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Submission to the Legal Resources Centre on the Right to Education

The Right to Education in the European Convention on Human Rights, European Social Charter and Indian Constitution

I. Introduction

This memorandum describes and analyses the right to education guaranteed by the European Convention on Human Rights, the European Social Charter and the Indian Constitution. The textual content of the right set out in each document, together with the varying mechanisms of enforcement applicable thereto, produce quite different patterns of litigation and protection across the three systems of law. Nonetheless, certain cases and approaches might be useful in the *Sompa* litigation. Specifically, the alliance between the right to equality and the right to education developed by the European Court of Human Rights might be helpful in structuring the claim. In addition, the Indian Supreme Court has articulated detailed content to elements of the right to education and taken supervisory enforcement measures of a kind that might be relevant in the South African context.

II. The Right to Education in the European Convention on Human Rights

1. Legislative Framework

The European Convention on Human Rights (the ECHR/Convention), drafted by the Council of Europe, entered into force on 3 September 1953. Its primary purpose is to protect civil and political rights. For this reason, much of the focus of education rights litigation within the Convention system concerns the protection of parents' choice in relation to their religious and political beliefs. It was understood that social and economic rights would be protected, albeit in a non-justiciable manner, through the Convention's sister instrument, the European Social Charter.

Nonetheless, some content has been given to the right to education in the Convention. Article 2 of the First Protocol to the Convention provides:

> '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.'[1]

In addition to the development of Article 2 itself, educational rights have been strongly protected on the basis of an alliance between the non-discrimination right in Article 14 of the Convention and the right to education in the First Protocol.[2] Article 14 provides:

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[1] Article 5 of the First Protocol sets out the relationship of the Protocol to the Convention as follows: 'As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.'

[2] Articles 8 (respect for private and family life), 9 (freedom of thought, conscience and religion) and 10 (freedom of expression) are also potentially relevant.

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

2. The Institutional Framework

The Convention establishes the European Court of Human Rights to hear complaints by individuals, groups of individuals, non-governmental organisations and states, alleging breaches of the ECHR.[3] The Contracting Parties to the Convention undertake to abide by the final judgment of the Court in any case to which they are parties[4] and the Committee of Ministers has the duty to oversee enforcement of the judgment.[5] The Court also has the jurisdiction to give advisory opinions upon the request of the Committee of Ministers.[6] Jurisdiction of this kind only arises where the advisory opinion is requested on a question that could not arise in contentious proceedings.[7]

3. Content of the Right to Education

A. Introduction

The starting point for a discussion of the right to education in the ECHR is the *Belgian Linguistics* case. In this case, the Court held that under the first sentence of Article 2 of the Protocol there is no obligation on states to establish a general system of education at their own expense. The Court reasoned that when the Protocol was opened for signature the member states of the Council of Europe already possessed, and at the time of the case continued to possess, a general official system of education and that there is thus no obligation to establish such a system.[8] The essence of the right protected in the first sentence of Article 2 thus concerns a right of access to existing educational institutions.

The negative formulation of the right, and the Court's subsequent interpretation thereof, has somewhat inhibited development of positive content of the right to education under the first sentence of Article 2. Instead, much litigation has focused on the second sentence, concerning the right of parents to have their children educated in accordance with their philosophical and religious convictions.[9] Litigation of this kind is well known, and has addressed violations of parents' rights including the teaching of indoctrination that may be considered disrespectful of the religious and philosophical convictions of parents,[10] the

[3] Arts. 19, 26-32, ECHR; Articles 33-34 ECHR.

[4] Art. 46(1), ECHR; see also Clare Ovey & Robin C.A. White, *Jacobs and White, The European Convention on Human Rights* 4th ed. (OUP, Oxford 2006).

[5] Art. 46(2), ECHR.

[6] Art. 47, ECHR.

[7] European Court of Human Rights, Decision on the Competence of the Court to give an Advisory Opinion, 2 June 2004.

[8] *Belgian Linguistics Case* (No 2)(A/6) (1979-80) 1 EHRR 252.

[9] Indeed, some cases that might have been litigated on the basis of the child's right to education were confined to an alleged violation of parents' rights - see e.g. *Valsamis v. Greece*, No. 21787/93 (1997) 24 EHRR 294 [25].

[10] *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (A/23) (1979-80) 1 EHRR 711 [53]; *Lautsi v. Italy*, No. 30814/06 (2010) 50 EHRR 42 [47]:

compulsory display of a symbol of a particular faith in a classroom,[11] and the provision of corporal punishment against parents' convictions.[12] These cases are not the focus of this section. Instead, this section focuses on two related strains of case law where the Court has fleshed out the right to education as such rather than the right of parents to educate their children in accordance with their philosophical and religious convictions.

B. Regulation of the Right to Education / Effectiveness

Despite the fact that it endorsed the right to education as primarily a negative right of access to existing institutions, the Court in *Belgian Linguistics* also set out an implicit requirement that the education provided in a state is effective.[13] Unfortunately, there has been little development of the exact meaning of effectiveness and how such a requirement might impose certain positive duties on the state. The Court has held, however, that for the right to education to be effective, it is necessary that 'the individual who is the beneficiary should have ... the right to obtain, in conformity with the rules in force in each State, ... official recognition of the studies which he has completed.'[14] Here, then, is a positive duty of recognition.

Moreover, the requirement that education is effective has been held to impose a duty to regulate education in such a way that does not injure the substance of the right or conflict with other rights guaranteed in the Convention,[15] and, in particular, with parents' rights to have their child educated in accordance with their convictions.[16] An example of the application of this principle may be found in the case of *Campbell and Cosans v. UK*. Here, parents objected to the use of corporal punishment in their child's school in Scotland, an objection that lead to the child's suspension. The Court held that this violated not only the parents' rights but also the child's; in respect of the latter, the suspension of a child for nearly an entire school year because of his parents' conviction that their child should not be liable to corporal punishment was outside the state's power of regulation and consequently violated the child's right to education under the first sentence of Article 2 of the Protocol.

Application of this requirement may also be found in the context of language rights. Although it has been clear since *Belgian Linguistics* that there is no right to be educated in one's language of choice, there may be a duty of continuing provision on the state where it has assumed responsibility for education in a particular language. In the case of *Cyprus v. Turkey*, the Court faced a situation where children in Northern Cyprus who had received their primary education in Greek were denied secondary schooling in Greek in the north. This was

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> 'The second sentence of Article 2 implies … that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.'

[11] *Lautsi v. Italy* (n 10) [57].

[12] *Campbell and Cosans* (A/48) (1982) 4 EHRR 252.

[13] *Belgian Linguistics* (n 8) [4].

[14] Ibid. See also David Harris et al, *Law of the European Convention on Human Rights*, 2nd ed. (OUP, Oxford, 2009) p. 702.

[15] *Belgian Linguistics* (n 8) [5].

[16] *Campbell and Cosans* (n 12).

because the Turkish-Cypriot authorities had abolished such schooling. The Court rejected the argument of the authorities that the children could transfer to schools in the south of the island and thus receive education in Greek:

> 'Having assumed responsibility for the provision of Greek-language primary schooling, the failure of the [Turkish Republic of Northern Cyprus] authorities to make continuing provision for it at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue.'[17]

Importantly, this obligation is not fulfilled if the location of the facilities is such as to make it unrealistic for the children to be educated there.[18]

Despite the existence of the case law set out above regarding the effectiveness of education, it is evident that litigation on Article 2 of the First Protocol has centred on the rights of parents rather than a child's right to education in and of itself. For this reason, the second strain of case law fleshing out the right to education is vitally important: the alliance of Article 2 with the non-discrimination provision in Article 14 of the Convention.

C. Non-discrimination and the Right to Education

Although Article 2 of the Protocol does not grant individuals a right to the creation of a particular kind of educational establishment, a State providing education cannot take discriminatory measures within the meaning of Article 14 in its provision of such education.[19] In other words, instead of bringing a self-standing claim under Article 2 regarding the quality of the educational provision, the right in Article 2 can be read with the non-discrimination principle in Article 14. It is in this alliance with non-discrimination where the right to education may receive robust protection.

The case of *DH v. Czech Republic* is particularly important in this regard. The case concerned the provision of education to Roma children in the Czech Republic. The applicants, children of Roma origins, were placed in special schools on the basis of their performance in educational tests. The applicants presented statistical data that showed, despite the neutral wording of the statute in question, a disproportionate impact on Roma children.[20] Given the inferior quality of the education provided in these special schools, this disproportionate impact was negative, and produced deleterious long-term effects on Roma children. The Court accepted that indirect discrimination was applicable to Article 14 of the Convention and that discriminatory intent was not a necessary element of such a finding.[21] Moreover, the Court accepted that 'statistics which appear on critical examination to be

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[17] *Cyprus v. Turkey* (App. 25781/94) (2002) 35 EHRR 30 [278].

[18] *Cyprus v. Turkey* (n 17) [278].

[19] *Belgian Linguistics* (n 8) [11].

[20] *DH v. Czech Republic* (App. 57325/00) (2008) 47 EHRR 3 [190]:

> '[T]he statistical data submitted by the applicants … indicates that at the time 56 per cent of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26 per cent of the total number of pupils attending primary school in Ostrava. Further, whereas only 1.8 per cent of non-Roma pupils were placed in special schools, the proportion of Roma pupils in Ostrava assigned to special schools was 50.3 per cent.'

[21] *DH v. Czech Republic* (n 20) [194]

reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce.'[22] Thus, on the evidence before it, the Court accepted that a claim of indirect discrimination had been made out, thus shifting the burden onto the government to show objective and reasonable justification, interpreted strictly, for the difference in treatment. No justification acceptable to the Court was presented. For this reason, the Court held that there had been a violation of Article 14 of the Convention, read in conjunction with Article 2 of Protocol 1.

These two articles, read together, thus prohibit discrimination in the provision of education on a number of grounds. Quite clearly, Roma children in the Czech Republic were being provided with sub-standard education. Despite textual and institutional differences, the case of *DH* might be a helpful comparative case in relation to the interaction between equality and education in the *Sompa* matter, particularly as to the complaint that children attending the applicant schools are not receiving the same educational infrastructure and provision that other schoolchildren receive.

4. Remedies

The European Court of Human Rights is required to order just satisfaction in cases where it has found a violation of the Convention or Protocols and the internal law of the member state provides for only partial reparation. The usual remedies are the declaration of a violation and the award of costs and expenses.[23] The Court sometimes awards damages to successful applicants. In *DH v. Czech Republic*, for instance, damages were awarded for non-pecuniary injury suffered by the applicants.[24]

In addition to damages, the Court has reiterated that states that are found to be in violation must adopt general and/or individual measures that are necessary to discharge the state's relevant Convention obligations.[25] However, the Court does allow the state considerable discretion to determine the precise means by which it will ensure observance of the Convention rights. In *DH v. Czech Republic*, the state had already repealed the offending legislation so the Court considered it unnecessary to reserve the question of the appropriate order to be made with respect to securing the state's compliance with the Convention. Much of the burden of ensuring that the violation has ceased and that general measures have been implemented to prevent similar violations in the future falls on the Committee of Ministers.[26]

III. The Right to Education in the European Social Charter

1. The Institutional Context of the European Social Charter

The European Social Charter (ESC) of 1961 opened for signature on 18 October 1961 and entered into force on 26 February 1965. The ESC, like the European Convention on

[22] Ibid [188].

[23] Ovey and White (n 4) 492; See e.g. *Valsamis* (n 9) [51] – [57].

[24] *DH v. Czech Republic* (n 20).

[25] Ibid [216].

[26] Art 46(2), ECHR; Rule 62, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, May 10, 2006.

Human Rights, is an instrument of the Council of Europe and protects primarily socio-economic rights to the European Convention's civil and political rights. However, the Convention and Charter are not of the same stature; the Charter is not enforced by a court.

The ESC 1961 consists of 19 economic and social rights, addressing primarily aspects of the right to work, but also including the right of young persons to protection, and rights to health, social security and social welfare. The European Social Charter (revised) of 1996 embodies the rights of the 1961 Charter and 1988 Additional Protocol, together with new rights and amendments. Its scope as a social rights instrument is more comprehensive: it lists 31 rights, including new rights to housing and to protection against poverty and social exclusion; and improved provisions on gender equality, the protection of disabled people, and the social, legal and economic protection of employed children.

The structure of each Charter is a list of 'rights and principles' (Part I), whose content is defined in a corresponding list of obligations on state parties (Part II). The obligation of the Parties is defined as follows at the head of Part I:

> 'The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised...'[27]

As of 12 June 2010, 30 States have ratified the revised Charter of 1996 and a further 13 have ratified the 1961 Charter. This section describes only the provisions of the revised Charter.[28]

2. Supervisory Procedures and Bodies

At the time of initial drafting, socio-economic rights were not thought to be justiciable. Consequently, the initial supervisory mechanism was simply a reporting procedure. Since 1995, however, there has also been a system of collective complaints.[29] The relevant supervisory organs are:

- The European Committee of Social Rights (ECSR/the Committee). The Committee is composed of 15 independent, impartial experts, elected by the Committee of Ministers for a 6-year term of office, renewable once.
- The Governmental Committee. This committee is composed of representatives of the states party to the ESC and assisted by representatives of the European social partners participating as observers.
- The Committee of Ministers. This is the Council of Europe's decision-making body, and is composed of the Ministers for Foreign Affairs of the 47 member states or their permanent representatives in Strasbourg.

Under the reporting procedure, the state parties are under an obligation to submit annual reports on how they have implemented the provisions of the Charter both legally and in practice. The Committee then examines the reports and determines, in published

[27] The wording is identical in the 1961 Charter, except that the reference is to 'Contracting Parties' in the 1961 Charter as opposed to 'Parties' in the 1996 Charter.

[28] Of the rights discussed below, Articles 17 is new and Article 15 is substantially revised. Article 9 is identical and Article 10 materially identical to the same-numbered provisions of the 1961 Charter.

[29] Additional Protocol of 1995 provides for a system of collective complaints (ETS No. 158).

'Conclusions', if the state has fulfilled its obligation under the Charter. Despite some initial confusion regarding the division of competencies among the three organs, it is now established that the Committee has exclusive competence to make findings of legal compliance or non-compliance.

If a finding of non-compliance is made, the Governmental Committee then considers the decision. The state concerned must set out the measures which it has taken or which it is contemplating taking in order to remedy the situation. In the case of the latter, the State must set out a timetable for achieving compliance. In the event of non-compliance or anticipated non-compliance, the Governmental Committee may propose that the Committee of Ministers address a recommendation to the state concerned. A recommendation calls on the state concerned to take appropriate measures to remedy the situation.

The collective complaints procedure allows certain listed non-governmental organisations to submit complaints concerning compliance with certain Charter provisions over which they have a recognised competence. The procedure has been designed to 'judicialize' the Charter.[30] The complainant NGO and the defendant state participate in an adversarial process before the Committee, which then issues a detailed decision. The Committee's decision is submitted to the Committee of Ministers. The Committee of Ministers cannot reverse the ECSR's decision or question its legal assessment, but it may decide whether or not to make a recommendation to the state concerned, taking into account of any social and economic policy considerations.[31] It would be fair to say that the institution of the collective complaints system has revitalised the Charter.

3. The Content of Education Rights in the European Social Charter

The ESC guarantees an accessible and effective primary and secondary education and vocational training system, as well as equal access to higher education. Of primary relevance are Articles 9, 10, 15§1, and 17, with last being the most important.

A. Article 17: The right of children and young persons to social, legal and economic protection

Article 17 places an obligation on states to establish and maintain (directly or indirectly) an education system that is free of charge. The Charter requires that special attention be given to ensure that vulnerable groups have equal access to education.[32] Education must be compulsory until the minimum age for admission to employment and the education system must be *effective* and *accessible*.[33] Accessibility is determined by the existence of a fair geographical and regional distribution of schools, in particular as regards to urban/rural areas,

[30] As of 9 June 2010, there have been 61 collective complaints registered. 14 states currently accept the collective complaints procedure.

[31] See e.g. *Confédération Française de l'Encadrement (CFE CGC) v. France*, Complaint No. 16/2003 [20] – [21]; Council of Europe, Explanatory Report on the Collective Complaints Protocol (1995).

[32] European Committee of Social Rights, Conclusions 2003, Slovenia, 80. The Conclusions of the Committee may be accessed here: http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/ConclusionsIndex_en.asp See also the Digest of the Case Law of the European Committee of Social Rights (Digest), 120. The most recent digest is available here: http://www.coe.int/t/dghl/monitoring/socialcharter/digest/digestindex_EN.asp.

[33] ECSR, Conclusions 2005, Moldova, 57; see also Digest, 120.

as well as existence of free primary and secondary education in practice.[34] The following factors are determinants of effectiveness:[35]

- Whether there is a functioning system of primary and secondary education;
- The number of children enrolled in school;[36]
- The number of schools;
- Class sizes and the teacher-pupil ratio;
- The system for training teachers;
- The existence of a system for monitoring drop-out and completion rates.

B. Article 9: The right to vocational guidance

Article 9 imposes on states the obligation to set up and operate a service that helps all persons to solve their problems relating to vocational guidance. Vocational guidance must be provided free of charge by qualified and sufficient staff to a significant number of people.[37] Vocational guidance should be provided within both the school system and the labour market.

C. Article 10: The right to vocational training

The right to vocational training in Article 10 includes technical and vocational education at both a secondary and higher level, a system of apprenticeships, and retraining and reintegration measures for the long-term unemployed.[38] Article 10(5) lists a number of measures aimed at securing access to vocational training in practice. These include measures of financial assistance, the reduction of fees, and the inclusion within normal working hours of time spent on training.

D. Article 15(1): The right of persons with disabilities to independence, social integration and participation in the life of the community

People with disabilities have a right to education and training, and must be integrated into mainstream facilities. The general aim of Article 15(1) is integrative; only in cases of compelling justification will special facilities outside the general or mainstream educational framework be permitted.[39]

4. Collective Complaints

There are two relevant decisions by the Committee under the collective complaints procedure regarding the right to education under the Charter. The first, *Autism-Europe v France*, No.

[34] See ECSR, Conclusions 2005, Bulgaria, 24. See also, Digest, 122: 'In addition, hidden costs such as books or uniforms must be reasonable and assistance must be available to limit their impact on the most vulnerable groups.'

[35] See ECSR, Conclusions 2003, Statement of Interpretation on Article 17, e.g. France, p. 174.

[36] See ECSR, Conclusions 2003, Romania & Conclusions 2005, Moldova: non-conformity owing to the level of non-attendance of compulsory schooling.

[37] Digest, 73.

[38] Digest, 79.

[39] ESCR, Conclusions 2005, Bulgaria, 26; see also Digest, 112.

13/2002, was decided on the merits on 14 November 2003. The complainant in the case alleged in the main that France had failed to fulfil its obligations under:

> 'Articles 15§1 and 17§1 of Part II of the Revised European Social Charter because children and adults with autism do not and are not likely to effectively exercise, in sufficient numbers and to an adequate standard, their right to education in mainstream schooling or through adequately supported placements in specialised institutions that offer education and related service.'[40]

During the hearing, the complainant abandoned its argument that France was violating these provisions as a matter of law and focused instead on the situation in practice. This practice showed, it alleged, amongst other problems, (a) an unavailability of special education institutions and services, (b) limitation of budgetary resources on the basis that special education is not considered within the definition of public service, (c) an inadequacy in early intervention, (d) an inadequacy of mainstream education, and (e) deficiencies in training and administration within special education.

Considering these factual allegations, the Committee concluded that the situation in France did constitute a violation of Articles 15§1 and 17§1 whether alone or read in combination with Article E of the revised European Social Charter.[41]

The crux of the Committee's reasoning may be found in paragraphs 53 and 54. The Committee found that:

> 'When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.
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> In the light of the afore-mentioned…France has failed to achieve sufficient progress in advancing the provision of education for persons with autism. It specifically notes that most of the French official documents, in particular those submitted during the procedure, still use a more restrictive definition of autism than that adopted by the World Heath Organisation and that there are still insufficient official statistics with which to rationally measure progress through time. The Committee considers that the fact that the establishments specialising in the education and care of disabled children (particularly those with autism) are not in general financed from the same budget as

[40] *Autism-Europe v France*, No. 13/2002 [7]. In addition, the complainant argued that France was not in compliance with 'non-discrimination principle embodied in Article E of Part V of the Revised European Social Charter since persons with autism do not benefit from the right to education recognized to persons with disabilities by Article 15§1 and generally set out in Article 17§1 of Part II of the Charter.' This section focuses on the substantive education claim although the Committee found the arguments 'so intertwined as to be inseparable' [47].

[41] Ibid, Conclusion.

normal schools, does not in itself amount to discrimination, since it is primarily for States themselves to decide on the modalities of funding.

Nevertheless, it considers, as the authorities themselves acknowledge, and whether a broad or narrow definition of autism is adopted, that the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled. It is also established, and not contested by the authorities, that there is a chronic shortage of care and support facilities for autistic adults.'

The Committee's finding in *Autism-Europe* was taken up by the Committee of Ministers in March 2004 in its adoption of Resolution ResChS(2004)1. This is not a hard enforcement mechanism by any means, although it does suggest positive steps were taken to remedy the non-compliance. The permanent representative of France to the Committee of Ministers provided the Committee with a list of measures that France proposed to take to bring itself into compliance with the Charter; the Committee noted its receipt of such a list and provided that it 'looks forward to France reporting that, at the time of the submission of the next report concerning the relevant provisions of the Revised European Social Charter, the situation has improved.'[42]

In its 2007 report on France, the Committee found that despite certain measures taken and progress made by France, it was 'not in conformity with Article 15§1 on the ground that equal access to education (mainstreaming and special education) of persons with autism is not yet guaranteed in an effective manner.'[43] This finding was reiterated in 2008 and was not addressed in 2009.

The second relevant case is *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, No. 41/2007, decided on the merits on 3 June 2008. In this case, the complainant alleged 'that the Government's failure to provide education for children with moderate, severe or profound intellectual disabilities living in homes for mentally disabled children in Bulgaria violates Article 17§2 of the Revised Charter, alone and in conjunction with Article E.'[44]

Noting General Comment No. 13 of the United Nations Committee on Economic, Social and Cultural Rights, the Committee considered that 'all education provided by states must fulfil the criteria of availability, accessibility, acceptability and adaptability.' It found in this regard that despite positive attempts by Bulgaria to provide education to children with intellectual disabilities, it had not refuted the allegations put to it by the complainant. More specifically, the requirements of accessibility and adaptability were not met.[45] In addition, it

[42] Council of Europe, Committee of Ministers Resolution ResChS(2004)1, Collective complaint No. 13/2002 Autisme-Europe against France.

[43] ECSR, Conclusions 2007, France [27]. The Report also reiterated that measures taken to redress non-compliance must fulfill three criteria: (i) reasonable timeframe; (ii) measurable progress; and (iii) financing consistent with the maximum use of available resources.

[44] *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, No. 41/2007 [7]. Bulgaria initially challenged the admissibility of the case on the basis that it had not accepted Article 15(1) of the Charter. This challenge was rejected by the Committee on the basis that non-acceptance of Article 15(1) does not exclude issues relating to disabilities of children being considered under Article 17(2). *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, No. 41/2007 Decision on Admissibility [9] – [10].

[45] *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, No. 41/2007 [43] – [44].

found that Bulgaria's financial constraints could not be used to justify non-compliance.[46] The Committee concluded:

- 'unanimously that there is a violation of Article 17§2 of the Revised Charter because children with moderate, severe or profound intellectual disabilities residing in [homes for mentally disabled children] do not have an effective right to education;
- by 12 votes to 1 that there is a violation of Article 17§2 of the Revised Charter taken in conjunction with Article E because there is discrimination against children with moderate, severe or profound intellectual disabilities residing in [homes for mentally disabled children] as a result of the low number of such children receiving any type of education when compared to other children.'[47]

The Committee of Ministers has not issued a resolution on the matter and, because the case is recent, the issue has not been addressed in subsequent reports by Bulgaria.

Outside the context of education, the European Committee on Social Rights has been willing to be quite prescriptive in giving content to socio-economic rights. An example of this may be found in two housing cases in Greece.[48] In both cases, the complainants averred, and the Court agreed, that a significant number of Roma families lived in inadequate and substandard housing in violation of Article 16 of the Charter. In the *INTERIGHTS* cases, the Court based its finding on, amongst other evidence, the fact that some families were living 'in prefabricated housing which have no mains power supply, running water or regular waste collection services and instead have generators and water storage tanks…' and others in settlements with 'no basic public utilities' and 'serious infrastructure deficiencies.'[49] These cases suggest that the Committee might be more willing in the near future to set out detailed standards in the context of other socio-economic rights, including education.

5. Remedies

The remedies under the European Social Charter were long constrained by the nature of the Committee as an essentially non-judicial body that focuses on compliance through a system of reporting. Of course, there is instrumental value in the ongoing obligation to report to the Committee, value that may be seen in the progress made and proposed by France in respect of autism, and in many other annual reports by states. Moreover, the Committee has now heard 61 collective complaints. The complaints system not only addresses the specific cases at hand but has also brought increased scrutiny and relevance to the Charter.

IV. The Right to Education in India

The right to education in India has developed by a combination of judicial, legislative, and constitutional action. Although the Indian Supreme Court played an important role in the

[46] Ibid [47].

[47] Ibid [55].

[48] *European Roma Rights Centre v. Greece,* No. 15/2003; *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece*, No. 49/2008.

[49] *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece*, No. 49/2008 [39].

development of this right, it is important to understand the context in which its decisions were handed down and that its decisions both provoked and responded to political circumstances.

1. The Original Constitutional Framework: The Constitution of 1950

Part III of the Constitution of India is entitled Fundamental Rights. Part III enshrines a range of rights – generally civil and political rights – that bind the state. Part IV of the Constitution is entitled Directive Principles of State Policy. These principles are not enforceable in court but are 'nevertheless fundamental in the governance of the country.'[50] The right to education originally appeared as a Directive Principle within Part IV. The unamended Article 45 provided:

> 'The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.'

Article 45 was the only Directive Principle that included an explicit time-limit for implementation.[51] However, it is commonly understood that little progress was made in fulfilling this constitutional principle over the next three decades.[52]

2. The Response of the Supreme Court

In the early 1990s, as a central element of the growing role of public interest litigation in India, the Supreme Court made two landmark decisions concerning the right to education. These cases are *Mohini Jain v State of Karnataka*[53] and *Unni Krishnan J.P. v State of Andhra Pradesh*.[54]

The narrow factual basis of both cases concerned the practice of private higher education institutions of charging 'capitation fees' – fees over and above certain prescribed fees that relate directly to tuition. Despite this factual context, the Supreme Court in *Mohini Jain* addressed the broader question whether a right to education is guaranteed under the Indian Constitution. Conceding that such a right is not explicit in Part III of the Constitution, the Court nonetheless held that by reading Articles 21, 38, 39(a), 41 and 45 together, it is evident that 'the framers of the Constitution made it obligatory for the State to provide education for its citizens.'[55] The judgment makes clear that the right to life in Article 21 is the foundation on which the Court builds its conception of the right to education:

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[50] Constitution of India, Part IV, Article 37:

> 'The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.'

[51] See Vijayashri Sripati and Arun K. Thiruvengadam, India - Constitutional Amendment Making the Right to Education a Fundamental Right 2 J Int'l Const. L. (2004) 148, 150. The authors also note that other Directive Principles bear on the right to education, particularly Articles 41 and 46.

[52] See ibid, 151 – 152.

[53] AIR 1992 SC 1858.

[54] AIR 1993 SC 2178.

[55] *Mohini Jain v State of Karnataka* AIR 1992 SC 1858 [7].

> '"Right to life" is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.'[56]

The Court returned to this question soon after this decision in the case of *Unni Krishnan.* Again, the case concerned access to a private institution of higher education and, as in *Mohini Jain*, the Court affirmed the right to education implicit in the right to life in Article 21. In defining the content of this right, the Court construed Article 21 in the light of the Directive Principles in Articles 41 and 45. On this basis, the Court found that the:

> 'Right to education, understood in the context of Articles 45 and 41 means:(a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes the age of 14 years, his right education is circumscribed by the limits of the economic capacity of the State and its developments.'[57]

Thus the Court in *Unni Krishnan* reaffirmed the fundamental right to education while limiting it to children up to the age of 14. However, because of the narrow factual basis of the case, it was not necessary for the Court to delineate the content of that right. The closest the Court comes to any additional definition is found in the judgment of Jeevan Reddy J:

> 'Before proceeding further, we think it right to say this: We are aware that "Education is second highest sector of budgeted expenditure after the defence. A little more than three per cent of the Gross National Product is spent in education", as pointed out in para 2.31 of Challenge of Education. But this very publication says that "in comparison to many countries, India spends much less on education in terms of the proportion of Gross National Product" - and further "in spite of the fact that educational expenditure continues to be the highest item of expenditure next only to Defence the resource gap for educational needs is one of the major problems. Most of the current expenditure is only in the form of salary payment. It hardly needs to be stated that additional capital expenditure would greatly augment teacher productivity because in the absence of expenditure on her heads even the utilisation of staff remains low." We do realise that ultimately it is a question of resources and

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[56] Ibid [12]; see further [17]:

> 'We hold that every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfill its obligation under the Constitution. The students are given admission to the educational institutions - whether State-owned or State recognised in recognition of their 'right to education' under the Constitution. Charging capitation fee in consideration of admission to educational institutions, is a patent denial of a citizen's right to education under the Constitution.'

[57] *Unni Krishnan J.P. v State of Andhra Pradesh* AIR 1993 SC 2178 [184]. It should be noted that the subsequent case of *T.M.A Pai Foundation and Others v. State of Karnataka and Others* AIR 2003 SC 355 discussed and overturned the narrow holding of *Unni Krishnan* regarding fees at private institutions of higher education.

> resources-wise this country is not in a happy position. All we are saying is that while allocating the available resources, due regard should be had to the wise words of Founding Fathers in Articles 45 and 46.'[58]

The cases of *Mohini Jain* and *Unni Krishnan* are landmarks in the development of the right to education in India. The next steps, however, took place outside the courts.

3. Constitutional Amendment and Legislative Enactment

In December 2002, the long-mooted Constitution (Eighty-sixth Amendment) Act was assented to by the President of India after passage in both houses. The Act made two relevant changes to the Constitution. First, it inserted a new Article 21A that reads: 'The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.' This reflects part of the holding of *Unni Krishnan.* It should be reiterated that the new Article 21A appears within Part III of the Constitution: Fundamental Rights. Second, it replaced the old Directive Principle in Article 45 with a new provision that reads 'The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.'

A few points must be noted. For one, the Act left open the coming into force of the amendments until a date to be gazetted by the government. This occurred on 1 April 2010. Second, and related to the first point, Article 21A contemplates enabling legislation. This was carried out in the Right of Children to Free and Compulsory Education Act, 2009 (RCFCEA), enacted in August 2009 and also entering into force on April 1 of this year. Third, it is as yet unclear how either the new Article 21A or RCFCEA relates to the holding in *Unni Krishnan.* The most important potential difference between the Supreme Court decision on the right to education and subsequent legislative and constitutional developments concerns the position of children aged 0 – 6, who are covered by neither Article 21A nor RCFCEA.[59]

4. Guidance on the Content of the Right to Education

Within the general framework of judicial decisions and constitutional and legislative developments set out above, we may look for guidance on the content of the fundamental right to education in two places: subsequent judicial decisions and the actual prescriptions of RCFCEA as the enabling legislation of Article 21A of the Constitution.

A. Judicial Decisions

[58] Ibid [193]. See also [185]: 'In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities gated by the Constitution.' Analyses of education expenditure in India are complicated by the fact that state governments are responsible for a large proportion of expenditure. This has lead to reasonably steep fluctuations within states and broad disparities among states. See Philip Alston and Nehal Bhuta, Human Rights and Public Goods: Education as a Fundamental Right in India (5) Center for Human Rights and Global Justice Working Paper – Economic, Social and Cultural Rights Series (2005) 24.

[59] See e.g. Vijayashri Sripati and Arun K. Thiruvengadam, India - Constitutional Amendment Making the Right to Education a Fundamental Right 2 J Int'l Const. L. (2004) 148, 155.

The case of *Avinash Mehrotra v. Union of India and Others* presents a recent examination of the content of the right to education.[60] This case concerned safety in schools and arose out of a fire that started in a middle-school in Madras. The school – a single thatched roof building with no windows and one entrance and exit – was a private school that was said to have 'sprung up in response to drastic cuts in government spending on education.'[61] The fire started in a nearby makeshift kitchen where cooks were preparing a midday meal, and killed many children.

After setting out the principles laid down in the cases mentioned above, the Supreme Court held that 'educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety.'[62] The Court went on to impose an obligation on schools to comply with certain fire-safety precautions, explicitly detailed in the judgment.[63] Moreover, the Court ordered the Education Secretaries of each State and Union Territory to 'file an affidavit of compliance of this order within one month after installation of fire extinguishing equipments.'[64]

More potentially relevant dicta may be found in the recent case of *Ashoka Kumar Thakur v. Union of India and Others*, which discusses at some length the relevant case-law on the right to education in the context of a challenge to reservations of places in educational institutions for certain classes and groups.[65] Justice Bhandari in particular discusses the right to education and calls for allocation of additional funds to achieve the mandate of Article 21A.[66] Moreover, he held that 'in addition to free education and/or other financial assistance, [children] should also be given books, uniforms and any other necessary benefits so that the object of Article 21A is achieved.'[67] This holding reiterates an earlier decision of the Bombay High Court which directed the state government to provide free text books to specified classes of children.[68]

B. RCFCEA

It is clear both that Article 21A envisaged comprehensive legislation to bring into effect the fundamental right to education and the Right of Children to Free and Compulsory Education Act constitutes that legislation.[69] Although the Act does not, on its face, mention Article

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[60] *Avinash Mehrotra v. Union of India and Others* (2009) 6 SCC 398

[61] Ibid [2].

[62] Ibid [30].

[63] Ibid [35] – [42].

[64] Ibid [41].

[65] (2008) 6 SCC 1.

[66] Ibid, Judgment of Bhandari J [70]. See also, *State of H.P. v. H.P. State Recognised and Aided Schools Managing Committee and Others* (1995) 4 SCC 507, [18]: 'The State must endeavour to review and increase the budget-allocation under the head "Education". The Union of India must also consider to increase the percentage of allocation of funds for "Education" out of the Gross National Product.'

[67] Ibid [74]. He continued 'Time and again, this Court, in a number of judgments, has observed that the State cannot avoid its constitutional obligation on the ground of financial inabilities.'

[68] Ganesh S/o Madhavrao Jadhav v. The Maharashtra State Board of Secondary and Higher Secondary Education and Ors (1992) 94 BOMLR 603.

[69] The Right of Children to Free and Compulsory Education Act, No. 35 of 2009, 26 August 2009.

21A, the language in the preamble tracks the constitutional amendment and indeed the two came into force on the same day, 1 April 2010. Moreover, even without such an explicit link, the Act is valuable in defining the Indian government's understanding of its obligations to its citizens in the sphere of education. For these reasons, it may be helpful to refer to the standards prescribed by the Act.[70]

The schedule to the Act is particularly relevant in its prescription of 'Norms and Standards for a School.' In terms of infrastructure, the Act requires 'separate toilets for boys and girls,' 'safe and adequate drinking water facility to all children,' and a 'kitchen where [a] mid-day meal is cooked in the school.'[71] Moreover, the provision of teaching equipment and a library is required. Despite the caveat mentioned above that the schedule to the Act is not an explicit articulation of the content of the constitutional right to education, these prescriptions may still be of some use in the *Sompa* case.

5. Remedies

The cases discussed above indicate a great willingness on the part of the Supreme Court of India to play an active role in attempting to ensure fulfilment of the right to education. This willingness started with the articulation and establishment of the right to education as a fundamental right and subsequently grew into the development of the right to include more than simply the provision of a classroom and a teacher. More recently, as the fire-safety case of *Avinash Mehrotra* shows, the Court's orders have included quite detailed prescriptions to government. Moreover, that case also demonstrates a creative approach to demanding compliance in the Supreme Court's demand that various Secretaries of Education file affidavits of compliance with the Court.

V. Conclusion

One common pattern in the three systems analysed above is the shift towards stronger protections of the right to education. Under the European Convention on Human Rights, this shift was marked by the willingness of the Court to ally the education right in the First Protocol with the right to equality. Likewise, the European Social Charter has been reinvigorated by the initiation of the collective complaints system. Finally, the Supreme Court of India sparked development of the right to education by locating it within the fundamental right to life rather than as merely a directive principle. These changes reflect growing recognition of the importance of social rights generally, and the right to education specifically.

[70] An analogy might be drawn here to the relationship between section 33 of the South African Constitution and the Promotion of Administrative Justice Act, 2000.

[71] Ibid, Schedule.