmental health)</li> <li>– language of instruction</li> <li>– freedom from censorship</li> <li>– recognition of children as subjects of rights</li> </ul>
	ADAPTABILITY	<ul style="list-style-type: none"> <li>– minority children</li> <li>– indigenous children</li> <li>– working children</li> <li>– children with disabilities</li> <li>– child migrants, travelers</li> </ul>
RIGHTS THROUGH EDUCATION		<ul style="list-style-type: none"> <li>– concordance of age-determined rights</li> <li>– elimination of child marriage</li> <li>– elimination of child labour</li> <li>– prevention of child soldiering</li> </ul>

Inter-relatedness of human rights creates overlap between different components of the right to education but it also facilitates mapping out the conceptual framework of the right to education, presented in Box 1. The framework demonstrates this inter-relatedness of individual components of the right to education, relates them to the type of governmental human rights obligations which are their counterparts, and adds examples of issues that figure prominently in translating the right to education from requirement into reality.

#### 4-A scheme in a nutshell

A consequence of the symmetry of law is that there could be no right to education without corresponding obligations for governments. The basic framework of governmental obligations is outlined through a series of explicit guarantees of the right to education in international human rights treaties, national constitutions, and domestic laws. These obligations can be easily structured into the 4-A scheme, as sketched in Box 2: governments have to make education available, accessible, acceptable and adaptable.

- *Availability* embodies two different governmental obligations: the right to education as a civil and political right requires the government to permit the establishment of educational institutions by non-state actors, while the right to education as a social and economic right requires the government to establish them, or fund them, or use a combination of these and other means so as to ensure that education is available.

- *Access* is defined differently for different levels of education. The government is obliged to secure access to education for all children in the compulsory education age-range, but not for secondary and higher education. Moreover, compulsory education ought to be free of charge while post-compulsory education may entail the payment of tuition and other charges<sup>5</sup> and could thus be subsumed under ‘affordability.’ The increasing trend of charging fees at post-compulsory education, contrary to the spirit of international human rights law, will be addressed in *Primer 7*, which is devoted to university education.
- One important facet of the *acceptability* of education has been highlighted by the addition of ‘quality’ before education in policy documents as of the 1990s, thus urging governments to ensure that education which is available and accessible is of good quality. The minimal standards of health and safety, or professional requirements for teachers, thus have to be set and enforced by the government. The scope of acceptability has been considerably broadened through the development of international human rights law. Censorship of school textbooks is no different from any other censorship, except that it is exposed as a human

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<sup>5</sup> There is difference in the explicit provisions of international human rights treaties, with the 1966 International Covenant on Economic, Social and Cultural Rights requiring the broadening of free-of-charge education upwards to the highest levels and the 1989 Convention on the Rights of the Child reiterating that primary education should be free of charge but implicitly endorsing the charging of fees in secondary and higher education.

Box 2:  
4-A scheme

AVAILABILITY	SCHOOLS	Establishment/closure of schools Freedom to establish schools Funding for public schools Public funding for private schools
	TEACHERS	Criteria for recruitment Fitness for teaching Labour rights Trade union freedoms Professional responsibilities Academic freedom
ACCESSIBILITY	COMPULSORY	All-encompassing Free-of-charge Assured attendance Parental freedom of choice
	POST-COMPULSORY	Discriminatory denials of access Preferential access Criteria for admission Recognition of foreign diplomas
ACCEPTABILITY	REGULATION AND SUPERVISION	Minimum standards Respect of diversity Language of instruction Orientation and contents School discipline Rights of learners
ADAPTABILITY	SPECIAL NEEDS	Children with disabilities
	OUT-OF-SCHOOL EDUCATION	Working children Refugee children Children deprived of their liberty



rights violation infrequently. The focus on indigenous and minority rights has prioritized the language of instruction, which often makes education unacceptable if the language is foreign to young children (and also often to the teacher). The prohibition of corporal punishment has transformed school discipline in many countries further broadening the criteria of acceptability. The emergence of children themselves as actors vindicating their right to education and rights in education promises to endow the notion of acceptability with their vision of how their rights should be interpreted and applied.

- *Adaptability* has been best conceptualized through the many court cases addressing the right to education of children with disabilities. Domestic courts have uniformly held that schools ought to adapt to children, following the thrust of the idea of the best interests of each child in the Convention on the Rights of the Child. This reconceptualization has implicitly faulted the heritage of forcing children to adapt to whatever schools may have been made available to them; the school effectively had a right to reject a child who did not fit or could not adapt. Moreover, a conceptual dissociation between ‘school’ and ‘education’ has taken place in attempts to provide education to imprisoned or working children. They can seldom be taken to school and thus education has to be taken to wherever they are.

The inherent balance between rights and duties, freedoms and responsibilities orientates law in general and thus also human rights law. Children cannot have a right to free education

unless the government is able to raise revenue, which means that companies and individuals have to pay tax. Unless parents accept that their children have a right to education, education will not be compulsory. Why law is important becomes clear if one considers how education can be provided: it can be delivered by religious institutions, with an implicit (or explicit) purpose of proselytizing; it can be perceived as a gift by a country’s political leaders or aid donors. Such models do not make education sustainable (proselytizing is often resisted, a gift can always be taken away) while beneficiaries are not treated as subjects of rights but rather as objects of charity, aid or political patronage.

Legal underpinning of education is routinely absent from such models. There is no legal right to aid nor a legal obligation to provide it. As one purpose of law is to ensure security and predictability, it defines who is entitled to what, who is obliged to do what, and what happens if the anticipated behaviour does not ensue so as to correct departures by any actor (including the government) from the required conduct. Domestic law on education routinely defines education as compulsory for children aged 6–15, and lays down the corollary obligation of the government to make education available and free of charge. Otherwise, education would be compulsory only in theory. Children have a duty to attend school because education is defined as a public good. It is imposed upon children so as to enable them to become economically self-sustaining, to enable them to understand the country’s language, past and future, to create an understanding of the chosen domestic ideology, religion or political doctrine. It should also teach children about human rights, but this is seldom translated into practice. Some

of the practically-implemented purposes of education may affirm human rights, others may deny them. A review of education in all its dimensions by the human rights yardstick is therefore necessary.

International human rights law defines governmental obligations relating to human rights as whole, specifying obligations to act and to react, to pursue specific conduct or to achieve a particular result. One essential role of the government is to set educational strategy, determine and

enforce educational standards, monitor the implementation of the strategy and put in place corrective action. This encompasses both core governmental obligations – to ensure that education is available and to respect freedom in education. The former is typically categorized as counterpart of economic/social/cultural rights, the latter as corollary of civil/political rights. Table 3 illustrates that no such division can be made – both types of governmental obligations are laid down as two sides of the same coin.

Table 3:

*Universal Declaration:*

Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.

*UNESCO Convention against Discrimination in Education:*

The States Parties to this Convention undertake to formulate, develop and apply a national policy which, ... will tend to promote equality of opportunity and of treatment ... and in particular: (a) To make primary education free and compulsory.

*International Covenant on Economic, Social and Cultural Rights:*

Primary education shall be compulsory and available free for all.

*Convention on the Rights of the Child:*

States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free for all.

*Universal Declaration:*

Parents have a prior right to choose the kind of education that shall be given to their children.

*UNESCO Convention against Discrimination in Education:*

The States Parties to this Convention agree that:

(b) It is essential to respect the liberty of parents, ... firstly to choose for their children institutions other than those maintained by the public authorities but conforming to ... minimum educational standards, and secondly, to to ensure ... the religious and moral education of the children in conformity with their own convictions.

*International Covenant on Economic, Social and Cultural Rights:*

The States Parties to the present Covenant undertake to have respect for the liberty of parents ... to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, ...

*Convention on the Rights of the Child:*

No part of [articles 28 and 29] shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions ...

Regardless of this feature of international human rights law, the trend of dissociating inter-related obligations continues and can be illustrated by typical descriptions of only one side of the coin:

- human rights may be defined only as safeguards against abuse of government's power, which leads to restricting human rights to protections against torture, summary executions or disappearances. The corollary is an erroneous perception that human rights can be secured without governmental funding because the only requirement is that governments refrain from abusing their power. Such a perception is based on silence about the cost of a well-trained, professional and well-paid police which is necessary to prevent abuses of power. The underlying vision of the government as an enemy leads to demands for a small government, opposition to taxation or governmental intervention in the free market, thus clashing against the postulated role of the government in eradicating poverty, protecting the rights of the child, or eliminating gender discrimination.
- the right to education may be defined in terms of access to free-of-charge schooling at all levels – from the nursery to post-graduate studies – which increases its cost beyond the reach of many governments. The underlying idea is that having a right means that the government should fund and deliver whatever service is associated with such a right. It is easily shown as a misinterpretation taking the right to marry as example –

nobody would argue that having a right to marry means that the government has to furnish a spouse to whoever wants one. Rather, having the right to marry entails corresponding governmental obligations to regulate the age of marriage (by prohibiting child marriage), to secure that women have a right to marry (by ensuring that they are not sold and purchased), that spouses have equal rights (starting from the outlawing of polygamy), or that people who marry are not penalized by having their taxation raised.

## 1. Availability

Ensuring that primary schools are available for all children necessitates a considerable investment, which is amplified by post-compulsory education and universities. While the state is not the only investor, international human rights law obliges it to be the investor of last resort so as to ensure that primary schools are available for all school-age children. In Africa children of primary-school age constitute close to one-third of the population and the majority is living in rural areas. Making primary education available to dispersed rural communities, some of whom may be nomadic, illustrates the scope of the challenge. The current global priority for primary education has focused attention away from secondary and tertiary education, and thus from governmental obligations in this area. This issues will be discussed in *Primer No. 7*.

Ensuring that education is available revolves rarely, if ever, only around funding. Freedom of parents and communities to

establish schools has been part of international human rights law since its creation. It is guaranteed amongst civil and political rights and is therefore subject to international as well as domestic legal enforcement. The European Commission on Human Rights has affirmed the right to establish private schools, subject to their regulation and supervision by the government to ensure that education, especially its quality, conforms to the prescribed standards.<sup>6</sup> Allowing anybody to set up an institution, call it a 'school,' carry out a programme called 'education,' and issue to learners pieces of papers called 'diplomas' which may turn out to be worthless is not the purport of international human rights law; it would constitute dereliction of governmental human rights obligations. Most countries thus operate some system of accreditation and/or licensing so as to ensure that schools are properly equipped and staffed and that their programmes conform to the definition of education. The balance which needs to be struck between the governmental obligation to ensure that education is worthy of its name and safeguards necessary to prevent the government from abusing its power to grant or withhold license has generated endless court cases all over the world.

Court cases are often brought by those who attended unlicensed educational institutions and are subsequently precluded from continuing their education because their diplomas are not recognized, or from taking examinations needed for employment or further education. In India, one

such case reached the Supreme Court in 1992, after students from an unrecognized educational institution had secured an order of a lower court to be allowed to take an exam, granted them on humanitarian grounds. Out of 129 students, only one passed, which well illustrated the poor quality of the unrecognized educational institution which they had attended. The Court has admonished the lower court, pointing out that 'slackening the standard and judicial fiat to control the mode of education and examining systems are detrimental to the efficient management of education.' The need to ensure that nominally available schools conform to the established educational standards has been thus described:

This Court judicially noted mushroom growth of ill-equipped and under-staffed unrecognized educational institutions in Andhra Pradesh, Bihar, Tamil Nadu and Maharashtra States and other States too are no exceptions. Obviously the field of education is found to be fertile, perennial and profitable business venture with least capital outlay. This case is one such case from the State of Maharashtra.

It would appear that individuals or societies, without complying with the statutory requirements, establish educational or training institutions ill equipped to impart education and have students admitted, in some instances despite warnings by the State Government and in some instances without knowledge of the State Government concerned, but with connivance at lower levels.

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<sup>6</sup> European Commission on Human Rights – *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden*, Application No. 11533, Decision of 6 March 1987, *Decisions & Reports*, vol. 51, p. 125.

The ill-equipped and ill-housed institutions and sub-standard staff therein are counter-productive and detrimental to inculcating spirit of inquiry and excellence in the students. The disregard of statutory compliance would amount to letting loose of innocent and unwary children.<sup>7</sup>

The other facet of the obligation to ensure that schooling is available are safeguards against abuses of power by the government. A government may close a university because professors and students have challenged the official orthodoxy exercising their freedom of expression. Or it may disregard the right to education and breach its obligation to ensure that education is available. The African Commission on Human and Peoples' Rights found in 1996 that a two year long closure of universities and secondary schools in Zaire (as it was at the time) constituted a violation of Article 17 of the Charter, which guarantees the right to education.<sup>8</sup>

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<sup>7</sup> Supreme Court of India – *State of Maharashtra v. Vikas Sabebrao Roundale and Others*, judgment of 11 August 1992, paras. 2–3 and 12, (1992) 4 *Supreme Court Cases* 435.

<sup>8</sup> African Commission on Human and Peoples' Rights – *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*, Communications 25/89, 47/90, 56/91 and 100/93 (joined), Decision of the Commission adopted at its 18<sup>th</sup> ordinary session at Prais (Cape Verde), *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995/96, Assembly of Heads of State and Government, Thirty-second Ordinary Session, 7–10 July 1996, Yaounde, Cameroon*.

Legal challenges of un-available education follow the rule of inverse proportion: where education is the least available, its absence is attributed to poverty and there are no legal challenges. The most important reason is that no legal obligation can force the state to make education available if this is beyond its powers; nobody can be legally obliged to do the impossible. English courts have held that this obligation requires the local authorities to do whatever they reasonably can to ensure that education is available. In one particular case, the duty of the local education authority to secure sufficient school places for all children within the compulsory school age was not fully implemented and 300 children were deprived of primary education because of a shortage of teachers. The court held that the authority did whatever was in its powers to rectify the situation and was thus not in breach of its statutory duty.<sup>9</sup>

### 1.1 Funding for public and private schools

Securing that education is available reveals a variety of models: the government can fund diverse schools but not operate any, or operate a network of state and/or public schools without funding any non-state schools. The extremes of a state's monopoly over education or its complete dissociation from education, neither of which would be consistent with international human rights law,

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<sup>9</sup> *R. v. Inner London Education Authority, ex parte Ali*, [1990] C.O.D. 317, [1990] 2 Admin.L.R. 822, 828B.

are rare. Some countries have only public schools, others only private, while most have a mixture. The meaning of 'private' varies a great deal. In its broadest sense, it encompasses all non-state-run schools, some of which may actually be partially or even fully funded by the state. Governmental obligation to make education available is in practice frequently, albeit erroneously, associated with its provision of education. In quite a few countries, governments provide subsidies to diverse range of schools without operating any.

The assumption behind the term 'private' is that all such schools are profit-making while many are not. The term is applied to formal and non-formal education, religious and secular schools, minority and indigenous schools, as well as schools for children with special needs. Some private schools are supplementing state-run schools and are established where they do not provide education in a particular minority language or religion, or do not accommodate children with physical or learning disabilities. Others are established as an alternative to state-provided education. The practice of states varies with regard to subsidies for non-public schools. Indeed, there is a great deal of difference in the very classification of schools as public and/or state schools and private schools. The classification developed by UNESCO, which is globally used in education statistics, divides schools by the criterion of their management, by the state or private, and 'government-aided schools are considered private if they are privately managed.'<sup>10</sup> Differently, English courts have

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<sup>10</sup> UNESCO – 1998 *World Education Report*, Paris, 1999, p. 118.

classified schools into state (i.e. public) and private by the criterion of the source of funding. If a school's funding comes out of public revenue, it is defined as a state school regardless of how it is managed.<sup>11</sup>

Resource allocation is generally seen as a political decision and un-elected courts neither can nor should usurp the prerogatives of elected parliamentarians. Human rights correctives lie at the boundary between political and legal processes. Education is commonly financed out of general taxation, which in some countries places the mobilization of funding for education beyond the remit of domestic courts. A typical example is the United States, where economic and social rights are not recognized and, furthermore, the Supreme Court has declared taxation as well as economic and social policy to lie beyond its purview. It has held that raising and disbursing tax constitutes a legislative function beyond the remit of courts. The case dealt with the financing of education at the district level out of property tax, which had created a great deal of difference between rich and poor districts. The Court has refrained from questioning this system, although funding depended 'on the relative wealth of the political subdivisions in which citizens live.' Rather, it favoured the 'freedom to devote more money to the education of one's children,' preferring local autonomy over increased powers for the central government: 'other systems of financing, which place more of the financial responsibility in the hands of the

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<sup>11</sup> *National Union of Teachers v. Governing Body of St. Mary's Church of England Aided School*, [1995] ICR 317, EAT [1997] IRLR 242 (CA); *R. v. Haberdashers' Aske's Hatcham Trust, ex parte T* [1995] ELR 350; EA 1996, ss 482 (1) (b), (3); 483.

State, [would] result in comparable lessening of desired local autonomy.’<sup>12</sup>

Nevertheless, challenges of the allocation of public funds to private schools in other countries have introduced human rights correctives in resource allocation. Such cases have often been a response to the recent trends of privatization and commoditization of education, especially to school vouchers.

School vouchers have altered the established practice of the states to finance a network of public schools so that all children have access, and the consequent allocation of children to a particular school by some objective criteria, such as distance. School vouchers introduced a different view of the obligations of the state – rather than having to ensure that public schools are available for all children and that all schools comply with the requirements of quality and safety, the introduction of school vouchers has enabled parents to shop around with the voucher in hand as payment. Through such voucher schemes, governments have enabled parents to choose a school for their children, with the state’s contribution to the child’s education embodied in the voucher, usually amounting to the enrolment and/or tuition fee. The rationale has been that individual schools should be rewarded for attracting learners, while those unable to do so should be deprived of funding. At a higher level of abstraction, the rationale is to enhance competitiveness and/or broaden parental freedom of choice. An additional, albeit implicit reason, has been a wish to subject public schools to competition, seeing them as having monopolized education. This approach has generated a great deal

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<sup>12</sup> US Supreme Court – *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), 21 March 1973.

of controversy by challenging the premise accepted in many countries, namely that the government is obliged either to provide all-encompassing public education (at least within the compulsory school age) or to subsidize a variety of non-public schools, in both cases ensuring that all schools comply with the basic quality standards.

Through voucher schemes, governments enable individual learners to make payments to the school of their choice. The distinction between public and private, state and non-state, fee-charging and free schools – and the diversity which they embody – is likely to be eroded if the introduction of vouchers gains ground. Only schools able to attract learners and/or funding will be left. The rationale behind vouchers sees governments as providing some funding to learners to the detriment of the full range of governmental human rights obligations, namely to ensure that schooling is available, accessible, acceptable and adaptable.

On-going debates about school vouchers started within the realm of economics, focusing on consumer choice and competitiveness while rejecting the notion of education as a public good.<sup>13</sup> Court cases have brought the issue into the realm of the rule of law. The voucher scheme introduced in 1993 in Puerto Rico was declared unconstitutional in the part which accorded to selected pupils a financial grant of \$1,500 for

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<sup>13</sup> Education constitutes a public good because its worth increases when it is shared and it cannot be prevented from spreading – people learn regardless of whether they are meant to or not, children and adults alike. Different from education, schooling cannot easily be defined as a public good because individuals can be prevented from access to school. Deprivation of schooling cannot be equalized with a lack of education – people learn at home, on the street, in the community, in prison or refugee camp.

transfer from public to private school.<sup>14</sup> The constitutional prohibition of diverting public funds to private schools, originating from the separation between the church and the state, has been upheld. Although the voucher scheme did not revolve around secular or religious schools, because private included religious schools, this constitutional ban precluded the spread of voucher schemes. They were also aimed at financially stimulating transfer from public to private schools (thus also transferring tax revenue to private schools) with the aim of increasing choice, against the constitutional requirement for public funds to be used solely for public schools.

Controversies relating to vouchers routinely revolve around economic arguments, however, thus departing from the meaning and purpose of the right to education. Within the existing jurisprudence, the Supreme Court of Colombia has ably clarified why education should not be guided by economic arguments alone:

[A]lthough the Constitution protects economic activities, private initiative and competition, as well as recognizing the right of private entities to establish schools, these liberties cannot negate nor can they diminish the nature of education as public service and its social function; education is also and above all else a fundamental right...

[E]ducation – even if it is private – has to be provided in the conditions which guarantee equality of

opportunity in access to education; all forms of discrimination and ‘elitism’ are thus repugnant to its nature of public service with profound social contents; these, by virtue of excessive economic demands, automatically deny access to intellectually able persons solely because [of] their levels of income.<sup>15</sup>

All aspects of public funding for private schools have been litigated vigorously, domestically and internationally, so as to define individual rights and the corresponding governmental obligations. Much international jurisprudence has originated from demands upon states to finance alternatives to uniform public schooling. The jurisprudence focusing on public funding to facilitate the exercise of freedom to establish and operate schools guaranteed under international human rights law has overcome a boundary between civil and political rights, which are often perceived as being costless, and economic, social and cultural rights, viewed as costly.

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<sup>15</sup> In the original, the Court has said: ‘si bien la Constitución protege la actividad económica, la iniciativa privada y la libre competencia y reconoce también el derecho de los particulares de fundar centros educativos, tales libertades no pueden anular ni disminuir el carácter de servicio público y de función social [atribuido por la Constitución Política a la educación,] que también y sobre todo es un derecho fundamental... [L]a educación – aun la privada – debe prestarse en condiciones tales que garantice la igualdad de oportunidades en el acceso a ella, por lo cual repugna a su sentido de servicio público con profundo contenido social cualquier forma de trato discriminatorio o ‘elitista’ que, en virtud de un exagerado requerimiento económico, excluya per se a personas intelectualmente capaces [por el] suyo nivel de ingresos.’ Supreme Court of Colombia – Request to determine that Article 203 (in part) of the Law No. 115 of 1994 is unconstitutional by Andres De Zubiria Samper, Judgment of 6 November 1997, C-560/97.

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<sup>14</sup> Tribunal Supremo de Puerto Rico – *Asociación de Maestros v. José Arsenio Torres*, 30 de noviembre de 1994, 94 DTS 12:34.



The Human Rights Committee has held that a government ‘cannot be deemed to act in a discriminatory fashion if it does not provide the same level of subsidy for the two [public and private] types of establishment, when the private system is not subject to State supervision.’ In a similar case, which dealt with the provision of free textbooks and school meals to children in public but not in private schools, the Committee has affirmed its previous view, adding that ‘the preferential treatment given to public sector schooling is reasonable and based on objective criteria.’<sup>16</sup> This affirmation of the priority for public over private schools goes beyond funding: the role of education in the socialization of children prioritizes inclusiveness over segregation. In the well-known words of the US Supreme Court, ‘separate educational facilities are inherently unequal.’<sup>17</sup>

The European Commission on Human Rights has during its previous existence affirmed that the state has no obligation to subsidize private schools while it has the right to subject such schools to regulation and supervision because it is responsible for ensuring that all education complies with the

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<sup>16</sup> Human Rights Committee – Carl Henrik Blom v. Sweden, Communication No. 191/1985, Views adopted on 4 April 1988, *Selected Decisions of the Human Rights Committee under the Optional Protocol, Seventeenth to thirty-second sessions (October 1982 – April 1988)*, United Nations, New York, 1990, p. 219, para. 10.3; *G. and L. Lindgren and L. Holm et. al. v. Sweden*, Communications Nos. 298/1988 and 299/1988, Views of the Committee adopted on 9 November 1990, U.N. Doc. CCPR/C/40/D/298-299/1988 of 7 December 1990, para. 10.3.

<sup>17</sup> *Brown et al. v. Board of Education of Topeka et al.*, Judgment of 17 May 1954, 347 U.S. 294.

prescribed standards.<sup>18</sup> Domestic courts have been dealing with this subject-matter in different countries and have followed the thrust of international human rights law. The Supreme Court of Canada, having examined a complaint against a denial of public funding to private religious schools, has affirmed that the purpose of public schools is provision of education for all members of the community. The exercise of the parental freedom to educate their children in accordance with their religious beliefs in separate schools (or at home) prevents their children from taking advantage of public schools and creates costs for the parents; such exercise of parental freedom does not entail an entitlement to public funding, however.<sup>19</sup>

## 1.2 Teachers

There is a myriad of human rights issues which particularly affect teachers but these attract little attention in the literature on the right to education, which is focused on children. If the rights of teachers are not respected and protected, it is impossible to imagine that this may be different for the rights of children.

To begin with, teachers have to be educated and trained to teach, and there has been no hesitation on the part of courts to

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<sup>18</sup> Eur opean Commission on Human Rights – Decisions concerning applications Nos. 6857/74 and 11533/85, *Decisions and Reports*, vol. 9, p. 27 and vol. 51, p. 125.

<sup>19</sup> Supreme Court of Canada – *Adler v. Ontario*, Judgment of 21 November 1996, [1996] 3 S.C.R. 609, (1996) 140 DLR (4<sup>th</sup>) 385.

affirm that teachers ought to be qualified to teach, including perfect command of the language in which they are expected to teach.<sup>20</sup> This court case illustrates the abyss between vast parts of the world where most teachers are untrained, and small parts where teachers' qualifications are strictly controlled. South Africa's Constitutional Court has addressed one frequent remedy for the lack of teachers, the resort to 'contract teachers.' Disfavouring this remedy, it has also faulted a requirement for teachers to be citizens. The Court has found that 'non-citizens are a minority in all countries and have little political muscle,' rejected the government's justification for denying teaching posts to non-citizens so as to provide employment to its own citizens, and gave the highest priority to the provision of quality education.<sup>21</sup>

The teachers' status as civil and/or public servants, which is particularly widespread for primary school teachers, often leads to the denial of their trade union freedoms as well as collective bargaining, while a definition of teaching as an essential service leads to the denial of the teachers' right to strike. Trade union freedoms and labour rights for teachers, much as for other professions, form part of basic international labour standards, which are legally enforceable in many countries as well as internationally. Denials of the right to

form trade unions, dismissals of striking teachers (or their punishment by internal exile, transfers, or reduced salaries), anti-union discrimination, harassment, arrests or murders of trade union leaders, have affected teachers in many countries. ILO Freedom of Association Committee has consistently rejected assertions that teaching is an essential service and has affirmed that teachers have the right to strike, stating that 'the right to strike can only be restricted and even prohibited in the public service (public employees being those who act as agents of the public authority) or in the essential services in the strict sense of the term (i.e. those services whose interruption would endanger the life, personal safety or health of the whole or part of the population).'<sup>22</sup> The Committee has reaffirmed the teachers' right to strike: 'the right to strike [is] one of the fundamental rights of workers and their organizations; it is one of the essential means through which they may promote and defend their occupational interests.'<sup>23</sup> Moreover, the ILO has affirmed that besides safeguarding their occupational interests, trade unions 'should be able to have recourse to protest strikes, in particular aimed at criticising a government's economic and social policies.'<sup>24</sup>

A complaint by two university teachers, who had been arrested for the offence of *lèse-majesté* ('outrage au Chef de

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<sup>20</sup> Human Rights and Equal Opportunity Commission of Australia – *Maria D'Souza v. Peter Geyer and Directorate of School Education*, No. H94/100, 1995–1996, and *T. v Department of Education of the State of Victoria*, No. H96/149, 1 July 1997.

<sup>21</sup> Constitutional Court of South Africa – *Larbi-Odam v. The Member of the Executive Council for Education (North-West Province)*, SA 745 (CC), 1998.

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<sup>22</sup> Freedom of Association Committee – 272nd Report, Case No. 1503 (Peru), para. 117.

<sup>23</sup> Freedom of Association Committee – 277th Report, Case No. 1528 (Germany), para. 285.

<sup>24</sup> Freedom of Association Committee – 304th Report, Case No. 1863 (Guinea), para. 358.

l'Etat dans l'exercice de sa fonction') and subsequently refused reinstatement in their jobs upon release from prison, with the justification that they had deserted their posts, was examined by the Human Rights Committee. The Committee has affirmed that 'the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticise the Government and to publish material with political content' applies to university teachers, whether they are part of the public service or not.<sup>25</sup>

The teaching profession is affected by various types of gender imbalance. Among primary-school teachers, female teachers are a small proportion in some countries while a vast majority in others, as illustrated in Table 4. These two extremes highlight the necessity of adaptability: many international and domestic policies have been developed to

increase the number of female teachers, but few to address the other extreme. There are few countries in the world that have established a policy of gender balance, namely the objective that the representation of one sex should not exceed 40% without corrective measures being triggered off. Table 4 shows that women constitute more than two-thirds or even more than four-fifths of primary school teachers in some countries. The risk of perpetuating their marginalization rather than promoting equality was noted forty years, in the very first report on discrimination in education within the United Nations. The Report summarized reasons for women forming the majority of teachers in primary school as 'the idea that women are particularly well suited to teach young children, the fact that teaching offers an outlet to women to whom many other careers remain closed, and the fact that men are attracted towards better paid professions.'<sup>26</sup>

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<sup>25</sup> Human Rights Committee – *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, Communications No. 422/1990, 423/1990, and 424/1990, Views of 12 July 1996.

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<sup>26</sup> United Nations – Study of Discrimination in Education by Charles Ammoun, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/181/Rev. 1, Sales No. 1957.XIV.3, New York, August 1957, p. 43.

Table 4:  
Gender imbalance amongst teachers

<b>Above 90%</b>	Armenia, Bahamas, Georgia, Kazakhstan, Mongolia, Czech Republic, Italy, Latvia, Lithuania, Moldova, Russia, Slovakia, Slovenia, Ukraine	<b>Between 25 and 50%</b>	Afghanistan, Algeria, Burundi, Cambodia, Cameroon, China, Congo, Djibouti, Eritrea, Ethiopia, Gabon, India, Kenya, Laos, Malawi, Mauritius, Morocco, Niger, Nigeria, Oman, Papua New Guinea, Tanzania, Tunisia, Turkey, Uganda, Vanuatu, Zambia, Zimbabwe
<b>Between 75% and 90%</b>	Australia, Austria, Azerbaijan, Botswana, Bulgaria, Colombia, Croatia, Cuba, Dominica, Estonia, France, Germany, Guyana, Hungary, Ireland, Israel, Jamaica, Kyrgyzstan, Lesotho, Malta, New Zealand, Nicaragua, Qatar, Romania, San Marino, Seychelles, Sri Lanka, Suriname, St Kitts and Nevis, St Lucia, Swaziland, United Kingdom, Uzbekistan, Venezuela, USA, Yugoslavia	<b>Below 25%</b>	Benin, Burkina Faso, Chad, Côte d'Ivoire, DR Congo, Equatorial Guinea, Gambia, Guinea, Mali, Mauritania, Mozambique, Nepal, Pakistan, Senegal, Togo
<b>Between 50 and 75%</b>	Albania, Bahrain, Belgium, Belize, Brunei Darussalam, Canada, Cape Verde, Chile, Cyprus, Denmark, Dominican Republic, Ecuador, Egypt, Fiji, FYROM, Greece, Grenada, Honduras, Indonesia, Iran, Iraq, Japan, Jordan, Kiribati, Korea, Kuwait, Madagascar, Malaysia, Myanmar, Namibia, Netherlands, Paraguay, Peru, Samoa, Saudi Arabia, South Africa, Spain, St Vincent and Grenadines, Sudan, Sweden, Switzerland, Syria, Tajikistan, Tonga, Trinidad and Tobago, United Arab Emirates		

*Source: UNESCO – World Education Report 1998, pp. 144–147; the figures refer to 1995.*

## 2. Accessibility: Focus on girls

Access to public schools should be guided by non-discrimination, the overriding principle of international human rights law, which applies to civil and political, and economic, social and cultural rights, as well as to the rights of the child. Non-discrimination is not subject to progressive realization but has to be secured immediately and fully. Respect of parental freedom of choice for the education of their children is also not subject to progressive realization but should be guaranteed fully and immediately. Its exercise, however, sometimes clashes against the elimination of discrimination for the rights of the child, such as deprivation of education for girls.

*Primer No. 6* is devoted to discrimination, including in access to education, hence this one is confined to brief outline of access to education for girls. Indeed, the existing quantitative and qualitative information on the lack of access to education has thus far been systematically collected only for girls and women. The right to education has been demonstrated to act as a corrective to the free market. Governments indeed have human rights obligations *because* primary education should not be treated as a commodity. There has been a growing acceptance of the necessity for governmental intervention concerning access to primary education for girls. Many economists refer to the rationale for such intervention as a market failure. In its simplest version, it can be described as the

unwillingness of parents to send their daughters to school because there is no economic rationale to invest in their daughters' education. A demand for girls' education thus has to be created by providing incentives to parents. Such initiatives showed that conflicting expectations upon girls may deprive them of access to education. If they are required to perform household labour, the school schedule has to be adapted to the seasonal and daily rhythm of subsistence food production or family life. Since poor families depend on the work of each member of the family for their survival, combining school and work often proves necessary so as to make school really accessible for girls.

An interplay between non-availability of schools and parental choices often impedes girls' access to education. There is a great deal of research targeting parental choices, but a paucity of information about the availability of schools for girls. Available schools may be open only to boys – by law or in fact – while the existing educational statistics do not make this difference visible. It is impossible to determine whether the available schools have a sufficient intake capacity to enrol and retain all primary age school girls or not. Table 5 shows that gender imbalance prejudices girls, although there are countries in which the girls outnumber the boys. Primary schools in the Caribbean or Eastern Europe have difficulties in attracting and retaining boys, one reason being that the vast majority of teachers are female.

Table 5: Gender imbalance amongst pupils

<b>More than + 10%</b>	Lesotho (11%), Trinidad and Tobago (11%)	<b>- 10% to - 20%</b>	Cameroon (10%), Comoros (10%), Mozambique (10%), Mali (11%), Papua New Guinea (12%), Senegal (12%), Burkina Faso (13%), Egypt (13%), Iran (13%), Laos (14%), Niger (14%), Gambia (18%), Guinea (18%), Morocco (19%)
<b>+ 3% to + 9%</b>	Mongolia (3%), Nicaragua (3%), Bahamas (4%), Dominican Republic (4%), Botswana (5%), Namibia (7%),	<b>More than - 20%</b>	Congo/Kinshasa (21%), Central African Republic (22%), Guinea-Bissau (26%), Togo (26%), Afghanistan (27%), Chad (29%), Benin (31%), Nepal (39%),
<b>+ 1% to + 2%</b>	Albania, Bahrain, Costa Rica, Denmark, Ecuador, El Salvador, Estonia, Fiji, Georgia, Haiti, Honduras, Hungary, Korea, Luxembourg, Malaysia, Panama, South Africa, USA, Yugoslavia		
<b>- 1% to - 2%</b>	Belize, Bulgaria, Canada, Chile, China, Croatia, FYROM, Guyana, Libya, Madagascar, Malta, Oman, Peru, Philippines, Poland, Qatar, Samoa, Saudi Arabia, Slovenia, Tanzania, United Arab Emirates, Zambia		
<b>- 3% to - 5%</b>	Belarus, Eritrea, Indonesia, Kenya, Kyrgyzstan, Latvia, Tunisia, Turkey, Vanuatu, Venezuela, Somalia,		
<b>- 6% to - 9%</b>	Congo/Brazzaville (6%), Uganda (7%), Algeria (8%), Bangladesh (8%), Bolivia (8%), Burundi (8%), Syria (8%), Ethiopia (9%), Djibouti (9%), Iraq (9%), Mauritania (9%),		

*In the following countries there is no difference between net primary school enrolment for boys and girls: Argentina, Australia, Austria, Barbados, Belgium, Brunei Darussalam, Cape Verde, Cuba, Cyprus, Czech Republic, Finland, France, Germany, Greece, Ireland, Jamaica, Japan, Jordan, Kuwait, Malawi, Mauritius, Netherlands, New Zealand, Norway, Paraguay, Portugal, Romania, Russia, Rwanda, Singapore, Spain, Sweden, Switzerland, United Kingdom, and Uruguay.*

*Source: UNICEF – The State of the World's Children 1999, pp. 106–109.*

### 3. Acceptability

Extreme views of the role of the government in education are embodied in seeing the state as the sole funder and provider of education, with the other extreme deeming the state to be only the regulator. Much as in any other area, the extremes are rarely present in the practice of states and cloak the global consensus around the regulatory role of the state, that is, its task to set and enforce educational standards and provide the necessary funding. The right to education ‘by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals.’<sup>27</sup> The state is obliged to ensure that all schools conform to the minimal criteria which it has developed, thus ensuring one component of making education acceptable.

Respect for parental freedom to have their children educated in conformity with their religious, moral or philosophical convictions has been affirmed in all general human rights treaties and is continuously subjected to litigation. The Supreme Court of Canada has rejected a claim by a parent to ‘educate his children as he pleases,’ based on ‘his authority over his children and his duty to attend to their education’ which comes from God. Although Canadian law does not require compulsory education but allows parents to exempt their children from attending school if they are ‘under efficient instruction at home or elsewhere,’ the applicant had refused to apply for an approval of home education, claiming that this

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<sup>27</sup> European Court of Human Rights – *Belgian Linguistic Case*, Judgment of 23 July 1968, Series A, No. 6, para. 5.

would violate his religious freedom. The Court has found that ‘accommodation of defendant’s religious beliefs would entail a complete exemption from state regulation’ and thus ‘severely impede the achievement of important state goals.’<sup>28</sup>

Respect of religious convictions in education has emerged with particular frequency with regard to Jehovah’s Witnesses. The European Court of Human Rights examined a complaint concerning a girl who was suspended from school because of her refusal to participate in a parade. She regarded it as a commemoration of war, and her religious convictions prevented her from participating in an event that would glorify warfare. The Court took note of the parents’ pacifist convictions (not saying much about the girl’s) but found no human rights violation.<sup>29</sup> The Supreme Court of the Philippines has taken the opposite approach and affirmed that children who are Jehovah’s Witnesses have the right to be exempt from the flag ceremony (consisting of the singing of the national anthem, saluting the flag and reciting a patriotic pledge) because their freedom to exercise their religious beliefs could only be limited on the grounds of a danger to public safety.<sup>30</sup>

The language of instruction is a frequent bone of contention because it can preclude children from attending

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<sup>28</sup> Supreme Court of Canada – *R. v. Jones*, [1986] 2 S.C.R. 284.

<sup>29</sup> European Court of Human Rights – *Efstathiou v. Greece* and *Valsamis v. Greece*, Judgments of 18 December 1996.

<sup>30</sup> Supreme Court of the Philippines – *Ebralinag v. The Division Superintendent of School of Cebu*, G.R. Nos. 95770 & 95887, 1 March 1993 and 29 December 1995.

school or learning, if they are at school. It has always created a great deal of controversy in education and this is not likely to diminish, on the contrary. Controversies span decision-making on the official language(s) of instruction for public schools, the teaching of as well as teaching in minority and indigenous languages (as well as the recognition thereof), and the teaching of (as well as in) foreign languages.

The European Court of Human Rights has affirmed the right of the state to determine official languages of the country which are thus the languages of instruction in public schools, but denied that there was such a thing as a right to education in a language of one's choice.<sup>31</sup>

Governments have been required to respect the right of minorities to set up their own schools in minority languages since the time of the League of Nations. In 1919, the precedent was set by Poland. Alongside education in minority languages in public schools, it affirmed the right of citizens who were members of minorities to establish, manage and control schools at their own expense 'with the right to use their own language and to exercise their religion freely therein.'<sup>32</sup> That right was subsequently confirmed by the Permanent Court of International Justice.<sup>33</sup> More than half a century later, dilemmas regarding the language

of instruction have increased rather than diminishing. Demands that minority schools be made 'free' (that is, state-financed) are often made but seldom granted. The right to be educated in one's mother tongue has been on the international human rights agenda since the 1950s and controversies intensified in the 1990s, when the wisdom of unilingual education, even in one's mother tongue, has been challenged, adding a new item to this endless controversy. The financial implications of multilingualism in primary school have further exacerbated controversies.

From the rights of the child perspective, the obligation to make primary school acceptable goes far beyond parental freedom of choice or the language of instruction, and poses a great deal of challenge for all states. Restrictions upon school discipline are a good example because they have considerably increased in the past decade to protect the child's dignity against humiliation or degradation. They were, and are likely to remain, subject to litigation.

An attempt by parents whose religious doctrine deemed physical punishment of children to be legitimate and necessary to challenge Sweden's 1979 policy against corporal punishment of children forced the European Commission on Human Rights to revisit the issue that had already been the object of considerable litigation. The parents complained against the encroachment upon their rights, but did not persuade the Commission to rule against Sweden.<sup>34</sup> A similar case was litigated in South Africa two decades later, with a similar

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<sup>31</sup> European Court of Human Rights – *The Belgian Linguistic Case*, Judgment of 23 July 1968, Series A, vol. 6, p.31.

<sup>32</sup> Article 8 of the Polish Minorities Treaty of 1919, reproduced in *Protection of Linguistic and Racial Minorities by the League of Nations*, Geneva, 1927.

<sup>33</sup> Permanent Court of International Justice – *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, Series A/B, No. 64.

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<sup>34</sup> European Commission on Human Rights – *Seven individuals v. Sweden*, Application No. 8811/79, decision of 13 May 1982 on the admissibility of the application, *Decisions and Reports*, vol. 29, p. 111–112.



result. It is excerpted in Box 6 below, in the section which deals with the role of education in preventing violence.

## 4. Adaptability

What children should learn at school and how the learning process should be organized is the source of never-ending challenge and change. The usual approach is to review the contents and process of learning from the viewpoint of the child as future adult, while the Convention on the Rights of the Child requires that the best interests of the child be given priority. The choice in the Convention to refer to the best interests of the individual child highlights the need for the educational system to become and remain adaptable. The challenge is immense – the system of education is required to adapt to each individual child, against the historical heritage of excluding all the children who were deemed not to be able to adapt to the system of education as it was.

The way in which children perceive their own community and the world at large is influenced by the presence and absence of particular people and phenomena within the system of education. Children with disabilities are often segregated into separate schools or denied education altogether, and also absent from school books. Differently, the head of state and/or government tends to be very much present in schools – each classroom may have his photograph and textbooks may devote considerable attention to his professional or private life. Neighbouring countries may be portrayed in a positive or negative life. Amongst the children themselves, many may be excluded from formal schooling. Domestic servants, which are

prevalent throughout Africa and in much of Asia, are likely not be deemed school-worthy and school-going children will not perceive them as school-children but as servants. Moreover, an unusual term has been forged to differentiate between children by classifying some as ‘educable,’ excluding others. The criterion is fluid – children who may be classified as ‘non-educable’ may simply not understand the language in which they are addressed. Children with learning difficulties may be classified as ‘un-educable’ and prevented from learning rather than being helped to learn.

The historical heritage of education has encompassed many different criteria and methods of exclusion. As mentioned above in the section on access to education, some of this exclusion has followed stereotyped features attributed to people who are female, or non-white, or foreigners, or indigenous. Another track, not much different substantively, has followed a division of humanity into able and disabled, excluding those classified as disabled from education.

### 4.1 Children with disabilities

Conceptually the most far-reaching judicial interpretations of the meaning of the right to education have dealt with children with disabilities. It is indeed the best illustration of the strength and vigour of the notion of the rights of the child to see courts in a variety of countries affirming that education has to be adapted to each child rather than forcing children to adapt to whatever schooling has been designed for them.

The requirement upon schools to adapt to learners with special needs has been subjected to a great deal of litigation. The

objective of inclusiveness, that is, integration of learners with disabilities in mainstream schools has imposed upon schools and teachers the need to adapt to learners with divergent abilities and needs. The Supreme Court of Canada has thus defined non-discrimination with regard to persons with disabilities:

Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons with never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for a ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses 'the attribution of stereotypical characteristics' reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics

which is the central purpose of [non-discrimination].<sup>35</sup>

The principle of non-discrimination has been interpreted to necessitate a comparison between learners with and without disabilities in order to detect and inhibit less favourable treatment of learners with disabilities. A distinction between meeting their special needs and a positive obligation to treat them more favourably has been analyzed by the Federal Court of Australia. The Court has found that accommodation of special needs sometimes requires positive action to be taken, but has not accepted the reasoning of the Human Rights and Equal Opportunity Commission, whose decision it has faulted. The Commission claimed that the yardstick should be the effort made by the school, or the lack thereof, to meet the needs of a specific learner. The Commission laid down as the yardstick 'what the school ideally ought to have done.' The Federal Court has adopted a lower criterion, explaining that non-discrimination required a comparison between the treatment of the learner with disabilities with that of a learner without disabilities in the same circumstances,<sup>36</sup> and thus laying down a relative rather than an absolute yardstick.

The European Commission on Human Rights has held that the right to education 'does not require the admission of a severely handicapped child to an ordinary school, with the expense of

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<sup>35</sup> Supreme Court of Canada – *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R., 241, para. 67.

<sup>36</sup> Federal Court of Australia – *A school v Human Rights & Equal Opportunity Commission & Anor* [1998] 1437 FCA, 11 November 1998.

additional teaching staff or to the detriment of other pupils' when education can be provided in a special school.<sup>37</sup> This has been amplified by the German Federal Constitutional Court, which has held that inclusiveness, the general approach favouring the education of disabled and non-disabled children together in general public schools, does not diminish the need to review the circumstances of each individual case, giving particular weight to the views of the child and his or her parents. The Court has added the need to consider the requirements, including financial, of a specific solution for the educational authorities:

The current state of pedagogical research does not indicate that a general exclusion of disabled children from integrated general schools can be constitutionally justified. The education should be integrated, providing special support for disabled pupils if required, so far as the organizational, personal and practical circumstances allow this. This reservation is included as an expression of the need for the State to consider all the needs of the community in carrying out its duties, including the financial and organizational factors.<sup>38</sup>

Different from the general trend towards a preference for inclusive education, the US Supreme Court has held that disabled children

should be provided with education which enables them to benefit educationally and meets general educational standards, not specifying how this should be accomplished. The Court has said, however, that for children with disabilities within compulsory school age education should be free.<sup>39</sup> Similarly, Dutch courts have held that the state's reduction of funding for education of children with special needs, in the form of halting the growth of the number of teachers regardless of increasing numbers of students, constituted a human rights violation.<sup>40</sup> These affirmations of the governmental obligation to ensure that funding is available represent a valuable example of the need to apply human rights correctives to resource allocation.

#### 4.2 Working children

Adaptability of education has been vividly depicted in the alteration between getting children into school and getting education to where the children are. For children who are deprived of their liberty, education ought to be provided where they are and this is unlikely to happen unless children have the right to education. Similarly, many working children cannot attend school and so education has to be provided where they are.

The International Labour Organization laid down the link between the age for completion of compulsory education and the minimum age for employment in 1921, when ILO Convention

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<sup>37</sup> European Commission on Human Rights – *Martin Klerks v. the Netherlands*, Application No. 25212/94, Decision on admissibility of 4 July 1995, *Decisions & Reports*, vol. 82, 1994, p. 129.

<sup>38</sup> Federal Constitutional Court of Germany – Decision of 8 October 1997, 1 BvR 9/97.

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<sup>39</sup> US Supreme Court – *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 28 June 1982.

<sup>40</sup> Raad van State – *Kemper v. City of Leiden*, Judgment of 10 May 1989; Tribunal of 's Gravenhage – *City of Leiden v. the Netherlands*, Judgment of 26 July 1989.

No. 10 prohibited employment which prejudices children's school attendance and set the age at 14. This link has almost fallen into oblivion and the recent global mobilization for the elimination of child labour has channelled attention to working children. The ILO-IPEC (International Programme for the Elimination of Child Labour) has been set up to facilitate 'a process geared to reform and change in social attitudes and in public and corporate policies that will lead to sustainable prevention and abolition of child labour from within a country.'<sup>41</sup>

Both prevention and abolition of child labour have imposed additional challenges upon education. Prevention of child labour necessitates a conceptual shift in the orientation of education towards the acknowledgment of one simple fact: the unavoidable labour reality is very much local.<sup>42</sup> Any and every global or foreign model then has to be adapted to that local reality. The dominant trend in the conceptualization of human rights in the Western industrialized countries, which influenced international human rights law, defined work as access to employment in the formal sector. Self-employment in the informal sector (whether subsistence and entrepreneurship) emerged later and does not have, as yet, any clear-cut international human rights standards. The heritage of designing primary education so as to lead pupils to secondary and higher education does not make the situation

better, on the contrary. Adaptability of education to self-employment in the informal sector is often hampered by school curricula 'developed centrally by groups of 'experts' who design them to prepare children for the next level of education to which many children will be unable to proceed.'<sup>43</sup> The attractiveness of such education for pupils and their parents suffers in consequence.

Creating opportunities for working children to 'learn and earn'<sup>44</sup> have been grounded in the necessity for poor people – including children – to work so as to be able to survive. Full-time education then appears to be a luxury rather than a basic right of the child, and changing that cruel reality requires a great deal of political and financial commitment. The Supreme Court of India has accepted this 'learn and earn' approach for non-hazardous employment of children below 14 years of age, mandating a reduction of daily working hours to six, coupled with at least two hours of education at the expense of the employer. For hazardous work, the Court has recalled that child labour could not be eliminated without tackling the underlying poverty and suggested ensuring work for an adult member of the family in lieu of the child or, if this is impossible within the limits of the economic capacity of the state, the provision of a minimum income to the family in order to enable them to send the child to school. This should be payable as long as the child attends school.<sup>45</sup>

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<sup>41</sup> *ILO-IPEC Highlights of 1998*, International Labour Organization – International Programme on the Elimination of Child Labour, Geneva, October 1998, p. 6.

<sup>42</sup> Atchoarena, D. & Hite, S. – *Training Poorly Educated People in Africa*, Document prepared for the International Labour Office (ILO) by the International Institute for Educational Planning, Paris, April 1999, p. 65.

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<sup>43</sup> Haspels, N. et al. – *Action against child labour: Strategies in education. Country experiences in the mobilization of teachers, educators and their organizations in combatting child labour*, ILO-IPEC, Geneva, May 1999, p. 41.

<sup>44</sup> ILO-IPEC – *Action against child labour: The role of education*, A briefing paper produced for Consortium Meeting on Secondary Education, Paris, 10 – 11 June 1999, p. 10.

### 4.3 Violence against children, violence by children

War is not seen as a gender issue although boys are disproportionately affected by their socialization into the role of combatants. Throughout history, schooling contributed to the militarization of boys. Participation in warfare was a part of traditional initiation rituals, through which boys become men, for millions of boys. Glorification of war continues through those school textbooks which are dotted with wars and war heroes, through the promotion of violent sports, and the almost limitless commercialization of computerized war games. Education for war has, unfortunately, a much longer tradition and is more commercially attractive than education for peace.

Nevertheless, education is commonly discussed in quantitative terms. In countries which have just undergone warfare, pleas for education in the name of returning to normal life often means reverting to pre-war education. The extent to which education actually contributed to warfare is questioned only if extreme examples of advocating genocide are identified. Otherwise, schooling is assumed to have been benign. Sometimes, it was even non-existent. If it existed, it might have contributed to the militarization of boys.

In providing humanitarian aid, an important obstacle to including education is a view that education is not indispensable for human survival nor required for subsistence. The absence of education for victims of armed

conflicts and disasters dooms them to remain recipients of assistance while preventing them from becoming self-sustaining. Water, sanitation, medical services, shelter, clothing and food constitute the ‘survival package’ which is offered through humanitarian relief. Including education in this package is a development of the 1990s, but overcoming the previous ‘ideology of survivalism’ has yet to become institutionalized.

Where schooling is available, it can deny rather than promoting the best interests of each child. Educational curricula can be designed with a view to those children who will continue to higher education, thus failing those who cannot do so. The contents can be imported from far-away countries and be incomprehensible in the local circumstances. Methods of teaching can rely on force and violence. In the words of Peter Newell, ‘discipline, at home or at school, which deliberately hurts or humiliates children, especially from adults they love and respect, teaches first the acceptability of violence.’<sup>46</sup>

The Constitutional Court of South Africa has examined the interplay between different, sometimes conflicting, demands upon education – to reconcile collective and individual rights, the rights of parents and the rights of children, the government’s commitment to the parental right to educate their children in accordance with their religious beliefs, to translating the right to freedom from violence from a constitutional guarantee into a rule of conduct for schools. Highlights from its judgment are presented in Box 6.

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<sup>45</sup> Supreme Court of India – *Mehta v. State of Tamil Nadu*, Judgment of 10 December 1996, (1996) 6 SCC 756; AIR 1997 SC 699; (1997) 2 BHRC 258.

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<sup>46</sup> Newell, P. – No nostalgia for corporal punishment, *The Independent*, 5 January 1994.

## Box 6

### Towards freedom from violence for all school children

The central question in this matter is: when Parliament enacted a law to prohibit corporal punishment in schools, did it violate the rights of parents of children in independent schools who, in line with their religious convictions, had consented to its use?

In support of its contention that parents have a divinely imposed responsibility for the training and upbringing of their children, the appellant ... contends that corporal punishment is a vital aspect of Christian religion and that it is applied in the light of its biblical context using biblical guidelines which impose a responsibility on parents for the training of their children. It has further claimed that according to the Christian faith, parents continue to comply with their biblical responsibility by delegating their authority to punish their children to their teachers.

In an affidavit submitted on behalf of the respondent, the Director-General of the

Department of Education contends that corporal punishment in schools is contrary to the Bill of Rights. ... According to the affidavit, corporal punishment is inherently violent, and involves a degrading assault upon the physical, emotional and psychological integrity of the person to whom it is administered. South Africans have suffered, and continue to suffer a surfeit of violence.

It is clear from the above that a multiplicity of intersecting constitutional values and interests are involved in the present matter – some overlapping, some competing. The parents have a general interest in living their lives in a community setting according to their religious beliefs, and a more specific interest in directing the education of their children. The child, who is at the centre of the inquiry, is probably a believer, and a member of a family and a participant in a religious community that seeks to enjoy such

freedom. Yet that same child is also an individual person who may find himself 'at the other end of the stick' and as such be entitled to [constitutional protection]. Then, the broad community has an interest in reducing violence wherever possible and protecting children from harm. The overlap and tension between the different clusters of rights reflect themselves in contradictory assessments of how the central constitutional value of dignity is implicated. On the one hand, the dignity of the parents may be negatively affected when the state tells them how to bring up and discipline their children and limits the manner in which they can express their religious beliefs. The child who has grown up in the particular faith may regard the punishment, although hurtful, as designed to strengthen his character. On the other hand, the child is being subjected to what an outsider might regard as the indignity of suffering a painful and humiliating hiding

deliberately inflicted on him in an institutional setting. Indeed, it would be unusual if the child did not have ambivalent emotions.

The respondent has established that the prohibition of corporal punishment is part and parcel of a national programme to transform the education system to bring it into line with the letter and spirit of the Constitution. The creation of uniform norms and standards for all schools, whether public or independent, is crucial for educational development. A coherent and principled system of discipline is integral to such development.

The state is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. More specifically, by ratifying the United Nations Convention on the Rights of the Child, it

undertook to take all appropriate measures to protect the child from violence.

Courts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents' religious practices. It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance.

Section 12 of the Constitution now adds to the rights protected by the interim Constitution the following provisions: ... Everyone has the right ... to be free from all forms of violence ... It should be noted that these rights to be violence-free are additional to an not substitutes for the right not to be punished in a cruel, inhuman or degrading way. Under section 7(2) the state is obliged to 'respect, protect and fulfil' these rights. It must accordingly take appropriate steps to reduce violence in public and private life. Coupled with its

special duty towards children, this obligation represents a powerful requirement on the state to act.

As part of its pedagogical mission, the Department [of Education] sought to introduce new principles of learning in terms of which problems were solved through reason rather than force. In order to put the child at the centre of the school and to protect the learner from physical and emotional abuse, the legislature prescribed a blanket ban on corporal punishment. ... The ban was part of a comprehensive process of eliminating state-sanctioned use of physical force as method of punishment. The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.<sup>47</sup>

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<sup>47</sup> Constitutional Court of South Africa – Christian Education South Africa v. Minister of Education, Case CCT 4/00, judgment of 18 August 2000, full text available at <http://www.concourt.gov.za>.

The lead by the Constitutional Court of South Africa towards making education violence-free, highlighted in Box 6, closes a gap in the human rights rationale against violence in education. The traditional focus in human rights on the protection against abuse of power by the government relies on self-policing by governments themselves, individually and collectively. The existing international standards represent a patchwork while domestic approaches vary a great deal. Some governments recognize their obligation to guarantee individual security and/or safety, others accept only some limits upon resort to violence by the agents of the state. Violence by non-state actors is addressed as a variety of different and unrelated phenomena – racial (or racist) violence, or violence against women, or communal violence, with child abuse occasionally raised to prominence to then disappear again from the public agenda. What governments should – or should not – do to prevent victimization, including by ‘normalization’ of violence at home, in school, in the media, or through computer games, is fiercely discussed but no shared approach is emerging. The common approach is often combating violence with violence, for which the proverbial examples are death penalty for homicide or corporal punishment of school children lest they would continue to be – or become – violent.

Violence has appeared on the human rights agenda in its different manifestations, ranging from arbitrary executions and death penalty to football hooliganism and child abuse. Calls to recognize a right to violence-free life illustrate desires to extend human rights further. Thus the

Declaration on Violence against Women included, in an early draft, a ‘right to violence-free private and family life,’<sup>48</sup> which does not appear in its final text. Such a right was, however, written into the Inter-American Convention on Violence against Women, which declares that ‘every woman has the right to life free of violence.’<sup>49</sup> In 1993, the General Assembly of the United Nations, responding to information on widespread killings of street children, recognized that all children have the right to ‘freedom from violence and harassment.’<sup>50</sup> Attention of the United Nations subsequently shifted to violence *by* not only *against* children.

The mass media are often accused of glorifying violence, sometimes also of nudging people, particularly children, to imitate the violence portrayed on TV screens or computer games. A hypothesis that violent behaviour results from exposure to violence has been subjected to empirical verification many times, especially for children, yielding mutually contradictory outcomes. A middle-of-the road view holds that ‘exposure to images of brutality could turn an already disturbed child towards violence. At the very least,

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<sup>48</sup> Division for the Advancement of Women – Background material on international action relevant to a draft declaration on violence against women, 28 August 1992, p. 6.

<sup>49</sup> Organización de los Estados Americanos – Convención interamericana para prevenir, sancionar y erradicar la violencia contra la mujer (Convención de Belem do Para), adopted on 6 June 1994, Article 3, Doc. OEA/Ser.P AG/doc.3115/94 rev.2, 9 June 1994.

<sup>50</sup> United Nations – Plight of street children, General Assembly resolution 48/136 of 20 December 1993, preamble.



such images may give a child a picture of how it might vent its rage,<sup>51</sup> and thus may lead to copycat violence.

In some countries, children are protected from excessive exposure to violence. The Constitutional Court of Germany has explained the need to prevent children from access to harmful material by focusing on ‘all printed matter, films, or pictures that glorify violence or crime, provoke racial hatred, glorify war, constitute [moral] harm and thus may lead to serious or even irreversible injury.’<sup>52</sup> This has led to heightened criteria for scrutiny for children than for adults. It is useful to recall that the German Criminal Code prohibits the production or dissemination of material that describes ‘cruel or inhuman acts of violence against human beings in a manner expressing glorification or intentional minimization of such acts of violence or demonstrating the cruel or inhuman acts in a manner injuring human dignity.’<sup>53</sup> This example is an exception to the widespread marketing of violent films and games to children.

Violence is not only films and games for too many children but a part of life. Children committing atrocities have attracted much international attention because the phenomenon seemed to have become institutionalized in the 1990s, especially in Sierra Leone from which Civilian’s

story is reproduced in Box 7. A child who was trained to kill following orders at the age of nine is at school three years later, with uncertain prospects. The journalist interviewing him was keen on finding out what the boy felt. He failed. Maybe the boy thinks about violence as films-and-games, maybe he is preventing himself from feeling anything, except when the military comes along and he has a hysterical attack.

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<sup>51</sup> We must protect young minds, *The Independent*, 26 November 1993.

<sup>52</sup> Judgment in the Nudist Magazine case of 23 March 1971, reproduced from: Kommers, D.P. – *The Constitutional Jurisprudence of the Federal Republic of Germany*, 1989, p. 423–424.

<sup>53</sup> Section 131 of the Criminal Code, reproduced from: Harfst, G. and Schmidt, O.A. – *German Criminal Law*, 1989.

## Box 7

### What can education do for ex-child soldier nicknamed Civilian?

In the second classroom on the right, a place with no glass in the windows nor even a light bulb in the ceiling, children are chanting in English: "How many days make a week? Seven days make one." and Richard asks a boy of 12 to step out and meet me.

Sulaiman Kamara, his name is. But here they all call him Civilian. He fought in the war on the side of the rebels. He says he killed a lot of people. How many, I ask – three, four? Ten? Twenty, even? Twenty-five?

Civilian thinks about it for a moment, and I guess that he is not calculating the total but wondering what the effect will be when he says it out loud. The effect on me, the effect on him. Finally, he puts a number to his thoughts. "I killed fifty people. More than 50."

WE sit on a bench in an empty classroom whose ceiling bears obscene graffiti left behind by the rebels. The story Civilian tells is spellbindingly awful. First, I ask about his recruitment.

"The rebels came into town and displayed what they had. Drinks, a lot of food and vehicles. Some of my friends said, 'Let's go and see what is happening.' We went round to have a look and that was when we all got caught."

He describes how he was turned into a soldier, aged nine. "When they captured us, the rebel commander took us into the bush by force. He asked that we be trained. They started training us by giving us a gun. They pointed at a certain area of the gun that I had to pull on. When I pulled

on it, I heard a sound that was like ..." – he makes the noise of a magazine loading – "and then they asked me to press the trigger. When I pressed it, the gun exploded. It fired. The training was to do it again and again. Fire again and again. Then we used the gun on somebody."

The victim was a man accused of supplying arms to the government forces. "They captured him," Civilian explains. "They told me what he had done. They told me to shoot him in the legs. So I took the gun and shot him there. He could not scream because his mouth was taped up."

It is all so matter of fact. Civilian says he felt nothing himself because he had been given marijuana, and had become 'sleepy' as he discharged the bullet into the man's body.

I wonder how much he feels now. There is no emotion showing.

Sitting opposite me, Civilian continues. His story darkens further. “When I joined the rebels, the commander killed his own parents in my presence. And he said that we should do likewise. We should not have sympathy for anybody. The rebels then killed my own mother and father.”

The boy was asked if there were any other members of his family in the area. His grandparents, he said. So he was told to kill them. He explained, “I went to their house and met my grandfather first. He was preparing to go for prayers. I said ‘Grandfather, we have been told that we should not spare anybody we meet, and this time there is no sympathy.’ And I shot him in the back.”

His grandfather fell down, dying. Civilian says, “He shouted, ‘Oh, my son, why do you

want to kill me?’ And I told him, ‘I’m not your son, don’t call me your son,’ and I gave him another shot and he died. And then I went into the house. There I met my grandmother praying and then I shot her. She was blind.”

She was blind. While I reflect on the words, Civilian has made a circle with his thumb and forefinger and is blowing invisible bubbles around the room, his lips raspberrying them into life.

“How do you feel now, when you look back?”

He shrugs at my question, always the child. “Now I just pray, ‘Father God, have mercy on me, forgive me. I’m not going to do it again. I pray and ask God to have mercy on me.’” I search for feeling in his words, but still cannot hear any.

It’s difficult to know how to react to what this young boy is saying. The first

response is disbelief – he must be making the story up to get attention. But he has had precious little of that, and Richard Cole assures me that the young boy’s account is perfectly credible because, he says, it is actually unremarkable.

Unremarkable? “Yes, because so many boys and girls have been put in this situation,” Cole says. He explains why the boy got the nickname Civilian – when he first came to the school, if he ever saw a person in uniform he would become hysterical. “We all had to run up to him, shouting, ‘Civilian, Civilian, you are Civilian’ to calm him down.”<sup>60</sup>

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<sup>60</sup> Vine, J. – Rebels without a cause, *High Life*, September 1999, p. 34–35.

A multitude of research projects has been devoted to identifying the cause of violence, based on an assumption that ‘violence is a preventable disease’.<sup>54</sup> Seeking a cure, a simple remedy, often follows such a diagnosis. This follows from the implicit assumption that violence can be explained, its causation described, types of perpetrators profiled, and subsequently violence can be eliminated. Education is seen as a key, especially for children. However, ‘where violence is a means not of expressing identity, but of creating it,’<sup>55</sup> as may well have been Civilian’s fate, there does not seem to be a ready-made answer.

The routine response of governments to children involved in violence is to treat them as if they were adults. As a consequence, our laws and policies fail to respond to the fact that children *can* resort to violence but remain children, regardless of what they may have done. A departure from this approach was triggered by the Convention on the Rights of the Child in 1989 and the decade-long negotiations of its Protocol on child soldiers, summed up by Dita Reichenberg and Sara Friedman as the need to address ‘all contributing causative factors’<sup>56</sup> in trying to help children scarred by warfare, including child soldiers.

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<sup>54</sup> Will, G.F. – Violence is a ‘preventable disease,’ *International Herald Tribune*, 28–29 November 1992.

<sup>55</sup> Woollacott, M. – Terrorism and the warfare of the weak, *Guardian Weekly*, 7 November 1993.

<sup>56</sup> Reichenberg, D. and Friedman, S. – Traumatized children. Healing the invisible wounds of children in war: A rights approach (The contribution of UNICEF), in: Danieli, Y et al. (eds.) – *International Responses to Traumatic Stress*, Baywood Publishing Company, Amityville/New York, 1996, p. 315.

For children such as Civilian, prospects are pretty much dependant on luck. This boy is too young to stand trial for killing fifty people, as he seems to freely admit, since the lowest age to hold children legally responsible in the existing proposals is fifteen. His prospects for getting education depend on the funding which his current school can secure. The government has committed itself to provide free education to children only for the first three years of primary school,<sup>57</sup> which is likely to leave too many out of school. If Civilian is lucky and continues going to school, his education should be directed to ‘fostering respect for human rights’ as well as his preparation of ‘responsible life in free society,’<sup>58</sup> as international human rights treaties require. If this turns out to be the case, he may well encounter the first verse of this poem:

If children were to decide, there would be no hatred  
in the world, and all people would agree that war  
remain only a word.<sup>59</sup>

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<sup>57</sup> Concluding observations of the Committee on the Rights of the Child, U.N. Doc. CRC/C/15/Add. 116, 2000.

<sup>58</sup> Charter on the Rights and Welfare of the African Child, Article 11 (2) (b) and (d).

<sup>59</sup> This poem was written by Zljok Sabol, a Slovenian school child, and translated by Majda Celik. Reproduced from: Reardon, B.A. – *Tolerance – The Threshold of Peace. Primary-school Resource Unit*, UNESCO Publishing, Paris, 1997, p. 83.

## The next step: Human rights in education

It is easy to imagine children happily agreeing that war should remain only a word in a violence-free school, coming from a loving family and a prosperous community. For children like Civilian, war was and remains the reality, and ‘violence-free’ is only a word. What education could do for him is an open question, much as whether he did – and will – have much of it.

Those children who do have access to schooling may not get the education that would encompass cherishing peace or respecting human rights. They may be sitting in a class with over a hundred other children, taught by an overworked and underpaid teacher, beaten each time they fail to do their sums properly. An assumption that getting children to attend school equals the realization of their right to education thus often conflicts with reality.

*Primer No. 4* looks into human rights in education, arguing that schooling does not necessarily amount to education. It summarizes how human rights in education should be safeguarded, acknowledging that in many countries they are not recognized as yet. Our failure to secure schooling for all children tends to focus our attention on the needed but lacking funds and schools, keeping us focused on the means. Securing the means does not automatically mold education towards desired ends, provided that there was a global agreement on what education is *for*. The field of human rights is a rare exception in having defined both the ends and the means of education hence there is a legal framework to guide education

Discussing human rights in education is thus necessary. Without a clear vision of the inter-relationship between the

right *to* education and rights *in* education, promoting human rights education or human rights through education remains impossible. What happens in schools is seldom examined through the human rights lense, the most important reason being that the notion of rights *in* education is new. Evidence of abuses of education and in education is not systematically collected and remains largely unknown and facilitates the perpetuation of abuses.





Raoul Wallenberg Institute  
*of Human Rights and Humanitarian Law*

LUND UNIVERSITY

Raoul Wallenberg institute  
Box 1155, 221 05 Lund, Sweden  
Tel: +46 (46) 222 12 00  
Fax: +46 (46) 222 12 22  
[www.rwi.lu.se](http://www.rwi.lu.se)



Swedish International Development  
Cooperation Agency  
105 25 Stockholm, Sweden  
Tel: +46 (8) 698 50 00  
Fax: +46 (8) 20 88 64  
[www.sida.se](http://www.sida.se)