

**AN APPRAISAL OF STATES' OBLIGATIONS TO ACTUALIZE THE RIGHT TO EDUCATION UNDER INTERNATIONAL LAW\***

**Abstract**

*The importance of education in the world today, to say the obvious, cannot be overemphasized. Education can be used to give meaning to right to life and other human rights. Life, itself, becomes meaningful and worth living if individuals attain at least the minimum required standard of education. Thus, education is germane and paramount to a country's development and can also serve as a key factor for the alleviation of poverty. This article examines the contents of the right to education as fundamental right. The paper observes that international law prioritizes primary and/or basic education above other levels of education and enjoins States to make it free and compulsory. This is because implementing and enforcing primary and/or basic education is one of the fundamental prerequisites in actualizing the right to education in other levels. It is argued in this paper that the right to education, if guaranteed and protected, would unlock the enjoyment of other rights and ultimately would empower the individual to play a meaningful role in the society. The paper concludes that in order to implement and enforce the right to education, State obligations under international law must be domesticated and made justiciable. Remedies should also be made available in case of violations.*

**Keywords:** 'State Obligations', 'Right to Education', 'International Law'.

**1. Introduction**

Education is humankind's most effective tool for personal empowerment. Education takes the status of a human right because it enhances human dignity through its fruits of knowledge, wisdom and understanding. For instrumental reasons, education is a multi-faceted social, economic and cultural human right. It is a social right because in the context of the community, it promotes the full development of the human personality. It is an economic right because it facilitates economic self-sufficiency through employment or self-employment. It is a cultural right on the other hand because the international community has directed education toward the building of a universal culture of human rights. In short, education is the very prerequisite for an individual to function fully as a human being in modern society.<sup>1</sup> Centrality of education in people's lives is being increasingly recognized in today's globalized world. Education is invaluable for empowering individuals and for social transformation. It has a key role in preparing children for democratic citizenship and responsibilities of future. Education is also central to poverty eradication strategies and the achievement of global commitments for sustainable development. It is fundamental building block for human development.<sup>2</sup>

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\* **PETER ANDEM**, LL.B (Uyo), BL, LL.M (Unibadan) – A Doctoral Student, Faculty of Law, University of Uyo, Nigeria. E-mail: peterandem@yahoo.com. 08034817916.

**THEOPHILUS WILLIAMS NWOKE**, LL.B (Hons), BL, LL.M (Unibadan), PhD (in view), Lecturer Department of Public and Private Law, Nnamdi Azikiwe University, Awka. Email: theophilusnwoke@gmail.com;theophiluschukwudinwoke@gmail.com,07037370522

<sup>1</sup> R P Claude, 'The Right to Education and Human Right Education'. *SUR International Journal on Human Rights*, 2005,p37. Retrieved 20<sup>th</sup>, Jun. 2018 from, The **right to education** and human **rights education** - Scielo.br[http://www.scielo.br/scielo.php?pid=S1806-64452005000100003&script=sci\\_arttext&tlng=en](http://www.scielo.br/scielo.php?pid=S1806-64452005000100003&script=sci_arttext&tlng=en)

<sup>2</sup> K Singh, 'Right to Education and Equality of Educational Opportunities'; *Journal of International Cooperation in Education*. 2014, vol 16.2. p 5.

While the liberal concept of human rights of the nineteenth century envisaged that parents retained the primary duty to give their children adequate education, the State's obligation was to ensure that parents complied with their obligations.<sup>3</sup> Socialist theory perceived the State as a beneficial institution whose principal task it was to ensure the economic and social well-being of the community through positive governmental intervention and regulation.<sup>4</sup> The individual was recognized to have claims to basic welfare services against the State.<sup>5</sup> Education was viewed as one of the individual's welfare entitlements. Liberalism regarded private actors as the prime providers of education. The socialist concept of human rights shifted the primary responsibility of providing education to the State.

Although socialism on the whole has not been a successful social or State theory, its socialist theory that education, first and foremost, is the responsibility of the State, is still invaluable. These days, the State sets up and maintains a system of schools, makes primary education compulsory and free, restricts child labour, becomes involved in the legal regulation of curricula and lays down minimum educational standards. Yet, at the same time, the State guarantees the right of parents to establish and direct private schools, if they so wish.<sup>6</sup>

Today, many States protect the right to education in their Constitutions. Some do so in the form of a fundamental right, enforceable at law, others do so in the form of a "Directive Principle of State Policy", which constitutionally obliges the government but is unenforceable. There are also States whose Constitutions do not afford explicit recognition to the right to education. But, even in these instances, education is seen as a vitally important public function. The thrust of this paper is to examine the obligations placed on States to actualize the right to education within its jurisdiction. In doing so, the paper attempts to discuss the rationale behind the right to education being raised to the status of a human right. It also examines the core contents of the right to education and highlighted some judicial authorities to buttress the fact that the right to education is justiciable under international law.

## 2. Is the Right to Education a Human Right?

Human rights are intended to recognize our most cherished values and express our identity as a people. A human right must possess three defining characteristics, namely: (i) in that it must be universal (held by all persons); (ii) moral (existing whether or not a particular nation, government, or legal system recognizes it); and (iii) essential (ensuring the dignity and quality of life of all human beings).<sup>7</sup> The right to education meets these three requirements. Maurice Cranston has posited that: A human right by definition is a universal moral right, something which all men everywhere, at all times ought to have, something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because he is human.<sup>8</sup>

Several rationales can be invoked to support the argument that education should be recognised as a fundamental human right. Firstly, there is the social utilitarian argument. The emphasis here is on the

<sup>3</sup> K D Beiter, *The Protection of the Right to Education by International Law, Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*. (Martinus: Nijhoff Publishers, 2012) p.21.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> D Boyd, 'The Right to a Healthy Environment: Revitalizing Canada's Constitution'. Sample material UBC Press. 2012. Retrieved 25 Jun. 2018 from <http://www.ubcpress.ca/books/pdf/chapters/2012/TheRightToAHealthyEnvironment.pdf>

<sup>8</sup> M Cranston, 1962. *Human Rights Today*, (London: Ampersand Books, 1998), p.40.

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importance of education for society. The Supreme Court of the United States of America in the case of *Brown v. Board of Education*,<sup>9</sup> stressed the importance of education for the performance of public responsibilities and for the due exercise of citizen rights. A minimum level of competence is considered to be required to effectively exercise one's right to vote and to participate in political activity in a meaningful way. A well-educated citizenry is seen as critical for the maintenance of democratic structures and ideals. Education is further held to be the primary means for transmitting the values of society to the next generation. The words of the US Supreme Court in *Plyler v. Doe*<sup>10</sup> that “we have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests”, capture the essence of the social utilitarian approach.

A second rationale is the argument that education is a prerequisite for individual development. The consideration is that without education the individual is unable to develop as a person and to realise his potential. Many international human rights instruments refer to this role of education. Article 26(2) of the Universal Declaration of Human Rights of 1948, requires that “education shall be directed to the full development of the human personality. . .” Article 29(1)(a) of the Convention on the Rights of the Child of 1989 lays down, in more specific terms, that “. . . the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential . . .”. In terms of this approach, education should be recognized as a fundamental human right as only education makes it possible to realize one's abilities.<sup>11</sup>

A third rationale is the individual welfare argument. Here it is argued that the individual should have a right to such welfare necessities provided by the community at large which he is unable to provide by himself. It is held that education is a welfare necessity which the individual cannot provide by himself. He should, therefore, be accorded a claim to receive education, otherwise, he would suffer a significant and enduring disability.<sup>12</sup> He should be assisted to achieve such a standard of literacy and numeracy to enable him to function effectively in his community. Education should place the individual in a position to secure employment and thereby satisfy his personal needs, such as food or shelter.

In some measure, the above arguments provide a basis for the recognition of education as a fundamental human right. However, the most important foundation for a human right to education must be seen to be man's inherent dignity. Human dignity should be recognised as the basis of human rights. Education should be seen as a requirement of human dignity and should, therefore, be recognised as a human right.<sup>13</sup> The notion of human dignity is today accepted to constitute the moral basis of human rights.<sup>14</sup> The first preambular paragraph of the Universal Declaration of Human Rights of 1948 holds that “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, . . . the General Assembly proclaims [the] Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . .”. Article 26 of the Declaration then goes on to proclaim a human right to education. In effect, recognition of human dignity is seen to require recognition of a human right to

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<sup>9</sup>*Brown v. Board of Education* 347 U.S. 483. 1954.

<sup>10</sup>*Plyler v. Doe* 457 U.S. 202 1982.

<sup>11</sup>K D Beiter, *The Protection of the Right to Education by International Law, Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*. 2006. *op cit.*, p. 26

<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid* p.27.

<sup>14</sup>*Ibid.*

education.<sup>15</sup>The International Covenant on Economic, Social and Cultural Rights of 1966, in Article 13, establishes the link between education and dignity quite clearly. Article 13 (1) stipulates that “. . . education shall be directed to the full development of the human personality and the sense of its dignity . . .”. Accordingly, the Covenant views education as a prerequisite for a dignified existence.<sup>16</sup> Education that makes available knowledge and skills and trains the individual in logical thought and reasoned analysis is seen as a requirement of dignity. Hence, human dignity should be perceived as the ultimate reason for recognizing education as a human right.

The right to education is the most evident example reflecting the universality, interrelatedness and indivisibility of human rights as it has been characterized as implying two different aspects: first, the social aspect which is understood as the state’s positive obligation in providing education, namely to invest financial and technical resources in setting up and maintaining an education system and second, the freedom aspect of the right which implies the State’s negative duty of refraining from discriminating against students on grounds such as race, sex, language, religion or culture and also the liberty of parents to choose for their children schools other than those established by the public authorities in conformity with their own convictions. The categorization of the right to education mostly as an economic and social right is due to the fact that the realization of the right requires positive actions and resources from the State.<sup>17</sup>The right to education requires efforts on the part of the States to make available various forms of education. Therefore, the States must invest financial and technical resources in setting up and maintaining an educational system. The State’s obligation in this case is of positive nature and requires expenditure of money.<sup>18</sup>

### 3. The Core Contents of the Right to Education

The core content of the right to education includes:

**a) Availability:** Availability describes the government’s obligation to ensure that there are educational institutions and programs in sufficient quantity, with the necessary facilities to function appropriately in the context in which they operate (e.g., adequate structures, sanitation facilities for both sexes, safe drinking water, trained teachers who receive domestically competitive salaries, teaching materials, and even facilities such as libraries, computer facilities, and information technology). In making education available, the government must permit the establishment of schools and provide the resources necessary to develop the physical institutions. This obligation includes the duty of the government to provide a sufficient number of schools so as to avoid excessive class sizes and resulting decreases in the quality of education.<sup>19</sup>

**b) Accessibility:** Accessibility refers to the need for education to be accessible and open to everyone.<sup>20</sup> The Committee on Economic Social and Cultural Rights (CESCR) considers accessibility to have three components. First, education must be accessible to all without discrimination.<sup>21</sup> Articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly recognize the

<sup>15</sup> *Ibid.*

<sup>16</sup> *ibid*

<sup>17</sup> I E Koch, *Human Rights as Indivisible Rights: The Protection of Socio- Economic Demands under the European Convention on Human Rights*. (Martinus: Nijhoff Publishers, 2009), p 151.

<sup>18</sup> D E Balanescu, ‘Safeguarding Education Beyond Borders’. *ICL Journal*. Retrieved Mar. 10, 2018, from [https://icl-journal.com/download/aad59e91b493d805d770d3bdd8034f38/ICL\\_.pdf](https://icl-journal.com/download/aad59e91b493d805d770d3bdd8034f38/ICL_.pdf)

<sup>19</sup> Preliminary Report of the Special Rapporteur on the Right to Education, Ms.KatarinaTomaševski, U.N. ESCOR, Comm’n on Hum.Rts., 55th Sess., para.50–74, U.N. Doc. E/CN.4/1999/49 (1999).

<sup>20</sup> Preliminary Report of the Special Rapporteur on the Right to Education, Ms.KatarinaTomaševski, *op cit.* (no. 49), para. 57.

<sup>21</sup> CESCR General Comment 13: Right to Education, para. 6.

importance of accessible education without discrimination.<sup>22</sup> The Committee specifically obligates States to ensure that third parties allow girls to attend school.<sup>23</sup>

This means, for example, that States parties must create incentives to increase girls' school attendance through measures such as the adoption of policies that work around housework schedules, the creation of financial incentives for parents, and the raising of the child marriage age.<sup>24</sup> Second, education must be physically accessible to all. This means that schools should be located in a manner that enables all individuals to participate, including those living in rural areas and vulnerable populations, such as racial and ethnic minorities.<sup>25</sup> This may mean building schools in indigenous regions, providing a means of transportation for certain groups, or using technology as an alternative means of instruction (e.g., online instruction).<sup>26</sup> Third, and finally, education must be economically accessible to all.

**(c) Acceptability:** Acceptability addresses the form and substance of the education with regard to both quality and appropriateness. This is a duty based on principles of basic human dignity, and it requires that education be of a quality that has meaning to the individual students, to the community, and to society at large.<sup>27</sup> Instruction should involve non-discriminatory subject matter and incorporate content appropriate to the students' cultural, linguistic, and social backgrounds.<sup>28</sup> More broadly, acceptability describes the government's duty to ensure that schools have certain minimum standards for teachers, students, building facilities, and curricula.<sup>29</sup> Article 13(2) of the ICESCR addresses the concept of acceptability by stating that the material conditions of teaching staff "shall be continuously improved."

**(d) Adaptability:** Adaptability addresses the need for education to be flexible and able to respond to the needs of students within their diverse social and cultural settings. In achieving adaptability in education, the government should provide resources that enable schools to develop individualized education plans that meet the needs of the communities served by the schools.<sup>30</sup> In addition to customizing the curricula, schools must monitor the performance of teachers and students and make modifications depending on the results. An education system that is not adaptable is likely to have a high dropout rate for vulnerable groups of students, such as pregnant girls. Article 13(1) of the ICESCR states that:

Education shall be directed to the full development of the human personality and the sense of its dignity, . . . strengthen the respect for human rights and fundamental freedoms . . . [and] enable all persons to

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<sup>22</sup> Article 2(2) of ICESCR states that "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 specifies that "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

<sup>23</sup> CESCR, General Comment No. 13: The Right to Education, para. 50.

<sup>24</sup> K D Beiter, (2006) *op cit* at 488-89.

<sup>25</sup> Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomaševski, *op cit*. para. 57

<sup>26</sup> S Kalantry ; J E Getgen and S A Koh; 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on The Right to Education in The ICESCR', 2010. *op cit* p. 277.

<sup>27</sup> Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomaševski, *op cit*. para. 62-69.

<sup>28</sup> CESCR, General comment No. 13: Right to Education, para. 6(c).

<sup>29</sup> S Kalantry J E Getgen, and S A Koh ; 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on The Right to Education in the ICESCR', 2010. *Op cit*. p. 278.

<sup>30</sup> *Ibid*.

participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.

In order for education to achieve these goals, it must be adaptable.

#### 4. Is the Right to Education Justiciable under International Law?

Justiciability refers to ‘the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur.’ The concept therefore deals with the question: to what extent a claim that is in some way or another related to the right to education in a particular case is suitable for judicial or quasi-judicial review by invoking a remedy.<sup>31</sup> It is necessary to now highlight some decided cases to show how the right to education is justiciable in the international community.

In *Dilcia Yean and Violeta Bosica v Dominican Republic*<sup>32</sup> two girls born in the Dominican Republic of Haitian immigrant mothers were denied birth certificates necessary to prove that they were citizens of the Dominican Republic. Without such birth certificates they were unable to enrol in school. The Inter-American Commission on Human Rights considered the case under the Declaration on the Rights and Duties of Man, Article XII (right to education) and the American Convention on Human Rights, Article 19 (rights of the child). It held that the Government had deprived the petitioners of their right to education under Article XII by discriminatorily depriving them of their legal identity under domestic law. Under the American Convention on Human Rights, Article 19, as informed by the Convention on the Rights of the Child, the State is obliged to provide special protections to children, including preventing economic and social degradation. Article 19 obligations include the right to education as education gives rise to the possibility of children having a better standard of living and contributes to the prevention of unfavourable situations for the child and for society itself.

The Government violated Article 19 by not extending such protections to Dominican children of Haitian descent and by taking actions which denied the petitioners the most basic rights of citizenship, including education. The Inter-American Court of Human Rights confirmed that the *migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights*. The Court ordered that the *State should comply with its obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special protection that must be provided to children*.

In *Mohini Jain v. State of Karnataka and Others*,<sup>33</sup> the Supreme Court of India reaffirmed that the fundamental right to life under Article 21 of the Indian Constitution includes the right to live with human dignity and all that goes along with it. In the view of the Court, the right to education flows directly from the right to life. The life and dignity of an individual cannot be assured unless they are accompanied by the right to education. Consequently, the State government is under an obligation to endeavour to provide educational facilities at all levels to its citizens. It is worthy of note that prior to this decision, the right to education was not a justiciable right under the Indian Constitution; it was included in the Directive Principles of State Policy contained in Chapter IV of the Constitution (Articles 41 and 45). It was thus not part of the fundamental rights included in Chapter III. However, the Court argued that these Principles had to be read into fundamental rights. Both are complementary to each other: ‘without making the right to education under Article 41 of the Constitution a reality, the

<sup>31</sup>F Coomans., ‘Justifiability of the Right to Education’; *Erasmus Law Review*. 2009, 2:4. p.427.

<sup>32</sup>*Dilcia Yean and Violeta Bosica v Dominican Republic*, Report 28/01, Case 12. 189. 2001.

<sup>33</sup>*Mohini Jain v. State of Karnataka and Others* AIR 1858. 1992.

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fundamental rights under Chapter III shall remain beyond the reach of the large majority which is illiterate.’

**Non-Discrimination:** In the famous case of *Brown v. Board of Education*<sup>34</sup> the plaintiffs argued that the use of race to segregate white and black children in public schools was a violation of the equal protection clause of the Fourteenth Amendment of the US Constitution. The Court said that when a State in the United States has undertaken to provide education, it is a right that must be made available to all on equal terms. The Court held that:

to separate the children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.<sup>35</sup>

The Court ruled that ‘*in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal*’. Consequently, the segregation complained deprived the plaintiffs of the equal protection of the laws guaranteed by the Fourteenth Amendment.

**Academic Freedom:** Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction.<sup>36</sup> The European Court of Human Rights has underlined the importance of academic freedom, stating that it “comprises the academics’ freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction.”<sup>37</sup> In *Good v. Republic of Botswana*,<sup>38</sup> the African Commission on Human and Peoples’ Rights (ACommHPR) held that the Republic of Botswana violated Article 9 of the African Charter on Human and Peoples’ Rights, protecting the freedom of expression, when the President deported a university professor for writing an article criticizing Botswana’s presidential succession process.<sup>39</sup> From the foregoing, it can be appreciated that the right to education is justiciable.

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<sup>34</sup>*Brown v. Board of Education* 347 U.S. 483. 1954.

<sup>35</sup> *Ibid*

<sup>36</sup> *Ibid*, para. 39. It must be noted that the enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.

<sup>37</sup> *Sorguc v. Turkey* no. 17089/03, Judgment of 23 September 2009, para. 35. The fact of this case is that, at an academic conference, a university professor criticized his university’s appointment system and was later sued by an assistant professor for attacking his reputation. The domestic court ruled against the professor, agreeing that his remarks constituted an attack on his colleague’s reputation. The ECTHR held that the State violated Article 10 of the European Convention because the national court “attached greater importance to the reputation of an unnamed person than to the freedom of expression that should normally be enjoyed by an academic in a public debate” without explaining why the plaintiff’s reputation deserved more protection than the freedom of expression.

<sup>38</sup> *Good v. Republic of Botswana*, Communication No. 313/05, 47th Ordinary Session, 26 May 2010, paras. 196–200.

<sup>39</sup> The complainants alleged that the deportation order without an opportunity to seek judicial review violated, *inter alia*, the professor’s academic freedom. The Commission reasoned that the professor’s article contained “critical comments that are expected from an academician,” and added that even if the State found the article offensive, it “can and should be tolerated,” since “dissenting views must be allowed to flourish.” At para. 199.

## 5. The International Obligations of State for the Right to Education

Article 2(1) of ICESCR requires States parties to realize the rights of the Covenant “individually and through international assistance and co-operation, especially economic and technical”. Thus, States parties need not realize Covenant rights all on their own, but may also rely on international assistance and co-operation. They are obliged to do so, where the rights of the Covenant cannot be realized without such assistance and cooperation. Article 23 of ICESCR specifically recognizes the role of not only the ratifying States, but also of other States in the achievement of Economic, Social and Cultural (ESC) rights. This is because every State party has a legal interest in the performance by every other State party of its human rights obligations.

This follows from the fact that the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), there is a United Nation (UN) Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.

General Comment No. 13, in paragraph 56, spells out the importance of international assistance and co-operation regarding the right to education.<sup>40</sup> The international community, including intergovernmental bodies, is stated, in article 10(2),<sup>41</sup> to have “an urgent responsibility” to alleviate the constraints that prevent some countries from achieving education for all. When a State is unable to provide free and compulsory education; it should create strategies to do so and seek assistance from the international community. States are obligated to render to its citizenry quality education that measure up with international standard of best practices.

## 6. The Domestic Obligations of States for the Right to Education

- a) Under Article 2(1) of ICESCR States undertake to ‘take steps . . . by all appropriate means, including particularly the adoption of legislative measures’ towards the full realisation of the rights guaranteed under the Covenant. The obligation to ‘take steps’ is not qualified or limited by other considerations.<sup>42</sup> The duty to take steps must be understood as a duty to take not only those steps stipulated in the ICESCR, but also additional steps. This is of importance when considering article 13 of ICESCR. Paragraphs (1) to (4) of Article 13 of ICESCR mention various steps aimed at realising the right to education. Even so, the duty of States parties in article 13(1) to “recognise the right of everyone to education” expects them to take steps over and above those set out in the said paragraphs of Article 13.<sup>43</sup>

<sup>40</sup> In its General Comment 3, the Committee drew attention to the obligation of all States parties to take steps, “individually and through international assistance and cooperation, especially economic and technical”, towards the full realization of the rights recognized in the Covenant, such as the right to education. Articles 2 (1) and 23 of the Covenant, Article 56 of the Charter of the United Nations, article 10 of the World Declaration on Education for All, and Part I, paragraph 34 of the Vienna Declaration and Programme of Action all reinforce the obligation of States parties in relation to the provision of international assistance and cooperation for the full realization of the right to education. In relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education. Similarly, States parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education.

<sup>41</sup> Article 10(2) World Declaration on Education for All, adopted by the World Conference on Education for All, held at Jomtien, Thailand from 5 to 9 March 1990.

<sup>42</sup> CESCR, General Comment No.3: Nature of State Parties Obligation, para 2; Limburg Principles, 16 and 21.

<sup>43</sup> K D Beiter, *op cit* p. 378.

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- b) The steps to be undertaken, whether immediate or progressive, should be by 'all appropriate means', which in terms of Article 2(1) includes 'particularly the adoption of legislative measures'. Legislative measures include not only the adoption of new legislation, but also the duty to reform, amend and repeal legislation manifestly inconsistent with the Covenant.<sup>44</sup>This does not mean that States are obliged to take legislative measures in order to give effect to the rights recognised in the Covenant, however, every State has a 'margin of discretion' in assessing which measures are most suitable to meet the specific circumstances for implementing its respective obligations.<sup>45</sup>
- c) By requiring States parties to use 'all appropriate means', the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.<sup>46</sup>There are several non-legislative measures (eg the provision of judicial or other effective remedies, administrative, financial, educational/informational campaigns and social measures) that are regarded as 'appropriate means'.
- d) The lack of financial and other resources in a particular State may hinder the full implementation of the right to education,<sup>47</sup>which entails that the complete realization of the right will not be achieved immediately or within a short period of time.<sup>48</sup>However, the progressive realization of rights does not mean that the fulfilment of the right will never be achieved. States have a specific and continuing obligation "...to move as expeditiously and effectively as possible" to ensure the full realization of the right. This implies that states have an obligation to take continuous steps in order to satisfy varying degrees of realization before achieving the complete implementation of the right.<sup>49</sup>
- e) The undertaking by a State party to use 'the maximum' of its available resources towards fully realizing the provisions of the Covenant entitles it to receive resources offered by the international community. In this regard, the phrase 'to the maximum of its available resources' refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.<sup>50</sup>This means that the availability of resources refers not only to those controlled by or filtered through the State or other public bodies, but also to the social resources that can be mobilized by the widest possible participation in development, as necessary for the realization by every human being of ESC rights. In this respect 'available resources' refers to resources available within the society as a whole, 'from the private sector as well as the public. It is the State's responsibility to mobilize these resources, not to provide them all directly from its own coffers.'<sup>51</sup>

Article 2(1) of ICESCR requires States to use the available resources equitably and effectively targeted to subsistence requirements and essential services.<sup>52</sup>To comply with this obligation, States should address all factors that adversely affect the availability of resources. For example, States must combat corruption since corruption diverts available resources that could have been invested in providing human

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<sup>44</sup> Limburg Principles, para. 18.

<sup>45</sup> CESCR, General Comment 14, para 53, See also CESCR, General Comment 15, para 45. Every State has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances.

<sup>46</sup> CESCR, General Comment No. 9: The Domestic Application of the Covenant, para 1.

<sup>47</sup> CRC Committee General Comment 5, para 7.

<sup>48</sup> CESCR, General Comment No.3: The Nature of State Parties Obligations, para 9.

<sup>49</sup> *Ibid*, para. 9.

<sup>50</sup> CESCR, Statement: An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under an Optional Protocol to the Covenant, UN Doc E/C.12/2007/1 (10 May 2007), para 5.

<sup>51</sup> A Chapman, A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly* 1996, 18:23–66, p11.

<sup>52</sup> Limburg Principles, 23, 27 and 28.

rights. It also affects the poor disproportionately, due to their powerlessness to change the *status quo* and inability to pay bribes, creating inequalities that violate their human rights.<sup>53</sup>

- f) States Parties are obliged to prioritize the introduction of compulsory, free primary education for all, such duty being immediate in nature.<sup>54</sup> States are required to provide access to education without discrimination, and this obligation must be applied immediately and fully.<sup>55</sup> States have a duty to both ensure that access to education is free from gender discrimination by taking special measures to ensure that women have access to education, which will in turn empower females and help to combat gender discrimination more broadly.
- g) States are prohibited from discriminating against migrants and refugees in providing access to education. For example, the State cannot charge migrant students a special fee for secondary education while allowing national students to attend free of charge.<sup>56</sup> States cannot charge refugees prohibitive fees to access education, and the State is required to recognize any foreign school certificates, diplomas, and degrees that the refugee has obtained.<sup>57</sup> Children must be provided with an education regardless of their own citizenship or residence status.<sup>58</sup>
- h) States are obligated to ensure that individuals with disabilities have effective access to education, to the extent State resources allow it.<sup>59</sup> Convention on the Right to People with Disability (CRPD) requires States to ensure that people with disabilities “can access an inclusive, quality and free primary education and secondary education on an equal basis with others.”<sup>60</sup> In *O’Donoghue v. Minister for Health*,<sup>61</sup> the Irish High court adjudicated on the subject of the right to education for children having disabilities and held contrary to the defendant (the State) that a severely mentally disabled child is not uneducable.

It based its decision on the definition of education clarified by the Supreme Court in the case of *Ryan v. AG*,<sup>62</sup> which defines it as ‘the teaching and training of a child to make the best possible use of inherent and potential capacities, physical, mental and moral’. It also considered the advance made internationally in the field of education for children with disabilities. Thus, the court made it clear that the Constitution obliges the State to provide for free primary education to all children, including disabled ones, and that special measures must be undertaken for those children whose handicap prevented them from enjoying the conventional education. Similarly, in Israel, the Supreme Court decided that the right to education for children with disabilities includes the right to free education not only in respect of

<sup>53</sup> M Ssenyonjo, *op cit* p. 62-63.

<sup>54</sup> CESCR, General Comment 13: The Right to Education, para. 25, 48, and 51.

<sup>55</sup> CRC, art. 2; CESCR, General Comment 13: The Right to Education, para. 31, American Convention on Human Rights, art. 1; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, art. 3; African Charter on Human and Peoples’ Rights, art. 2; European Convention for the Protection of Human Rights and Fundamental Freedoms, art.14; and UNESCO, Convention against Discrimination in Education. amongst others.

<sup>56</sup> *Ponomaryovi v. Bulgaria*, no. 5335/05, ECHR 2011, Judgment of 30 August 2011.

<sup>57</sup> Convention Relating to the Status of Refugees, art. 22.

<sup>58</sup> The Inter-American Court in the case of *the Girls Yean and Bosico Children v. The Dominican Republic* held that the State’s refusal to admit a student because she lacked a birth certificate violated the American Convention, holding that the State should comply with its “obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special protection that must be provided to children.” para. 244.

<sup>59</sup> CRC, art. 23.

<sup>60</sup> CRPD, art. 24(2)(a). See also Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, art. 13(3)(e); Revised European Social Charter, art. 15; African Charter on the Rights and Welfare of the Child, art. 13.

<sup>61</sup> *O’Donoghue v. Minister for Health & Ors* [1993] IECH 2.

<sup>62</sup> *Ryan v.A.G.* [1965] IR294, O’ Dalaigh C.J.

special education, but also in integrated educative settings. In this case the government was ordered to arrange its budgetary provisions to cover these services.<sup>63</sup>

- i) States must guarantee equal right to education: this requires States to remove economic and social barriers to education. To this end, the ICESCR States that the “development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.”<sup>64</sup>

This requires States to create and ensure the existence of a school system and to “enhance the equality of educational access for individuals from disadvantaged groups.”<sup>65</sup> More so, in order to provide equal access to education, States are obligated to equally distribute educational resources. Sharp disparities in spending policies that result in differing qualities of education” may constitute discrimination.<sup>66</sup> For example, States are obligated to ensure equal access to education among males and females in both urban and rural areas, which involves ensuring that females receive the same quality of education and academic resources as males, as well as the same opportunities to benefit from scholarships or programs of continuing education.<sup>67</sup>

- j) States must guarantee equal right to education; this requires States to remove economic and social barriers to education. To this end, the ICESCR states that the “development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.”<sup>68</sup>

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- k) States have the duty to ensure that education is conducted in a conducive and safe learning environment which should be friendly, inspiring and motivating. The school environment must thus reflect the freedom and the spirit of understanding, peace, tolerance equality of sexes, among all peoples, ethnic, national and religious groups and persons of indigenous origin.<sup>72</sup> States must focus on the quality of the learning environment, which includes teaching and academic resources, to guarantee the right to receive an education of good quality.<sup>73</sup> To this end, States are obligated to adopt minimum educational standards to ensure that all schools offer quality education for both boys and girls.<sup>74</sup> The school building should be

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<sup>63</sup> *Supreme Court of Israel, Yated and others v. the Ministry of Education*, HCJ 2599/00, August 14, 2002.

<sup>64</sup> Art. 13(2)(e). International Covenant Economic Social Cultural Right, 1966.

<sup>65</sup> CESCR, General Comment 13: The Right to Education, para. 26.

<sup>66</sup> *Ibid*, para. 35.

<sup>67</sup> Art. 10 Convent on Elimination of all forms of Discrimination Against Women, 1970.

<sup>68</sup> Art. 13(2)(e). International Covenant Economic Social Cultural Right, 1966.

<sup>69</sup> CESCR, General Comment 13: The Right to Education, para. 26.

<sup>70</sup> *ibid*, para. 35.

<sup>71</sup> CEDAW, art. 10.

<sup>72</sup> CRC, General Comment No.1: Aims of Education, para. 19.

<sup>73</sup> *Ibid*, para. 22

<sup>74</sup> ICESCR, art.13; CRC, art.29 (2).

able to protect students from the elements, have an appropriate number of classrooms, provide safe water, and have separate sanitation facilities for boys and girls.<sup>75</sup> States have a duty to protect the right to education in the face of attacks on schools. Under international human rights law, States have a duty to prevent and respond to attacks so that students are safe and their right to an education is protected. The human right to education is inalienable, and does not cease when violence occurs.<sup>76</sup>

- j) Education has to be of the highest possible quality to help every child and adult reach his or her potential, and that quality should be consistent across regions, different populations and urban and rural settings.<sup>77</sup> Hence States are under obligation to provide and maintain this quality level, otherwise attending classes would be meaningless. When assessing this quality, States should take into account various factors, such as measuring learning outcome of pupils and students, the efforts and training-level of teachers, the availability and quality of teaching materials, the condition of school buildings, sound and safe environment, school health, preventive education against HIV/AIDS and drug abuse and science and technology education etc.<sup>78</sup> The quality level of education should also encompass international best standards regarding the purposes of education as encapsulated in international legal norms. States in the international community are enjoined to invest reasonable budgetary allocation to provide quality education for all beneficiaries especially the children.
- k) The State is both guarantor and regulator of education. The provision of basic education, free of cost, is not only a core obligation of States; it is also a moral imperative.<sup>79</sup> States are regarded as having principal responsibility for the direct provision of education in most circumstances.<sup>80</sup> Hence, it is an established principle of human rights law that the State remains responsible for its obligations, even when they are privatized. The European Court of Human Rights has held that, under the European Convention on Human Rights, a State cannot absolve itself from responsibility by delegating its obligations to private school bodies.<sup>81</sup> This position is reinforced by the Guiding Principle on Business and Human Rights which emphasize that when States delegate their responsibilities to businesses, they remain responsible for ensuring that their human rights obligations are being met by those companies.<sup>82</sup>

## 7. Conclusion

The right to education is a prerequisite to individual dignity. The dignity of each human being comprises an important guiding and underlying principle of constitutional bills of rights and international human rights instruments. An education that imparts knowledge of essential skills and trains the individual in logical thought and reasoned analysis forms the basis of individual dignity and self-respect.<sup>83</sup> Without the right to education human beings are unable to realize their potential and become fully functioning members of society. The role performed by educational system in the development of the human person is of utmost important, hence the State must ensure that the individuals under their jurisdiction are given education which will enable them to develop their abilities, individual judgement and sense of moral and social

<sup>75</sup> CESCR, General Comment No.13: The Right to Education, para 6.

<sup>76</sup> For example, if a school can no longer be used for educational purposes due to an attack, States have an obligation to relocate students and teachers to a safe location where education may continue.

<sup>77</sup> UNICEF, 2011. The Right of Children with disabilities to Education: A Right-Based Approach to inclusive Education. Geneva: UNICEF Regional Office for Central and Eastern Europe and the Commonwealth of Independent States (CEECIS). Retrieved April 10, 2017, from [www.unicef.org/ceecis](http://www.unicef.org/ceecis).

<sup>78</sup> F Coomans, 'Identifying the Key Elements of the Right to Education: A Focus on its Core Content' 2007. Retrieved April 7, 2017.

<sup>79</sup> *Ibid*, para. 48.

<sup>80</sup> CESCR, General Comment No.13: The Right to Education, para. 48.

<sup>81</sup> *Costello-Roberts v. the United Kingdom*, judgement of 25 March 1993, paras. 27 and 28.

<sup>82</sup> K Singh, 2015. *Op cit* (no. 373) para. 53.

<sup>83</sup> W F Foster, and G Pinheiro, 1987-88. Constitutional Protection of the Right to Education. *DALHOUSIE L.J.* 11: 755, 771.

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responsibility.<sup>84</sup>The CESCR has described education as an “empowerment right” and as “the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities”.<sup>85</sup>

The exercise of the right to education is not intended merely to acquire skills and knowledge but to achieve a variety of objectives which will ensure to the benefit not only of individuals but to the communities within which they live. The various international and regional Conventions containing the right to education not only grant this right but also impose an obligation on the State parties to guarantee the exercise of this right. Contracting parties are accountable to their individuals as well as to the international community for their compliance to these obligations.<sup>86</sup>State must fully assume their obligation to respect, protect, and fulfil the right to education. This can be achieved by giving effect to the Right of Education in the domestic legal order and ensuring its effective enforcement in case of violation through national, regional, and international and quasi-judicial mechanisms.

### **8. Recommendations**

It is recommended as follows:

- A. The right to education should be provided the broadest and strongest legal protection possible. States with a dualist legal tradition should ensure their Constitutions and national legislation are amended to directly provide for the right to education. This is important, as constitutional protections cannot be ignored by courts, quasi-judicial mechanisms or even government’s unwilling to address violations of the right.
- B. Domestic legislation should define the rights and responsibilities of all stakeholders for the right to education. At a minimum, such legislation should create the legal framework for primary, secondary, tertiary and vocational education systems. It should also create monitoring and reporting mechanisms, providing indicators and statistics necessary for the right to education to be evaluated and enforced. Parliamentarians have an important role to play in fostering democratic perception of the justiciability of the right to education. Their primary role is to promote legislation which implements the right to education into the domestic legal frame work.
- C. States have the primary responsibility to disseminate information about the importance of education and the right to education to its populace. The Mass media and the civil societies can also play an important role in this regard; they should inform students, teachers, and parents of their respective rights and obligations, and how violations of the right to education can be addressed, ranging from parents-teachers’ interviews, school administrative complaint procedures, to national human rights mechanisms and even international mechanisms where applicable.
- D. Law faculties should promote teaching, research and studies on the right to education, particularly regarding its enforcement and justiciability. These can focus on how the international legal obligations for the right to education as a fundamental right are integrated into Constitutions and laws, and how national jurisdictions are endowed with effective enforcement mechanisms for protecting the right to education.

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<sup>84</sup> Principles 7 and 10 of the Declaration of the Rights of the Child 1959; Article 5(3) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 A/RES/36/55 (adopted by the U. N. General Assembly on 25 November 1981).

<sup>85</sup> CESCR, General Comment 13: The Right to Education, para. 1.

<sup>86</sup> See Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights, para 10. Retrieved May 30, 2017, from<<http://www.escri-net.org/docs/i/425445>>