

**THE PROTECTION OF THE RIGHT TO EDUCATION IN THE
INTERNATIONAL, EUROPEAN AND INTER-AMERICAN HUMAN RIGHTS
SYSTEM**

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Abstract:

This thesis addresses the protection of the right to education in the international, european and inter-american human rights system. The aim is to understand the scope, content and mechanisms of protection under this three jurisdictions.

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Introduction

The right to education is a fundamental right recognized in almost all the constitutions of western countries as a human right. Its relevance is remarkable as it is not only a social right but also has the characteristic of being an instrumental one. Its exercise leads to the possibility of enjoying and enforcing rights such as the right to development, to work among others. Despite its importance its justiciability is always difficult to achieve in the interamerican system. The fact of being considered a socioeconomic right has contributed to this situation and to its neglect.

Contrary to other rights, there is a lack of analysis of the regional protection of the right to education. This does not mean that any scholar has studied it but that the approach has been from the international law rather than from a comparative perspective or domestic law. Dieter Beiter, Tomasevski and Hogson books give us a comprehensive overview and theoretical framework for initiating in its study¹. Beiter and Hogson concentrate in the universal system of protection of human rights, mainly all UN instruments. While Tomasevski, the former Special Rapporteur for the Right to Education has developed a basic and useful scheme to measure the accomplishment of the right to education using indicators such as acceptability, availability, accessibility and adaptability.

Regional systems have developed since the middle of the last century and have followed the same trend as the international instruments. I mean, they have recognized and positivize first the civil and political rights originating the European Convention of Human

¹ DIETER BEITER, K. *The protection of the right to education by International Law*, (Leiden, Martinus Nijhoff Publishers, 2006); TOMASEVSKI, K. *Education denied*, (London, Zed Books, 2003); HODGSON, D. *The human right to education*, (Aldershot,,: Ashgate Publishing, 1998)

Rights and Freedoms and the Inter-American Convention of Human Rights. Later, the attention came to the social, cultural and economical rights, in which normally is ascribed the right to education.

This thesis will concentrate on the study of the protection of the right to education in the international, European and Inter-American systems. It will focus on the main rights conflicts that have been litigated in the European Court of Human Rights and the special manner in which the Interamerican Court of Human Rights is addressing its protection. It would be noted that it is not invoked for alleging any violation, although the Protocol of San Salvador to the Interamerican Convention protects it in its article 13. Thus, there is a lack of regional jurisprudence on this topic. The comparative study of its enforceability and justiciability in other systems will enable us to understand the strategies to litigate socioeconomic rights in the Interamerican system.

I have divided this thesis in two chapters. The first one consists in the study of the legal and theoretical framework. The second one will focus on the problem of justiciability analyzing the jurisprudence from the three chosen jurisdictions.

The main outcome of this research will be to explain the strategies for litigating socioeconomic rights which would be useful for legal practitioners.

CHAPTER 1 - The Right of education its nature and legal protection

1.1 Theoretical framework

In spite of its undisputed importance for the development of the human being the right to education has been recognized as an individual right later. As asserted by Volio, life, freedom, equality and private property reached protection first². When elaborating a history of the right to education as we currently formulate the right it can not be overlooked the role that philosophers performed in this evolution.

John Locke and Rousseau constitute a milestone in the idea of education. The former one emphasizes the role of parents as guardians of their childrens freedom, which according to Volio corresponds to a right to education guardianship. Indeed, the focus on freedom during the seventeenth and eighteenth century put the seeds in the importance of education towards the formation of personality, independence inherent to every human being. A classic book regarding the philosophy of education, the Emile of Rousseau, considers the fruits of education necessary for life³.

The revolutions such as the French and the American one also contributed to the development of this right. In fact, the former one brought the idea of equality remarking the need of a public education as opposing to the greek of ideal of education which was far from benefiting the majority of people. The connection between education and the State is

² Volio, Fernando. The child's right to education: a survey. In: The child's right to education edited by Gaston Mialaret (Paris: Imprimerie des Presses Universitaires, 1979), 19.

³ "We are born weak, we need strength; helpless, we need aid; foolish, we need reason. All that we lack at birth, all that we need when we come to man's estate, is the gift of education." See: Rousseau, Jean Jacques. L'Emile.

found by Volio in Thomas Jefferson democratic ideals⁴. In effect, is with the emergence of the modern states that education ceased to be a private matter.

When Dogson traces the formation of education as human right, identifies two developments which helped to its conception: socialism and liberalism emergence⁵. The need of a secular education was urgent to be coherent with these prevalent views. Is in Germany where first appears a set of provisions recognizing this right in the Frankfurt Constitution or *Paulskirchenverfassung* of 1849. Here seven provisions deal with educational rights⁶. In the nineteenth century, the Weimar Constitution addresses these rights in the section of “Education and Schooling” in articles 142 to 150⁷. Another improvement can be found in the Constitution of the Union of Soviet Socialist Republics of 1936 who guarantess free and compulsory education at all levels⁸.

Dogson traces the apparition of this right in the international instance, these dates back to a minorities rights treaty between the allies and Poland just after World War I: Treaty between the Principal Allied and Associated Powers and Poland (1919), whose article 8

⁴ Volio, Fernando. The child’s right to education: a survey. In: The child’s right to education edited by Gaston Mialaret (Paris: Imprimerie des Presses Universitaires, 1979), 20.

⁵ Hodgson, Douglas. *The human right to education* (Aldershot: Ashgate Publishing, 1998). 9

⁶ See articles 152 to 158 from the Section “Basic Rights of the German People”. In: *Verfassung des Deutschen Reiches* "Frankfurter Reichsverfassung" bzw. "Paulskirchen-Verfassung" [vom 28. März 1849] <http://www.documentarchiv.de/nzjh/verfdr1848.htm>, as consulted on 21/03/2012.

⁷ See Weimar Constitution In: http://www.zum.de/psm/weimar/weimar_vve.php, as consulted on: 21/03/2012.

⁸ Article 121. Citizens of the U.S.S.R. have the right to education. This right is ensured by universal, compulsory elementary education; by education, including higher education, being free of charge; by the system of state stipends for the overwhelming majority of students in the universities and colleges; by instruction in schools being conducted in the native language, and by the organization in the factories, state farms, machine and tractor stations and collective farms of free vocational, technical and agronomic training for the working people. See: Constitution of the Soviet Socialist Republics (1936). In: <http://www.departments.bucknell.edu/russian/const/36cons04.html#chap10> As consulted on: 21/03/2012

protects education and use of language by guaranting the right to establish, manage and control the schools⁹.

As it can be seen, the UDHR is not the first document recognizing this right but mainly the most comprehensive and explicit one. Later we will address and analyze it. Now for a better assertion of the nature, scope and main characteristics of the right to education we will scrutiny it and formulate a theoretical framework.

1.1.1 Nature of the right

The right to education needs an integral approach, one which can note not only its needs or objectives but also its justification. Finally all human rights found one in the dignity of the human being. However, is in the right to education in which the relation to dignity can be seen so clearly and translucent. Delbrück, asserts that is because of this foundation that the right to education comes to be a “liberal (classical) human right” which looks for protection of the individual from State infringements¹⁰.

If we consider its effects on the human being, we may find that is also an empowerment right. The right to education offers the means for realizing other human rights. At the same time it offers as examples: social mobility, poverty can be overcome and women can be empowered. Nevertheless, education can not be reduced to this practical view¹¹. In fact, only with certain basic skills and knowledge the individual can be able to assume its rights and duties as citizens. As instrumental or empowerment right, the effective exercise of the rights is conditioned to the right to education.

⁹ Hodgson, Douglas. *The human right to education* (Aldershot: Ashgate Publishing, 1998). 10.

¹⁰ Delbrück, Jost. “The right to education as an International Human Right”. In: *German Yearbook of International Law*, 35, (1992): 104.

¹¹ Fisher, Angelina. “The content of the right to education-theoretical foundations”. In: *Center for Human Rights and Global Justice working Paper, Economic , social and cultural rights Series 4* (2004): 10

For other authors like Hodgson, education can be regarded as a welfare right as one can not self provide of it and its full achievement would lead the individual to master in a basic standard abilities necessary for living¹². For instance, in the majority of countries is the State the primary provider and has as one of its main duties the regulation and implementation of the right to education. Situation which has led to consider this right as one implying positive actions from part of the State. Furthermore, the right to education has been confined as a socioeconomic right. Although this assignation can not be regarded as entirely correct.

1.1.2 Is a socio-economic right?

The existence of two Pacts one devoted to civil and political rights and other to socioeconomic rights has been object of justification for this categorization. But, it should be regarded the history of the formulation of this legal instruments. As it is well known, it was conceived an all inclusive instrument, but some states mainly western states avocated for separate documents. Why occurred this? Mainly because of the conception that ESCR rights require positive state measures and are not capable of judicial enforceability.

The doctrine is divided when considering these distinctions and arguments vary largely. As synthetised by Beiter, ESCRs do not pass the Cranston test to qualify as human rights¹³. They are too imprecise, require resources for its realization, and consider that they are not universal and not morally compelling but utopic. Arguments have been provided to refute this radical position. It is assumed that ESCRs such as education or food are important and necessary. Lines before it has been said that education is an empowerment right. Moreover,

¹² Hodgson, Douglas. *The human right to education* (Aldershot: Ashgate Publishing, 1998). 20

¹³¹³ Cranston applies a four criteria test. "Firstly, the right concerned must be counterbalanced by a duty of the State which can pass the practicability test (in effect, the right must be judicially enforceable), secondly, legislation must suffice to secure the right, thirdly, the right must be genuinely universal and, fourthly, the right must be of paramount importance." See: Beiter Dieter, Klaus. *The Protection of the Right to Education by International law*. Leiden: Martinus Nijhof Publishers, 55.

also civil and political rights require some action from the State. For instance, to exercise the right to a fair trial, the State must provide a judicial system, legal assistance or interpretation which in all the cases generates costs.

Another author who poses an interesting justification for this division is Bossuyt. He considers that ESCR rights differ from CPR because of content and character, which is always the same everywhere and is absolute in case of the later. As pointed by Beiter, Bossuyt forgets the margin of discretion conceded to each State for the determination of the rights by the ECtHR, the derogations and limitations of some CPR rights whether in times of emergency whether in case of inherent limitations doctrine¹⁴. To sum up, Beiter consideration of a subtle difference due to a degree factor seem more appropriate when discussing about this distinctions.

Some scholars doubt of a full socio-economic right content of the right to education. Indeed, this right has a mixed content when it is deeply studied; the respect for parents position regarding the religious education arose in the ICCPR. So, from its mere placement and explicit formulation in the ICESCR can not be deduced this socio-economic right nature. Van Bueren points out the artificiality of this distinction as it overlooks its different dimensions, but when analyzed jointly it can be found that finally the right to education is non-derogable, characteristic which emphasizes its fundamental nature¹⁵.

¹⁴ Beiter Dieter, Klaus. *The Protection of the Right to Education by International law*. Leiden: Martinus Nijhof Publishers, 58-60

¹⁵ Van Bueren, Geraldine. "Education: whose right is it anyway?" In: *Human Rights: a european perspective*, edited by Liz Heffernan (Dublin: The Round Hall Press, 1994), 341.

Any hierarchy is implied in the formulation of these rights, as asserted by Nowak, on the contrary it is useful for the interpretation of its scope and extent¹⁶. However, in the practice of human rights it can be perceived that they are not taken seriously.

1.1.3 Relevant elements of the right to education

This right involves many actors. The State among others such as parents, mainly children, adults, civil society, entrepreneurs, etc.

Parents are included also as providers and as the entitled ones to choose among the different options taking into account the principle of the best interest of the child. (P.13 Fisher) Another function of the parents can be seen as what Fisher calls “guardians of pluralism”.¹⁷ It is important to consider that parents have been given an important role, recognized not only by international law and regional conventions but also by national constitutions and secondary state legislations.

The beneficiary is the child (in most of the cases), although the right to education is not only addressed to children or “minors in schooling age” but also to adults as part of the life long learning process. However, when a child is the beneficiary is his view or personal preference considered? Van Bueren argues that the child preferences and position regarding to his or her convictions has been forgotten in this instruments, posing an important question “which rights have children under international law, if they disagree

¹⁶ Nowak, Manfred. “The right to education”. In: *Economic, social and cultural rights* edited by Asbjorn Eide, Catarina Krause and Allan Rosas. (Dordrecht: Martinus Nijhoff Publishers, 1995), 195-196.

¹⁷ Fisher, Angelina. “The content of the right to education-Theoretical foundations”. Center for Human Rights and Global Justice working Paper, Economic, social and cultural rights series 4 (2004): 31.

with their parents choice of education¹⁸”. To regard the child as beneficiary should not mean that is a passive agent in his/her process of education. As the author has pointed out, the figure of a “silent receptacle of knowledge” representing the child attitude towards education.

If there will be the need to provide a content of the right to education which will emphasize the basic or minimum elements that shall be accomplished in order to consider the effective exercise of the right, then a core content concept of this right should be established. Coomans consider of great importance to give a core content to this right but also to all ESCR rights as it “also be seen as an answer to the notion of progressive realization and resource availability that are part of the Article 2 (1) ICESCR¹⁹”. In other words, the need for establishing a core concept of the right to education is indispensable not only to close the escape door to States unwilling to enhance any step or measure on its development but also not to take out the essence or substance of the right.

In the following lines the core concept of the right to education will be delineated according to the proposals of Coomans: minimum, universal and non derogable²⁰.

The core content of the right to education overpasses its simple provision in the ICESCR as is also covered by other legal international instruments, provisions concerning other rights which overlap with it because of the multiple dimensions of the right to education that has been mentioned before.

¹⁸ Van Bueren, Geraldine. “Education: whose right is it anyway?” In: *Human Rights: a European perspective*, edited by Liz Heffernan (Dublin: The Round Hall Press, 1994), 345.

¹⁹ Coomans, Fons. “Exploring the normative content of the right to education as a human right: recent approaches” *Persona y Derecho*. N°50 () 73.

²⁰ Coomans, Fons. “Exploring the normative content of the right to education as a human right: recent approaches” *Persona y Derecho*. N°50 () 75-78.

The access to education as formulated in almost all covenants is one of the most important elements. The ECHR in its negative provision “No one shall be denied the right to education, recognizes the universality and prohibition of discrimination in the sphere of education. Implying that disadvantaged groups may have access to education. Article 2 of the PIDESC and ICESCR enshrine non-discrimination principle.

Compulsory basic education is recognized in legal instruments as primary education. One may ask what is understood by “primary” or “basic” as these variates among States and if only the school based system is comprehended. What is relevant to remark is that this provision has for aim to ensure primary education to everybody and especially to protect the child against the control of the parents whom for whichever reason could oppose to the full exercise of this right and deprive him/her from receiving education.

The guarantee for exercising the right is that it shall be free, being the State the main provider. This does not mean that private institutions should provide free education or that the State should subsidize them. However, it can be understood that there exists a freedom to establish and direct educational institutions from the limitation clause (of the Art. 13 (4) of the ICESCR), whenever the program developed by those institutions is coherent with the aims of education.

Instruments promote that education should have a content of quality. Indoctrination is not education. Consequently, the program should have a pluralistic spirit.

As the beneficiary of education, mainly the child, is a subject of law and his/her dignity and best interest is the guideline principle for the exercise of all his/her rights, education shall be provided free of inhuman disciplinary measures. Article 28 (2) of the CRC mention discipline and punishment in schools, this is a unique provision. If completely

convinced this applies to public schools, Nowak is a bit doubtful whether there is recognition of horizontal effects in private schools²¹.

Parents enjoy liberty when choosing the kind of education that their children should receive. State, therefore, must respect their convictions. This is a right comprehended not exclusive of the right to education but also a civil right as component of the religious freedom (in Article 18 (4) ICPR). Special importance must be given when these convictions are “racist, hostile to human rights, or antidemocratic²²”. Therefore, this right is not absolute.

Core content create core obligations for the State in order to achieve the exercise of the right. As mentioned in the General Comment N° 13, States have obligations to respect, protect and fulfil mainly, create obligations of conduct and result. Following the 4-A scheme provided by the Tomasevski, former Special Rapporteur on the right to education, is possible to develop indicator in order to measure if the State has accomplished its duty to make education: available, accessible, acceptable and adaptable²³.

1.2 Legal framework

1.2.1 Universal protection system UN

The fact that the Universal Declaration of Human Rights (UDHR) contains the right to education is due, according to Novak, to the commitment of the socialist countries representatives when elaborating the Universal Declaration²⁴. Education can be seen as

²¹ Nowak, Manfred. “The right to education”. In: *Economic, social and cultural rights* edited by Asbjorn Eide, Catarina Krause and Allan Rosas. (Dordrecht: Martinus Nijhoff Publishers, 1995), 208-209.

²² Beiter Dieter, Klaus. *The Protection of the Right to Education by International law*. Leiden: Martinus Nijhof Publishers, 557.

²³ Tomasevski, Katarina. UN DOC. E/CN.4/1999/49. Following reports and working papers on relation to indicators of the right to education provide the 4-A scheme.

²⁴ In the socialist concept, on the contrary, the right to education, together with the right to work and the right to social security, figured among the most prominent human rights which were conceived as individual rights

contributing to form the basis of “individual dignity and self-respect”²⁵. Its article 26 (3) gives a priority right to parents when choosing the kind of education for their children. It is surprising that in the CRC the respect for parents rights conviction in education can not be found in any provision, which as sustained by Van Bueren could lead in a situation in which the rights of the child could override parents decisions when they threaten the health or safety of the child²⁶.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the first legally binding universal instrument aiming to protect the right to education. Under its article 13 and 14 the elements of the right to education are delineated. This instrument has inspired regional and other instruments in the formulation of this right. Its content has already been explained lines before, but also in the following lines the main elements will be addressed in the General Comments (GC) of the Committee on Economic, Social and Cultural Rights (CESCR).

The CESCR, monitors rights contained in the ICESCR since 1986. The Committee works in a review function and normative function basis²⁷. The CESCR scrutinize governmental reports and also delivers general comments, elaborates Ad hoc reports, and conducts visits. But there is not an individual or interstate petition procedure. This situation may be solved as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Covenant OP-ICESCR has been adopted on 2008. When it enters into force, individual applicants will be able to present their complaints directly to the Committee,

that required positive action by the State and society. See: Nowak, Manfred. “The right to education-Its meaning, significance and limitations”, *Netherlands Quarterly of Human Rights*. Vol. 9, N° 4 (1991): 418

²⁵ Hodgson, Douglas. *The human right to education* (Aldershot: Ashgate Publishing, 1998). 19

²⁶ Van Bueren, Geraldine. “Education: whose right is it anyway?” In: *Human Rights: a european perspective*, edited by Liz Heffernan (Dublin: The Round Hall Press, 1994), 347.

²⁷ Beiter Dieter, Klaus. *The Protection of the Right to Education by International law*. Leiden: Martinus Nijhof Publishers, 345

overcoming the current limitation of the ICESCR which previews only a reporting procedure which could disregard disadvantaged groups and personal petitions²⁸.

The CESCR has delivered some general comments (GC), in regard to the right to education two are relevant. The General Comment N° 11²⁹ Plans of action for primary education, explains the duty acquired by States consisting on drawing a plan of action in order to achieve compulsory primary education free of charge. This plan will have a progressive implementation however this does not mean that can be postergated as it is remarked “the time-frame must be fixed in the plan”. Stressing in this manner the importance of the right and the inflexibility of the duties acquired by the States parties in the ICESCR.

The General Comment N° 13³⁰ on the Right to education, elaborated by the United Nations Committee on Economic, Social and Cultural Right (UNCESCR) in collaboration with UNESCO. This comment should be considered together with GC N° 11 discussed before. GC 13 has an assumption: the right to education is indispensable for the full exercise of other human rights; it is conceived as an empowerment right. Focusing on the normative content of Article 13 the comment will address with remarkable detail the States obligations. The right to receive an education has to be interpreted accordingly with the conditions of the State in concern and shall regard what has been called the four A`s, such as: availability, accessibility, acceptability and adaptability. And indicates a novel principle such as the best interest of the student.

²⁸ Was adopted on 10th December 2008 by Resolution A/RES/63/117 with 39 signatory states The Optional Protocol has been ratified by eight States: Spain, Ecuador, Mongolia, Argentina, Brazil, Bolivia, Bosnia and Herzegovina, and Slovakia as the last one (March 7th, 2012) . Only two more ratifications are needed for its entrance into force.

²⁹ E/C.12/1999/4

³⁰ E/C.12/1999/10

Remarks the compulsory character of the right to primary education, although it does not provide any definition of it. This lack of definition is problematic as the approach and length of primary education can vary between States. However, there is a guideline like the correspondence to basic education maintaining some distinctions. While primary education must be free, secondary education can be free according to the progressivity principle, so States are obliged to take “concrete steps”. Higher education differentiates mainly in its availability character because it is conditioned to the capacity of the individual.

Article 13 comprehends the right to fundamental education which is hold by every person, not limited to children. This can found its explanation in the idea that education is a process which extends on life.

Right to education also includes the right to educational freedom which other legal documents refer to. Particular reference is made to the freedom of public schools to instruct in religious topics when this is made in an “unbiased and objective way”. Furthermore, parents enjoy the liberty to choose among public and private schools, having a complementary provision article 13 (4) which states right to establish and direct educational institutions.

There are some provisions in the Covenant which are not conditioned to the availability of resources such as the prohibition against discrimination and equal opportunity. The progressivity principle, as emphasized by the GC, does “not deprive States parties of all meaningful content”. It also refers to the obligation to ensure at least the enjoyment of the minimum essential level as referred in its General Comment n° 3. When States fails to fulfill the normative content of article 13 occur a violation whether by act of commission or by omission.

The Declaration of the Rights of the Child³¹ adopted by United Nations General Assembly on 20 November 1959 dedicates its seventh principle to recognize the right to education. There are three obligations which society and public authorities must fulfil, according to Volio³²: the supply of a public education system, the task of making education compulsory and finally to make it free at least for elementary level. The declaration conceives education as a mean which will enable the child to become a useful member of society. According to Dogson, this entails a social utilitarian perspective but also can be seen as a condition for a complete individual development³³.

However, this instrument was not binding because of its nature of declaration; it provided a guideline and constitutes a precedent to the CRC.

The Convention on the Rights of the Child adopted in 1989³⁴, is by so far the most accepted human rights instrument in history. It can be asserted that almost all world states are parties: 193. The CRC is a legal instrument which constitutes an advance point in the protection of children. First, because it conceives the child not as a minor only characterized by his or her particular frailty but as a subject of rights. Second and consequence of this conception, the children as bearer of rights needs an integral protection for an effective realization of his/her rights. Funding in this manner the so called integral protection doctrine. And third, all interpretation of their rights must be done according to the best interest of the child. This last principle mainstreams the whole CRC.

³¹ Adopted by UN General Assembly Resolución 1386 (XIV) of 10 December 1959

³² Volio, Fernando. The child's right to education: a survey. In: The child's right to education edited by Gaston Mialaret (Paris: Imprimerie des Presses Universitaires, 1979), 25-26.

³³ Hodgson, Douglas. *The human right to education* (Aldershot: Ashgate Publishing, 1998). 18-19-

³⁴ Convention on the Rights of the Child, adopted by General Assembly resolution 44/25 in New York, 20 November 1989.

In order not to repeat or enumerate the rights comprehended in the CRC I will point out the provisions which have a particular rights, those ones who are not found in other legal instruments. The CRC devotes to articles to the right to education: 28 and 29. Having a resemblance with the ICESCR as noted by Coomans, there are is a particularity regarding the realization of the right to primary education: it appears that the provision could not be so strict in the enforceability because uses the verb “make”³⁵. Other features are the references to school discipline in conformity to children dignity in article 28.2 and the prevention of child labour in article 32.1.

The CRC has a monitor mechanism consisting on the submission of country reports by state parties. These reports are repected and examined in the Committee of the Rights of the Child by eighteen experts acting in independent capacity, however they are nominated by the States parties. But there is not procedure for receiving citizens complaints.

Recently on 28th February 2012, a new instrument has been opened for signatures, this is the Optional Protocol to the Convention on the Rights of the Child on a communications procedure- OPIC³⁶.

The General Comment N°1 entitled “The Aims of Education”³⁷, explains the significance of article 29 (1) of the CRC. In sum, this provision can be seen as an ethical framework which mainstreams the whole convention as children rights can not be seen one apart from the other. Moreover, this provision explicitly sets the obligation of the State to provide an

³⁵ Reading the provision: 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; Coomans founds that the UDHR and the ICESCR are stricter. See: Coomans, Fons. “Exploring the normative content of the right to education as a human right: recent approaches” *Persona y Derecho*. N°50 () 71

³⁶ A/RES/66/138

³⁷ CRC/GC/2001/1

education of quality, “underlines the individual and subjective right to a specific quality of education”. Indeed, education is aimed to make possible for children enjoyment and adequate life in a free society. Therefore, the education which he or she shall receive must be one which enshrines the values impregnated in the CRC, going beyond schooling the GC prefers to give a holistic approach. In order to monitor the fulfillment of this provision the Committee asks the States to indicate in their reports the programme of activities taken in relation to art. 29 and to the main problems it can pose on their respective jurisdictions. It must be remarked that the resource constraints will not exempt a State party of this obligation.

There exist other international legal instruments which directly or indirectly protect the enjoyment of the right to education: Article 5 (e) (v) of the Convention on the elimination of all forms of racial discrimination (CERD), the Convention relative to discrimination in the educational sphere and its Protocol, Article 10 of the Convention on the elimination of all forms of discrimination against women (CEDAW).

1.2.2 European protection system

This system belongs to the Council of Europe (CoE) established in 1949. The treaty which forms its legal base is the well known Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols. A supervisory body monitored the Convention and other instruments, initially it was formed by a Commission and a court but since the adoption of Protocol 11 it only comprises a permanent Court (ECtHR) which is based in Strasbourg. The ECtHR has a contentious and limited advisory competence. And complaints can be filed by any individual, group of individuals or NGO which consider being a victim of a violation. When there is a finding on the merits in contentious cases a declaratory public judgement is given. It has to be remarked that the court has the

possibility to order precautionary measures. Finally, the compliance of its decisions is monitored by the Committee of Ministers of the CoE. In regard to the right to education, it is protected and can be litigated in the ECtHR.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not contain any article which protects the right to education. But in its First Protocol (1952) is found a cathegoric provision stating that “no person shall be denied the right to education”. This negative formulation is particular. According to Dogson, apart from avoiding a form which could entail positive obligations for the States by the time the Protocol was adopted there was no need in Europe to require an educative system as all parties had already one³⁸. However, Koch considers that this particular formulation puts an emphasis on the negative components and at the same time gives strong parental rights³⁹. The explanation for this conception may be founded in the context and circumstances when the Protocol was drafted, as we know, much before the CRC was adopted. Therefore, the conception that prevails during that moment is of a child in need of protection, properly a minor and not a subject of rights.

Koch doubts of a positive content according to the wording of the provision, therefore she proposes a dynamic interpretation as the Gadamer doctrine, in order not to make use of the preparatory works “from the middle of the last century.”⁴⁰ However, other scholars such as de Groof consider another reading: the provision of the Protocol effectively guarantees a right to education in its first sentence but also rights of parents to ensure their children

³⁸ Hodgson, Douglas. *The human right to education* (Aldershot: Ashgate Publishing, 1998). 56

³⁹ Koch, Ida Elisabeth. “The Right to education under the ECHR”. In: *Human Rights as indivisible rights. The protection of socioeconomic demands under the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2009), 177.

⁴⁰ Koch, Ida Elisabeth. “The Right to education under the ECHR”. In: *Rights Human Rights as indivisible rights. The protection of socioeconomic demands under the European Convention on Human* (Leiden: Martinus Nijhoff Publishers, 2009), 178.

education according to their convictions⁴¹. Indeed, is in its caselaw that the ECtHR has delineated this right, has given it a precise content. Sometimes looking for the intention of the legislator in the travaux préparatoires, and in others interpreting in the light of principles such as the one which states that the Convention is a living instrument for example. In the chapter two this evolution and particular approach of the Court will be treated deeply.

Coherent with the indivisibility of human rights, the right to education can not be detached from other rights protected under the ECHR. This is why, in any case a differential treatment occurs in relation to the right to education, article 14 can be used jointly.

The European Social Charter (ESC) does not refer to “education” but to “vocational guidance and training” in its article 9. Also establishes in its article 10 a system of apprenticeship. It is the Revised charter (RESC) the one who addresses education in its article 17.2 but there is no mention on its compulsory character.

1.2.3 Inter-american protection system

This system forms part of the Organization of American States (OAS) established in 1948 by the Charter. Its legal base apart from the Charter is constituted by the American Declaration on the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969) and its protocols and other conventions. Later, was established a Commission (1960) based in Washington DC. and then a Court (1979) which is based in San José de Costa Rica. In comparison to the ECtHR, the IACtHR has a broad advisory jurisdiction apart from its natural contentious jurisdiction. But the position of the individual regarding access to file complaints is very limited. This is due to the particular

⁴¹ De Groof and Gracienne Lauwers. *No person shall be denied the right to education. The influence of the European convention on Human Rights on the Right to Education* (Nijmegen: Wolf Legal Publishers, 2004), 18.

composition of the system. The inter-american system has-differentiating to the European system- a Commission and a Court which operate consecutively. Any person or group of persons, an NGO can file complaints to the Commission. But, after pursuing the process in this instance, is the Commission the one who will decide based on a report if will send the case to the Court. It has to be noted that also a State can directly address the Court, but as usual in all systems, States do not accuse each other.

Another important differences with the European system are that the IACtHR is not a permanent body but works on sessions which can be ordinary or extraordinary, and that when finding merits on a case can order compensation or some form of reparation. Moreover, in the inter-american system thematic and country rapporteurs can be appointed by the Commission. Finally, the monitoring of compliance is the responsibility of the General Assembly and Permanent Council of the OAS. In relation to the right to education it can be litigated as it is recognized in the Protocol.

The importance of the right to education in the inter-american system can be traced back since the foundation documents of the Organization of American States in 1948. In its Charter as amended later by the Protocol of Buenos Aires, the relevant position that occupies the right to education is evident. Appearing in several provisions: articles 31 (enhancing cooperation for development in the cultural and educational fields among others), 47 (priority to development plans on education), 48 (cooperation to meet educational needs), and 49 (effective exercise of right to education in the three levels: elemental, middle and high) included in the chapter concerning integral development, the right to education can be perceived as a “right instrument” and a right closely interrelated to dignity and human development. This interrelation will be appreciated in detail in the

following chapter where will be discussed the progress and problems of its effective in a selection of jurisprudence of the ICtHR.

In the American Declaration of the Rights and Duties of the Man (1948) the right to education is recognized in its article 12, stating the values that will inspire the exercise of the right such as liberty, morality and human solidarity⁴². Elementary education shall be provided for free. It can also be perceived an antecedent of the principle of progressivity in its formulation as it establishes the equality of opportunities according to merits, talents and the desire to use the resources that “the state or the community is in a position to provide”. This could mean that the equality of opportunities whether in access or acceptability is conditioned by the economy of the concerned State. Although, this is a Declaration and not a treaty in the case of State parties of the OEA has a particular application. The Inter-american court in one of its Advisory Opinions has stated that the Declaration is the instrument which contains and defines the rights referred in the organization charter. By consequence, for OEA State parties the declaration is a source of international obligations.⁴³

The American Convention on Human Rights (ACHR) so called Pact of San José (1969) does not explicitly mention the right to education, but in its provision relating to socio economic rights, article 26 establishes the principle of progressivity. Nevertheless, the ACHR does not recognize per se socio economic rights but remits to the OEA Charter. Therefore any State obligation can not be derived directly from this provision in relation to socioeconomic rights. But, at the same time as Abramovich remarks, it is not correct to deprive this provision from any operative character. In one hand, we can not consider it as

⁴² The ADHR ignored the differentiation between civil, social and economic rights. Including in its vast list to other rights such as: protection to maternity, preservation of health, right to work and to salary, as examples.

⁴³ Advisory Opinion OC-10/89

unoperative; and from the other, it is not a complete catalogue of socioeconomic rights. So, Abramavich proposes an interpretation consisting that this article states a commitment from State parties to take measures in order to achieve the full realization of the rights mentioned in the OAS Charter progressively⁴⁴.

One may question which rights are those derived from the OEAS Charter. Considering that the Charter does not enshrine rights but principles, this is a first obstacle for the visibility of rights. In the article 49 as it has been mentioned the Charter refers to the States proactivity in relation to education, one may deduce from this provision that article 26 could create some commitment to State parties.

Is in an additional protocol, known as Protocol of San Salvador adopted almost twenty years later, where there is an explicit recognition of the right to education in a binding document in the American continent. Article 13, an extensive provision which according to doctrine resembles the ICESCR, delineates the content, accessibility and availability of this right. Moreover, the Protocol converts the right to education in an exigible right, meaning that it is possible to litigate- article 19.6- towards its protection in the Inter american commission of Human Rights and proceed if it's the case in the Inter american Court of Human Rights. In this manner, the right to education upgrades (to say) its level of protection, as is not only monitored by the evaluation of State reports which is the case with other socioeconomic rights such as (health, work or protection of the elderly) but also enhances its exigibility in the Courts.

⁴⁴ Abramovich, Victor and Julieta Rossi. La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos. In: *Derecho Internacional de los Derechos Humanos* compiled by Claudia Martín, Diego Rodríguez Pinzón and José Guevara. (México: Fontamara-American University-Universidad Iberoamericana, 2004), 460.

The Inter American system has experimented an important progress on the evaluation of accomplishment of the States duties regarding socio-economical rights. The General Assembly of the OAS has adopted the Resolution AG/RES-2074 (XXXV-O/05) which includes the Standards for the preparation of periodic reports to the Protocol of San Salvador. This standards have as main aim to “draw up guidelines and rules for the preparation of the reports⁴⁵” mandated in Art. 19 of the afore mentioned protocol. To summarize, the importance of this instrument is to provide a new tool which can help not only the OEA but also the States to be conscious of the advances and progress in the respect and status of this rights- so called reciprocity principle. The reports prepared in consultation with civil society organizations must be submitted each three years to the Secretary General of the OEA, who will transfer them to the CIDI and to the IACHR in order to formulate observations or recommendations if it’s the case⁴⁶. Eventually the report can be included in the Annual Report. A relevant contribution is the definition of the principle of progressiveness “notion of gradual advancement in creation of the conditions necessary to ensure the exercise of an economic, social, or cultural right”⁴⁷. This can have a positive effect for the interpretation of progressivity in DESC rights which normally has been postergated. Moreover, the report will consider a system of progress indicators which will cover different rights but at the same time will be crosscutted in order to provide meaningful information. Considering gender, people with special needs, ethnic and cultural diversity among others.

⁴⁵ Standards for the preparation of periodic reports pursuant to the Protocol of San Salvador (2005)AG/RES 2074 (XXXVO/05)

⁴⁶ The Interamerican Council for Development- CIDI will provide a group of experts. In its framework they will examine the Report and propose recommendations.

⁴⁷ Standards for the preparation of periodic reports pursuant to the Protocol of San Salvador (2005)AG/RES 2074 (XXXVO/05), 5.1

CHAPTER 2 - Justiciability of the Right to Education

2.1 Understanding justiciability

As commonly ascribed to the classification of social, economical and cultural rights, the right to education is object of suspect of lack of justiciability. Coomans previews the problem of justiciability interlinked with the status as a “second rank” human right among courts and legal operators⁴⁸.

What justiciability means in this paper is what Viljoen describes as a right “which can be object of a claim (or petition), about the setting in which it may be resolved and about the consequences of successfully invoking it”⁴⁹.

Whenever, in the systems under study the UN, the european and the inter-american a variation in terms of manners to address justiciability will be found. It is without doubt that in the european system, the right to education is justiciable as confirmed by a great number of cases. However, in the inter-american system has to be noted that there has been yet no case which bases its claim on article 13 of the Protocol of San Salvador. Nevertheless, the right to education has been treated indirectly.

If the legal operators and claimants do not use article 13 of the Protocol another solution could be to use the article 26 of the ACHR. But it has been perceived that the presence of article 26 of the CADH does not contribute in an effective positive way to the protection of

⁴⁸ Coomans, Fons. “Exploring the normative content of the right to education as a human right: recent approaches” *Persona y Derecho*. N°50 () 62.

⁴⁹ Viljoen, Frans. The justiciability of socio-economic and cultural rights: experience and problems. In: *Human Rights in Education, Science and Culture. Legal developments and challenges* by Yvonne Donders, Vladimir Volodin.(Cornwall: Ashgate, 2008) 55

the DESC⁵⁰, at least a priori. Indeed, applicants do not use this article aimed to DESC in order to claim for violations of this right. When it has been used, the court has been reluctant to consider a violation. As an example the *Five Pensioners v. Perú* case.

In the following section, selected cases will be discussed in order to determine how has been the strategy to make them justifiable.

2.2 Case law and other means of protection relevant to the right to education

2.2.1 Analysis of European Case law

First, a brief overview of the application procedure. An individual may present an individual complaint to the ECtHR whenever consider to be personally and directly affected by a violation of a human right contained in the ECHR and its Protocols. Before all domestic remedies must have been exhausted and is within the period of six months from the last decision. After examining the accomplishment of the admissibility criteria set in the article 35 of ECHR, an intent of friendly settlement will be tempted. If it is not reached, then the court will examine the merits and determine if there has effectively occur a human right violation conceding just satisfaction and/or the refund of expenses. The execution of the judgement will be supervised by the Council of Ministers.

In this section relevant cases will be analyzed in order to understand the interpretation and application of the provisions protecting the right to education.

⁵⁰ “A priori, il paraît peu probable que les droits économiques, sociaux et culturels, puissent, en tant que tels, fonder un constat de violation dans le cadre de la procédure contentieuse de la Cour. En effet, la formulation de ces droits en termes de développement progressif atteste du caractère programmatique de l’article 26 et semble le soustraire, à défaut de contenu substantiel, au contrôle contentieux interaméricain.” Hennebel, Ludovic. *La Convention américaine des droits de l’homme. Mécanismes de protection et étendue des droits et libertés* (Bruxelles: Bruylant, 2007), 737.

The *Belgian Linguistic* case was the first case related to the right to education. Belgian legislation provided that state schools will teach only in the official language and that private schools will teach also in the official language if wanted to receive public funds. The applicants alleged that their right to education was violated in conjunction with article 14 and 8, because them (French speaking) resided in Dutch speaking areas and could not have access to French speaking schools in the periphery of Brussels. The court found a breach in article 2 of the protocol however, not for reason of language choice but for discrimination based on the place of residence.

This case served to the Court to start giving the content to the right to education, especially to determine its scope. Therefore, the right to education as stated in the Protocol needs State regulation, which naturally “may vary in time and place according to the needs and resources of the community and of individuals⁵¹.” So, when reading the second sentence it must be evaluated as a whole. By consequence, there will not be any right to pursue education in the language of preference or choice of the parents. The respect is for the individual convictions, philosophical and religious which does not include languages.

What is guaranteed is the right to access to the existent educational establishments, which will give classes in the official language of the region.

The *Timishev v. Russia* case⁵² clearly addresses the conditions of accessibility of the right to education. Ilyas Timishev applied to the ECtHR alleged several violations (article 2 of Protocol N°4 alone or in conjunction with article 14 of the convention) and the violation of article 2 of Protocol N°1, which is the focus of interest in this dissertation. Timishev is an ethnic Chechen who had to abandon his property after its destruction due to a military

⁵¹ Mowbray, Alastair. *Cases and materials on the European Convention on human rights* (Oxford: Oxford University Press, 2007), 960.

⁵² Applications n°s 55762/00 and 55974/00

operation in 1994. He went to live to Nalchik and have complex problems regarding the obtention of a permanent residence and the freedom of movement on that region. His children, who were attending classes in the town school, were refused re-admission to school because he was not able to present a migrants card⁵³. The applicant exhausted all domestic remedies, complaining first to the Town Court and then to the Supreme Court which upheld the decision arguing that if they lack appropriate registration of their residence, then his requests for schooling are unsubstantiated. Moreover, the regional education department argued that the school was overcrowded.

The *Folgero and others v. Norway* case⁵⁴ is a recent one. The case originated on a parents complaint against a new course in “Christianity, Religion and Philosophy” which was taught in the compulsory school system of Norway. The opportunity for exemption of the course was limited and conditioned to the justification that parents have to give for it, implying that they should know some details of the program. The Grand Chamber decided that there has been a violation of the article 2 of the Protocol of the Convention. Based on principles established in previous cases it assured that the right of parents to choose education according to their religion and philosophical conviction must be respected by the State while safeguarding pluralism in education. The course was not found to be objective.

When addressing the issue of the content, pluralism must be always taken into consideration, finally as recognized by Jacobs the lines are so fine when defining what is

⁵³ Mr. Timishev has had to surrender his migrant card in Exchange for compensantion for his lost property in the Chechen Republic.

⁵⁴ Application n° 15472/02

permissible and what is not in regard to the parents religious and philosophical convictions⁵⁵.

The *Kjeldsen, Busk Madsen and Pedersen v. Denmark* case⁵⁶ is one of the first cases concerning the right to education. It originated in various applications of Danish parents of children in school age who objected the subject of sex education in state primary schools. Although, private schools were not obliged to teach this subject, the applicants could not consider the option to enroll their children there as those schools were situated very far from their homes. They asked to have their children exempted from taking these classes. The Court considered that article 2 second sentence prohibits indoctrination, which can not be found on the present case. Therefore, there has been no breach of article 2 of Protocol n° 1 and article 14 of the ECHR.

Kjeldsen case is relevant to understand now one of the main elements in defining education such as acceptability. Here, what is important is the content, the substance, an education of quality which is perceived by a good program. The ECtHR is interested in protecting the persons from being indoctrinated. Moreover, expressly admits that the knowledge may have some religious kind as to pursue a complete neutral education is an impracticable exercise⁵⁷. What is then established is the condition that the knowledge shall be imparted in an “objective, neutral and pluralistic manner”. Setting the limits, the court remarks that

⁵⁵ Jacobs, White et. Al. *The European Convention on Human Rights* (Oxford: Oxford University Press, 2010), 517.

⁵⁶ Application n° 5095/71, 5929/72, 5926/72

⁵⁷ See paragraph 53 of the judgement: “In particular, the second sentence of Article 2 of the Protocol (P1-2) does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature.”

the aim of education is not to indoctrinate. In the particular case, attention has been given to the fact that the content of the course did not incite them in a way that attempted against their stability or health. As it can be inferred, the Court applies a fair balancing considering from one side the interest of the parents and from the other of the society, in this case a well informed school population (prevention of unwanted pregnancies).

Another feature to take into account is the holistic interpretation of the ECHR made by the Court. Considering not only article 2 of Protocol 1 but also other articles of the Convention such as articles 8, 9 and 10.

The *Campbell and Cosans v. UK* case⁵⁸ is an old landmark in the right to education. It concerns the practice of corporal punishment as disciplinary measure in Scottish schools. In the case of Campbell, the Regional Council correspondent with her child school refused to guarantee an exemption of application of punishment. And in Mrs. Cosans case, the child was suspended from school due to being unwilling to accept the punishment. Although, he was offered readmission the parents refused it because they conditioned it to not receive any punishment during his studies and the school did not accept it. The parents claimed there was a breach of article 3 of the ECHR and of article 2 of the Protocol. In its judgement the Court did not find a violation of article 3 but that it has been a violation of the right to education, in concrete the second sentence related to the parents' convictions. UK has to respect the parents' convictions and the condition to reaccess to the school implied to go against them.

Campbell is so relevant, it gives a definition about children education “ is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the

⁵⁸ Application n° 7511/76 and 7743/76

transmission of knowledge and to intellectual development.⁵⁹” because it gave an insight of what the term conviction means to the court. Indeed, the interpretation given has been a broader one, similar to beliefs it entails the satisfaction of criteria. “Must be convictions worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with any right of the child to education.”⁶⁰ Consequently, philosophical convictions are applied to corporal punishment. Attention to the fact that is not that corporal punishment is forbidden but what is in breach of human right is the fact that the idea of corporal punishment is against the philosophical convictions of the parents. Therefore, is a matter of parents rights. Naturally, after 1989 this disciplinary practice was banned thanks to the CRC⁶¹.

Another point to consider is the limitation of state powers that has been asserted by the Court. As Mombray states State can not suspend more pupils for this kind of reasons in public funded schools⁶².

The term “convictions” is so comprehensive, however the following rulings of the Court have constrained it gradually⁶³. It has not been understood as an open clause and only satisfying the criteria can be claimed protection under that provision. As Koch concludes, what the Court did in this case was aimed to “regard the entire issue in a concrete context

⁵⁹ Para. 33

⁶⁰ Par. 36 Judgement Cosans

⁶¹ But this does not happened everywhere. It Is referred that pupils in private schools were still subjected to corporal punishment until 1999. See: De Groof and Gracienne Lauwers. *No person shall be denied the right to education. The influence of the European convention on Human Rights on the Right to Education* (Nijmegen: Wolf Legal Publishers, 2004), 55.

⁶² Mowbray, Alastair. *Cases and materials on the European Convention on human rights* (Oxford: Oxford University Press, 2007), 960.

⁶³ That is the case with the parents linguistic preferences as determined in the Belgian Linguistic cases for example.

and in the light of contemporary value conceptions.⁶⁴” Furthermore, the State margin of appreciation finds a limit which is the religious and philosophical convictions of parents⁶⁵.

When comparing both cases Campbell and Kjeldsen, can appear one question: why in the former case the Court upheld the parental objections while in the other not? Jacobs advances one explanation consisting on the fact that punishment involves the physical integrity while sex education “reflects the duty of the State to provide children with information.”⁶⁶

The Roma cases:

The *D.H. and others v. the Czech Republic* case⁶⁷ concerns the placement of eighteen Roma children in special schools aimed for learning disabled students in the Ostrava region of the Czech Republic between 1996 and 1999. During this time, the Czech “Schools Act” prescribed that students who finished elementary education in special schools would not continue studies in the secondary schools. The Court found a breach of article 14 (prohibition of discrimination) together with article 2 of Protocol nº1. This was the first case of indirect discrimination in the field of education.

The *Orsus and others v. Croacia* case⁶⁸ is one that had a not favorable result and is considered as a setback for Roma Rights. The background consists on Roma students who had to study in separate classes because they did not mastered the Croatian language. They claimed that this was because of racial discrimination, as they belonged to the romani

⁶⁴ Koch, Ida Elisabeth. “The Right to education under the ECHR”. In: *Human Rights as indivisible rights. The protection of socioeconomic demands under the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2009), 166.

⁶⁵ Sudre, Frédéric et. al. *Les grands arrest de la Cour européenne des droits de l’homme*. (Paris: Themis, 2009), 598.

⁶⁶ Jacobs, White et. al. *The European Convention on Human Rights* (Oxford: Oxford University Press, 2010), 517.

⁶⁷ Application nº57325/00

⁶⁸ Application nº15766/03

group. In its decision, the Court did not find any prejudice against them and considered justified their placement in separate classes. Moreover, it was highly positive for their acquisition of knowledge.

And the *Sampanis and others v. Greece* case⁶⁹ originated in an application for failure to provide schooling for their children during one year and their posterior placement in separate classes. The first day of classes parents of non-roma students organized a protest and blocked the school as a sign of not agreeing with the admission of Roma students. Under pressure Roma children parents signed an authorization in order to transfer their children to another prefabricated building. The parents claimed their children right to education has been violated taking into consideration article 14 (prohibition of discrimination). Indeed, the court found a breach of those rights and did not consider valid the previous authorization signed by the parents as nobody can waive the right of a prohibition of discrimination.

The relevance of this cases flows from the deprivation of all the elements of the right to education. Indeed, accessibility, availability, acceptability and adaptability have been affected. Accessibility because they are not accepted in normal, ordinary educational centres as the non-roma school boy or girl. Availability due to lack of special teachers, staff to help this children or adolescents with the problems they may face due to their particularity of belonging to a minority. Acceptability because it is not education of quality what they are receiving. In fact, when being assigned to special sections or special education they are receiving instruction not accorded to their capacities. And finally, adaptability because they are not taught in their language, romani, but in the official one of

⁶⁹ Application n° 32526/05

the State. However, as it has been mentioned, article 2 of Protocol 1 does not guarantee the education in the language of one choice but in the official or available one.

In *D.H. and Others*, the court focused its attention in the disproportionate number of romani students in special sections, and found there grounds for a strong presumption of indirect discrimination which the State had to revert. Moreover, the case was not examined on its individual basis but on the collective one, as they were members of that community who was being affected by the discrimination.

This judgement is highly appreciated due to three facts, as stated by Devroye: the founding of systemic discrimination, the application of the principle of indirect discrimination and the treatment of evidence. And the impact which may have in the future would be felt in Europe. At least this has occurred in Czech Republic and in Slovakia with the transposition of the EU Race Equality Directive, following the court decision⁷⁰.

2.2.2 Analysis of inter-american case law

The procedure in the Inter American system of human rights is characterized by two phases: in the first one, a friendly settlement is tried to be obtained using the good offices of the Commission; and in the second one, a claim is filed in the Interamerican Court of Human Rights.

The Commission processes the petitions of States parties of the Convention and its Protocol⁷¹ and of the Declaration of human rights, and decide based on these instruments. As it is mentioned, a friendly settlement is the goal to be reached; but if this not occur, and after being examined the arguments of both parties the Commission decides on its ruling

⁷⁰ Devroye, Jennifer. "The case of *D.H. and others v. the Czech Republic*". In *Northwestern Journal of International Human Rights* 7 (2009): 99.

⁷¹ 15 States have ratified the Protocol: Argentina, Brasil, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, México, Nicaragua, Panamá, Paraguay, Perú, Suriname y Uruguay. In: <http://www.cidh.oas.org/Basicos/basicos4.htm> (accessed on 27/03/2012)

that there has been a violation of a human right enshrined in one of the two instruments, then the process on the Court is activated. Therefore, there is not direct access to the Court, no locus standi for individuals.

In the Court the analysis is not only done in respect to the violation of the rights enshrined in the ACHR but also in Inter-american Convention to Prevent and Punish Torture, the Inter-american Convention on the Prevention, Punishment and Erradication of Violence against Women and the Inter-american Convention on the Forced Disappearance of Persons. The process in the Court is likewise a normal judicial progress. However, there the process can be held only if the State has accepted the contentious competence of the Court. There exists opportunity to provide evidence, present arguments, attend public hearings, produce oral testimony and issue written allegations. When the Court issues its sentence there can determine if found a violation the correspondent reparation.

Two examples of the treatment of this right under the ADHR are the *Yanomami* and the *Yehova's Witnesses*. The former one concerns an indigenous community in Brazil who was suffering human rights violations (articles 1, 2, 3, 11, 12 (right to education), 17 and 23 of the ADHR) due to a mining development project on their land. The Commission recommended to Brazil to develop educational programs in consult with the communities and experts⁷². The *Yehova's Witnesses v. Argentina*⁷³, is an old case. The violation of the right to education appears in the context of a protest held by three hundred school children against a prohibition imposed to this religious organization to exercise any activity in Argentina in 1977. They were dismissed from their school and denied the possibility to

⁷² Resolution 12/85. Case 7615

⁷³ Case 2137

take the exams even if studying at home. The Commission found clearly a violation of the right to equality of opportunity to education, among others.

Sawhoyamaxa case is one of forced internal displacement in which the right to dignity, security and freedom had been violated. This indigenous community was forced to leave in the side of a road deprived of all services. The Court valued the effort of the Paraguayan government consisting on the approval of an order pursuant to delivery of food, medical and educational material. But considered that it was not enough to guarantee “the free and full exercise of human rights.”⁷⁴ In the reparation section of the judgement the Court orders apart from the restitution of their ancestral land, the creation of a special fund to finance educational, training among other programs for the Sawhoyamaxa community. Programmes which first have to be consented by them and adjusted to their customs⁷⁵. This reparation is regarded as a form of guarantee the exercise of their right to education. In the section devoted to the Right to life, the Court remarked its view for positive action on enabling a dignified life⁷⁶.

Instituto de Reeducación del Menor v. Paraguay case, so called “Panchito Lopez”, is a case which refers to the living conditions of detention centres aimed to children. This centre was overpopulated and not appropriate for the detention, lacking recreation, instruction and health care facilities. The detainees were not all sentenced; many were not yet brought to trial. During the process of petition to the Inter-american Commission the centre suffered three fires, some occupants died and others were injured. In its judgement the court considers proved the violation of articles: 4(1) (protection of the right to life),

⁷⁴ Par. 167

⁷⁵ The education has to respect the cultural values not only of the Community but also of Paraguay and be bilingual. Is the community the one destined to decide which languages, whether guarani (ancestral language of Paraguay) or Spanish, and exent language (the community language).

⁷⁶ See paras 17-24.

5(1) (the right to physical, mental and moral integrity), 5(2) (freedom from torture or to cruel, inhuman, or degrading punishment or treatment), and 5(6) (obligation to rehabilitate detainees) in conjunction with Article 1(1), read in the light of Article 19. And also considered that special measures were needed to ensure the education of the children interned in Panchito Lopez, and finds that in those circumstances the failure was more serious⁷⁷.

In this case, the court also asserted the protection of children rights based on this corpus iuris. Without pronouncing an isolated violation of article 19 of the ACHR included in its analysis violations to the derived obligations of that article which include social and economical rights⁷⁸. State has a positive duty entailing some measures in which education and health are the pillars for a dignified life⁷⁹. Even in particular situations like this one, in which the adolescents were deprived from liberty they are still subjects of law and therefore, rights holders. The State continues having the same duties consisting in providing with health assistance and education. The Court considered this duty important in order not to destroy the project of life of the children. The effective exercise of the right to education is so essential for the project of life that the Court cited again the corpus iuris including the educational programs which should be supervised by the State because they derive from a correct interpretation of the ACHR and the article 13 for San Salvador

⁷⁷ “It has also been proven that the State did not provide the children interned at the Center with the education they needed and that the State was required to provide as part of its obligation to protect the right to life, in the sense previously explained, and as required under Article 13 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights. The education program offered at the Center was unsatisfactory, as it did not have adequate resources and teachers (*supra* para. 134.12). The State’s failure to fulfill its obligation in this regard has all the more serious consequences when the children deprived of liberty are from marginal sectors of society, as is true in the instant case, because the failure to provide an adequate education limits their chances of actually rejoining society and carrying forward their life plans.” Para. 174 sentence Panchito López.

⁷⁸ “Las acciones que el Estado debe emprender, particularmente a la luz de las normas de la Convención sobre los derechos del niño, abarcan aspectos económicos, sociales y culturales que forman parte del derecho a la vida y del derecho a la integridad personal de niños”. See: Judgement of 2 November 2004. Para. 149.

⁷⁹ Advisory Opinion “Legal Condition and human rights of the Child”. Para. 86

Protocol⁸⁰. This in attention to the double vulnerability of children in correctional establishments.

The vulnerability makes the duty of the state of higher importance but at the same time serves to the court to declare the responsibility and establish the reparations.⁸¹ In this regard, educational measures have been object of reparations. As examples in Gómez Paquiyauri Brothers, Cotton Campus, Aloeboetoe among others the Court determined the construction of schools, implementation of educational programs, human right awareness courses, vocational assistance and others.

Yean & Bosica v. Dominican Republic (case N° 12.189) this case aroused when two Dominican girls were deprived from schooling due to non fulfillment of formal requirements. Dilica and Violeta were daughters of Haitian migrants nationals residing in the Dominican Republic. According to the *ius soli* principle, they had the right to be Dominicans but the authorities who operate the law applied it wrongly, as a result they were denied Dominican citizenship. Schools in Dominican Republic require the parents to present documents such as birth certificates. Requirement that the girls couldn't fulfill as were denied registration. One of the girls, Violeta, was expelled from school. In order to continue her studies she had to attend a night adult school.

This case was not presented under a claim based on the infringement of the right to education but on the right to nationality. In Yean and Bosico case their vulnerability flows from the statelessness condition created by the negative to be registered as Dominican nationals. This derived in a later violation of their access to school and to identity.

⁸⁰ Para. 172 Sentence Instituto de reeducación del menor

⁸¹ Ibáñez Rivas, Juana María. "Los derechos de los niños, niñas y adolescentes en la jurisprudencia de la Corte Interamericana de Derechos Humanos" In: *Revista IIDH Instituto Interamericano de Derechos Humanos* 51 (2010) 43.

The ICtHR addressed the case identifying the double vulnerability of statelessness and children. In order to do this the court invoked the corpus iuris which includes the CRC

Villagrán Morales et. al v. Guatemala, so called Street children, this is a case in which the court contributed advancing important concepts for the effective protection of the rights of the child. The case concerns five adolescents who lived in the streets of Guatemala, who were subject of detention, degraded treatment and final homicide by members of the police force as part of a systematic method to struggle against juvenile delinquency. The court found the double discrimination suffered by children deprived from a family environment. Moreover, the Court used as source of law not only the ACHR but also the CRC. Considering that these persons were living deprived from minimal conditions and that were always at risk, the Court hold the State had denied them the possibility to realize their project of life and integral development. The concurrent vote of the judge Cancado Trindade supports this view which will be analyzed in the following section⁸².

The ICtHR in the Villagrán Morales case for the first time invoked the CRC not only to define children but also to declare the violation of article 19 of the aforementioned convention. In this way, the court affirmed a corpus iuris integrated by the universal and inter-american system norms (ADHR, ACHR and Protocols) when rights of the child are object of interpretation. The ICtHR uses normally different sources of law, but in this case had the purpose to emphasize their condition as subjects of law⁸³. This condition has been

⁸²“ 4. El deber del Estado de tomar medidas positivas *se acentúa* precisamente en relación con la protección de la vida de personas vulnerables e indefensas, en situación de riesgo, como son los niños en la calle. La privación arbitraria de la vida no se limita, pues, al ilícito del homicidio; se extiende igualmente a la privación del derecho de vivir con dignidad. Esta visión conceptualiza el derecho a la vida como perteneciente, al mismo tiempo, al dominio de los derechos civiles y políticos, así como al de los derechos económicos, sociales y culturales, ilustrando así la interrelación e indivisibilidad de todos los derechos humanos.” See: Concurrent vote of Judge Cancado Trindade in the Sentence of 19th November 1999.

⁸³ “De esta manera, el Tribunal estableció que los niños, en gran medida, carecen de esa capacidad, pero de igual forma”son sujetos de derechos, titulares de derechos inalienables e inherentes a la persona humana”.

object of an advisory opinion later. Furthermore, this assumption served the court to assert a protective approach in regard to the violations.

For the purpose of identifying where is the right to education in this case, is necessary to focus on the reparations established by the court: the construction of an educational center. “There is an obvious need to protect children who work informally from abuse and from the worst forms of child labor. There is an added need to train and educate working children in order to provide them with education while they work and facilitate occupational and upward mobility⁸⁴.”

Adolescents in the custody of FEBEM v. Brasil case will be a milestone in the protection of socioeconomic rights. This is the first case in which a claim has been made based in the article 13 of the Protocol of San Salvador, among others. Its resolution is pending.

On 2000 an NGO filed a petition to the Commission alleging that Brazil has violated articles, 4, 8, 5, 19 and 25 of the ACHR and article 13 of the Protocol. The victims were a group of adolescents in custody of the units of the Foundation for the Well-Being of Minors- FEBEM in the Sao Paulo. The violations were based not only because of the system of incarceration but also because they were subject of systematic torture and degraded treatment. The units were overcrowded, no hygienic and reduced physical space. The climate of the correctional center promoted violence and in more than one occasion have had fights, resulting in wounds and even deaths of adolescents. The Commission found admissible the FEBEM case and it has followed its course⁸⁵. Currently, the ICtHR

See: Ibáñez Rivas, Juana María. “Los derechos de los niños, niñas y adolescentes en la jurisprudencia de la Corte Interamericana de Derechos Humanos” In: *Revista IIDH Instituto Interamericano de Derechos Humanos* 51 (2010)17.

⁸⁴ Uché, Ewelukwa. Litigating the rights of street children in regional or international fora: trends, options, barriers and breakthroughs. *Yale Human Rights and Development Journal*. (2006).

⁸⁵ Report N° 39/02 of Admissibility Petition 12.328

has ordered provisional measures which include the execution of socioeducational measures in an open or partial open regime⁸⁶.

2.2.3 UN means of protection

Under the ICESCR it has been said that there is no complaint system yet, in the medium term with the entry into force of the new protocol this situation will change. However, not only an individual complaint system can protect the right to education. In the UN system other means of protection are being applied. In this section a few examples will be presented to serve as basis for discussion and analysis.

When recalling the theoretical framework, some observations on the nature of this right were made. It has multiple dimensions and its content is part of “first generation” or “civil and political rights”, if it is permitted to use such classification only for methodological reason naturally. In that extent, the Human Rights Committee has given some communications.

Erkki Hartikainen v. Finland, Mr. Hartikainen complaints that the School System of Finland Act violates article 18 (4) of the ICPR, as it makes compulsory the attendance to classes of history of religion taught using material written by Christians, having unavoidably a religious nature. Finland submitted a report proving the efforts that the government was making in order to overcome those problems. Finally, the Committee concluded that within the framework of protection there was not incompatibility with the Finnish act.

The Committee on Economic, social, and cultural rights is in charge of monitoring the ICESCR by means of Reports. The last report available is of 2010. After receiving the

⁸⁶ See para. 9.g of the Resolução da ICtHR of 30th november 2005 “ Medidas Provisórias com respeito à república federativa do Brasil - Caso das crianças e adolescentes privados de liberdade no “Complexo do Tatuapé” da FEBEM”

reports and examining them the Committee publishes its Concluding Observations. As an example, in relation to the right to education the Report of the Kingdom of Netherlands⁸⁷. The structure of the CO is one section devoted to remark the positive aspects relating to measures, legislation and policies adopted since the last review of the State report in relation to ICSECR. Other section, addresses the subjects concern and the recommendations. In 2010 the Committee is concerned “because undocumented children opting to enroll in vocational education programmes are not yet able to complete their apprenticeships because of work permit requirements in the Netherlands”. So, makes a recommendation consisting on taking the appropriate remedial measures in order to enable them to complete the apprenticeships.

Furthermore, adequate human rights education (art. 13) is also a matter of concern. So the “Committee calls on the State party to ensure that human rights education is provided in schools at all levels and universities, and that it covers the economic, social and cultural rights.”

As it can be seen the Committee makes a call or recommends, it’s a kind of softlaw which will serve as guide for enacting policies and legislation. That is why these documents have to be disseminated among state servants and civil society. The outcomes will be presented later, in five years.

Committee on the Rights of the Child also uses the system of Reports to follow up. In this case, we will analyze the state of fulfillment of articles 28 and 29 of Argentina. The Committee, in its Concluding Observations (CO) observed that Argentina has accomplished an increment in school enrollment in primary and secondary education, but

⁸⁷ E/2011/22 E/C.12/2010/3 Report on the forty-four and forty-fifth sessions. Economic and Social Council.

there are still problems involving marginalized areas and vulnerable persons such as illegal migrants or indigeneous children. As the Committee on Social and Economic Rights, the CRC also formulates its recommendations in general way: “Increase the budget allocation· or “strengthen programmes of subsidies”, “improve the quality of education”⁸⁸.

2.3 Comparable elements and analysis

From a first view, it is a temptation to affirm that there is not comparable element as one is a universal system, the others are regional ones. Moreover, the Covenants have a different wording entailing different levels of protection and finally, the case law confirms a distinct development in the protection not only of the right to education but also of economical, social and cultural rights. However, taking into account the differences there are some common elements which will serve as a starting point for analysis.

In the three human rights systems object of this paper, the cases arose within the context of vulnerable groups. In the european system, the cases related to the Roma population constitute a clear example while in the Inter-american system the vulnerable comparable group are the indigenous populations. In both contexts appear as marginalized groups who have a particular identity, language and culture. However the protection is quite different.

In the european system of human rights we find a developed system. The case law is abundant in this regard. The Roma cases referred in this paper are only an example of landmarks. It can be appreciated that the ECtHR has founded its argumentation in the indirect discrimination suffered by this groups. Moreover, the cases have an impact on the legislatures of the States, as happened with D.H. and others v. Czech Republic which enhanced the transposition of the EU Race Directive. In addition, other States have

⁸⁸ CRC/C/121 Report on the Thirty First Session. Committee on the Rights of the Child

adopted special educational policies to address the problem of access to education of the Roma population. Indeed, the litigation of the case may finish with the judgement but it would be ineffective if it stay as a solitary victory. If right to education is pursued for all, what matter is to enhance the effects of the judgements into the political sphere and take action.

That impact is exactly what the ICtHR lacks in its judgments. As it has been demonstrated, the court has addressed the right to education indirectly. However, after affirming the rights of the indigenous communities there is no interest to enhance their rights. The supervision procedure of the ICtHR is rather slow and ineffective.

Other common vulnerable groups are migrants. In this regard, both ECtHR and ICtHR have addressed the protection of migrants right to education. Moreover, the UN system also provides a comprehensive framework which includes migrant workers family, displaced population among others. The ECtHR in *Timishev v. Russia* has approached to this case remarking the universal character of the right to education, accentuating the provision “No one shall” which has an inclusive character, meaning everybody under the jurisdiction. And based in the democratic values within Europe. Giving in this manner full effectivity to the free compulsory elementary education provision of the ICESCR.

In the ICtHR the violation of the right to education appears again indirectly but based on the violation of the rights of the child in *Yean and Bosico v. Dominican Republic*. It is clear for the court that the CRC constitutes part of the *corpus iuris*, which serves to interpret the ACHR. In this case, the two Dominican girls were affected because they were stateless, meaning that one of the most important rights has been denied to them due to their Haitian ascendance: the right to have rights, the nationality.

The most importance difference within this systems maybe not the protection offered but the way in which the individual or collective applicants are using the possibilities delineated in the Covenants.

For the UN system, it would be too radical to affirm that offers weak protection. If compared the wording of its provisions protecting the right to education it can be found that is similar to other legal instruments, specially the Protocol of San Salvador (art. 13). The main deficiency is till now the absence of an individual complaint procedure as the one that has the ICCPR. However, this deficiency will be overcome soon when the new Protocol for the ICESCR, which contemplates that option is ratified by two more states. In a certain way, the lack of a complaint procedure finds its balance with the other means of protection such as the reports or general comments. In addition, thanks to the special nature of the right to education, some of its dimensions, parental rights as an example can be subject of a complaint procedure under the ICCPR as happened in *Hartikainen v. Finland*.

In the European system of Human Rights the use of the article 2 of the Protocol 1 is if no frequent, at least no scarce or non existent, as actually happens in the Inter-american system. In other words, under the ECtHR the right to education is justitiable, and legal practitioners know this and individuals or victims are aware of this. Consequently, they use the provision. The content of the right to education has being delineated thanks to all the judgements, since the Belgian Linguistic cases till the recent *Lautsi v. Italy*.

In the Inter-american system the provision exist but has been invoked only once, *FEBEM* case which has remained in the first phase under the Commission. Although, being countries characterized by expanded and extreme poverty, in which the access to basic services is restricted to those who can afford to pay for them; the right to education is not

invoked by lawyers. Meaning that in the domestic legal systems there is also lack of litigation of this right. How have been doing in order to protect the right to education in the inter-american system?

In the following lines it will be explained the strategy that the ICtHR has developed to protect not only the right to education but also other social economical rights.

Due to the grave inequality in this region, the Commission and the Court are enforcing state obligations to provide services including education. This has been done with an expanding interpretation of civil and political rights⁸⁹. In addition, the court has deployed other means such as the principle of indivisibility of human rights and the interpretation based in the corpus iuris specially when the case relates to a vulnerable group.

In the *Sawhoyamaya* judgement the Court emphasized the right to life doctrine. This right is said to have two dimensions, one acknowledged by everybody consisting in no interference and other which involves positive action from the State. As exercising its protective function one of its aims consists in creating the “conditions to guarantee a decent existence” because the right to life is more than “a right to subsist, but is rather a right to self development which requires appropriate conditions”⁹⁰. In order to achieve this is the State the main supplier of the means. Before, in the *Yakyé Axa v. Paraguay* judgement the Court used the same resource to dignified life (*vida digna*). Moreover, the right to education was intertwined with the means to overcome their vulnerability situation⁹¹.

⁸⁹ Gómez, Verónica. “Economic, social and cultural rights in the inter-american system”. In: *Economic, social and cultural rights in action*, edited by A. Mashood and Robert Mc Corquodale (Oxford: Oxford University Press, 2007), 193.

⁹⁰ Paras 18. *Sawhoyamaya* judgement.

⁹¹ Paras. 169 *Yakyé Axa v. Paraguay*. Judgement of 17 of June 2005. Serie C n° 124.

How is the right to education necessary for a dignified life? The ICtHR has addressed this issue in almost all the cases related to the right to education. Firstly, because normally the individuals involved in a case of a human right violation belong also to the group of extreme poverty. Secondly, because the poverty is conceived as circular. In Latinamerica, there is a pattern in which a family which is under extreme poverty had ancestors which belonged also to that group and the future generations have a great probability to continue there. Thirdly, is the State the guarantor of the right to life. Therefore, is the State the one who must offer the means to live a decent life, to overcome the consequences of poverty. And education is the main instrument to revert the situation. The ICtHR has understood this, and in its rulings frequently states that when the State fails to provide instruction or educational programs condemns the individual to live being abused, such as happened in Street children case. But the lack of guarantees of the right to education not only causes abuses it also perpetuates the vulnerability of the individual or the group, as stated in the cases of the indigenous communities.

Therefore, in the ICtHR, right to life implies as in every system a negative right consisting on not being deprive of life by any public authority but also the right to a dignified life which imposes positive obligations to the State in order to guarantee it. Gómez founds that the satisfaction of a right to a dignified life has been achieved thanks to an “expansive interpretation of civil and political rights”⁹².

However, it can not be asserted that an infringement of this right could lead to a successful case, there exists an strategy which can be identifiable in the selected cases. How operates the right to a dignified life? As Pasqualucci asserts, the allegation of a violation of the right

⁹² Gómez, Verónica. “Economic, social and cultural rights in the inter-american system”. In: *Economic, social and cultural rights in action*, edited by A. Mashood and Robert Mc Corquodale (Oxford: Oxford University Press, 2007), 193.

to a dignified life needs the completion of three elements: show a lack of access to basic services, show that the State knew about the vulnerable situation and to show that there exist a casual relationship between the State negligence and the extremely poor living conditions of the applicants. Best positioned will be those belonging to vulnerable groups such as people in prison, state health services, child orphan or detention centers, children, pregnant women, displaced indigenous population⁹³.

It has been said that the principle of indivisibility and interdependence of rights has also been deployed by the ICtHR. In fact, as Eide asserts rights relate to each other in three different ways: positively by mutual reinforcement, negatively when the impact of violations of one neglects the others and finally, balancing the rights of the individuals⁹⁴.

In the preamble of the Protocol is recognized the interdependence between socioeconomical and civil and political rights, considering its “close relationship”, they are affirmed as an “indivisible whole” which is based in human dignity. The right to education fits perfectly in this model, as it is an instrumental and empowerment right. And indivisibility meaning that States must protect all human rights: civil, political, social, economical. Is in the area of children rights where the interdependence with the UN system of human rights is more plausible. As has been done in regard to the *corpus iuris*⁹⁵.

⁹³ Pasqualucci, J.M. The Right to a dignified life (Vida digna): The integration of economic and social rights with civil rights and political rights in the interamerican human rights system. In: Hastings *International and Comparative Law Review* 31 (2008)

⁹⁴ Eide, Asbjorn. “Interdependence and Indivisibility of Human Rights”. In: *Human Rights in Education, Science and Culture. Legal developments and challenges* by Yvonne Donders, Vladimir Volodin.(Cornwall: Ashgate, 2008) 14-15

⁹⁵ Estupiñán, Natalia. “El derecho a la educación: pilar esencial para el proyecto de vida de las niñas y niños. Análisis de la normatividad y jurisprudencia en materia de niñez.” In: *Apuntes sobre el sistema interamericano II*. Edited by Carlos Restrepo and Paola Acosta. (Bogotá: Instituto de Estudios Constitucionales, 2010), 21.

Conclusions

The right to education should be considered a multidimensional one. As it comprehends elements from the so called civil and political rights such as the parental rights to educate their child accordingly with their philosophical and religious views and convictions. Moreover, is a right whose violation entails the deprivation of the exercise of other rights due to its character as empower or instrumental right.

The so diffused classification of the generation of rights has caused the differences in treatment on justiciability. Especially, in the inter-american system where the notion of progressivity has been used as a recurrent excuse by State to not afford their international responsibilities. Therefore, that classification should only be used for methodological purposes.

The protection provided to the right to education by the UN human rights protection system can be seen as complementary of the regional ones. UN system has been pioneer in the treatment, positivization and formulation of mechanisms of protection of all civil and social rights. However, the lack of an individual complaint procedure for the International Covenant on Economic Social and Political Rights (ICESPR) weakens the system. The other means of protection such as the Special Rapporteur and the publication of the Concluding Observations by the Committee on Economic, social, and cultural rights and the Committee on the Rights of the Child are important but not enough, if it is taken into account that the problems and issues related to the right to education are recurrent. In this regard, the initiative already materialized with the Optional Protocol to the ICESPR will reinforce and vitalize the effectivity of this rights by the novel individual complaint procedure. It is also important, the new Protocol to the Convention on the Rights of the Child establishing a communication system in which the children will be the main actors.

Taking into account the fact that the right to education is considered as one of the most important rights for the children, this new instrument could be of invaluable utility for addressing the violations.

The right to education is justiciable in both the Inter-american and European System, However, each system has developed its caselaw in a differently. The European System has developed the content of the right to education since the first case (Belgian Linguistic Case) while in the Inter-american system the article aimed to its protection (article 13 of the San Salvador Protocol) has only once being invoked.

The European System has developed case law covering the protection of the right to education as freedom and as parental right. The protection conferred to the right to education flows direct from the provision of the article 2 of Protocol 1 of the ECHR. While in the Inter-american system of human rights, although having a provision article 13 of Protocol of San Salvador which permits to claim under its system: Commission and Court, is hardly invoked. Alternatively, the inter-american court has developed an indirect protection of the right to education through the use of an extended conception of the right to life which includes the right to enjoy the conditions for a dignified life.

The Inter-american Court has developed also a comprehensive interpretation of the international instruments of human rights, especially when the victims are vulnerable groups, such as migrants or children. This corpus iuris includes the CRC, the Covenants among others.

It can be concluded that the right to education, although having its particularities of protection is fully justiciable. However, legal operators should, in the case of the inter-

american system, employ all the provisions and means available in order to develop a solid case law.

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