

Master's in Public Law :

Dissertation Part

**The International Human Right
to Education**

Supervisor : Professor D. MEYERSON

**Manuella Verhaeghe de Naeyer
NO. VRHMANOO1
Department of Public Law - LLM
University of Cape Town : 1997-1998**

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Introduction

Education as a human right is a subject of considerable debate all over the world. Indeed, we are living at a time when concern for educational rights has reached new heights. The importance of the right to education is recognized in several international instruments and in many constitutions but it is also one of the most complex human rights under present international law. In 1954, the United State Supreme Court in the famous case of *Brown v Board of Education* stressed the fundamental importance of education for all and asserted that “in these days, it is doubtful that any child may reasonably be expected to succeed in life if he (or she) is denied the opportunity of education”⁽¹⁾.

Today, almost 50 years after the Universal Declaration of Human Rights asserted that “everyone has the right to education”, 145 million children (60 per cent of whom are girls) are still denied access to primary school. In addition, 885 million adults (565 million of whom are women, most of them living in the developing regions of Africa, Asia and Latin America), are still totally illiterate and more than one third of the world’s adults have neither access to printed knowledge nor technical skills to help them adapt to their society’s rapidly changing social and economic conditions ⁽²⁾.

Moreover, more than 100 million children and countless adults fail to complete the basic education programmes they start and millions more enter schools but do not learn enough to meet their basic learning needs.

On the threshold of the 21st century, the world’s nations face global challenges which have the potential to constrain the human right to education. In Chapter one, we will focus on certain of these problems in order to have a better understanding of the difficulties of the implementation of the right to education.

Education, as a human right, was one of the last human rights and needs to receive the attention it deserves. Chapter two will be devoted firstly to a brief historical background of the right to education and secondly to a general overview of the content and development of the right to education at both the international and regional level.

¹ *Brown v Board of Education*, 347 U. S. 483 (1954).

² *World Education Report 1995*, (1995), Unesco Publishing, Oxford, at 18-19, 104, 122 at 125.

In Chapter three, after having defined the term “education”, we will examine the nature of the right to education, particularly in the framework of the three generations rights, and the aims and objectives of education.

Some of the aspects of the right to education will be analyzed in Chapter four, with an important focus on the principle of non-discrimination which is considered as the obvious starting point in operationalizing economic, social and cultural rights, and thus the right to education. In this chapter, special emphasis will be given to the specific education needs of the minority children and to the evolution of the right to education in South Africa.

Finally, Chapter five will treat of the implementation of the human right to education with a particular focus on the World Conference on Education for All held in Jomtien in 1990.

Chapter I

Global challenges faced today by the world's nations with regards to the right to education

On the threshold of the 21st century, the world faces major global challenges which have the potential to constrain the development of individuals and the human right to education which is the very foundation of human development. Rapid population growth, the threat of economic stagnation and decline, the growing economic disparities among and within nations, massive unemployment, millions of people dislocated and suffering from war, civil strike, violence and crime, cultural inequalities, widespread environmental degradation are examples of these challenges which pose problems of direct or indirect concern to all nations, although the nature, extent and incidence of the effects of the problems vary according to each nation's specific conditions and societal context.

These problems are in many ways interrelated. We need to focus on some of these problems to have a better understanding of the difficulties of the implementation of the right to education.

1. Rapid population growth and demographic pressure.

Population growth continues to exacerbate economic, social and environmental problems, particularly in the poorest part of the world. From 2.5 thousand million in 1950, the world population has grown in the second half of this century to an estimated 6.2 thousand million at present. This rapid population growth means, for education, that the number of learners, and especially of children, has grown immensely. Ninety percent of this growth has taken place in Asia, Africa and Latin America where young people in the age category 0-14 years form about 40 % of the population. The primary-school age population in developing countries will have increased by about 89 million children between 1990 and 2000. As an example, in the countries of Africa, South Asia and the Middle East and North Africa, if the current high population growth rates continue, the number of 6-to-11-year old children not in school will increase to 162 million by 2015, from 129 million in 1990 ⁽³⁾.

³ "Development in practice. Priorities and Strategies for Education". A world Bank Review, (1995), at 2, 36.

An other phenomenon which occurs in parallell is the migration from rural areas to cities. In many cities, mostly in developing countries, it is estimated that on the year 2000 they will have more than 10 million inhabitants and in some cases more than 20 million inhabitants, which will increase the number of children living on the streets.

This rapid population growth and the massive migration have serious consequences for the provision of educational services, specially in the poorer countries.

In industrial countries, such as in North America and Europe, demographic trends follow a different aggregate pattern. Indeed, young people in the age-category 0-14 years form less than 25 % in these two regions. However, even there, the more disadvantaged groups are growing at a higher rate than the population as a whole ⁽⁴⁾.

2. Economic stagnation and unemployment.

Economic stagnation during the 1970's and 1980's has set in, affecting most countries. The poorer countries, however, have been hit again most seriously. This economic stagnation has resulted in decreased budget for education. In more than 50 developing countries, the percentage of the national budget devoted to education declined during the 1980's? In fact, between 1980 and 1990, in the world's poorest countries, expenditure on education per pupil declined by 25 % ⁽⁵⁾.

The population growth and the economic stagnation entailed an increase in the number of unemployed people. Many people were attracted by paid employment and a better life and thus moved to urban centres. However, nowadays, many of these people in metropolies live in great poverty with few or no employment opportunities and overall beyond the reach of the social services, among which figures the formal school system ⁽⁶⁾.

Increased urbanization and unemployment have in fact created extremely poor living conditions for millions more people the world over.

3. Economic disparities

The 1980's have seen economic disparities widen both within and among nations. In the 1990's, the economic disparities between countries, between populations, and between

⁴ L.F.B. Dubbeldam. "What are development, culture and education ?" in International yearbook of education, vol. XLIV - 1994, Development, culture and education, by L.F.B. Dubbeldam et al., 1994, at 8.

⁵ M.B. Anderson, "Education for all. What are we waiting for ?", Sept. 1992, Unicef, New York, USA, at 9-10.

⁶ L.F.B. Dubbeldam, op. cit. (n4), at 9.

groups within countries seem to be growing larger rather than smaller. In regard to the economic disparities between countries, on the one hand, some developing countries have nowadays been able to improve their economies but on the other hand, other countries are facing even more serious poverty than before.

In regard to the disparities among people within a single nation, economic policies and practices in some countries have the effect to stimulate a concentration of wealth and to increase social inequalities.

Moreover, the unprecedented expansion of knowledge during the past decades has entailed inequitable access to formal education and other learning opportunities and has engendered even greater disparities among people within a single nation. Therefore, in some countries, the wealthy become more educated and the undereducated grow poorer (7).

In fact, economic factors combine with long-standing intergroup competition, prejudice and mistrust to frustrate the implementation of rights and among them of the right to education. For instance, people in the upper social classes may fear that their superior position will be threatened if people in lower classes are furnished favorable or better educational opportunities. In addition, members of a religious or ethnic group may be unwilling to accord equal educational rights to those outside their group (8).

4. Marginalized populations, cultural inequalities and violence.

Armed conflicts, occupation, civil wars and disorders lasting many years continue to command public attention and resources in many countries and lead to the death of many people, the destruction of facilities like school and the breaking down of the educational system.

As a result of economic disparities and violence, but also of war, of natural disasters and of abuse of human rights, large numbers of immigrants and refugees have moved from one place to another. Resistance against the flow of immigrants is growing in many countries and is leading to a revival of racism.

In some countries, there are still large inequalities between the opportunities available for people of different groups. These inequalities are based on ethnicity, gender, religion, social status or language. A strong revival of nationalism of an ethnic character occurs in some countries, such as racist incidents and ethnic cleansing. A challenge for education will be to contribute to increase mutual understanding and tolerance among people.

⁷ L.F.B. Dubbeldam, op. cit. (n4) at 9.

⁸ D. Ray and N. Tarrow, "Human Rights and Education", 1987, Vol. 3, Ed. by N.B. Tarrow, Pergamon Press, at 11.

Only some of the problems and challenges that the world is facing today have been underlined. While not sufficient in itself to resolve the larger political, social and economic challenges faced by the world's nations, better and increased education is a necessary part of any resolution of these challenges. Indeed, there is a strong and crucial need to reinforce and extend education to bring into being forms of sustainable national development that reconcile cultural and technological change within social and economic development.

Education - the empowerment of individuals through the provision of learning - is truly a social responsibility and a human right.

Chapter II

Recognition of the Human Right to Education

Education as a human right was one of the last human needs to receive the attention it deserves.

This can be explained by two major reasons. The first reason is that, among the list of basic needs, health, shelter and food have always been considered as priorities for survival and thus have always received first call on limited resources.

Secondly, only recently, development specialists and economists have begun to understand the positive contribution education makes to national development. Indeed, as we will explain later in this paper, education which produces knowledge, skills, values and attitudes, is essential for civic order and citizenship and is - in particular, primary and lower-secondary education - critical for sustained economic growth and reduction of poverty, especially at a time when, as a result of technological change and economic reform, labour market structures are shifting dramatically.

Recent research led by the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the United Nations Children's Fund (UNICEF) and the World Bank have demonstrated the beneficial effects that education has on productivity, health, nutrition, fertility rates and child welfare in general, all of which are of critical importance in the struggle for self-sufficiency and sustainable development ⁽⁹⁾.

As it will be explained further on, the spread of education has reduced poverty by helping the growth of developing countries' economies at historically rapid rates but major challenges remain and among them expansion of access to education in some countries and, in many others, to increase equity, improve educational quality and speed education reform ⁽¹⁰⁾.

1. Historical background of the right to education

The right to education emerged belatedly in the history of civil liberties. Indeed, individuals had first to gain the independence and to assert their basic personality and

⁹ M. Carnoy, "The case for investing in basic education", 1992, Unicef, New York, at 3-7.

¹⁰ F. Dall, "Education and the United Nations Convention on the rights of the child : the challenge of implementation", Nov. 1993, Unicef, International Child Development Centre, Child Rights Series, n° 4, at 1, 10-11; "Development in practice. Priorities and Strategies for Education", op. cit. (n° 3) at Xi 1, 17.

dignity. Education, in comparison with other rights such as the right to life, freedom, equality, joined the group of human rights much later, in spite of its great importance in the hierarchy of human rights. At the international level, it was not fully proclaimed until after World War II.

Education has always been characterized by two major concerns of cultures and peoples, “namely to transmit to the young the technical skills necessary to master the tasks of daily life as well as the religious, philosophical, cultural and social values of the respective peoples and societies (11)”.

Before recognition of the “individual” right to education, education was considered from the point of view of the general interest of society. The two main goals of the educational systems were the social well-beings and the preservation of the group’s cultural traits. The most important thing was to fulfill collective ideals.

Until the age of Enlightenment, in Europe, education was primarily a function assumed by the parents and by the Church. It was only with the emergence of the modern and secular state that education was considered as a matter of public concern. During the eighteenth century, most European states attempted to regulate the complex educational relations between Church, children, parents and other owners of educational institutions, among various measures, by means of mandatory school attendance (12).

The French and American Revolutions established the promotion of education, for the benefit of the majority of citizens at least, as a state or public function. On the one hand, public education was considered as a means of realizing the egalitarian ideals upon which these revolutions were based and, on the other hand, education was no longer the exclusive privilege of a particular social class.

In fact, it was the French Revolution which foreshadowed modern criteria in the field of education, by emphasizing public education as the means of achieving the goal of the ideal of equality in freedom so dear to the revolutionaries and particularly dear to those who were resolved to achieve human dignity by carrying the struggle beyond the limits set by civil and political freedoms and rights. Education was no longer to be used in order to a particular

¹¹ J. Delbrück, “The right to education as an International Human Right”, *German Yearbook of International Law*, (1992), at 94 et seq; M. Nowak, “The right to education” in *Economic, Social and Cultural Rights*, A. Textbook, 1995, Ed. by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, at 190-191; K. Halvorsen, “Notes on the Realization of the Human Right to Education”, *Human Rights Quarterly* (1990), vol. 12, at 341.

¹² M. Nowak, *op. cit.* (n 11), at 191.

social class but instead, its benefits were to be made available to the majority. In other words, it was to be made democratic.

The French Revolution and its contemporary American Revolution established the concept of education as an essential task of the state “in as far as it offers a means of enlightening citizens and fulfilling democratic ideals” (13).

Therefore, public education “common to all men” became a goal of lovers of freedom, equality and democracy. Subsequently, several nations enshrined this goal in their political constitutions and educational legislation, establishing universal and free compulsory public primary education. Compulsory education laws were also introduced to provide children with a basic general education and vocational training, thereby withdrawing them from the labour force (14).

Thus, in the course of the nineteenth century, the state responsibility for education found its way into the domestic bills of rights and opened the way for future constitutions. For example, in the constitution of the German Empire of 1945 (15), education was affirmed as a function of the state, independent of the Church and the right of the poor to free education was guaranteed. In addition and at the same time, the right for every German to found and direct schools and to give instructions at home was provided.

The German constitution is said to reflect the somewhat contradictory attitude of nineteenth century liberal thought on education because, although conscious of the danger of too much state involvement in educational matters, liberalism advocated state intervention for the purpose of reducing the dominance of the Church and of protecting the rights of children against their own parents.

Thus, the liberal concept of human rights focused on the duty of parents to provide education, the liberty of the parents to choose education within certain limits established by law and the duty of the state to guarantee that every child receive adequate education by means of mandatory school attendance and the legal regulation of school curricula. The state was therefore responsible for promoting the free compulsory education as well as for supervising private education when public and private systems existed side by side as occurred in the majority of countries with a pluralistic democracy (16).

¹³ F. Volio, “The Child’s right to education : a survey” in G. Mialaret, The Child’s right to education, 1979, Unesco, at 21-22.

¹⁴ D. Hodgson, “The International human right to education and education concerning human rights”, in The International Journal of Children’s Rights, (1996), 4, at 239.

¹⁵ “Paulskirchenverfassung” of March 1849. See for the text, F. Hartung, “Die Entwicklung der Menschen - und Bürgerechte von 1776 bis zur Gegenwart”, 1964, at 84.

¹⁶ M. Nowak, op. cit. (n 11), at 191-192; F. Volio, op. cit. (n 13), at 22.

It is only the socialist concept of human rights which actually shifted the primary obligation of providing education to the state. For the first time, Article 121 of Stalin's Soviet Constitution of 1936⁽¹⁷⁾ laid down an explicit human right to receive education with a corresponding duty of the State to provide education. It is interesting to note that the right to education, together with the right to work and the right to social security, are considered as the most prominent human rights in all constitutions of socialist states.

2. Recognition of the human right to education at the international level.

A. Mainstream recognition

This section will provide a necessary general overview of the content and development of the right to education at the international level.

It was not until the second World War that the right to education was recognized at the international level. The right to education, following the second war has been recognized by a variety of universal and regional instruments in a way which reflects both the liberal and the socialist human rights concept.

1) The **Universal Declaration of Human Rights (UDHR)**, adopted by the General Assembly of the United Nations in Paris on 10th December 1948, proclaimed once and for all the right to education for "everyone", and thus, for the first time at the international level, it was recognized that the right to education was a fundamental human right. A general right to education was directed and specifically articulated in the UDHR in its article 26 (1) which states :

"Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the base of merit".

Children are obviously the main beneficiaries of this right. It is for them that the systems and techniques of education are mainly designed. However, Article 26 of the

¹⁷ F. Hartung, op. cit. (n 15), at 118.

UDHR also applies to adults for education is a dynamic and continuous process. This Article 26 requires that governments give every individual the opportunity to acquire knowledge and also to provide the necessary facilities ⁽¹⁸⁾.

The obligation to supply free education to children implies that each nation should establish a free public education system in order to place education within the reach of the “great majority of children”. Compulsory elementary education entails that every person has an irrevocable entitlement to a period of education at public expense and the term “compulsory” is intended to imply that nobody could prevent children from receiving a basic education. For example, the state would have to meet the rights of children to receive at least an elementary education when their parents, through ignorance or neglect, pay no attention to this need ⁽¹⁹⁾.

The Declaration also proclaimed in its article 26 that secondary and higher education should be accessible on the basis of merit rather than on that of wealth or station, with access to specialized and technical programmes as a human right in every part of the world.

Article 26 (3) also affirmed the rights of parents to choose the type of education appropriate for their children. Paragraph 2 of Article 26 sets out the function and objectives of education. Thus, the quality of education was also insisted upon. It emphasizes the role of education in the maintenance of peace and the promotion of understanding among all nations. Indeed, Article 26 (2) states that :

“Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights, and fundamental freedoms. It shall promote understanding, tolerance and further the activities of the United Nations for the maintenance of peace”.

The goal of education is therefore considered not merely as a question of communicating knowledge, i.e. instruction, but rather, and above all, as training and helping of individuals to make maximum use of their capacities, i.e. education.

Two final remarks about the UDHR are to be made : on the one hand, the UDHR enunciated its concern about education as a human right when relatively few nations had free and compulsory elementary education available for all and even fewer possessed adequate

¹⁸ M. El Fasi, “The right to education and culture” in the *Journal of the International Commission of Jurists* (June 1968), vol IX, N° 1, Part two, Special Issue 1968, at 34-35; F. Volio, *op. cit.* (n 13), at 22-23.

¹⁹ F. Volio, *op. cit.* (n 13), at 25; D. Hodgson, *op. cit.* (n 14), at 241.

and higher education systems, which was rather remarkable ⁽²⁰⁾. On the other hand, some critics have been addressed to the Universal Declaration. Firstly, it appears that the Declaration's limitation of free education to elementary education now falls short of the practice of many countries where, even some of the least developed, offer secondary and sometimes higher education free. Secondly, no mention is made of the right for everyone to enjoy his national language and to use it for education. This omission is to be regretted indeed, since tension in certain countries of the world is due to linguistic differences (such as in India, Canada, Belgium) ⁽²¹⁾ ⁽²²⁾.

In conclusion, the Universal Declaration enunciated a set of ideals that legitimized education as a priority for development and harmony in many parts of the world and its Article 26 highlighted the characteristics of a "democratic" education. The educational provision of the Declaration, as we shall see, has been reaffirmed, amplified and considerably detailed by later United Nations instruments which deal with specific topics or with the rights to particular groups (such as women, children, disabled persons and refugees).

2) The Universal Declaration of 1948 was followed by another document which was to be a further milestone in the history of the right to education. **The 1959 Declaration of the Right of the Child** indeed recalled the Universal Declaration and set out ten principles for the protection of the youth. The Declaration, adopted by the United Nations under Resolution 1386/XIV established that free and compulsory basic education should be an essential building block for the promotion of a child's "general culture and enable him [or her] ... to become a useful member of society" ⁽²³⁾. Thus, such equal opportunity and access to free and compulsory elementary education for all should promote general culture and develop individual abilities and responsibility.

To ensure implementation of the full enjoyment of the right to education, children should benefit from two obligations incumbent upon society and public authorities.

The first obligation is to supply free of charge the education required by the individual circumstances of each child. This implies that the society should set up and develop a system of public education, which would offer "equal opportunity" to the poor children of a majority group - as given to the minority whose economic and social status give it an initial advantage in obtaining education.

²⁰ D. Ray and N. Tarrow, *op. cit.* (n 10), at 10.

²¹ See Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, Judgement of 23 July 1968, Publication of the European Court of Human Rights, Series A, N° 6, at 30-31.

²² M. El Fasi, *op. cit.* (n 18), at 34, 39; D. Hodgson, *op. cit.* (n 14) at 241.

²³ Principle 7 of the 1959 Declaration on the Rights of the Child.

The obligation to make education compulsory is the second obligation incumbent upon society which implies a responsibility on the part of the authorities to ensure compliance with the law. Parents should nevertheless remain free to choose the type of schooling they want for their children, which includes attendance at private institutions (24).

The 1948 Universal Declaration and the 1959 Declaration on the Rights of the Child are, technically however, resolutions of the General Assembly of the United Nations which, on the one hand, do not require ratification by member states, and on the other hand, do not specify any enforcement procedures. Therefore, those two declarations are not legally binding (at least for a number of commentators). They merely call member states to observe and promote their principles and are intended to influence national constitutions and practices related to the expansion of the human right to education.

3) On 14 December 1960, the General Conference of UNESCO adopted the **Convention against Discrimination in Education**. UNESCO - the United Nations Educational, Scientific and Cultural Organization - is the agency charged by the United Nations with the specific responsibilities of education and promoting human rights (25). The purpose of UNESCO is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, language or religion(26).

The Convention against Discrimination in Education (27) is the first international instrument to prescribe comprehensive international standards for public education (28). The Convention is based on two principles set out in the Universal Declaration in Article 2 which prohibits any kind of discrimination and Article 26 which recognizes that everyone has the right to education. The two main goals of the Convention is to eradicate all forms of discrimination and to promote and to ensure that steps are taken to bring about equality of opportunity and treatment for all in education (29).

²⁴ F. Dall, op. cit. (n 10) at 1; F. Volio, op. cit. (n 13) at 25-26.

²⁵ A.-M. M'Bow, "Introduction" in G. Mialaret, *The Child's Right to Education*, 1979, Unesco, at 9-10.

²⁶ Constitution of Unesco, 1945 (Article 1).

²⁷ Entry into force 22 May 1962.

²⁸ Article (1)(a) of the Convention.

²⁹ B.G. Ramcharan, "Equality and Non-discrimination", in Louis Henkin (ed.), *The International Bill of Rights - The Covenant on Civil and Political Rights*, 1981, New York, Columbia University Press, at 265-266.

Other aspects of education were spelt out in subsequent UNESCO instruments.

The **Recommendation Concerning the Status of Teachers** (1966) recognized that “advance in education depends largely on the qualifications and ability of the teaching staff”. The **Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Right and Fundamental Freedoms** (1974) stated that education should enhance international understanding and instill a sense of civic order. Therefore, member states are urged “to ensure that educational aids, especially textbooks, are free from elements liable to give rise to misunderstanding, mistrust, racialist reactions contempt or hatred with regard to other groups or peoples”.

The **Revised Recommendation Concerning Technical Vocational Education** (1974) recognized education as a lifelong process and the **Recommendation on the Development of Adult Education** (1976) urged to set up appropriate structures and measures to meet the educational needs of adults, with a special focus on women.

All these above mentioned international instruments adopted by the General Conference lay down certain standards and set out provisions designed to ensure that education progresses by successive stages so that it benefits all groups and all ages and to contribute to the development of the individual and to the socio-economic development of the various countries.

Unfortunately, these recommendations largely failed to generate the response needed to meet the growing demand - supply crisis even in basic education. The two major factors of the crisis, as mentioned above in Chapter one were the outcome of exploding population growth rates and the persistent economic decline particularly among the least developed nations of South Asia and Africa ⁽³⁰⁾.

4) By 16 December 1966, the General Assembly of the United Nations, in Resolution 2200 (XXI) adopted two international instruments supplementing the Universal Declaration on Human Rights. These are the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** and the **International Covenant on Civil and Political Rights**. Article 13 of the first of the above-mentioned covenants is exclusively devoted to the right to education and, in its day, contained the most extensive and detailed provisions on the subject of education to be incorporated in an international legal instrument ⁽³¹⁾.

³⁰ F. Dall, op. cit. (n 10), at 2; F. Volio, op. cit. (n 13) at 27-28; D. Ray and N. Tarrow, op. cit. (n 8), at 9-11.

³¹ Article 6 (2), Article 10 (1) and Article 14 of the ICESCR are also relating to education.

The Covenant set out the principles enshrined in the Universal Declaration as binding legal standards and thus strengthened their effect. Article 13 of the ICESCR expands upon the content attributed to the right to education by Article 26 (1) of the Universal Declaration. Article 13 (1) proclaims that the “States Parties recognize the right of everyone to education”. Article 13 (2) (a) requires that “Primary education shall be compulsory and available free to all”, while article 13 (2)(b), unlike article 26 (1) of the Universal Declaration, makes specific reference to secondary education, which “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”. Article 13 (2) (c) concerning higher education goes further than the Universal Declaration by calling for the “progressive introduction of free education” at this level as well.

Finally, article 13 (2)(c) adds a new provision in calling for the active pursuit of the development of a system of schools at all levels, the establishment of an adequate fellowship system and the continuous improvement of the material conditions of teaching staff ⁽³²⁾.

5) Finally, the 1989 **Convention on the Rights of the Child (CRC)**, adopted by the United Nations General Assembly on 20 November 1989 and its articles 28 and 29 represent the most recent comprehensive formulation of the right to education at the international level. It seems important to point out that the CRC is the most widely ratified of all United Nations human rights treaties and that it has entered into force faster than any other United Nations human rights treaty. By March 1, 1996, the Convention had been ratified by 187 states. The Convention had become the most important legal instrument on the Rights of the Child (³³). Moreover, the Convention is said to be the first international legal instrument giving human rights to children. It is a unique human rights treaty which protects not only the child’s civil and political rights but it also extends protection to the child’s economic, social, cultural and humanitarian rights ⁽³⁴⁾.

Drafters of the Convention drew heavily on the relevant provisions of the ICESCR (1966) and the UNESCO Convention Against Discrimination in Education (1960).

Article 28 of the CRC states that :

³² D. Hodson, op. cit. (n 14), at 243.

³³ L.J. Leblanc, “Reservations to the Convention on the Rights of the Child : a macroscopic view of state practice”, in *The International Journal of Children’s Rights*, (1996), 4, at 357.

³⁴ J. Wolf, “The Concept of the “Best interest” in terms of the UN Convention on the Rights of the Child”, in M. Freeman and P. Veerman (eds), *The Ideologies of Children’s Rights*, 1992, at 130; D. McGoldrick, “The United Nations Convention on the Rights of the Child”, in *International Journal of Law and Family*, (1991), 5, at 133.

28.1. 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 to all;
- b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- d) Make educational and vocational information and guidance available and accessible to all children;
- e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

28.2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

28.3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 28 thus contains provisions already found in international instruments promoting the right to education, including the right to compulsory and free primary education and access "to all" to secondary, vocational and higher education.

However, some critics are addressed to article 28 of the CRC because this article involves some ambiguities regarding the specific obligations that signatories have in terms of implementing these principles.

In the introductory part of article 28 (1), the use of the term "progressivity" is to be read with article 4 which states that state parties are obliged to undertake measures to implement the economic, social and cultural rights recognized by the Convention to the maximum extent of their available resources. However, the obligation imposed by the

Convention seems weaker than that imposed by article 13 (2)(a) of the ICESCR because in the CRC, there is no equivalent provision to article 14 of the ICESCR which obliges states parties who have not already implemented free and compulsory primary education to adopt within two years a detailed plan of action for the implementation of such a system.³⁵ In fact, the CRC fails to specify any time-frame.

Article 28 (1)(b) seems also weaker than article 13 (2)(b) of the ICESCR. Indeed, on the one hand, State Parties to the Convention are merely required to “encourage the development of different forms of secondary education”. On the contrary, under the Covenant, “secondary education in its different forms ... shall be made generally available ...”³⁵. On the other hand, the introduction of free secondary education is given lower priority in the Convention than it is under the ICESCR³⁶.

Finally, article 28 (1)(c) concerning higher education, fails to include the phrase “the progressive introduction of free education” contained in article 13 (2)(c) of the Covenant.

Thus, regrettably, article 28 (1) (a)(b)(c) appear to derogate from the international standards previously embodied in the various formulations of the right to education.

Other ambiguities may be found in article 28 of the Convention regarding the specific obligations that State Parties have in term of implementing the principles contained in article 28 (1). As an example, the obligation to ensure non-discriminatory policies in relation to the enjoyment of education rights has an immediate effect notwithstanding the non-availability of financial resources. The principles of non-discrimination contained in article 2 of CRC is applicable in terms of education but the drafters apparently believed that discrimination in schools was a sufficiently important and serious problem to include the reference to “equal opportunity” in the context of Article 28.

The immediate effect of Article 2 of the CRC, not subject to the availability of resources is of great importance particularly in the field of basic education. This principle means that “whatever resources are available must be allocated to ensure the enjoyment of the right to non-discriminatory education”. The importance of this principle needs to be stressed, especially in countries where the limitation of resources may be used by governments as a justification for not enforcing the educational provisions of the CRC. Despite appearances, indeed, certain children in many countries of the world are treated unequally compared with others. For example, children belonging to a minority group, as also women and girls who represent two thirds of those who nowadays do not have access to education, also children

³⁵ See Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child*, E/CN.4/1989/48 (2 March 1989) at 82, para. 463 (Unesco suggestion that the words “encourage the development of” be deleted so as not to derogate from existing standards).

³⁶ Commission on Human Rights, *op. cit.* (n 35), at 82, para. 464.

from poor economic backgrounds and children discriminated on grounds such as race and creed⁽³⁷⁾. However, we can observe that, despite the criticisms addressed to the CRC, it added to the strongly legalistic recommendation a moral and ethical dimension : the affirmation of the right of the child to a non-discriminatory education that fully respect his or her cultural identity and language needs.

Finally, Article 28 (1)(b) and 28 (1)(c) are new provisions. Article 28 (2) requires that school discipline should be administered “in a manner consistent with the child’s human dignity” and article 28 (3) calls for international cooperation in matters regulating education, which seems of crucial importance today.

b) International instrument regulating specific topics and concerning particular groups.

The right to education has also been recognized by international instruments regulating specific topics or concerning particular groups. This section is devoted to a brief enunciation of those international instruments.

Article 22 of the **Convention relating to the Status of Refugee** of 1951, Article 22 of the **Convention relating to the Status of Stateless Persons** of 1954, Articles 5 (e)(v) of the **International Convention on the Elimination of All Forms of Racial Discrimination** of 1965 and Article 10 (a) of the **Declaration on Social Progress and Development** proclaimed by the United Nations General Assembly on 11 December 1969 figure among the international instruments regulating specific topics of international concern which are concerned among other provisions with the protection of the right to education.

Most of the international instruments which seek to protect or recognize the rights of particular groups including the right to education take the form of declaration. A declaration has the characteristic of proclaiming a set of principles, ideals or standards but does not contain binding legal obligations. However, some provisions of a declaration can eventually “crystallize” into customary laws (some provisions of the 1948 Universal Declaration of Human Rights have crystallized into customary law) or can be incorporated into a binding international agreement⁽³⁸⁾.

³⁷ A. Rex, “Racism and education”, in G. Mialaret, *The child’s right to education*, 1979, Unesco, at 119; F. Dall, *op. cit.* (n 10), at 3-4.

³⁸ For example, certain provisions of the 1959 Declaration on the Rights of the Child became later part of the 1989 Convention on the Rights of the Child.

Principles 5, 7 and 9 of the 1959 **Declaration of the Right of the Child**, Principle II of the 1965 **Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respects and Understanding between People**, Article 9 of the 1967 **Declaration on the Elimination of Discrimination Against Women** and Article 10 of the 1979 **Convention on the Elimination of All Forms of Discrimination Against Women** are all concerned with the right to education.

Educational rights have also been mentioned in international instruments concerning disabled persons such as in the 1971 **Declaration on the Rights of Mentally Retarded Persons** in its Principle 2 and in Principle 6 of the 1975 **Declaration on the Rights of Disabled Persons**.

Finally, various declarations concerning religious and belief minorities have included the right to education in their provisions, such as the 1981 **Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief** in its Article 5 ⁽³⁹⁾.

3. Recognition of the right to education at the regional level

The right to education has also been recognized at the regional level. Rights relating to education are included in the **American Declaration on the Rights and Duties of Man** (1948) (Article XII), the **European Convention on Human Rights** (1950) (Protocol I, article 2) (elaborated by the 1961 European Social Charter in its articles 7 (3), 9 and 10), the **African Charter of Human and Peoples' Rights** (1981) (Article 17), the **Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights** (1988) (Articles 13 and 16) (otherwise known as the Protocol of San Salvador) ⁽⁴⁰⁾.

4. International conferences recognizing the “human” right to education

In Teheran, in May 1968, the first United Nations sponsored International Conference on Human Rights was organized. International concern about widespread illiteracy resulted, 30 years ago, in the adoption by the Conference of Paragraph 14 of the Proclamation of Teheran which stated that “ [... International action aimed at eradicating illiteracy from the face of the earth and promoting education at all levels require urgent attention”].

³⁹ D. Hodgson, op. cit. (n 14), at 245-248.

⁴⁰ D. Davis, H. Cheadle, N. Hayson, *Fundamental Rights in the Constitution - Commentary and Cases*, “Education”, 1997, Juta & Co Ltd, Cape Town, at 294-295; D. Hodgson, op. cit. (n 14), at 249-250.

Governments were invited to allocate more resource to combat illiteracy and UNESCO was urged “to stimulate efforts for enhancing the contribution which literacy could make to economic and social development and the promotion of human rights”.

As we have shown, since the recognition of education as a fundamental human right in the 1948 Universal Declaration on Human Rights, the right to education has been widely recognized in international human right law. Despite this recognition, in 1990, 130 million children were still denied access to primary school and 960 million adults were still illiterate (41).

The World Conference in Education for All, held in Jomtien (Thailand) in March 1990 gathered together, for the first time in history, over 155 governments which attended the meeting, whose sole purpose was to discuss the world’s current educational crisis with a special focus on basic education.

For the first time also, all the major actors, multilateral agencies, donors and a large group of non-governmental organizations (NGOs) gathered to discuss the specific issues affecting the education of the world’s children. Education was thus the subject of a landmark international meeting under the joint sponsorship of the United Nations Development Program (UNDP), the United National Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children’s Fund (UNICEF) and the World Bank (42).

The Conference passed two resolutions containing, respectively “The World Declaration on Education for All” and a ‘Framework for Action to Meet Basic Learning Needs”. The Jomtien Declaration is based on the firm belief that investment in human resources is at least as important to social and economic progress as investments made in other sectors. Education for All was declared among the most urgent of the world’s priorities.

The Declaration proclaimed the right of all persons to “benefit from educational opportunities designed to meet their basic learning needs”. Those needs are understood to include both essential learning tools, such as literacy and numeracy, and the basic knowledge, skills and attitudes required for people “to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions and to continue learning” (43).

41 “Development in practice. Priorities and Strategies for Education”, op. cit. (n 3) at 36, 41.

42 “Development in practice. Priorities and Strategies for Education”, op. cit. (n 3) at Xi; F. Dall, op. cit. (n 12) at 5.

43 M.B. Anderson, op. cit. (n 5), at 5; M. Carnoy, op. cit. (n 9), at 4; Challenge for children and women in the 1990’s - “Eastern and Southern Africa in profile”, July 1991, United Nations Children’s Fund, at 43; D. Hodgson, op. cit. (n 14) at 249.

Moreover, the four main organizers of the World Conference - the World Bank, UNICEF, UNDP and UNESCO - announced that they would more than double their budget allocation for basic education projects in order to reach the goal of universal primary education by the year 2000.

The World Conference has thus created a new global environment for education and specially for basic education. The Jomtien Declaration and its 10 articles reiterate not only the right to "education for all" but also underscore the importance of education not only as a child right or a human right (for individual growth) but also as a necessity (for national economic development). In addition, the "Framework for Action" arrived for the first time to a statement that clearly spelled out how to implement the educational provisions of preceding international instruments. It identified a set of clearly articulated goals to find innovative cost-effective ways of delivering at least basic education to all groups of children.

We will analyse more in detail the goals of the 1990 Jomtien World Conference later in this paper, when analyzing the results already achieved and, overall, the improvements and the challenges that the world's nations, specially in the developed part of the world, are still facing today more than ever.

Chapter III

Definition, nature of the right to education, aims and objectives of education

1. Definition of the term “education”

Before analyzing the nature of the right to education and the aims and objectives of education, a primary remark is necessary concerning the definition of the term “education”. Indeed, the concept of education can be variously defined. On the one hand, education, understood in the broad sense, covers “all activities by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enables that group to subsist, however elementarily, in the particular conditions of its characteristic environment and ethics” (44). The General Conference of UNESCO has itself defined the term education to imply “the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge” (45).

Education can also, on the other hand, be more narrowly defined to refer to formal or professional “instruction imparted within a national, provincial or local education system, whether public or private” (46). For the purpose of this paper, education will refer to formal education as defined by the General Conference of UNESCO for the purpose of its 1960 Convention against Discrimination in Education. Article 1 (2) defined the term “education” to mean “all types and levels of (formal) education, and includes access to education, the standard and the quality of education and the conditions under which it is given”.

2. Nature of the right to education : the right to education in the framework of three generations.

In the context of this paper, it seems necessary to set the right to education in the framework of the three generations rights.

⁴⁴ A.-M. M’Bow, op. cit. (n 25), at 11.

⁴⁵ Article 1 (a) of the Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms, 1974.

⁴⁶ A.-M. M’Bow, op. cit. (n 25), at 11.

Internationally, recognized human rights are on the one hand those included in the International Bill of Human Rights, which includes the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR) and on the other hand, those elaborated on subsequent instruments adopted by the UN General Assembly.

Through the adoption of numerous conventions and declarations, both at the universal level and at the regional level, the International Bill of Human Rights has since been extensively elaborated. The UDHR contains the whole range of human rights within one consolidated text. In 1951, the UN General Assembly decided that two separate human rights covenants should be prepared, one on civil and political rights and the other on economic, social and cultural rights.

Several assumptions founded this decision and among them, it was argued that the two sets of rights were of different nature. Civil and political rights were considered to be “absolute” and “immediate” whereas economic, social and cultural rights were held to be programmatic, to be realized gradually and therefore not a matter of rights⁽⁴⁷⁾. It was also argued that the implementation of economic, social and cultural rights was held to be costly because they were understood as obliging the state to provide welfare to the individual, whereas civil and political rights were “free” in the sense they did not cost much⁽⁴⁸⁾. The contents of the civil and political rights were assumed to be obligations of States only not to interfere with the integrity and the freedom of the individual.

However, many of these assumptions have been demonstrated to be overstated or mistaken⁽⁴⁹⁾. There are, in fact, considerable similarities in state obligations with regard to both sets of rights⁽⁵⁰⁾.

Human rights instruments adopted in later years have included the different sets of rights side by side. The 1989 Convention on the Rights of the Child is the best example of this integration. It protects not only the child’s civil and political rights but it also extends protection to the child’s economic, social and cultural rights⁽⁵¹⁾.

⁴⁷ E.W. Vierdag, “The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights”, *Netherlands Journal of International Law*, (1978), vol. 9 , at 103.

⁴⁸ M. Bossuyt, “La distinction juridique entre les droits civils et politiques, et les droits économiques, sociaux et culturels”, *Revue des droits de l’homme*, (1975), vol. 8, at 790.

⁴⁹ See Martin Scheinin “Economic and Social Rights as Legal Rights”, in *Economic, Social and Cultural Rights, A. Textbook*, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijkoff Publishers, at 41-62.

⁵⁰ A. Eide, “Economic, Social and Cultural Rights as Human Rights”, in *Economic, Social and Cultural Rights, A. Textbook*, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijkoff Publishers, at 23 who demonstrates how many of the assumptions have been overstated or mistaken.

⁵¹ D. McGoldrick, *op. cit.* (n 34) at 133.

In 1993, representatives of 171 governments assembled in Vienna at the World Conference on Human Rights reiterated that all human rights are universal, indivisible, interdependent and interrelated⁽⁵²⁾.

Three generations of human rights are usually distinguished today by modern human rights terminology : the first generation of civil and political rights, the second generation of economic, social and cultural rights, and the third generation of solidarity or group rights.

Since all human rights are interdependent, indivisible and interrelated, as it was strongly reiterated at the 1993 World Conference on Human Rights, the theory of three generations does not imply any hierarchy or lower and higher stages in the development of human rights law. Many authors do not adhere to the notion of “generations” since the history of the evolution of human rights at the national level does not make it possible to place the emergence of different human rights into clear-cut stages⁽⁵³⁾. It is interesting to point out that in the European system, the right to education and cultural rights are considered in conjunction with civil and political rights rather than with economic and social rights. Indeed, the right to education is included in Protocol N° 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) and not in the European Social Charter. However, we will keep the notion of three “generations” rights to set the right to education, since the assignment to any of the three generations may assist in interpreting the exact scope of the right to education and the corresponding obligations of the State.

The right to education, as it is guaranteed in Article 13 of the CESC, Article 28 of the CRC and Article 26 of the UDHR, is first of all a “second generation right”. A second generation right is based on the socialist philosophy which holds that human rights can only be guaranteed by positive state action. Therefore, the right to education obliges states to develop and maintain a system of schools and other education institutions in order to provide education for everybody, if possible, free of charge. Some scholars maintain that the right to education is a social right while others consider it as the most outstanding example of the “cultural rights” category⁽⁵⁴⁾. Generally, however, the right to education is considered to be a cultural right but it is also related to other human rights.

⁵² The World Conference on Human Rights : The Vienna Declaration and Programme of Action. UN doc. A/CONF. 157/23, part I, para 5.

⁵³ A. Eide and A. Rosas, “Economic, Social and Cultural Rights : A universal Challenge”, in *Economic, Social and Cultural Rights, A. Textbook*, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, at 16.

⁵⁴ M. Nowak, *op. cit.* (n 11), at 196.

Indeed, the right to education is certainly linked to the notion of cultural rights but it is also an essential element in economic and social rights. Education is increasingly important in order to make optimal use of property to secure an adequate standard of living (which is the most comprehensive social right), in order to obtain satisfactory work and to perform well in work (which is the most fundamental economic right), as well as to be able to use income derived from property, work or social security in an optimal way for an adequate standard of living⁽⁵⁵⁾. In addition, the enjoyment of many civil and political rights, such as freedom of information, expression, assembly and association, the right to vote and to be elected or the right of equal access to public service depends on at least a minimum level of education. Other rights, such as the right to take part in cultural life, to enjoy the benefits of scientific progress and to receive higher education on the basis of capacity can only be exercised after a minimum level of education has been achieved. In one word, education is a precondition for the exercise of human rights.

Thus, the right to education is first of all and essentially a welfare or a “second generation right”, which is to be provided to individuals primarily by governmental agencies. The right to education belongs to all individuals although children are the main beneficiaries. Article 26 (1) of the Universal Declaration of Human Rights implicitly recognizes that education is a life-long and continuous process. Therefore, the right to education implies specific duties of State to ensure it to everyone without discrimination and to combat existing inequalities in the access to and enjoyment of education (by legislative and other methods)⁽⁵⁶⁾. One of these methods is to make education free and compulsory until a certain age. It is important to note that education is one of the few human rights for which it is universally agreed that the individual has a corresponding duty to exercise this right.

Usually, a human right only belongs to one of the three generations. However, some authors consider that the right to education is a right and the only right that reveals aspects falling under all three generations, as the historical background and the wording of the right in various universal and regional human rights instruments show.

On the one hand, education is also said to fall in the category of the “first generation of human rights”, that is the civil and political rights. The classic bills of rights, adopted during the American and French Revolutions, do not include any rights specifically related to education but this has changed with the increasing influence of liberalism on the definition of constitutional rights. In Germany, for instance, the educational rights defend the liberal and

⁵⁵ A. Eide, *op. cit.* (n 50), at 32.

⁵⁶ These obligations of the State are laid down in the UNESCO Convention Against Discrimination of 1960.

anti-clerical ideas of freedom of science, research, teaching, education and profession against interference by the State and the Church.

The liberal concept of education has also been adopted after World War II in the international human right treaties and for instance, the main emphasis of Article 2 of Protocol N° 1 to the ECHR is on the States' duty to respect the parents' rights to ensure education and teaching in conformity with their own religious and philosophical convictions⁽⁵⁷⁾. Article 18 (4) of the CCPR and Article 13 (3) of the CESCRC also contain similar protection of parents' rights to ensure education from undue state interference.

In addition, Article 13 (3) and 13 (4) of the CESCRC, Article 28 (2) of the CRC guarantee the liberty of individuals and bodies to establish direct educational institutions in conformity with certain minimum educational standards, laid down by the State. Indeed, the liberal concept of education, teaching, science and research can only be ensured by means of certain institutional guarantees and implies a certain degree of autonomy for educational institutions to determine their teaching policies without undue state interference.

Thirdly, and on the other hand, the right to education is said to have certain links with the so-called "solidarity rights" of the "third generation of human rights" (58). For example, Article 28 (3) of the CRC calls for international co-operation in matters relating to education and 15 (4) of the CESCRC obliges States to recognize "the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields". More recently, the "World Declaration on Education for All" adopted in Jomtien in 1990 advocated strongly toward international solidarity and efficient measures in the framework of international development cooperation to eradicate illiteracy and to achieve universal completion of primary education by the year 2000. As we shall see, an active policy of academic cooperation and solidarity is of particular significance in North-South relations. Indeed, the huge gap between educational facilities in industrialized countries and those in developing countries demands international solidarity and efficient measures to eradicate ignorance and illiteracy throughout the world.

3. Aims and objectives of education.

The history of education unfolds a rich variety of aims and objectives which are usually related to religious values and political needs. With the emancipation of the individual

⁵⁷ L. Widhaber, "Right to education and Parental Rights", in R. St.J. MacDonald et al., The European System for the Protection of Human Rights, 1993, at 531-551.

⁵⁸ M. Nowak, *op. cit.* (n 11), at 195-198.

during the age of Enlightenment and the emergence of a science of education, many “theories of education” have been developed. The “liberation of the child” was proclaimed by Jean-Jacques ROUSSEAU in “Emile” for the first time as the major aim of education, which entailed many theorists to focus on the question how this could be achieved ⁽⁵⁹⁾.

The role of education has been described by several authors. For example, for one commentator, education is “a form of action that will enable the child to discover the environment and its technical, economic and political components, adjust to it and master it” ⁽⁶⁰⁾. An other commentator considers the right to education as follows : “while primarily an individual right, can be understood within its social function of developing people as full citizens of their society” ⁽⁶¹⁾, which will ensure to the benefit not only of individuals but of the communities within which they live.

The provisions of international and regional instruments which recognize the right to education articulate the basic aims or goals sought to be realized by the exercise of the right. Although the goals and objectives of education may vary according to the respective historical, political, cultural, religious or national context, these provisions furnish common goals for the educational systems of all countries. There seems to be a growing consensus that the exercise of the right to education is not intended merely to acquire information and knowledge but to achieve a variety of objectives or aims and among them, to enable the human being to freely develop his or her personality and dignity, to actively participate in a free society and to contribute to tolerance and respect for human rights. For instance, article 13 (1) of the CESCR proclaimed that “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms” ⁽⁶²⁾.

Despite the fact that some regional human rights instruments are very vague in defining the aims of the right to education ⁽⁶³⁾, and notwithstanding all the controversies about the universality of human rights preceding the Vienna World Conference on Human

⁵⁹ M. Nowak, *op. cit.* (n 11), at 193.

⁶⁰ G. Mialaret, “What kind of education ?”, in *The Child’s Right to Education*, 1979, Unesco, at 48.

⁶¹ H. Cullern “Education rights or minority rights” in *The International Journal on Law and the Family*, (1993), 7, at 144.

⁶² Similarly, Article 26 (2) of UDHR; Article 5 (1) a of the UNESCO Convention Against Discrimination in Education. See also M. El Fasi, *op. cit.* (n 18), at 37.

⁶³ As for example, Article 2 of Protocol 1 to the ECHR which focuses only on the liberty of parents to ensure education in conformity with their own religious and philosophical convictions or article 17 (3) of the 1981 African Charter on Humans and Peoples’ Rights which focuses only on the duty of the State to promote and protect “morals and traditional values recognized by the community”.

Rights (1993) ⁽⁶⁴⁾, there does at least exist today a fairly broad universal consensus of four major aims and objectives of the right to education which have been frequently and consistently prescribed by the international and regional instruments :

- a) the full development of the individual's personality, talents abilities and dignity.
- b) the strengthening of respect for human rights and fundamental freedoms.
- c) the enabling of all persons to participate effectively in a free society.
- d) the promotion of understanding, tolerance and friendship among all nations, racial ethnic or religious groups and the furtherance of the activities of the United Nations for the maintenance of peace.

However, other aims are less frequently mentioned by the various international or regional instruments and among them, the intergenerational transmission of cultural heritage, the development of national consciousness, the contribution to the economic and social development of the community, the development of a sense of moral duty and social responsibility, the development of the individual's critical ability and judgment and the development of respect of the national environment ⁽⁶⁵⁾.

The most detailed provision on the aims and objectives of the right to education in international law can be found in Article 29 (1) of the 1989 UN Convention on the Rights of the Child. The States parties to the Convention agree that the education of the child shall be directed :

- a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- e) The development of respect for the natural environment".

⁶⁴ Vienna Declaration and Programme of Action, Un doc. A/CONF. 157/23, part II, para. 79.

⁶⁵ See D. Hodgson, op. cit. (n 14), at 251-252.

Innovative educational aims are added in article 29 (1) of the CRC. Respect for different civilizations, for indigenous cultures and for the natural environment are recognized as major goals of education. As we will see later, article 29 (1)(c) which contains specific reference to the culture of the child and to taking account of cultural traditions, is of fundamental importance because it contains more detailed provisions in support of the kind of education that should be made available to ethnic or other minority groups, which is an important element in a world of religious, cultural and ethnic diversity.

However, certain educational aims may conflict one with another. For instance, multicultural pluralistic societies are finding it increasingly difficult to strike a balance between national and majoritarian values and cultural and minority values. Indeed, the adoption of universal standards and goals raises difficult problems rendered acute in relation to economic, social and cultural rights ⁽⁶⁶⁾.

⁶⁶ F. Dall, *op. cit.* (n 10, at 4; D. Hodgson, *op. cit.*, (n 14), at 253; D. McGoldrick, *op. cit.*, (n 34), at 132, 137 and 148.

Chapter IV

Analysis of some of the aspects of the right to education

1. The right to receive education

The right for every human being to receive education, and children in particular, constitutes the core of the right to education under international law. As we have already pointed out, the most important provisions (article 26 of the UDHR, articles 13 and 14 of the CESC, article 28 (1) of the CRC) create state obligations to fulfil the right to education by means of positive action. These provisions generally recognize a right of access to all stages of education - “fundamental education, primary education, secondary and higher education” and a stronger obligation is placed on states to guarantee free and compulsory primary education.

The obligations contained for example in article 2 (1) of the CESC and in article 4 and 28 (1) of CRC are, however, only defined as “progressive obligations”, which entails that each State Party has to undertake steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights concerned”. Thus, most provisions establish obligations of result. Only few provisions establish an obligation of conduct as for instance in article 14 of the CESC.

As we will explain in the chapter devoted to the implementation of the right to education, obligations of conduct are easier to monitor than obligations of result and the assessment of the compliance of State Parties with their obligation of result is far more difficult.

In this context, the important question which emerges is the question of specifying which are the exact corresponding State obligations to fulfil the right to receive education. It is widely recognized that the right to receive education under international law is a primary function of the State and only obliges governments to provide for adequate educational facilities ⁽⁶⁷⁾.

⁶⁷ D. Hodgson, *op. cit.* (n14), at 238, 261; M. Nowak, *op. cit.* (n 11), 198-200.

Article 2, Protocol 1 of the European Convention on Human Rights provides that “no person shall be denied the right to education”. The article was interpreted by the European Court of Human Rights which held that it does not require that the States ensure at their own expense, or subsidise, education of a particular type but only implies that “those who are under the jurisdiction of one of the contracting States have the right to avail themselves of the means of instruction existing at a given time” (68). However, it has been strongly advocated that even if understood in this way, the exercise of the right to education “requires by implication the existence and the maintenance of a minimum of education provided by the State, since otherwise the right would be illusory, in particular for those who have insufficient means” (69).

Indeed, it seems today accepted that all schools, vocational training institutions and universities do not have to be established and maintained by the government alone. However, the governments have the obligations to “ensure that all conditions laid down in international law such as free and compulsory primary education or general and equal access to secondary and higher education is guaranteed by means, for example, of legislative measures, state supervision, and subsidies” (70). Thus, it is widely assumed that States have at least an obligation to provide for the existence and maintenance of a minimum of educational facilities and that no restrictions may be imposed upon access to primary education (71).

2. Non-discrimination, equal access and opportunity to education and equal enjoyment of the right to education.

A. Introduction

Non-discrimination is a fundamental pillar of international human rights law. The Universal Declaration of Human Rights sets out the basic requirement. “Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind” (72). “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to protection against any discrimination in violation of

⁶⁸ Belgian Linguistic Cases 1 EHRR (1968), at 241, 252.

⁶⁹ P. van Dijk & J.G..H. van Hoof, “Theory and Practice of the European Convention on Human Rights”, 1990, (2 ed.), Deventer Kluwer Law and Taxation Publishers, at 467.

⁷⁰ M. Nowak, *op. cit.* (n 11) at 201.

⁷¹ L. Wildhaber, *op. cit.* (n 57) at 533; J. Delbrück, *op. cit.* (n 11), at 101.

⁷² Universal Declaration, article 2.

this Declaration ...” (73). In Article 2 of both United Nations Covenants State parties undertake to guarantee all the rights enunciated therein 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 (74).

Non-discrimination as the overriding human rights principle is considered as the obvious starting point in operationalizing economic, social and cultural rights and thus the right to education.

Experience has shown and still shows nowadays that some governments tend to use the system of education as a means to systematically discriminate against ethnic or racial, religious and linguistic minorities as well as other vulnerable groups, such as women or blacks.

Unequal opportunities and discrimination against persons belonging to minorities or majorities in some case, and indigenous people have been and are still widely practised or tolerated in the educational, cultural, economic and social life of most societies (75).

The 1978 UNESCO Declaration on Race and Racial Prejudice in its article 5, paragraph 2 stated that :

“States [.....] have a responsibility to see that the educational resources of all countries are used to combat racism, more especially [.....] by making the resources of the educational system available to all groups of the population without racial restriction or discrimination and by taking appropriate steps to remedy the handicaps from which certain radical or ethnic groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps from being passed on to children”.

Article 7 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination also pointed out that :

“States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture [.....], with a view of combating prejudices which lead to racial discrimination and of promoting understanding, tolerance and friendship among nations and racial or ethnical groups ...”.

Minority education has been addressed in regional human rights instruments as well.

⁷³ Universal Declaration, article 7.

⁷⁴ S. Knight, “Proposition 187 and International Human Rights Law : Illegal Discrimination in the Right to Education” in *Hastings International and Comparative Law Review*, (1995/1996), vol. 19, at 199-200.

⁷⁵ G. Alfredsson, “The Right to Human Right Education”, in *Economic, Social and Cultural Rights, A. Textbook*, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosars Martinus Nijhoff publishers, at 216, 217, 222.

At the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides the first post-1945 statement of explicitly minority-oriented education rights in Protocol I, Article 2 :

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.

Regarding the Cultural Minorities, in 1992, the Council of Europe adopted the European Charter for Regional and Minority Languages which provides detailed guarantees for education in minorities’ languages.

No mention, however, is made of minority education rights in the American Declaration of the Rights and Duties of Man and in the African Charter on Human and Peoples’ Rights.

In the specific field of education, the 1960 UNESCO Convention Against Discrimination in Education made the major contribution to the field of discrimination in education.

Article 1 set out a comprehensive definition of discrimination in education. For the purpose of this Convention, the term “discrimination” includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular :

- a) of depriving any person or group of persons of access to education of any type or at any level;
- b) of limiting any person or group of persons to education of an inferior standard;
- c) subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons, or
- d) of inflicting on any person or group of persons conditions which are incompatible with the dignity of man ⁽⁷⁶⁾.

There have been several examples of discrimination in education throughout the world. For instance, access to education has been denied in Argentina to children professing the faith of Jehovah’s witnesses. These children were expelled from school ⁽⁷⁷⁾. In denying university loans to students of the Korean minority, the Japanese practice, only recently

⁷⁶ B.G. Ramcharan, *op. cit.* (n 30), at 265.

⁷⁷ Case 2137 (Argentina), report of the Inter-American Commission on Human Rights, OAS Doc OEA/Ser L/V/II 47 doc 13 rev 1, 29 juin 1979.

reformed, also deprived a group of persons of access to education. Aspects of both (b) and (c) were present in the racially segregated school system which existed in parts of the United States until the 1960s as in South Africa where the non-whites have been limited to education of an inferior standard and under a system of racially segregated school until the end of the apartheid regime. The corporal punishment cases under the ECHR ⁽⁷⁸⁾ illustrate the discrimination which consists in inflicting conditions which are incompatible with the dignity of man. In these cases, inflicting corporal punishment in contravention of a parent's convictions was found to be a violation of the education rights granted under the ECHR to Belief Minority parents.

Other discriminations based on linguistic, ethnic, religious, or gender grounds still occur in the educational system of many countries. For instance, in several countries of the world, girls still do not enjoy the same educational opportunities as boys. Moreover, the denying of access to education or the maintaining of segregated educational facilities with different educational standards are among the most efficient methods for governments wishing to prevent certain groups from equally participating in the political, social, economic or cultural life of their countries. Indeed, by deliberate design, or perhaps as the unintentional consequence of other political decisions, governments' policies may entail an educational system which enforces subordination on a minority or a majority of the population and which reinforces social differentiation and creates barriers between children from different racial, ethnic, religious or linguistic groups. Cases may also occur where the effective residential segregation of minorities coupled with a universal education policy may result in segregated schools "in which the special problems of the minorities are so overwhelming that equal opportunities of education are denied on a "de facto basis" ⁽⁷⁹⁾. Therefore, in the same way as for the elimination of the "de jure" discrimination, the elimination of the "de facto" discrimination must be considered of crucial importance in order to favor access to the full enjoyment of the right to education to disadvantaged and minority groups.

Besides the Convention Against Discrimination in Education, there are other provisions of international prohibiting discrimination in relation to education such as Article 5 (e) (v) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination, Article 10 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women and Article 5 (2) on the 1981 Declaration on the Elimination of All Forms of

⁷⁸ Campbell and Cosans v UK (1982), 4 EHRR 293 (EUR ct HR).

⁷⁹ J.A. Rex, "Racism and education", in G. Mialaret, *The child's right to education*, 1979, UNESCO, at 120; M. Nowak, *op. cit.* (n 11), at 202.

Intolerance and of Discrimination based on Religion or Belief, Article 13 of the CESCR and Article 28 and 29 of the CRC.

In the next section, we will analyze education rights of Belief Minorities or Culture minorities. The third section will be devoted to an extreme case of educational discrimination which has been developed in the Republic of South Africa under the apartheid regime.

B. Minority education rights

In this section, we will focus mainly on the minority education rights of Belief Minorities and Culture Minorities. Belief Minorities include all individuals and groups who differ from the majority because of religion or other philosophical convictions. Culture Minorities are those which are characterized by their ethnic or linguistic background.

Today, the special educational needs of minority children create particular problems as ethnic and religious tensions have taken on a new “ferocity” throughout the world. Demands by ethnic and religious groups for minority education rights have been increasing throughout the course of this century and will increase even more during the next decades.

The UNESCO Convention against Discrimination in Education has made the major contribution to the field of minority education rights and clearly advocates the inclusion of minority education rights as an essential part of an integrated approach to the right to education. All the important themes of minority education rights are contained in the Convention, such as non-discrimination, equality of educational opportunity, separate schools for minorities, gender equality and access to education. It is important to point out again that in Article 1 (2) of the UNESCO Convention, the term “education” refers to all types and levels of education and includes access to education, as also the standard and quality of education and the conditions under which it is given.

As mentioned above, the main objectives and aims (Article 1) of the Convention are to eliminate practices of discrimination. However, Article 2 sets out a number of situations which shall not be deemed to constitute discrimination within the meaning of Article 2 of the Convention.

Article 2 (b) deals with the establishment for religious or linguistic reasons of separate institutions offering an education which is in keeping with the wishes of the pupil’s parents, provided attendance is optional and the education conforms to general standards. In the same line, Article 2 (c) covers the establishment of private educational institutions so long as their object is not to secure the exclusion of any group but to procure additional

educational facilities to those provided by the State and so long as the education conforms to general standards ⁽⁸⁰⁾.

In the recently adopted Convention on the Right of the Child, it is important to observe that the right to education is set out without specific reference to minorities (Article 28) but that a separate right of minorities to enjoy their culture is included (Article 30). However, Article 29 of the CRC seems to provide more detailed provisions in support of the kind of education that should be made available to ethnic or other minority groups. One important aspect of any educational service is the need to provide an education that values and develops respect for the “child’s parents, his or her own cultural identity, language and values”. Another important element in a world of religious, cultural and ethnic diversity is to prepare children to live in a free society “in the spirit of understanding, peace, tolerance ...”. Therefore, even if the CRC sets out a right to education without specific reference to minorities, it seems that the provisions of Article 29 reinforce the notion that even the smallest group has a right to an education that fully respects its cultural identity and specific language needs ⁽⁸¹⁾.

a) Values underlying the minority education right.

Respect for the rights of children of Belief or Cultural Minorities and recognition of their cultural plight constitute two of the most important educational challenges of our age.

Two values are said to underline the minority education rights : equality of opportunity and pluralism. Equality of opportunity “focuses on the provision of education which will enable minority group members to take their place within the wider society and aims at the maximization of individual talents”. Pluralism “focuses on the maintenance of minority identity and the celebration of diversity of cultures” ⁽⁸²⁾.

1. *Equality*

We deal first with the concept of equality of opportunity. In fact, one of the basic questions concerns the meaning of the word “equality” in the educational context. Does it mean “identical” or “the same” or “similar” ?

In the educational field, several methods of equality may be used : formal equality, equality of opportunity and equality of results ⁽⁸³⁾.

⁸⁰ See also Article 13 (4) of the ICESCR.

⁸¹ D. Hodgson, op. cit. (n 14, at 257-258, F. Dall, op. cit. (n 10), at 4.

⁸² H. Cullen, “Education Rights or Minority Rights”, in *International Journal of Law and the Family*, (1993), 7, at 143.

⁸³ K. Halvorsen, op. cit. (n 11), at 355.

Formal equality is to be clearly totally rejected. The American vision of justice in schooling in the last century and the development of a racially segregated school system following this vision is one of the best examples which illustrates the formal equality approach in education. Formal equality implies that all children have equal access to publicly-funded education. Thus, the American system of schooling was based mainly on the doctrine of racially segregated schools, provided that the schools offered equivalent instruction. This was the doctrine of “separate but equal”, which was approved even by the Supreme Court of the United States in *Plessy v Ferguson*. The doctrine of “separate but equal” was intimately related to segregation in the field of public education. This doctrine was in fact originally designed with a view to the system of separate schools for white and black children. Thus, for decades, many states in the United States maintained separate schools for black and white children. Separate they were, but hardly equal. In fact, in practice, the result was that there was no equality in segregated schools either since, among other reasons, a much higher amount of state funds was made available per white pupil than per black pupil in many of the Southern States. Because of this inequality, the National Association for the Advancement of Colored People (NAACP) took the matter to the courts in a series of cases to test the validity of racial segregation on the basis of the Constitution of the United States, which in the Fourteenth Amendment, guarantees “equal protection of the laws”⁽⁸⁴⁾.

In the 1950’s, the United States Supreme Court, in the famous case of *Brown v Board of Education*⁽⁸⁵⁾ handed down “that in the field of public education the doctrine of “separate but equal” has no place : separate educational facilities are inherently unequal”.

Therefore, the Court overruled *Plessy v Ferguson* and declared that segregation in education contradicted the Equal Protection clause of the Fourteenth Amendment to the US Federal Constitution. It is important to note that, in this case, no evidence had been placed before the Court to indicate that the separate schools for the white and black children involved were in any way unequal. Therefore, the Court had to deal with the effect of segregation itself on public education irrespective of the equality or inequality of the relevant facilities and had to investigate the basis of segregation “per se”, as quoted in the decision : “We come to the question presented : Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities ? We believe that it does”⁽⁸⁶⁾. And another quote is also interesting to point out : “Segregation of white and colored children in public schools has a detrimental effect upon the colored

⁸⁴ H.J.O. Vanheerden, “South African Law Commission. Project 58”, Interim Report on Group and Human Rights, August 1991, at 330-332.

⁸⁵ *Brown v Board of Education of Topeka*, 347 U.S. 483 at 495 (1953); 347 U.S. 483 (1954).

⁸⁶ *Op. cit.* (n 85); at 493-4.

children. The impact is greater when it has the sanction of law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to regard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system” (87).

Hence, equality of opportunity could only be guaranteed in integrated schools. It was recognized that it was not legitimate for a majority to use its power to force segregation on a minority and that racial segregation created a stigma wherever it existed, which indisputably would affect a child’s self-esteem and standing as an equal citizen. *Brown v Board of Education* was thus premised on the principles that educational equality is essential to achieving racial equality, that a quality education for children of all races is essential to educational quality, and that racial integration in public schools is essential to providing a quality education (88).

Thus, through policies of rezoning of schools and of “busing” Black children from schools of high concentration to ensure their equal participation in all schools, the desegregation of schools started in the United States. Hence, the United States was to progress from a policy of legal segregation to one of integration, with the courts ensuring that both inequality between schools and racial segregation within schools were abolished.

However, in the United States, after *Brown*, the desegregation process has been difficult to realise and the remedies are often not entirely effective. A lot of commentators consider today that the commitment to integrate public school has declined and recent cases indicate that the current Supreme Court of the United States is less committed than was the *Brown* Court in interpreting the equal protection clause in ways that promote racial and educational equality. “Specifically, the Court requires proof of racial animus in analyzing school policies that have the effect of promoting racial segregation; it invalidates affirmative action policies aimed at integrating educational institutions, it ignores the connection between race and poverty, thereby allowing school financing schemes that allows for gross disparities in educational resources between white schools and schools attended primarily by students of colour” (89).

Therefore, it seems that the United States did not launch its desegregation programme in a democratic manner. The desegregation programme has constantly been attended by racial

⁸⁷ *Op. cit.* (n 85), at 193-4.

⁸⁸ J.D. Van der Vyver, “*Brown v Board of Education* : A survey of the American Desegregation Programme”, in *SALJ*, (1979), vol. 19, at 491, 501-503.

⁸⁹ S.E. Rush, “The Heart of Equal Protection. Education and Race”, in *Review of Law and Social Change* (New York University), (1977), vol. XXIII, Number 1, at 57-58.

consciousness : a school must admit so many white and so many black pupils, teachers and other employees irrespective of where they come from or what the really relevant circumstances may be. The really relevant factors were not taken in consideration such as the pupil's residential address and intelligence or the teacher's abilities and qualifications. The result is that today, even if "de jure" segregation has been rejected, the United States society is still segregated as a matter of fact ⁽⁹⁰⁾.

Desegregation continues to be the exclusive method for equalizing black and white education but enforced integration, whether by court order or legislation, can be as inhuman and degrading as enforced segregation. Thus, the question arises as to whether integrated schools should be imposed on a minority which does not want them.

In conclusion, as the segregation cases in the United States show, the formal equality may mask a system where some groups and specifically minority groups receive an education of lesser quality. Many states have already implemented formal equality but the education rights of the minorities need more than a formal equality or a mere equality.

After having rejected formal equality as a method of evaluation for the minorities education rights, two types of equality remain.

The first one is equality of results. The problem with equality of results is that on the one hand, it is limited by economic conditions and on the other hand, it does not distinguish between differences based on morally arbitrary criteria such as ethnicity or religion and differences in merit, based on talents unless a very broad range of outcomes is adopted as acceptable by society. However, the existence of a sufficiently broad range of outcome would make comparison of results virtually impossible. "While some members of a minority group may want access to the same results as the majority, some will not. Equality of results, therefore, does not leave room for pluralism" ⁽⁹¹⁾.

The third method of evaluation in education is equality of opportunity. On the one hand, equality of opportunity involves more than non-discrimination which may result in formal equality only. On the other hand, even if equality of opportunity involves an assumption that everyone within a society wants the same range of goods from that society, it is said to differ from equality of results because equality of opportunity implies a weaker

⁹⁰ J.D. Van der Vyver, *op. cit.* (n 88), at 513-514.

⁹¹ H. Cullen, *op. cit.* (n 82), at 152. H.J.O. Vanheerden, *op. cit.* (n 84), at 337; J.H. Carens, "Difference and Domination : Reflections on the Relation between Pluralism and Equality" in Chapman and Wertheimer (eds), *Majorities and Minorities : NOMOS XXXII*, 1990, New York : NYU Press, at 227-229.

reliance on minority group members having identical values by removing the emphasis on outcomes and thus leaving space for pluralism ⁽⁹²⁾. Article 3 of the UNESCO Convention against Discrimination obliges States Parties to eliminate discrimination in law and in fact while Article 4 obliges States Parties to implement a policy of equality of opportunity for all. In addition, as set out in the Convention, the goal of equality opportunity is reinforced by the educational goal of development of full potential and the obligation to maintain general educational standards in separate schools.

2. Pluralism

The second value underlying minority education rights is pluralism. Minority education rights are based on the view that public institutions must reflect the fact that most societies contain many beliefs and cultures and that thus a pluralist view of society is desirable.

We can see the value of pluralism throughout the UNESCO Convention against Discrimination in Education in its Article 2 (b) and in the Convention on the Rights of the Child (Article 29 (2)). In addition, Article 5 (1)(b) of the first Convention mentioned allows parents to ensure that their children are taught in accordance with their beliefs and Article 5 (1)(c) recognizes the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each state, the use or the teaching of their own language, provided attendance is optional and the education conforms to general standards. However, the second Convention mentioned above does not explicitly recognize the right of minority groups to use their own language for the purpose of general teaching ⁽⁹³⁾.

What exactly does the notion of pluralism imply? Pluralism involves the respect and the promotion of diversity which means allowing people to value different social goods or different ways of obtaining goods. Pluralism involves also the respect of a minority group to maintain a distinct collective identity. Pluralism also requires that assimilation of minorities be prohibited. Therefore, policies which preserve minority values are called upon States because education is one of the most important tools for promoting minority characteristics. It has been argued that if minority characteristics are not transmitted through the education system, an erosion of minority identity may result ⁽⁹⁴⁾.

⁹² H. Cullen, *op. cit.* (n 82), at 152.

⁹³ Indeed, the Four Directions Council had unsuccessfully sought the inclusion in Article 30 of a provision recognizing the right of indigenous children "to be educated, at least at the primary level in the language of his parents as well as an official language of the State". Commission on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1987/25 (9 March 1987), at 13, para 54; D. Hodson, *op. cit.* (n 14), at 258.

⁹⁴ F. Caportorti, "Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities," 1979, New York : United Nations.

In conclusion, both values exposed above seem indeed necessary to give full effect to minority education rights. Integration (not assimilation) and preservation of minority identity are not opposing goals. Neither of the two essential values, equality of opportunity and pluralism, should be entirely sacrificed without impairing the minority education rights.

Therefore, States are called upon to respect and promote diversity because minority education rights do not merely involve giving minorities the same levels of education as are provided for the majority. Today, however, it seems that the implementation of the Convention against Discrimination in Education has been incomplete because the reporting process planned in the Convention has not provided the information and guidance which is needed⁽⁹⁵⁾.

b) Some problems raised by the minority education rights.

In practice, multicultural pluralism societies are finding it increasingly difficult to strike a balance between national and majoritarian values and cultural and minority values.

Regarding the scope of minority education rights for Belief Minorities, a definition of how to describe this type of minorities is not simple to reach even if, in matters of education, it seems that international bodies have been willing to conceive Belief Minorities in an extensive way⁽⁹⁶⁾. Other problems may occur where a tenet of belief conflicts directly with general educational policy as for example Muslim parents who claim that their rights as Belief Minorities have been violated because the state general educational policy plan that male and female children receive the same education in the same schools.

In practice, also, a state is often unwilling to make any accommodation to a minority Belief. Thus, is raised the following question: is a state obliged to fund private separate minorities schools, knowing that minorities are often economically disadvantaged? The view that non-funding of private schools does not constitute discrimination has been expressed by the Human Rights Committee under the ICCPR⁽⁹⁷⁾ as well as by the European Commission on Human Rights⁽⁹⁸⁾. International human rights law also does not seem to recognize a duty on the state to fund private educational institutions, or to provide subsidies and assistance equal to that of public educational institutions⁽⁹⁹⁾.

⁹⁵ See H. Cullen, *op. cit.* (n 82), at 148-150, 158-159.

⁹⁶ See for example the Jehovah's Witnesses case, where many children professing that faith were expelled from school. The Inter-American Commission on Human Rights concluded that these children has been denied the right to education (Case 2137 (Argentina), report of the Inter-American Commission on Human Rights, OAS, Doc OEA/Ser L/V/II 47 doc 13 rev 1, 29 June 1979. See also the conclusion reached by the European Court of Human Rights in *Campbell and Cosans v UK* (1982), 4 EHRR 293 (Eur Ct HR).

⁹⁷ *Lindgren v Sweden* (1991), 12 HRLJ 24 HR C'tee, Communications N° 298/1988 and 299/1988.

⁹⁸ *W. and KL v Sweden*, Application N° 10476/83, 45 DR 143.

⁹⁹ See Article 13 (3) and (4) of the Covenant on Economic, Social and Cultural Rights.

In the UNESCO Convention, nothing is said about the issue of funding of separate minority schools, which seems however central to the implementation of minority education rights ⁽¹⁰⁰⁾.

Other issues are also important for the implementation of the minority education rights for Culture minorities. Culture minorities are those characterized by their ethnic or linguistic background. As we have explained above, one value underlying the minority education rights is pluralism. Pluralism focuses on the maintenance of minority identity and the celebration of diversity of cultures which seems crucial today because cultural and ethnic diversities are present in a single society. Even the smallest group has a right to an education that fully respects its cultural identity and specific language needs. The exercise of the child's right to education cannot be dissociated from cultural and linguistic problems. It is essential that a child have an education "which must, of course, give him first roots in the culture of the human group to which he belongs and thus enable him to develop all his faculties in the socio-cultural environment with which he is familiar", but which must also enable him in a world of steadily increasing interdependence among people from different cultures, to become acquainted with the culture of others and open his eyes to the world at large ⁽¹⁰¹⁾.

Thus, one of the problems faced by Culture Minorities is when they are differentiated by language. Through language people can transfer their knowledge, values and ideas to others and, by doing so, their culture. All individuals are socialized in one language - the one used by their parents, relatives and community. Children have a mother tongue long before they develop their capacity for reflective and informed choice about ethnic identification, and parents typically transmit their mother tongues. Apart from its instrumental value in communication, language is also an important marker of identity and those who wish to use minority languages do so partly as an expression of belonging to and identifying with a community. However, language use only has its valuable expressive dimension if rooted in a "free and fair context". This means that people belonging to Culture Minorities who are forced to use a particular language cannot be thought thereby to express their identity. Then arises the question as to know whether Culture minority children have the right to be educated in the language of their choice in public educational institutions. In the Belgian linguistic case ⁽¹⁰²⁾ the European Court of Human Rights held that Article 2 (Protocol 1) implied a right to be educated in the national language or one of the official languages but did not give rise to a positive claim to state-funded education in any language of one's choice. Belgium has a territorial approach to linguistic matters, which include education, for the

¹⁰⁰ H. Cullen, *op. cit.* (n 82), at 163-169.

¹⁰¹ A.-M. M'Bow, *op. cit.* (n 25), at 13.

¹⁰² Belgian linguistic cases (N^o 2) (merits) (1968) 1 EHRR 252 (Eur Ct HR).

major part of its territory, exception made for the region of Brussels-Capital, which is bilingual. The territorial approach in Belgium means that the two regions, “Flandres” and “Wallonie” are unicultural as far as education is concerned. The laws which determine the linguistic boundaries also entrench the territorial rule for determining the language of education, regardless of mother tongue or choice. In the middle of the 20th century, French-speaking Belgians had begun to move into Flemish areas, thus becoming regional linguistic minorities. Only in private schools could regional linguistic minorities have free choice of language of education. Several French-speaking Belgian parents, residing in the Dutch majority region of Belgium, in “Flandres” challenged as discriminatory this regulatory system under the ECHR.

Both the European Commission on Human Rights and the Court gave their opinion. The Commission found that when a state encourages integration without allowing for the preservation of minority culture, it is in fact imposing assimilation. “The refusal to subsidize minority French-language schools in the Dutch region, and failure to recognize diplomas earned in violation of the language - of - education legislation are discriminatory against French-speaking children” (103).

However, and regrettably, the European Court of Human Rights considered that the Belgian Government had a margin of appreciation to impose linguistic homogeneity with the regions and thus that there was no discrimination against the French-speaking children. For the Court, minorities’ children had nothing more than an equal right of access to the educational facilities which the state chooses to provide. The State only had a duty to respect the freedom of individuals to teach in a non-official language in private schools established and directed by members of a particular community. Therefore, the European Convention on Human Rights does not express guarantee education in the language of one’s choice in public education institutions. It seems that the Court, in the Belgian linguistic case, by enforcing the territorial principle in the language of education, has failed to uphold culture minority education rights (104).

In the Canadian Charter of Rights and Freedoms, in section (3), the provision of minority language instruction out of public funds applies wherever the number of children of citizens who have such a right “so warrants”.

¹⁰³ Belgian linguistic cases. Report of the Commission, Series B, N° 1, at 329 and 345.

¹⁰⁴ L. F.B. Dubbeldam, “Development, culture and education”, in *International Yearbook of Education, Development, Culture and Education*, by L.F.B. Dubbeldam et al., 1994, volume XLIV - 1994, at 21-22; H. Cullen, op. cit. (n 82), at 170-171; D. Davis, H. Cheadle and N. Hayson, op. cit. (n 40), at 299.

In the case *Mahe v Alberta* (105), the Canadian Supreme Court interpreted this provision to establish “a sliding scale” of entitlement to different levels of public educational assistance based on the number of children whose parents qualify under Section 23. Thus, section 23 does not simply announce that official language minorities have the right to education in their own language but rather, it provides parents falling within certain precisely drawn categories (S 23(1)), with a right to have their children receive “primary and secondary school instruction” in the minority language of the province and limits the application of that right to areas where numbers warrant.

In this case, the value of minority education to cultural survival was emphasized : “Language is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture... the aim must be to provide members of the minority with an education appropriate to their linguistic and cultural identity” (106) (107).

Thus, the approach of the European Court of Human Rights and the one followed by the Canadian Charter of Rights and Freedoms to Culture Minorities distinguished by language differ strongly. The European Court failed to uphold minority education rights while the Canadian Charter guarantees mother-tongue education for minority groups under the conditions of Section 23.

In conclusion, Culture Minorities must find some method of education which provides equality of opportunity while allowing them to preserve their culture. Of course, as set out in Article 5 (1)(c)(i) of the UNESCO Convention, Culture Minority children need sufficient understanding of majority culture in order to permit integration and must be able to learn and to communicate in the majority language, otherwise they will find themselves inevitably marginalized. “Prohibiting the minorities from learning the majority language and banning minority-language instruction offend common principles : they attach linguistic security by creating unfair pressure to conform” (108). However, the States have the obligation to preserve minority culture within education. Some authors have argued in favour of education which is both bilingual and bicultural. An UNESCO report (109) has recognized that both linguistic and cultural adaptation may be necessary for minority children : “(the minority children) come into contact, not only with a new language, but also with new concepts”. It seems indeed that in multicultural societies, bicultural education will at the same

¹⁰⁵ *Mahe v Alberta* (1990) 68 DLR (4th) 69 (SCC)

¹⁰⁶ *Mahe v Alberta*, op. cit. (n 105), at 83.

¹⁰⁷ D. Réaume and L. Green, “Education and Linguistic Security in the Charter”, in *McGill Law Journal*, (1989), vol. 34, N° 4, Montréal, at 779, 786-791.

¹⁰⁸ D. Reaume and L. Green, op. cit. (n 107), at 781.

¹⁰⁹ UNESCO 1953 : 47

time permit the integration of the Culture Minority children and the protection of their identity. As it is pointed out by some commentators, it seems that bicultural education does not necessarily require separate schools ⁽¹¹⁰⁾. We can even argue that the integration and the preservation of minority identity will be achieved better in an integrated school where different cultures and languages are respected, promoted and preserved. One main danger to avoid is assimilation. The other danger is marginalization, which occurs when Culture Minorities' Children are isolated from the mainstream educational system because of their distinctive culture and language. Respect for the rights of Culture Minority children and recognition of their cultural rights should constitute two of the most educational challenges of our age.

C. The right to education in South Africa.

a). Introduction

As we have explained above in this paper, segregation is the most blatant example of discrimination against minorities in education. The segregated minorities' children do not have the chance to receive the same education as the majority because they have no access to majority schools. Most often, segregation is deliberately undermined by the authorities, who either leave minorities to educate themselves or "starve" the minority system through underfunding and neglect as it occurred in the United States under the "separate but equal" doctrine.

In the Republic of South Africa, the extreme case of educational discrimination as a matter of deliberate government intent has been developed. The system of education developed in South Africa was not merely a system of separation of the races at all levels, but a system of separation in which the avowed intent was to ensure that the African population receive a different education and hence remain in a subordinate social position.

Historical, political, philosophical, economic and social issues have contributed largely to the unique system of education in South Africa which was structured on ethnic groupings (Blacks, Coloured, Indians and Whites).

In South Africa, initially, a dual education system developed naturally. On the one hand, the settlers' communities provided for the education of their own children either through the government or privately. On the other hand, missionary societies undertook the

¹¹⁰ H. Cullen, *op. cit.* (n 82) at 174. See also T. Skutnabb-Kangas "Multilingualism and the education of minority children" in Skutnabb-Kangas and Cummins (eds), *Minority Education : From Shame to Struggle*, 1988, Clevedon : Multilingual Matters,, at 22-27.

education of the African population. Free compulsory education up to secondary level was available to the White population. For the African population, there was a mixture of government and mission provision, which involved fees for children who stayed on to higher levels and a considerable contribution by parents to the cost of erecting and maintaining school buildings. "These developments were, as has been said, natural enough in a country governed by settlers come from educationally advanced countries and did not, in themselves, imply any malign political intent" (111).

In 1948, under the leadership of Dr. D.F. Malan, the National Party won a general election on a policy whose pivot was a formula of political and social "separateness", also referred as "apartheid" or "multinational development" for the White, Coloured, Indian and Black population groups "to ensure the maintenance, protection and consolidation of the White race as the bearer of Christian civilization in South Africa, and to enable it to fulfil its function of responsible trusteeship to guide the other groups towards eventual freedom in a peaceful manner" (112). Dr. H.F. Verwoerd, in his capacity as Minister of the then Department of Native (later Bantu) Affairs (from 1950 to 1958) and as Prime Minister (from 1958 to 1966) developed further and brought to fruition the policy of separate development in so far as the Blacks were concerned and were responsible for the Bantu Authorities Act of 1951, which provided for the establishment of a hierarchy in the Black areas, formally known as reserves and later as homelands, as a precursor of self-government in these territories.

In 1953, Parliament enacted the Bantu Education Act, which transferred control of the education of African children to the central government's Department of Bantu Affairs and the purpose of this transfer was stated by the Minister of Bantu Affairs as follows :

"Native education should be controlled in such a way that it should be in accord with the policy of the State ... good racial relations cannot exist when the education is given under the control of people who create wrong expectations on the part of the Native himself. Education must train and teach people in accordance with their opportunities in life, according to the sphere in which they live". Thus, the specific aims of the new system were to ensure that "Bantu" children did not aspire to positions in life which they could not hope to attain. Even the single goal of literacy was related to the African's position as a servant. The sole educational opportunity of the African child laid in an education suitable for a servant. The intent of "Bantu Education" entailed the most complete denial of the child's

¹¹¹ John A. Rex, *op. cit.* (n 37), at 120-121. See also A.L. Behr, "Education in South Africa : Origins, issues and trends", 1988, Pretoria, Academia, at 9-18 for an analysis of the roots of South Africa educational system.

¹¹² W.J. De Kock. "History of South Africa", 1971, Pretoria : Department of Information, at 43.

right to education. As it is pointed out, probably no where in the world has there never been such a deliberate attempt to use the educational system for purposes of inculcating as sense, and indeed, a reality of inferiority, as was made through the Bantu Education Act (113).

The primitive notion of “Bantu Education” was modified with time. Firstly, it was modified because the apartheid doctrine advanced beyond that of a simple doctrine for the permanent creation of an African helot class. The rationale of secondary education for Africans was that certain professional skills were necessary to allow the community to sustain itself. In a second time, the development of the doctrine did go beyond the notion of deliberately producing a helot class. In fact, the notion grew that, provided they were kept separate, Africans were entitled to educational development to the highest levels if they could finance it from their own resources. Black Universities started to develop along with the development of the Bantustans. The schools in the Bantustans ceased to be a basic means of ideological control and political subordination but the resources of the Bantustan education system were meagre and the opportunities for professional personnel were disproportionate because of the unequal sharing of basic economic resources between South Africa and its satellites.

In fact, a more sophisticated concept of apartheid took place based on the notion of the so-called African homelands. This simplistic notion of “Bantu Education” was thus abandoned but the notion survived and continued to affect the allocation of resources. Because of the limitation on expenditure, the African child had nothing compared with the opportunities of a White child, neither in primary nor in secondary education.

The highest point of these limitations upon opportunities for education was the attempt to impose Afrikaans in the African schools of Johannesburg in 1976. The African parents had always been willing for their children to study in English. Consequently, the African children refused to go to school, demonstrated against the system and finally many of them fighting for an adequate education were shot in the so-called Soweto riots. Thus, resistance in education escalated dramatically in the 1980’s. The crisis in education, concerning access, contents and control, reached a summit in the latter part of the decade after three previous decades of apartheid education.

In conclusion, the whole system of South African education provided a striking example of apartheid or “multinational development” in action, for the segregation of students of the different racial groups, from the beginning of primary school to the completion of university training. The different racial groups were not only educated separately but also

¹¹³ J.A. Rex, *op. cit.* (n 37), at 122.

differently, in order to prepare them for the position in South African society for which they were destined⁽¹¹⁴⁾. In fact, education in South Africa has served a political purposes almost from its very beginning and one of these purposes was to protect White supremacy and White privilege by restricting the education of Non-Whites to a modicum of literacy and numeracy. Figures speak for themselves. As regards the 1990 allocation of funds, there was a distinct imbalance. For the 1990 financial year, in respect of state schools, R 30 82 per pupil was spent on whites and R 764,72 per pupil on blacks. Regarding the success of black education, only 41 % of the candidates from schools of the Department of Education and Training (that is, black pupils) passed matric at the end of 1989 and only 36.4 % in 1990⁽¹¹⁵⁾.

b) The right to education in the 1996 Constitution of South Africa

Of all the countries with written constitutions or bills of rights, 58 have included the right to education and 71 do not mention it. The Federal Republic of Germany, Canada, several State constitutions in the United States, the Netherlands, Norway, Sweden, Denmark, India and Namibia figure among the countries which have included educational rights in their constitution or their bill of rights⁽¹¹⁶⁾.

1) Debate concerning the protection of the second generation rights in the Constitution of South Africa.

In the past, the debate in South Africa mainly concerned the question : Which rights should be protected in the bill of rights - only the first generation rights, or, and then especially, the second generation rights ?

Many lawyers, judges and political commentators objected to the inclusion of the second generation rights on the grounds that courts would find it difficult or even impossible to enforce these rights. Some jurists considered that these rights did not belong in a bill of rights because a government with insufficient means simply could not fulfil its duties.

¹¹⁴ M. Ganji, "Summary of the Report of the Special Rapporteur appointed by the Commission of Human Rights", 1968, United Nations, at 24-26. J.A. Rex, op. cit. (n), at 120-126. M. Metcalfe, "Desegregating Education in South Africa", Research Report N° 2, July 1991, University of the Witwatersrand, Johannesburg, at 13.

¹¹⁵ H.J.O. Vanheerden, op. cit. (n 84), at 343, Figures supplied by Ministers P. Clase and S. van der Merwe during question time in the House of Assembly, February 1990.

¹¹⁶ D. Davis, H. Cheadle, N. Hayson, op. cit. (n 40), 1997, at 295.

In fact, many South Africans were quite prepared to see the first generation rights protected, but were opposed to the idea of second generation rights and to one of its inevitable correlates, affirmative action. However, for many Black citizens, among whom those represented by ANC, the second generation rights were the very rights that matter for the new South Africa. In a draft on fundamental rights released in November 1990 by the ANC, it was pointed out that economic, social and cultural rights should be regarded as core human rights because certain needs were so basic and should constitute the foundation of human rights' claims, namely nutrition, education, health, shelter, employment and minimum income. "In South Africa, it is not just a question of dealing with poverty such as you might find in other countries, but with responding to the social indignities and inequalities created as a direct result of State policies under apartheid. The strategy proposed for achieving the realization of those rights is to acknowledge them as core human rights, and require the state to devote available resources to their progressive materialisation ... and to provide the minimum elements of a decent life for all South Africans" (117).

2) Section 29 of the 1996 South African Constitution.

Chapter 2 of the 1996 South African's final constitution contains an extended list of "universally accepted fundamental rights, freedoms and civil liberties". Not only are included in Chapter 2 the traditionally called civil and political rights or so-called "first generation rights" but also those referred to in traditional human rights debate as economic, social and cultural rights, i.e. second generation rights" and some "third generation rights" such as the right to a clear environment. The inclusion of these second or third generation rights alongside the more traditional rights is a truly radical constitutional development. The South African Constitution of 1996 rejects the rigid conceptual distinction between civil and political rights on the one hand and economic, social and cultural rights on the other and accepts the internationally recognized idea that all human rights are interdependent and indivisible. Therefore, there is no conceptual difference between the two sets of rights. All rights are aimed at guaranteeing each individual the "freedom to live his or her life with dignity and respect". It must be conceded that there are some differences between the various rights as, for example, the fact that economic, social and cultural rights will require relatively

¹¹⁷ H.J.O. Vanheerden, op. cit. (n 84), SA Law Commission Interim Report on Group and Human Rights (1991) Project 58, at 523-524; R.K.W. Goonsekere, "Affirmative Action in Education, Health, Welfare and Employment", in *Affirmative Action in a New South Africa, The Apartheid Legacy and Comparative International Experiences and Mechanisms of Enforcement*, May 1992, published by the Centre for Development Studies (CDS), University of Western Cape (UWC), based on a Conference convened by the Constitutional Committee of the ANC in October 1991, Cape Town, at 26.

greater state action to ensure their realisation and thus are somewhat more dependent on positive state action than are civil and political rights but as it is pointed out, “the difference separates the two sets of rights more in terms of degree than in kind” (118).

Section 29 of the 1996 South African Constitution guarantees the right to education. This right can be traced to the similar but more restrictive right contained in Section 32 of the interim Constitution. The manner in which s. 29 of the final text has been developed from s. 32 of the interim Constitution necessitates an integrated treatment.

Section 29 states that :

- 1) Everyone has the right
 - a) to a basic education, including adult basic education; and
 - b) to further education, which the State must take reasonable measures to make progressively available and accessible.
- 2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account :
 - a) equity
 - b) practicability, and
 - c) the need to redress the results of past discriminatory law and practice.
- 3) Everyone has the right to establish and to maintain, at their own expense, independent educational institutions that
 - a) do not discriminate on the basis of race
 - b) are registered with the state, and
 - c) maintain standards that are not inferior to standards at comparable public educational institutions.
- 4) Subsection 3) does not preclude state subsidies for independent educational institutions.

The human right to education is today of fundamental importance in South Africa. An uniform system of education for all South Africans without discrimination based on race or colour should be one of the starting points for the construction of the “New South Africa”. Some of the aspects of the right to education guaranteed in section 29 are analysed here below. We will also emphasize some of the problems resulting from the inequalities created

¹¹⁸ P. De Vos, “Pious wishes or a directly enforceable human rights ? : social and economic rights in South Africa’s 1996 Constitution”, in *South African Journal on Human Rights*, (1997), vol. 13, Part. 1, at 71.

as a direct result of state policies under apartheid which South Africa will have to face in the future. It is important to point out that contrarily to other discriminatory practices, in South Africa, the discriminatory practices have not been directed against the minorities but against the racial group that form the majority of the people of this country, i.e. the non-whites (Blacks, Coloured and Indians) and more particularly the Blacks.

a) The right to a basic education

Section 29 (1) of the Constitution guarantees that everyone has a substantive right to a basic education. Firstly, unlike the right in s. 26 and s. 27 of the final constitution, this right is not qualified with reference to a progressive realisation within the bounds of available resources and therefore places a duty on the state to realise it immediately. In “*In Re the School Education Bill of 1995 (Gauteng)*”⁽¹¹⁹⁾, it was explicitly acknowledged and affirmed that the right to basic education protected in s. 32 (a) of the interim Constitution creates a positive obligation on the state (at 545 1). The right to basic education “creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education”. The judge also referred to the right to basic education being at public expense (at paras 8-9).

Secondly, however, the right is qualified by requiring merely the provision of basic education. The concept of “basic” education has not yet been interpreted by South African Courts and should evolve with the increasing educational standards and capacities in South Africa and the changing requirements of society. Thus, what is meant by “basic education” should not be static overtime. As acknowledged by article 1 of the UN World Declaration on Education for All, “the scope of basic learning needs and how they should continue to be met varies with individual countries and cultures and inevitably changes with time”.

In fact, the concept “basic” is open-ended and give the courts a wide latitude to determine what standard of education is prescribed. International instruments and foreign jurisprudence tend to accord public education a role in three areas : first as a developer of human potential ⁽¹²⁰⁾, secondly, as a foundation for good citizenship (a minimum standard of education is necessary to avoid inequalities in the right to speak or to vote) ⁽¹²¹⁾ and thirdly “as a provider of functional efficacy in the labour market” ⁽¹²²⁾. Thus, any basic education should at least provide learners with the elementary means for being successful in society, including the minimum essential learning tools of literacy and numeracy. And success in

¹¹⁹ *In Re The School Education Bill of 1995 (Gauteng)* 1996 (4) BCLR 537 (CC).

¹²⁰ See Article 1 of the United Nations World Declaration on Education for All.

¹²¹ See *San Antonio Independent School District v Rodriguez* (1973) 411, US 1 at 36-37.

¹²² R.R. Kriel, “Education”, in Chaskalson et al (eds), *Constitution Law of South Africa*, (1996), at 38-3 and 38-4.

society must be understood broadly to include “the ability to support oneself through fulfilling work, and to enjoy basic civil and political rights - the rights to freedom of speech, conscience and association, and to make informed political choice etc...” (123).

Moreover, even if Article 29 (a) does not itself require that the education be free and compulsory, it does imply that no one should be denied a basic education owing to a lack of resources. The White Paper on Education and Training published on 15 March 1995 accepted that the provision of schooling for all children to the GEC level (one-year reception class plus 9 years of schooling) is a public responsibility which must be borne by public funds (Chapter 7, para 17; Chapter 13, paras 37-44). In addition, South Africa, on June 1995, ratified the 1989 Convention on the Rights of the Child and is therefore also obliged “to make primary education compulsory and available free to all” with a view to progressively achieving the right of the child to education (Article 28(1)(a)) (124).

Thus, section 29 (1)(a) has a lot of implications for South African children and adults: indeed, if s. 29 (1)(a) is positively framed, and it should be understood in this way, the state could be required to extend the necessary institutions, facilities and services required to provide a basic education so as to ensure at least reasonable access by students anywhere in the country even by public transport. A final remark needs to be stressed : S. 29 (1)(a) prescribes educational standards. Yet, because of massive structural inequalities in the history of education in South Africa and among them the inequality in the resources granted to schools, the state will have to spend different sums of money in order to achieve those educational standards. Indeed, “providing similar quality education for urban or poor or disabled students is more expensive than providing similar education for their richer or rural or non-disabled counterparts”. Going even further, extra-efforts or affirmative action policies are necessary to put the disadvantaged groups on the same educational level as the “advantaged groups”(125).

b) The right to equal access to educational institutions.

S. 29 of the final Constitution has dropped the right to equal access to educational institutions contained in s. 32 (a) of the Interim Constitution. Indeed, this right was considered superfluous in view of the provisions of the equality clause. However, the right

¹²³ D. Davis, H. Cheadle, N. Hayson, op. cit. (n 40), at 296.

¹²⁴ Sloth-Nielsen, “Ratification of the United Nation’s Convention on the Rights of the Child : some implications for South African Law”, SAJHR, (1995), 11, at 420.

¹²⁵ R.R. Kriel , op. cit. (n 122), at 38-5. See V.V.W. Duba, “Affirmative Action in a New South Africa”, The Apartheid Legacy and Comparative International Experiences and Mechanisms of Enforcement, May 1995, published by the Centre of Development Studies (CDS), University of the Western Cape (UWC), based on a Conference convened by the Constitutional Committee of the ANC in October 1991, Cape Town, at 39.

to equal access is of fundamental importance in South Africa since all the educational system in South Africa under apartheid was based on the separation and segregation of the different racial groups. It is important to point out is that the “equal access” requirement is not confined to basic education or to children, but extends to all educational institutions. Thus, equal access is an anti-discrimination provision and prohibits not only admission requirements which are discriminatory but also positively requires that admission itself be non-discriminatory. Of course, certain criterias for excluding students from access to educational institutions will not be considered unfair discrimination. However the admission criteria cannot amount to direct or indirect discrimination in terms of s. 9 (3) and (4) of the Constitution. Thus, criterias such as disability or numerical capacity of the school will not necessarily be considered unfair discrimination, direct or indirect, but criterias for admission such as race will immediately amount to unfair discrimination

However, given the history of South Africa, there is a danger that if equal access is understood as equality of opportunity alone, it could translate into constructive exclusion for those groups that have suffered previous discrimination in the past ⁽¹²⁶⁾.

Therefore, affirmative action programmes adopted by educational institutions which give preference to the admission of groups disadvantaged by unfair discrimination in the past are specifically sanctioned in s. 9 (2) of the final Constitution. Equal access has the objective to create and sustain integrated student populations at educational institutions but racially neutral means will not be sufficient to achieve this objective. Affirmative action programmes, defined as “concerted efforts by an employer, education institution or organization to rectify past prejudicial practices against specific classes of individuals, such as blacks or women, by affording them temporary preferential treatment until the time of true equal opportunity is achieved” ⁽¹²⁷⁾ are necessary to eliminate the inequalities of the past and to create an uniform system of education in South Africa ⁽¹²⁸⁾.

c) Other education rights enshrined in the 1996 Constitution.

The right to a basic education and the right to equal access to all education institutions are certainly two important aspects of the right to education in the new South Africa. Other aspects of the right to education are also enshrined in the 1996 Constitution.

¹²⁶ R.C. Salomon, “Equal Education under Law” at 24-25 cited in the South African Law Commission “Interim Report on Group and Human Rights Project 58, op. cit. (n 84), at 328.

¹²⁷ A guide to American Law : Everyone’s legal Encyclopedia, 1983, New York : West Publishing, at 121.

¹²⁸ See *Motala and Another v University of Natal* 1995 (3) BCLR 374 (1)

First, s. 29 (b) recognizes the right to further education and places a general obligation on the state to increase the accessibility and availability of further education. However, the court's power of review is restricted to ascertaining whether reasonable measures have in fact been adopted to ensure that further education is made progressively accessible and available.

Secondly, s. 29 (2) guarantees the right of everyone to be educated in the language of one's choice in public educational institutions but this right can only be claimed in situations in which education in the language of choice is "reasonably practicable". This right will be an important factor in the South African context because of the numbers of children in an area who will prefer to be educated in a particular language. However, the final Constitution restricts the choice to the official languages. Part 2 of s. 29 (2) obliges the state to take into account the need to ensure equity among the various groups who may be seeking education in different languages of choice in a specific area, taking into consideration the practicability but also the need to redress the results of past discriminatory law and practice, which entail that the implementation of this right should never be allowed to impede access to quality education by members of groups disadvantaged in the past.

Thirdly, s. 29 (3) guarantees the right to maintain and establish independent educational institutions, but at private and not public expense and under certain conditions and control and s. 29 (4) allows state subsidisation but subject to the discretion of the relevant authorities. Given the racial discrimination in education in South Africa in the past, s. 29 (3)(a) contains a prohibition to establish and maintain independent educational institutions that discriminate on the basis of race (¹²⁹).

c) Conclusion

In conclusion, it seems that an uniform system of education for all South Africans without direct or indirect discrimination based on race or colour should be one of the starting points for the construction of the "New South Africa". However, affirmative action programmes and policies are necessary in order to rectify past prejudicial practices in education against "Non-Whites" (Blacks, Coloured and Indians) and, may be, more particularly against Blacks.

¹²⁹ See *In Re The School Education Bill of 1995 (Gauteng) 1996*, (4), BCLR, at 537 (CC) where it was stated that the state may be permitted, but not required, to help individuals in establishing such institutions, and may not interfere with individual efforts to establishing such institutions at para. 8; D. Davis, H. Cheadle, N. Hayson, *op. cit.* (n 40), at 298-302; R.R. Kriel, *op. cit.* (n 122), at 38-8 to 38-11.

It is public opinion today in South Africa that the South African labour pool is composed of primarily unskilled “Non-Whites” and more skilled “Whites”. It will be a duty of the South African State to use all its available resources to educate all its citizens in order to right the wrongs of the past.

3. The child’s right to education : A parental prerogative ?

Human rights instruments have consistently recognized and strongly protected the right and liberty of parents to choose the kind of education that shall be given to their children and thus to induct their children into the religious and philosophical beliefs upon which the parental way of life is based. It is thus recognized that parents are mainly and directly responsible for the general upbringing of their children and are also responsible for their formal education ⁽¹³⁰⁾.

Under present international law, only the children themselves seem to have no right to choose their own education. On the one hand, compulsory education and the prohibition of child labour are important means by which the State protects children against their parents and all forms of economic exploitation. Parents, on the other hand, are protected against totalitarian tendencies of state education by the right to choose the type of education for their children and by the right to establish and direct private educational institutions ⁽¹³¹⁾. But, what about the right of the child to choose the kind of education for himself or herself.

The Universal Declaration is the first international instrument which recognized such a parental right. Article 26 (3) of this instrument indeed accorded parents “a prior right to choose the kind of education to be given to their children”. Other provisions such as Article 13 (3) of the ICESCR, Article 5 (1)(b) of the Convention against Discrimination in Education, principle 7 of the Declaration of the Rights of the Child of 1959, and at the regional level, for example, Article 12 (4) of the American Convention on Human Rights, Article 13 (4) of the Protocol of San Salvador and Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms have from time to time recognized the right of parents to select the type of education to be given to their children in different contexts.

However, recently, there has been a trend towards the recognition that the exercise of the parental right to choose and decide the kind of education for their children should diminish as the child grows older and gains maturity.

¹³⁰ B. Crittenden, “The Rights of Children”, Melbourne Report, (1989), 5, at 4, 5; L. Wildhaber, *op. cit.* (n 57), at 457; J. Delbrück, *op. cit.* (n 11), at 102.

¹³¹ M. Nowak, *op. cit.* (n 11), at 205.

The 1989 Convention on the Right of the Child is perhaps the first human rights instrument that acknowledged the possibility of a diminishing parental prerogative. It does not contain an explicit reference to the freedom of parents to choose their children's school similar to Article 13 (3) of the ICESCR. Thus, the Convention possibly represents an undermining of the parental prerogative in one other respect (¹³²). Article 5 of the Convention provides that "State Parties shall respect the responsibilities, rights and duties of parents to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention" and Article 12 (1) states that "State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". Moreover, according to Article 3 (1) of the Convention, in all actions concerning children, "the best interest of the child shall be a primary consideration". Of course, this standard is simple to state but it can be exceptionally difficult to apply because of the range of personal, economic and other factors which determine the perception of what is in the "best interest" of the child. But it means that the interest of parents and the state are not the all important or only considerations where decisions are taken regarding children. The concept should cover the all round development of the child according to its abilities as a human person within a sound human environment (¹³³). Thus, we have to remember that the incapacity of childhood is not absolute. Indeed, a child gradually acquires the ability, and therefore the right to make decisions for himself or herself. It seems logical indeed that there should be a presumption that the parents do act in the child's best interest and that they are expected to choose the type of primary education to be undertaken by their children due to their child's relative inability and immaturity to make a personal informed choice. But, however, by secondary level, it seems that children may be in a better position to make independent decisions on their educational programmes and that the right to education should belong principally to the person being educated.

¹³² D. Hodgson, *op. cit.* (n 14), at 259-260.

¹³³ J. Wolf, "The Concept of the "Best Interest" in Terms of the UN Convention on the Rights of the Child", in M. Freeman and P. Veermar (eds), *The Ideologies of Children's Rights*, 1992, Kluwer Academic Publishers, Netherlands, at 126.

Chapter V

Implementation of the Human Right to Education

We have attempted to examine some of the various aspects of the difficult question of the child's right to education but the practical implementation of this right, which has been widely recognized, is however neither easy nor straightforward. As it has been pointed out by one commentator, "it is not enough to proclaim lofty principles if they are to remain a dead letter because the means of implementing them are absent" (134).

The right to education and specifically the right to a basic education is today still denied to millions of children and adults for structural and political reasons. Severe differences in economic and social opportunity continue to play a part in stunting child development within the first few critical years of life, and one could wonder if human right to education is not merely a pious hope.

The industrialized countries no doubt have educational systems which, at least in quantitative terms, meet their needs satisfactorily but the situation is quite different in developing countries. These countries have been able to provide schooling for only part of their school-age population and are still recording very high wastage rates. In fact, the great problem concerning education, especially in developing countries, is the lack of means. The main obstacle frustrating the child's exercise of the right to education in developing countries is grinding poverty. For one, poverty is the most formidable enemy of healthy child development : it determines the quality of the environmental conditions in which many children are forced to grow up; and these conditions, in turn, influence the children's physical, intellectual and emotional growth (135). Secondly, poverty prevents the authorities from setting up a sufficient number of schools and maintaining existing ones, operating teacher training colleges, recruiting competent staff and ensuring supplies. Poverty makes it impossible for families either to pay school fees and the cost of books and school materials or, even when schooling is free, to send a child to school when his work contributes to the precarious family budget. Indeed, in many developing countries, and in rural areas in particular, child labour is an economic necessity for many families, who are partly dependent

¹³⁴ M. El Fasi, *op. cit.* (n 18), at 34-35.

¹³⁵ J.P. Naik, "The Economic, Social and Family Context on the Child's Right to Education", 1979, UNESCO, Paris.

for their daily bread on the income earned by their children ⁽¹³⁶⁾. Moreover, “and again, poverty, having kept the parents illiterate, prevents them from providing their children with a background conducive to schooling” ⁽¹³⁷⁾.

However, as we have seen in the chapter devoted to the global challenges faced today by the world’s nations in regard to the right to education, poverty is not the only obstacle to the realization of the right to education. Population growth, internal and international armed conflict, economic disparities, foreign debt, environmental degradation, etc... are also significant obstacles. As we have pointed out previously, institutionalized or insidious racism also have some important effects on the exercise of the child’s right to education. Finally, the lack of effective monitoring of the implementation of the right to education is also another obstacle which prevents the fuller realization of this right.

1. The 1990 World Conference on Education for All.

The 1990 World Conference on Education for All, held in Jomtien gave an active dimension to the concept of education as a child right. The purpose of this Conference was to discuss the world’s current educational crisis, with a special focus on basic education. The Conference, in a final declaration, called for a “supportive policy context” for the implementation of the right to education, the mobilization of financial resources, and a strengthening of international solidarity, underscoring the importance of education not only as a child right or human right (for individual growth) but also as a necessity for national economic development. Article 1.1 from the Jomtien Declaration stresses the right of all individuals to a basic education, Article 1.3 asserts that basic education is a development necessity when Article 3.3 emphasizes that the education of girls and women constitutes a priority, since they constitute a largely untapped human resource for the development of nations.

The Framework for Action to Meet Basic Learning Needs, which also emerged from the Jomtien initiative, sets a number of goals at country, regional and global levels for meeting “the basic learning needs of all” by the year 2000. It was developed as a reference and guide for those prepared to make a commitment to implement the goal of “education for all” by formulating coherent plans for action. Guidelines for three levels of action are provided in the Framework : a) direct action within individual countries; b) co-operation among groups of countries sharing certain characteristics and concerns; and c) multilateral and bilateral co-operation in the world community.

¹³⁶ M. Droogleever Fortuyn, M. de Langen (eds), “Towards the realization of human rights of children”, 1992, at 14-15.

¹³⁷ A.-M. M’Bow, “Introduction”, op. cit. (n 25), at 13; D. Hodgson, op. cit. (n 14), at 261.

The World Conference has created a new global environment for basic education and has called for precise actions through a well-stated framework of goals. Four key goals for education for the year 2000 have been identified by the Jomtien Conference and form the basis for the education section of the goals of children in the 1990s, adopted six months later at the World Summit for Children :

- 1) Universal access to and completion of primary education.
- 2) Reduction of the adult illiteracy rate by one-half of 1990 levels, emphasizing female literacy sufficiently to effect a significant reduction in disparity.
- 3) A significant expansion of early childhood development activities, emphasizing appropriate low-cost family - and community - based interventions in resource-poor countries.
- 4) Exploitation of all available instruments of information, communication and social action - the so-called "third channel" - to help individuals and families to acquire the minimum basic learning which is necessary for better living ⁽¹³⁸⁾.

Basic education is particularly an important and crucial goal in developing countries. Investing in basic education has significant cultural and economic implications for both individual and national development. Historically, nations that have demonstrated the capacity to sustain social and economic development have also emphasized education and training to increase their people's capacity to accumulate knowledge, communicate information, and coordinate and organize themselves productively.

Accumulated experience in developing countries provides convincing evidence that increased investment in education and particularly in basic education can yield significant benefits which are of critical importance in the struggle for self-sufficiency and sustainable development. These significant benefits include among others higher incomes, lower fertility rates and improved health.

Basic education creates healthier families whom, themselves, are better educators of their children. Quality basic education increases economic productivity. Education is critical for economic growth and reduction of poverty. It develops higher social and psychological morale, as the population, obtaining what it believes to be its right, gains a greater sense of social and political participation. From this participation, as it has been observed, a "deeper development" is created for long-term structural change and is sustained by people's capacity to make improvement in their own lives. In turn, other development projects - improved

¹³⁸ "Challenge for Children and Women in the 1990's, op. cit. (n 43), at 43.

water, sanitation, roads, disease prevention, agricultural extension and industrialization, are more likely to succeed. Thus, Basic Education for All is the most urgent of the world's priorities because it improves both the lives of children and the economic growth and social welfare of nations (139).

With their present lack of resources and (in many instances) lack of relevance in many developing countries, primary schools are not able to provide education for all children. Hence, to meet the Jomtien goals of universal access and universal achievement in primary education, non-formal multi-channeled delivery systems which combine flexibility and improvisation will be necessary to address the learning needs of children. This non formal education can be targeted on precisely those people who are most likely to miss the formal education system : school drop-outs, adults (especially women), street children, working children and other disadvantaged groups. Examples of these alternative delivery systems, which include non-formal but organized schooling as well as any other communicative source which has the potential for educational impact, exist today in developing countries such as the BRAC schools in Bangladesh, Escuelas Mayas in Guatemala and the Tostan method in Senegal.

It has been estimated that most low and middle income countries could fulfil every child's right to a basic education over the next 10 years by applying education and fiscal policy reforms, especially a conscious shifting of national expenditures from military and other non-essential investments to education and other social services. But in some countries, such as sub-Saharan countries, where existing gross enrollment rate are below 50 percent, bridging the enrolment gap and keeping up with high population growth rates will require substantial technical and financial assistance from outside donors (140).

The education systems of developing countries have made unprecedented progress in recent years. In regards to the access to education, the average level of education in developing countries is increasing. However, the future holds major challenges for countries at all stages of educational and economic development. Some challenges are of critical importance. For example, enrollments are falling in Africa, the gender gap between boys' and girls' enrollments is still very wide in the Middle East and in South Asia, while in low-and-middle income countries the quality of education is poor. Finally, as the pace of

¹³⁹ "Development in practice. Priorities and Strategies for Education", op. cit. (n 3), at 19-31; M.B. Anderson, op. cit. (n 9), at 5-10; M. Carnoy, op. cit. (n), at 3-5, 11-13.

¹⁴⁰ F. Dall, op. cit. (n 10), at 29; Challenge for Children and Women in the 1990's, op. cit. (n 43), at 46-47.

technological change quickens, there is a worrying lag between the reform of economic structures and that of education systems, notably in the countries that have embarked on the transition from command to market economies ⁽¹⁴¹⁾.

2. International co-operation and development

Article 1 (3) of the United Nations Charter has recognized the necessity of “international co-operation in solving international problems of an economic, social, cultural or humanitarian character”. Whether it be for the purposes of encouraging the pooling of experience, highlighting the most urgent problems, laying down standards or supporting the efforts of governments and specialists, international co-operation has a vital and essential role to play. UNESCO has devoted its efforts to this cause even since it was set up. Article 1.2 (c) of the UNESCO Constitution refers to UNESCO’s role in diffusing knowledge “by encouraging co-operation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials”. To further the aims of the UNESCO Constitution, several international agreements have been concluded ⁽¹⁴²⁾.

Article 28 (3) of the 1989 Convention on the Rights of the Child contains the most recent and comprehensive formulation on the duty to co-operate internationally. It states that States Parties shall promote and encourage international co-operation in matters relating to education and that particular account shall be taken of the needs of developing countries.

It is indeed obvious that the effective realization of the right to education for children in the less developed countries need a real international co-operation, through the transfer of information, knowledge and technology. This principle was strongly reaffirmed in the World Declaration on Education for All in 1990. International co-operation which favours the transfer of information and technology from developed to developing countries is essential to prevent a widening of the gap which exists between these countries in term of the quality of educational opportunities available for their children and adults. The international community, therefore, has to take responsibilities to eliminate ignorance and illiteracy in developing countries and thus to reduce the widening “technical literacy” gap between the developed countries and the developing countries ⁽¹⁴³⁾. Otherwise, without international co-

¹⁴¹ “World Education Report 1995”, op; cit. (n 2), at 18-20.

¹⁴² For example, Principle 4 of the Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between People of 1965; Principle 43 of the Education Recommendation of 1974.

¹⁴³ D. Hodgson, op. cit. (n 11), at 254-256.

operation, “we” will promote an Orwellian world of two classes where a privileged and highly trained professional elite (concentrated heavily in the Northern and Eastern world) will be served by a mass of second-class workers (mainly from the “South”) permanently relegated to a life of limited opportunity for self-advancement.

3. Reporting and monitoring processes.

It is clear that fuller realization of the right to education could be achieved better by improvements in the reporting and monitoring processes. In addition, reliable indicators are essential for assessing States’ compliance with their obligations under the international instruments.

As we have already pointed out, most provisions concerning the right to education in the international instruments establish obligations of result. These obligations are defined only as “progressive obligations”, that is, each state party undertakes to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the education rights concerned”. However, some provisions establish an obligation of conduct. For instance, Article 14 of the CESCR states that “All States parties which have not yet secured free and compulsory primary education have an obligation, within two years after ratification, to work and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years to be fixed in the plan, of the principle of compulsory education free of charge for all”. It is clear that obligations of conduct are easier to monitor than obligations of result. Thus, reliable indicators based on reliable statistical or other relevant information that would act as tools for monitoring purposes are necessary so that children can really benefit from the right to education. Indeed, the fact that national laws and policies have been adopted is not sufficient proof that the rights enshrined in international conventions are requested, just as the ratification of an international Convention does not guarantee its implementation⁽¹⁴⁴⁾.

Typical indicators in the field of education are literacy rates, primary, secondary and tertiary enrollment ratios, completion and drop-out rates, primary pupil-teacher ratio or public expenditure on education as a percentage of GNP or of total public expenditure.

As it has been observed, firstly, one important objective of indicators is to dissociate unwillingness from incapacity; Secondly, human rights monitors should assess the situation in a given country against its recent past, that is, cross-temporal measures. Moreover, all

¹⁴⁴ J. Ennew and P. Miljeteig, “Indicators for children’s rights : progress report on a project” in *The International Journal of Children’s Rights*, (1996), 4 (3) at 213-236.

quantitative indicators must be interpreted in the context of the overall economic and political situation taking into account factors such a deterioration in the terms of trade, or a situation of international or internal armed conflict, etc...⁽¹⁴⁵⁾. Therefore, only a careful examination of these indicators will show whether a government has actually complied with or violated its obligations under international instruments.

Unfortunately, data and research on education are generally insufficient for monitoring policymaking, and resource allocation. Existing education statistics are generally not reliable and are often out of date and hence of limited use in informing policy decisions. In addition, statistics are often collected with too little critical reflection on the underlying theoretical framework, the comparative perspective, and the purposes for which the data are intended.

In most countries, on the one hand, there is little incentive, and often little funding, for the collection and analysis of data, especially that needed for the monitoring and evaluation of educational development and/or the assessment of learning. On the other hand, in many countries, fear of the potential political repercussions of reporting negative trends and weaknesses in the education system is an impediment.

At the international level, global leadership is lacking. Therefore, a major international cooperative effort to improve education data and research, specifically in developing countries, is to be one of the main priorities of UNESCO and the World Bank.

¹⁴⁵ K. Tomasevski, "Indicators", in *Economic, Social and Cultural Rights, A Textbook*, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, at 389; M. Nowak, op. cit. (n 11), at 200.

Conclusion

The right to education for every child and adult throughout the world is the biggest challenge of the 21st century. It is an essential requirement of human dignity.

We have attempted to examine some of the various aspects of the difficult question of the right to education. However, even if the difficulties impeding the improvement and development of educational systems cannot be solved merely by increasing financial resources, the effective implementation of the right to education will progressively require huge amounts of capital expenditure over time. Poverty, international and internal armed conflict, economic stagnation, international and national disparities, environmental degradation, population growth are only some of the obstacles to the realization of the right to education. These obstacles are retarding the ability and willingness of governments, of nongovernmental organizations, of communities, families and individuals to support new investments in education, and this despite the fact that education is the foundation of human development. In addition, in many countries in the world, education seems to be more directed at indoctrinating national, cultural and religious values than at the essential goal of liberating the child. Hence, the interest of the child is not sufficiently reflected in present international instruments relating to the right to education.

A failure to take decisive action to broaden the range, resources and suppliers to educative opportunities will deepen and accentuate the present short-comings and disparities and result in growing inequities in access to quality and effective learning opportunities, thus increasing, on the one hand the number of illiterate adults, and on the other hand, a growing population of children and youth with inadequate knowledge and skills in a world possessing a store of scientific and technological knowledge, unprecedented in history. Thus, the dilemma is not just that of guaranteeing that every child and adult be given a basic literacy and other skills regardless of gender, socio-economic background or racial and ethnic origin but also ensuring that every child and adult has access to relevant technical knowledge in order to meet the challenge of today's information and technological revolution which has already begun to have a major impact on most societies. Therefore, unless a basic and also a technologically relevant education to children in the developing world is provided, the "North-South" gap will be irreversible

In this respect, the Jomtien Declaration and Framework for Action has raised the level of international debate by challenging the nations to re-examine all the preconceptions about what constitutes an appropriate basic education; i.e. one which meets the technological challenges of our time.

Of course, the implementation and the improvement of the right to education will depend on the maturity and on the moral integrity of each nation's leaders, and also on the political will to set aside narrow group interests and to recognize priorities in favour of human needs. And each good-will shall require a comprehensive analysis of the country's education needs and mobilization of imaginative ideas and resources. Moreover, education and fiscal policy reforms, in particular a shifting of national expenditure from military and other non-essential investments to education is a necessity and a priority.

To some, the human right to education for all children and adults seems too ambitious and overall a utopia. Of course, we can not refute the fact that the access and opportunities to have a quality education for all children and adults throughout the world is a very ambitious goal since the world's countries and regions differ substantially in levels of development, in their ways of life and traditions, and in their means of adaptation and evolution.

However, despite these differences, access to quality education even basic, for more children and a reduction of illiteracy (specifically among the adult population) can certainly be greatly improved and better implemented even if the results are in no way perfect. If, faced with utopias and difficulties, we lose heart, energy and faith, nothing will ever improve, even at a modest level.

Bibliography

- ALFREDSSON, G., "The Right to Human Right Education", in Economic, social and cultural rights, A. Textbook, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, p. 213 to 227.
- ANDERSON, M.B., "Education for all. What are we waiting for ?" Sept. 1992, Unicef, New York, USA, p. 2 to 17.
- BEHR, A.L., "Education in South Africa : Origin, issues and trends", 1988, Pretoria, Academia, p. 9 to 18 and 213 to 220.
- BOSSUYT, M., "La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels", Revue des droits de l'homme, (1975), vol. 8, p. 790.
- CAPORTORTI, F., "Study on the rights of persons belonging to ethnic, religious and linguistic minorities", 1979, New York, United Nations.
- CARENS, J.H., "Difference and domination : Reflections on the relation between pluralism and equality" in Chapman and Wertheimer (eds), Majorities and Minorities : NOMOS XXXII, 1990, New York : NYU Press, p. 227 to 229.
- CARNOY, M., "The case for investing in basic education", 1992, Unicef, New York, p. 3 to 29 and p.60 to 85.
- Challenge for children and women in the 1990's - "Eastern and Southern Africa in profile", July 1991, United Nations Children's Fund, p. 43 to 50.
- CRITTENDEN, B., "The rights of children", Melbourne Report, (1989), 5, p. 4 to 5.
- CULLEN, H., "Education rights or minority rights" in the International Journal on Law and Family, (1993), 7, p. 143 to 177.
- DALL, F., "Education and the United Nations Convention on the rights of the child : the challenge of implementation", Nov. 1993, Unicef, International Child Development Centre, Child Rights series, n° 4, p. 1 to 46.
- DAVIS, D., CHEADLE, H., HAYSON, N., Fundamental rights in the Constitution- Commentary and Cases, "Education", 1997, Juta & Co Ltd, Cape Town, p. 294 to 302.
- DE KOCK, W.J., "History of South Africa", 1971, Pretoria : Department of Information, p. 43.
- DELBRÜCK, "The right to education as an international human right", German yearbook of international law, (1992), p. 94 et seq.
- "Development in practice. Priorities and strategies for education". A World Bank review, (1995), p. 1 to 52.
- DE VOS, P., "Pious wishes or directly enforceable human rights ? : social and economic rights in South Africa's 1996 Constitution", in SAJHR, (1997), vol. 13, Part 1, p. 67 to 101.
- DROOGLEEVER FORTUYN, M., de LANGEN, M. (eds), 'Towards the realization of human rights of children', 1992, p. 14 to 17.

- DUBA, V.V.W., "Affirmative action in a new South Africa", *The Apartheid Legacy and Comparative International Experience and Mechanisms of Enforcement*, May 1992, published by the Centre of Development Studies CDS), University of the Western Cape (UWC), based on a conference convened by the Constitutional Committee of the ANC in October 1991, Cape Town, p. 34 to 42.
- DUBBELDAM, L.F.B., "What are development, culture and education ?" in *International yearbook of education*, vol. XLIV - 1994, *Development, culture and education*, by L.F.B. Dubbeldam et al., 1994, p. 7 to 14.
- EIDE, A., "Economic, social and cultural rights as human rights", in *Economic, social and cultural rights*, A. Textbook, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, p. 21 to 40.
- EIDE, A. and ROSAS, A., "Economic, social and cultural rights : a Universal Challenge", in *Economic, social and cultural rights*, A. Textbook, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, p. 15 to 19.
- EL FASI, M., "The right to education and culture" in the *Journal of the International Commission of Jurists* (June 1968), vol IX, N° 1, Part wo, Special issue 1968, p. 33 to 40.
- ENNEW, J. and MILJETEIG, P., "Indicators for children's rights : progress report on a project" in *The International Journal of Children's Rights*, (1996), 4 (3), at 213-236.
- GANJI, M., "Summary of the report of the special rapporteur appointed by the Commission of human rights", 1968, United Nations, p. 24 to 26.
- GOONESEKERE, R.K.W., "Affirmative action in education, health, welfare and employment" in "Affirmative action in a new South Africa", *The Apartheid Legacy and Comparative International Experiences and Mechanisms of Enforcement*, May 1992, published by the Centre for Development Studies (CDS), University of Western Cape (UWC), based on a Conference convened by the Constitutional Committee of the ANC in October 1991, Cape Town, p. 26 to 33.
- HALVORSEN, K., "Notes on the realization of the human right to education", *Human rights quarterly*, (1990), vol. 12, p. 341 et seq.
- HARTUNG, F., *Die Entwicklung der Menschen - und Bürgerechte von 1776 bis zur Gegenwart*", 1964, p. 84 and 118.
- HODGSON, D., "The international human right to education and education concerning human rights", in *The International Journal of Children's rights*, (1996), 4, p. 237 to 262.
- KNIGHT, S., "Proposition 187 and international human rights law : illegal discrimination in the right to education" in *Hastings International and Comparative Law Review*, (1995/1996), vol. 19, p. 183 to 220.
- KRIEL, R.R., "Education", in Chaskalson et al. (eds), *Constitution Law of South Africa*, (1996), p. 38-1 to 38-19.
- LEBLANC, L.J., "Reservations to the Convention on the Rights of the Child : a macroscopic view of state practice", in *The International Journal of Children's Rights*, (1996), 4, p. 357.

- M'BOW, A.-M., "Introduction" in G. Mialaret, *The Child's Right to Education*, 1979, Unesco, p. 9 to 16.
- McGOLDRICK, D., "The United Nations Convention on the Rights of the Child" in the *International Journal of Law and Family*, (1991), 5, p.133.
- METCALFE, M., "Desegregating education in South Africa", July 1991, Research Report N° 2, University of the Witwatersrand, Johannesburg, p. 13 to 44.
- MIALARET, G., "What kind of education ?", in *The Child's right to education*", 1979, Unesco, p. 47 to 53.
- NAIK, J.P., "The economic, social and family context on the child's right to education", 1979, Unesco, Paris.
- NOWAK, M., "The right to education", in *Economic, social and cultural rights, A. Textbook*, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, p. 189 to 211.
- RAMCHARAN, B.G., "Equality and non-discrimination" in Louis Henkin (ed), *The International Bill of Rights. The Covenant on Civil and Political Rights*, 1981, New York Columbia University Press, p. 265 to 266.
- RAY, D. and TARROW, N., "Human rights and education", 1987, vol. 3, Ed. by N.B. Tarrow, Pergamon Press, p. 3 to 16.
- REAUME, D. and GREEN, L., "Education and Linguistic Security in the Charter", in *McGill Law Journal*, (1989), vol. 34, NO N° 4, Montréal, p. 777 to 816.
- REX, A., "Racism and education", in G. Mialaret, "The Child's right to education", 1979, Unesco, p. 119 to 128.
- RUSH, S.E., "The heart of equal protection. Education and race", in *Review of Law and Social Change (New York University)*, (1977), vol. XXIII, Number 1, p. 1 to 57.
- SCHIENIN, M., "Economic and Social Rights as Legal Rights", in *Economic, social and cultural rights, A. Textbook*, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, p. 41 to 63.
- SKUTNABB-KANGAS, T., "Multilingualism and the education of minority children", in Skutnabb-Kangas and Cummins (eds), *Minority education : From shame to struggle*, 1988, Clevedon : multilingual matters, p. 22 to 27.
- SLOTH-NIELSEN, "Ratification of the United Nations Convention on the rights of the child : some implications for South African law", *SAJHR*, (1995), 11, p. 401 to 420.
- TOMASEVSKI, K., "Indicators", in *Economic, social and cultural rights, A. Textbook*, 1995, edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, p. 389 to 401.
- VAN der VYVER, J.D., "Brown v Board of education : a survey of the American desegregation programme", in *SALJ*, (1979), vol. 19, p. 491 to 514.
- VAN DIJK, P. and VAN HOOFT, J.H., "Theory and practice of the European Convention on human rights", 1990, (2 ed), Deventer Kluwer Law and Taxation Publishers, p. 467.

- VAN HEERDEN, H.J.O., "South African Law Commission. Project 58", Interim Report on Group and Human Rights, August 1991, p. 121 to 142 and p. 325 to 527.
- VIERDAG, E.W., "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights", Netherlands Journal of International Law, (1978), vol. 9, p. 103.
- VOLIO, F., "The child's right to education : a survey" in G. Mialaret, The Child's right to education, 1979, Unesco, p. 19 to 33.
- WIDHABER, L., "Right to education and Parental Rights", in R. St. J. MacDonald et al., The European system for the protection of human rights, 1993, p. 531 to 551.
- WOLF, J., "The Concept of the "Best Interest" in terms of the UN Convention on the Rights of the Child", in M. Freeman and P. Veerman (eds), The Ideologies of Children's Rights, 1992, p. 130.
- World Education Report 1995, (1995), Unesco Publishing, Oxford, p. 18 to 39 and 103 to 125.