

Children's Fundamental Human Rights to Education: A comparative look at litigations that have helped to shape this concept.

St Paul Edeh



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St Paul Edeh

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University of Iceland
School of Education
Educational studies, International Studies in Education
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Supervisor

M. Allyson Macdonald

Abstract

Researchers in education studies have focused on helping us to understand concepts that have helped to develop education across the globe, such as children's physical and psychological development, pedagogical development, curriculum development, education budgets, education managements, sociology of education, and various state or regional education policies. As a result, in educational studies, it is often quite easy to remember the roles of teachers, principals, executive, legislatures, agencies, local education authorities, schools, or a ministry of education, but not usually the roles of the court in general and strategic litigation in particular. But both have played significant roles in development of education, particularly in developing the concept of children's rights to education as being of fundamental importance.

As education becomes more and more globalized, with its increasingly expanding bureaucratic structures in many countries, I believe that the roles of the court in shaping children's rights to education can no longer be ignored. Rather more understanding of it is necessary.

I adopted three types of literature examination in conducting this research; legal cases, legal research and educational research. Cases cited in this report will clearly direct reader's attention to some particular issues that have been an obstacle to children's fundamental right to education, how it was challenged and impacts of the court's decision on education.

By choosing cases from across the globe, I intend to show that violation of children's fundamental right to education is a global rather than regional or national phenomenon. No doubt that there are many other cases and articles about violation of children's right to education, but in choosing the cases I reported here, I am primarily concerned with the extent to which the impact of each decided case has propelled the development and sustenance of children's right to education. It follows that some major cases are not included albeit being of great importance.

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United Nations Universal Declaration of Human Rights (1948)

Paragraph one of article 26 of the Universal Declaration of Human Rights (UDHR) makes it clear that “everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit”. Paragraph two further states that “education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall further the activities of United Nations for the maintenance of peace”. Paragraph three of the same article concludes by stating that “parents have a prior right to choose the kind of education that shall be given to their children”.

The United Nations General Assembly on 10th December, 1948 adopted this declaration and called upon all Member States to publicize the text of the Declaration and “to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories”.

Introduction

I believe that it is not a coincidence that most Western countries and societies that have adhered to human rights are more advanced, prosperous and peaceful (OECD 2009, Human Development Index 2009).

There also appears to be no doubt of the impact of *strategic litigations*¹ in protecting the education rights of the underprivileged student groups in particular and in the development of education in general. But this is not usually discussed or studied to the level that I think it deserved, hence in this thesis, I want to bring to the attention of the education community this neglected side in a study with regards to children's fundamental rights to education.

Given that my purpose is merely to bring to the attention of the academic community the impact of these cases to the development of children's fundamental rights to education, much of the work is more about reporting facts and legal issues involved, roles of NGOs in bringing strategic litigations and court driven reforms, courts command and control characteristics, its facilitators roles, rather than overtly arguing for one spectrum or the other.

Strategic litigation

In this report I seek to use *strategic litigations* as decided by courts and tribunals in various parts of the world to illuminate some of the many ways nations or regions have failed to fully implement this indispensable right to many children.

The literature review began with an extensive search through many of the education related cases on the University of London External System's web-based case bank, where legal cases and published articles connected to the aim of this report were stored. Other educational databases such as Education Resources Information Centre (ERIC) were also helpful, as well as the Right to Education Project website.

¹ Strategic litigation is the use the justice sector to achieve legal and social change through test cases; these cases usually concern changes in social and individual justice.

In a strategic case, the legal process does not proceed in traditional legal fashion. Traditional lawsuits usually involve two parties and usually focus on one party's claims of a particular harm which the other party had caused in the past. Once the court establishes that a legal right has been violated and liability found, the litigation moves to the remedial phase, where the court generally focuses on awarding damages - usually in monetary ways - to compensate for the loss or harm caused (see Brikman, Folger, Goode, and Schul, 1980).

But in strategic litigations the legal process is quite different. Strategic cases often involve a wide range of parties, dealing with broader legal principle(s) and sometimes the directly injured parties are not even involved. Strategic litigations address perceived harm resulting from often subtle and indistinctive institutional actions or behaviours that are difficult to pinpoint precisely when determining liability (Coleman, 1974). As a result, the courts in finding liability act with flexibility and in a proactive and pragmatic manner. By ignoring literal interpretation of the law but adopting a more purposive, and proportionate interpretative concept, the court allows itself to create broader, forward-looking decisions or remedies that most times imply that the judiciary is legislating from their bench (Fiss, 1976).

Though the court has over the past six decades been able to bring some legitimacy to other efforts in addressing complex social problems which the executive and legislatures had failed to properly address, nevertheless critics still argue that the court is not the right institution to solve education problems. They argue that since the courts' main way of reforming education problems is by crafted order, but as the court lacks broader political will and social mobilization ability which requires extended public and government's support, it follows that the court lacks enough power to directly enforce its decisions at "street level" (Rosenberg, 1991).

But Superfine (2010, pp. 113) correctly argues that courts assuming the command-and-control or facilitator role generally act as the primary driver of educational reforms. However, because of the size of this thesis and lack of sufficient space for sustained arguments, it is submitted here that this thesis does not support either side of these arguments but is basically intended as a means of introducing a set

of cases that have played a significant role in developing and sustaining children's fundamental right to education.

Adult illiteracy is a double violation of the illiterate's human right to education. Firstly, it may be a consequence of the previous lack of available, accessible, acceptable and adaptable education for the now adults when they were children, and secondly, the state's subsequent or continued failure to provide free, quality and inclusive adult literacy programs represents an ongoing violation of the right to education. Even so in this report, I will limit my work to the violation of children's right to education with little mention of adult cases.

The United Nations Declaration of Human Rights which was adopted by all UN member states has not been fulfilled in many parts of the world, hence in looking at cases that have shaped and will continue to shape the concept of education as a fundamental human right, I will discuss show some of the violations of this that might have caused children serious social, economic and personal harm. Some decided cases can fit into more than one element of state/government violations. For example, the famous case of *Brown v Board of Education* can equally fit into the violation elements of accessibility, availability as well as racial discrimination.

Those who brought these kinds of cases are usually not the directly affected children or their parents or relatives, but in most cases Non-Governmental Organizations (NGOs), interested lawyers and other concerned individuals and institutions. This thesis will show how these groups used strategic litigations, some of the obstacles they encountered, and how the concerned government responded. I will also discuss here how the courts or tribunals used the principle of strategic litigation, which is sometimes also called impact litigation, to defend the right of children to education.

Designing a strategic litigation strategy was the subject addressed by one working group at a recent conference on child rights held in Geneva in 2009 (International Save the Children Alliance, 2010). Strategic litigation involves selecting and bringing a case to the courtroom with the goal of creating broader changes in society. Lawyers or people who use strategic litigation usually want to use the law to leave a lasting mark

beyond just winning the matter at hand. This means that strategic litigations are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves. As Edmund Foley put it at the conference in Geneva, “The rules are there to be tested” and “Litigation is an efficient way to develop jurisprudence and expand the frontiers of existing child rights norms” (quoted in International Save the Children Alliance, 2010, p. 6 and p. 29).

A strategic litigation must also address problems such as those related to the powerlessness of communities to obtain access to justice, the lack of cultural legitimacy for adversarial dispute settlement, and the need sometimes to incorporate alternative dispute resolution approaches into traditional litigation strategies. Elisabeth Dalhin observed in the Geneva conference, in the context of NGO or lawyers representing disadvantaged children, that; “these activities may seem overwhelming, and they require in-house legal capacity, dedicated resources, long term investment, counting on external expertise, the willingness to take the risk of becoming confrontational. But these reasons – as relevant as they are - should never be used as excuses for non-action, but on the contrary challenges interest groups to face and address complex problems” (quoted in International Save the Children Alliance, 2010, p. 15). Morka, at the same conference went on to add that “strategic litigation may come at a cost, but being confrontational is sometimes what is needed” (quoted in International Save the Children Alliance, 2010, p. 18). One of the delegates to the conference stated: “In any case, or strategy, it is crucial that the interests of the victim remain central, and come before any broader goals”.

I personally believe that the frontiers of justice are the best and lasting ways of solving social problems hence I have chosen this kind of research for my BA thesis. The research leading to this report was carried in a purely qualitative style by selecting cases that showed the many ways children’s right to education can be violated and the court’s command-and-control as well as facilitators of reform attitude/approach in solving this dilemma.

The following are some of the strategic cases that shaped and will continue to shape the principle of education as children’s fundamental human right.

General right of children to education

One of the major tasks of every government is to make its primary and secondary education free and government-funded and to ensure that there is adequate infrastructure and trained teachers able to support education delivery. In addition to the above UN declaration, African nations have also signed up to the more recent United Nations (UN) Millennium Development Goals (MDGs), which guarantees, among other things, universal access to education by the year 2015. But many governments in African countries still ignore education as an indispensable human right of children, as in the recent case of *SERAP v Federal Republic of Nigeria* and *Universal Basic Education Commission ECW/CCJ/APP/08/08*, where the newly formed Community Court of Justice² of the Economic Community of West African States (ECOWAS Court) ruled that such ignorance is in violation of children's fundamental human rights to education.

The case concerned various issues including enforceability of the right to education, enforceability of human rights, economic, social and cultural rights, right of people to enjoy their wealth and natural resources, jurisdiction, African Charter on Human and People's Rights. But for the purpose of this report, I will stick to the children's right to education part of this landmark decision.

The background of this case was that The Economic Community of West African States (ECOWAS) is a regional group of fifteen countries, founded in 1975. Its mission is to promote economic integration in "all fields of economic activity", particularly industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, education, social and cultural matters. From a socio-economic standpoint, ECOWAS is one of the main pillars of the African Economic Community. The ECOWAS Member States are: Benin, Burkina Faso, Cape Verde, Cote D'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

² ECOWAS Court of Justice is the African equivalent of European Court of Justice.

Article 4(g) of the ECOWAS Treaty guarantees its peoples: “The recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and People Rights.”

The plaintiffs alleged the violation of their right to quality education, their right to dignity, the right of peoples to enjoy their wealth and natural resources and the right of peoples to economic and social development guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples’ Rights.

The defendants (Federal Government of Nigerian (FGN)) counter argued that the ECOWAS (Community Court of Justice of the Economic Community of West African States) lacks jurisdiction to judge this issue because:

- The Compulsory and Basic Education Act 2004 and the Child’s Right Act 2004 are Municipal Laws of Nigeria and, therefore, not a treaty, convention or protocol of ECOWAS;
- “That the educational objective of the Federal Republic of Nigeria is provided for under Section 18 (1), (2) and (3) of Chapter II of the 1999 Constitution and is non justiciable or enforceable and cannot be determined by the court”;
- The Plaintiff has no locus standi, because the plaintiff has not “suffered any damage, loss or personal injury”.

After protracted legal arguments, the judgment (read in open court to the Public 27th October 2009) concluded that “regarding whether the court has jurisdiction to adjudicate on the application filed by the plaintiff the court held under article 9 (4) of the Supplementary Protocol, that the Court clearly has jurisdiction to adjudicate on applications concerning the violation of human rights that occur in Member States of ECOWAS”. That “the thrust of plaintiff’s suit is the denial of the right to education for the people of the Federal Republic of Nigeria, the denial of the right of people to their wealth and natural resources and the denial of people’s right to economic and social developments as guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and People’s Rights of which Nigeria is a signatory. When all these are

objectively read together, it logically follows that the Court does have subject matter jurisdiction of the suit filed by the plaintiff”.

Regarding whether the right to education is justiciable and can be litigated before the ECOWAS court, the court held that “the existence of a right in one jurisdiction does not automatically oust its enforcement in another, because they are independent of each other. Under Article 4(g) of the revised Treaty of ECOWAS, Member States of ECOWAS, affirmed and declared their adherence to the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights. The first defendant [Federal Republic of Nigeria] is a signatory to the African Charter on Human and Peoples’ Right and re-enacted it as laws of the Federal Republic of Nigeria to assert its commitment to the same. The first defendant is also a signatory of the Revised Treaty of ECOWAS and is therefore bound by their provisions.” Regarding whether the plaintiff lacks locus standi to initiate or maintain this action the court held that “public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he [or she] has suffered any personal injury or has a special interest that needs to be protected to have standing.”

In paragraph 35 (d) of this landmark decision it is stated that “the court is satisfied that at this stage prima facie facts have emerged in support of the case that the plaintiff has proper standing to bring the action and that the matter is justiciable in this court”.

The court said that the right to education can be enforced before the Court and dismissed all objections brought by the Federal Government of Nigeria (FGN), through the Universal Basic Education Commission (UBEC), that education is “a mere directive policy of the government and not a legal entitlement of the citizens.”

This is the first time an international court in Africa has recognized citizens' legal right to education, and this sends a clear message to other ECOWAS member states, including Nigeria and indeed all African governments, that the denial of this human right to millions of African citizens will not be tolerated.

Various other factors, ranging from socio, economic and political, racial, linguistic, cultural factors, can adversely affect children's right to obtain education. In the case of *Unni Krishnan, J.P., v. State of A.P. and Others.* [1993] 4 Law Reports of the Commonwealth 234; 4 February 1993. The contested issues varied but for the purpose of this report, the important issue was that time limits on progressive realisation of children constitutional rights to education are adjudicable. Here the Supreme Court of India was called upon to decide on capitation fees. Certain schools management was seeking enforcement of their right to business through the charging of "capitation" fees from students seeking admission. The court expressly denied this claim and proceeded to examine the nature of the right to education specifically stated in the following articles of the relevant Indian constitution which amongst other things provided that:

- Article 41: The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education etc.
- Article 45: The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.
- Article 46: The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

The Court asserted that Article 45 has a ten year limit for a reason, and noted that it is the only article in Part IV of the constitution to contain such a limit. It held, therefore, that the passage of 44 years since the enactment of the Constitution had effectively converted the non-justiciable right to education of children under 14 into one enforceable under the law. However, the Court expressed dismay in adding; 'it is relevant to notice that Article 45 does not speak of the "limits of its economic capacity and development" as does Article 41, which amongst other things speaks of right to

education. What has actually happened is more money is spent and more attention is directed to higher education than to—and at the detriment of—primary education [up to 14 years of age.]’

The Indian Supreme Court reiterated that “the right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. By saying so, we are not transferring Article 41 from Part IV [directive principles within the Constitution] to Part III [fundamental rights within the Constitution] - we are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21. We cannot believe that any State would say that it need not provide education to its people even within the limits of its economic capacity and development. It goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the State”.

The Court continued by asserting the right to education’s position as being fundamental to enjoying the right to life, and said: ‘We must hasten to add that just because we have relied upon some of the directive principles to locate the parameters of the right to education implicit in Article 21, it does not follow automatically that each and every obligation referred to in Part IV [of the Constitution] gets automatically included within the purview of Article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental importance. As a matter of fact, we have referred to Articles 41, 45 and 46 merely to determine the parameters of the said right.’

The practical implication of this decision is that the Court maintained that the right to basic education is implied by the fundamental right to life (Article 21) when read in conjunction with the directive principle on education (Article 41). The Court held that the parameters of the right must be understood in the context of the Directive Principles of State Policy, including Article 45 which provides that the state is to endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children under the age of 14. Furthermore, this decision also found that there is no fundamental right to education for

a professional degree that flows from Article 21, so that schools conferring degree can charge the so called “capitation fees” but not primary and secondary schools.

Quoting Article 13 of the International Covenant on Economic, Social and Cultural Rights, the Court stated that the state's obligation to provide higher education requires it to take steps to the maximum of its available resources with a view to achieving progressively the full realization of the right of education by all appropriate means.

After this decision the concerned government of India responded to this declaration nine years later by inserting the Ninety-third amendment to Constitution, Article 21-A, which provides for the fundamental right to education for children between the ages of six to sixteen. In addition, several States in India have passed legislation making primary education compulsory and free.

Although the Court in *Unni Krishnan* stated specifically that it was not transferring Article 41 from Part IV to Part III, in the subsequent case of *M.C. Mehta v State of Tamil Nadu & Others* (1996) 6 SCC 756; AIR 1997 SC 699, the Supreme Court stated that Article 45 had acquired the status of a fundamental right following the Constitutional Bench's decision in the earlier case of *Unni Krishnan*.

In rejecting the government's argument, the Court said that, in order to treat a right as a fundamental right, it is not necessary that it should be expressly stated as one in Part III of the Constitution as argued by the State, because in the courts view: “the provisions of Part III and Part IV are supplementary and complementary to each other.” The Court rejected argument that the rights reflected in the provisions of Part III are superior to the moral claims and aspirations reflected in the provisions of Part IV.

This case also demonstrated how the right to life can be interpreted as including the right to livelihood and in this case explicitly the right to education (at least primary and secondary education). It should be noted that the Indian courts have thus far been unique in reading the right to education directly into the right to life, and this is a fact implicit in India's commitment to educating its mass population.

More recently on the 17th April, 2010, the Indian legislatures passed a bill into law which aimed to make free education a fundamental right for all children between 6

to 14 years. It is submitted here that this law is very necessary in this country with the world's largest population of young people. It is estimated that at least 8 million children aged between 6 to 14 in India are currently out of school because many are kept out of school so that they can participate in their family's farming trade or business.

The Indian government on same day (17th April, 2010), announced \$38 billion dollars 5-years education plans that they hope will leave no child behind. Prime Minister Manmohan Singh, a man of a very modest upbringing himself, knows that this law and any amount of money spent in education are worth the investment. (see page 7 of April 12th 2010, edition of *Time Magazine*).

Adequate Standard of Living, Cultural Rights, Indigenous Peoples' Rights, Right to Life, discriminatory treatment of disadvantaged groups, exclusion, lack of access to land, availability of schools, are but few factors that have been included in the inexhaustible list of factors that militate against children's fundamental right to education in many parts of the world, particularly developing countries.

When you add the annoying fact that even the aggrieved children have no access to justice through which to seek their inalienable right to education then the picture becomes uglier. But all these factors have not prevented local and international NGOs from speaking for and on behalf of the affected children through the medium of local and international law. The Inter-American Court of Human Rights, dealt with such a complex and complicated case in *Yakye Axa v Paraguay*, (17 June 2005), which concerned the Yakye Axa and Sawhoyamaya Indigenous Communities of Paraguay, people who had been displaced from their traditional lands. They were unable to source water and food for themselves and were not provided with adequate house, road, health and education services. Not a single school existed in their community of approximately 30,000 inhabitants!

They had been living in temporary homes alongside the Pozo Colorado-Concepción highway for over 10 years. In those precarious conditions they had been unable to sustain their traditional activities - such as hunting, fishing and gathering honey - or their cultural and spiritual practices all of which had hitherto been part of

their formal and informal education. They lacked the political will and money to sue the government of Paraguay, but got the help of NGOs to bring their complaints to the Inter-American Court of Human Rights. They argued *inter alia*, that Article 4 of the Inter-American Convention on Human Rights which guarantees that “every person has the right to have his life respected,” had been breached.

The background was that Yakye Axa and Sawhoyamaya lodged separate claims to the land to which they had the greatest attachment – a fraction of what they considered to be their traditional territory. However, after 10 years of unsuccessfully seeking resolution of their claim through all available national informal processes, a group of NGOs helped them took their two cases to the Inter-American Commission on Human Rights and then to the Inter-American Court of Human Rights³, but confronted a formidable obstacle in the nature of the “rule of exhaustion of domestic remedies” which is an important rule governing the admissibility of a complaint at international level. It requires the complainant in general to have exhausted all remedies in the state where the violation occurred before bringing a claim to an international body. This usually includes pursuing your claim through the local court system. There are, however, exceptions to this rule. If the exhaustion of remedies is unreasonably prolonged, or plainly ineffective or otherwise unavailable to the applicant (owing, for example, to denial of legal aid in a criminal case), then the complainant may not be required to exhaust domestic remedies. The communities brought their cases to the Inter-American Commission and subsequently the Inter-American Court with the help of NGOs Tierraviva and CEJIL.

In both cases, the Court found that the rights of the Yakye Axa and Sawhoyamaya to judicial protection, to property, to life and a *fortiori*, to education had been violated. The Court held that the Paraguay government had failed to ensure that its domestic law guaranteed the community's effective use and enjoyment of their traditional land, thus threatening the free development and transmission of its culture,

³ The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, are both organs of the Organization of American States (OAS). Individual complaints can only be taken directly to the Court by State Parties to the American Convention. Other parties must submit their cases to the Commission which may then refer this to the Court. For further information, visit, www.crin.org/RM/Inter-American-Commission.asp

traditional practices and its educational development. The Court concluded that the State had the obligation to adopt positive measures towards providing a dignified life, particularly when high risk, vulnerable groups were at stake, whose protection should become a priority.

In each case it ordered the Paraguayan state to return the traditional lands of the Yakye Axa and Sawhoyamaxa within a period of three years and to provide a community development fund to ensure their survival once they return to their traditional land, with special funds specifically devoted to the educational developments of the children in particular. To strengthen this decision, the Court ordered that until the traditional land was reinstated the Paraguayan state must “supply, immediately and on a regular basis... water, regular medical care and appropriate food in quantities, variety and quality that are sufficient...to have minimum conditions for a decent life, latrines or appropriate toilets, bilingual material for appropriate education” (Inter-American Court judgment, Yakye Axa judgement, 17 June 2005).

The Paraguayan state was also ordered to enact into its domestic legislation, legislative, administrative and other measures necessary to provide an efficient mechanism to enable indigenous peoples in Paraguay to claim their traditional land and that as soon as possible to build primary and secondary schools. Furthermore the Inter-American Court stated that it would supervise enforcement and ordered the State of Paraguay to submit a report on measures adopted within one year after the decision was notified. However, the authorities in Paraguay have failed to comply with the Inter-American Court’s orders – in particular regarding the restitution of their traditional lands, where the schools would have been built. As such, the judgments have made little difference in practice to the education, socio, economic lives of the Yakye Axa and Sawhoyamaxa. The three-year court deadline passed for the Yakye Axa on 13 July 2008 and for the Sawhoyamaxa on 19 May 2009, yet the return of their traditional lands is still far from a reality and regrettably only one primary school but no secondary school has been built as at the time of writing this thesis.

But the effect of this decision is that the Yakye Axa and Sawhoyamaxa, although separate communities within the Enxet ethnic group, have united to exert pressure on the Paraguayan government to fight for their children’s educational rights.

In November 2008 President Fernando Lugo signed a bill on the expropriation of the traditional lands of the Yakye Axa. This was due to be discussed by Congress in the session beginning in March 2009. For the Sawhoyamaya, to date the authorities appear to have no clear plan for making the return of their lands a reality. As a result the children's right to education continues to suffer, because even international and local NGO with funds could not build schools for them because of land disputes.

But it must be noted that the Inter-American Court has reaffirmed its wide interpretation of right to life to include amongst others, the right to education as set out in the above UN declaration. The Court showed through its interpretation of the relevant law, that whenever the right to education had been violated, the affected communities are directly deprived of a means of decent livelihood including a right to education. Some courts, even if just a few currently, can be prepared to order a State to adopt positive measures to fulfil its signatory obligations under the 1948 UN declaration. Some courts have gone further and ordered that an offending government must amend its education legislation and also give priority treatment to vulnerable groups through such amendments.

In the Bangladesh case of *ASK v. Government of Bangladesh*, Supreme Court of Bangladesh Writ No. 3034 of 1999, where the inhabitants of a large number of very poor informal settlements in the Bangladesh capital city, Dhaka, were evicted without notice and their homes and the only available primary and secondary school were demolished by government's bulldozers. Two inhabitants and three NGOs lodged this complaint.

After referring to a list of cases including *Unni Krishnan and (Indian case of) Olga Tellis v Bombay Municipal Council*, the Supreme Court of Bangladesh found that the right to education could be derived from Bangladesh constitutional fundamental rights, including the rights to life, respect for dignity and equal protection of the law. The Court held that the State must direct its "Clean City policy" proportionately by ensuring the provision of alternative basic necessities of life including shelter, and education, which they implied as a directive principle enshrined in the Constitution (Article 15).

Whilst such directives in principles are not judicially enforceable, the Court held that the right to life included the right not to be deprived of any fundamental element of livelihood and concluded that shelter and basic education can be implied from the provisions of the constitution as directly connected to good livelihood intended to be protected by the constitution. I submit here that this is a welcomed purposive interpretation of the constitution to reflect a judicial creativeness as protectors of human rights.

The Court ordered the government to develop master guidelines, or pilot projects for the resettlement of the slum dwellers. They held that any plan to evict slum dwellers should provide for such evictions to occur in phases which take into account a person's ability to find alternative accommodation and that reasonable time should be provided before the eviction. Similarly the court ordered the government to build an alternative primary and secondary schools for those dwellers.

It could be seen from this and other decisions that if actions of the government lead to closing of schools or discrimination in the provision of education, it might be possible to present to a court the notion that the right to livelihood and therefore right to education is being eroded. Whilst other courts in other jurisdictions might not be prepared to interpret the right to livelihood this way, as it seems the Bangladeshi court had done, it is worth presenting this judicial decisions in another country or region where a similar petition is being lodged to see if it is possible for those courts to consider decisions of another court as an interpreting tool even if it will not be bound by it.

Almost every government places education budget amongst its first three priorities, but in practice few governments ever live up to this promise. For this reason, the Philippines government incurred the wrath of its senators when it failed to give education its adequate budgetary allocation. The Constitution of the Philippines obliges the government to assign the highest budgetary priority to education. In the case of *Guingona, JR v Carague*, Supreme Court of the Philippines - G.R. No. 94571, 22 April 1991, a group of senators in the Philippines Assembly challenged the constitutionality of the budgetary allocation of P86 billion for debt servicing in contrast to P27 billion for education.

The Court found that education had constituted the highest allocation apart from debt servicing which was necessary to safeguard the creditworthiness of the country and the survival of its economy. In making its decision, the Court stated; ‘There can be no question as to the patriotism and good motive of petitioners in filing this petition but unfortunately, the petition must fail on the constitutional and legal issues raised. As to whether or not the country should honour its international debt, more especially the enormous amount that had been incurred by the past administration, which appears to be the ultimate objective of the petition, is not an issue that is presented or proposed to be addressed by the Court. Indeed, it is more of a political decision for Congress and the Executive to determine in the exercise of their wisdom and sound discretion.’

Though the application was unsuccessful, however the effect of this litigation was that it brought the Philippines government’s insufficient budgetary allocation to education to public attention and following the public outcry, the government subsequently increased its funding of primary and secondary education.

Access to education includes access to educational materials

Building schools is not enough as a means of providing education to children in any society. The government must also make sure that its system of providing education or educational materials to schools or students is non-discriminatory and accessible to all, and that positive steps are taken to include the most marginalised or minority members of that society. So held the Czech Republic court in the case of Pl. US 25/94 JUDGMENT the Constitutional Court of the Czech Republic in the Name of the Czech Republic. The background to this case was that on 4 November 1994, the Court received from a group of Deputies of the Parliament of the Czech Republic a petition commencing a proceeding on the annulment of Government Regulation No. 15/1994 Sb. On the Provision Free of Charge of Textbooks, Teaching Texts, and Basic School Materials which set out the principle that teaching aids (exercise books, pencils, colour box, ruler, etc.) will be provided to all children in the Czech Republic.

These Group of Deputies asserted that the breach of law was that Regulation 15/1994 was in conflict with Article 33 of the Czech Republic’s Charter of Fundamental Rights and Basic Freedoms 1991 (part of and with the same legal

standing as, the Czech Constitution), which guarantees to all citizens the right to elementary and secondary education free of charge;

- Article 28 of the Convention on the Rights of the Child pursuant to which the Czech Republic as a State party bound itself to establish, free of charge, education for all children and to establish, free of charge, secondary general and specialist education and, in cases of need, to provide financial support as well.
- Article 41 of the Convention on the Rights of the Child stated, ‘Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in; (a) The law of a State party; or (b) International law in force for that State.’
- Article 5 paragraph 2 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) according to which, in case of a conflict between domestic and international rights, those rights shall be applied which were, on the day the international treaty entered into effect, more favourable for persons under the jurisdiction of the State Party.

The petitioners argued that the concept of free education means that the state should provide everything directly related to attendance at elementary and secondary schools, for example school text books, bags, pencil cases, writing equipment, physical education equipment, etc.

The government argued that under schedule 4 paragraph 2 of Act No. 29/1984 Sb., on the Basic and Secondary School System (the Education Act), the Government is to designate the extent to which textbooks, teaching texts, and basic school materials will be provided to students free of charge. They further argued that education free of charge as called for in Article 33 paragraph 2 of the Charter of Fundamental Rights and Basic Freedoms is to be understood as referring to the right of students to be provided with instruction in suitable buildings, payment of the wages of qualified instructors and other personnel, the costs of the operation and maintenance

of the buildings, free use of educational aids, that is, those which are owned by the school and which it uses for its own instruction (models, chemicals, chalk, wall maps and pictures, etc.). In effect, the state shall bear the costs of establishing schools and school facilities, of their operation and maintenance, but above all it means that the state may not demand tuition, that is, the provision of primary and secondary education for payment.

The court referred to and cited Regulation 15/1994, which provides that textbooks for elementary school are also lent to students free of charge, but they do not become their property. The government was of the view that making textbooks and education materials available free of charge cannot be interpreted as a basic human right. The Czech Republic government successfully argued further that students, or their parents, are to pay for some educational materials which are owned or used by the students, with the exception of materials which the state provides to students in the first year of elementary and secondary school, where the students purchase textbooks and they become their property.

The Government continued by arguing that Article 41 of the Convention on the Rights of the Child is not relevant in this matter because it states that "nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State Party..." Presumably the government's argument was that the purpose of the law of allowing the State to choose the funding of education was to make the education system more effective for everyone which it could only do if choices regarding funding were made solely by the government. It could be that if the government had a certain budget available for education, unless it could control exactly what it had to pay for within the education system, either some people would not have the full funding that others received or the government would have to increase its education budget. They said that given the high number of students it will be economically impossible for the government to provide basic educational materials like books or pencils, free of charge.

After the court assessed the demand that text books should be free of charge, the government won the case as the court held that free does not imply that the state has to bear all costs. The court stated that "free" in primary education means that State would

bear the cost of establishing schools, their maintenance and general operation. The court held that this does not mean that tuition and teaching materials need to be free. It is clear from this case that “education free of charge” cannot include a requirement that the State or Local Education Authority bear all costs incurred by its citizens when they pursue primary and secondary education. The court went on to state that the general cost connected with putting the fundamental right of children to education into effect can be divided between the State and the citizens.

It is appropriate to keep in mind that it is in the citizen’s own interest to obtain education and by this way also enhance his or her qualification and better his or her opportunities to make his or her way in the labour market. This means that families must make efforts to see that children achieve this, because the overall expenses connected with putting the right to education into effect are a long-term investment into the life of the individual. The decision of the court can be deducted to mean that the State bears the essential parts of these costs; however, the State is not obliged to bear all of the costs.

It is arguable that this court rightly balanced a conflicting problem here, because in principle it would have been almost impossible for any State to adequately provide all the necessary materials directly associated with modern day education. The petitioners here have asked for far too much and as a consequence made the court feel it will be imposing an unquantifiable and unprecedented obligation on the government of Czech Republic. In this case the basic right to education had been fulfilled by the government in that they provided school, teachers and other associated educational materials to the students.

Accessibility/transportation to obtain education

In the case of *Mora v. Bogota District Education Secretary & Others*, Decision T-170/03 Colombian Constitutional Court, Decision February 28, 2003, the capital of Colombia, Bogota, maintained a quota system in allocating children to schools. A five year-old child from a low-income family was placed in a public school located in a neighbourhood different to that in which her family lived due to exhaustion of quotas in

the schools close to her home. Her family claimed that this is a violation of the child's right to education.

The Court ordered the government to relocate the girl to a school closer to her home. The court stated that if the right to education of the child is affected because of quota restrictions within the schools near her home, then the guarantee of her fundamental right to education is seriously affected. They said that the quota system must take into account factors such as socio-economic or other factors. Quota assignments cannot be made in a mechanistic way just to "theoretically" fulfil the obligation to provide education to the population but must in any event, permit effective access to education. In this instance, acknowledging the transport costs in getting the child to school, the Court held that the system did not take into account the mother's lack of income and the time required to bring her daughter to the assigned school.

A similar decision was reached by a British court in *Devon County Council v George* [1989] House of Lords AC 573, 604B (leading judgement by Lord Keith) where the court held that ensuring that education is accessible includes providing transportation free of charge, to facilitate compulsory school attendance of children who live beyond the walking distance to school.

The Court stated: "In the case of pupils (living further away than walking distance), a local education authority would be acting unreasonably if it decided that free transport was unnecessary for the purpose of promoting their attendance at school, because if it were not provided then parents of these pupils would be under no legal obligation to secure their attendance". It must be noted that that in each of the above cases, the cost of transport has only been provided where either the pupils are not living within walking distance or there is another reason why they cannot get to school, such as disability. Transport costs are not necessarily automatically paid by the government. Even where there are no direct fees for education, there can be other costs associated with education such as those for books and transport which can ultimately be prohibitive in fulfilling the right to education.

Prohibition of use of certain languages in schools

Language is such a vital part of people's culture and identity that any law that unreasonably prohibits the use of a particular language which a significant number of a cultural group of people uses in their daily life is an abuse of their fundamental human right and an attack on their human development through being educated by that language. This was the situation leading to the case of *Cyprus v Turkey* Application no. 25781/94 European Court of Human Rights (May 2001). In this case, the situation was what has existed in northern Cyprus since the beginning of military operations there by Turkey in July and August 1974 and the continued division of Cyprus. Cyprus alleged that Turkey had continued to violate the Convention in Northern Cyprus after the adoption of two earlier reports by the European Commission of Human Rights, which were drawn up following previous applications brought by Cyprus against Turkey. The Court (ECHR), held that there had been amongst others the following two violations: - violation of Article 2 of Protocol No. 1 (right to education) in respect of Greek Cypriots living in Northern Cyprus in so far as no appropriate primary and secondary school facilities were available to them, and also there was a breach of children's right to education because of the unacceptable violation of Article 3 in that the Greek Cypriots living in the Karpas area of Northern Cyprus had been subjected to discrimination amounting to degrading treatments. The Court called on the Turkish authorities in Northern Cyprus to refrain from censoring Greek language textbooks and to allow the local language to be used in teaching and learning. The Court concluded by deciding that "the discontinuance" (that is, closure) of Greek-medium secondary schools amounted to a denial of the right to education through their native language.

The European Union has been active in promoting the principle of Free Movement of Persons (FMP) with the 27 Member States. This FMP principle has transformed many once homogenous cities across Europe into a multicultural society. The effect is that when family's move, from a different language to a new language, their children attending local schools will inevitably encounter language problems. This occurred in *The Belgian Linguistic Case* (Nos. 1 & 2) (No.1) (1967), Series A, No.5 (1979-80) 1 EHRR 241 (No.2) (1968), Series A, No.6 (1979-80) 1 EHRR 252, where

French-speaking residents of certain Flemish-speaking areas of Belgium, wanted their children to be educated through French language. While Dutch-speaking children in a particular French-speaking area were allowed to be educated in Dutch-speaking schools in a bilingual district outside the neighbourhood, French-speaking children in an equivalent Flemish area could not attend the French-speaking schools in the same bilingual district but were compelled to attend their local Dutch-language schools. Angered by this the Applicants argued that Section 4 of the Belgian Act of 30th July 1963 "relating to the use of languages in education" breached Articles 8 (right to private and family life) and 14 (non-discrimination) of the European Convention of Human Rights and Article 2 of Additional Protocol 1 (right to education) to the Convention. Section 4 of the Belgian Act states that the language of education shall be Dutch in the Dutch-speaking region, French in the French-speaking region and German in the German-speaking region.

The Applicants, inhabitants of Alsemberg, Beersel, Kraainem, Antwerp and environs, Ghent and environs, Louvain and environs and Vilvorde, submitted, between 1962 and 1964, six applications to the European Commission, both on their own behalf and on behalf of their children under age. The Commission referred the case to the European Court of Human Rights. The Applicants complained that the Belgian State:

- Does not provide or subsidise any French-language education in the municipalities where the applicants live or, in the case of Kraainem, that the provision made for such education is, in their opinion, inadequate;
- Withholds grants from any institutions in these municipalities which may fail to comply with the linguistic provisions of the legislation for schools;
- Refuses to acknowledge the validity of certificates issued by such institutions;
- Does not allow the applicants' children to attend the French classes which exist in certain places.

After hearing arguments from both sides the European Court of Human Right, stated that "No breach of Article 2 of Protocol 1 had occurred because the Court decided that the right to education does not extend to require States to establish at their

own expense, or to subsidise, education of any particular type or at any particular level, in other words, it does not guarantee children or parents a right to obtain instruction in a language of his or her choice”. However although Article 2 of Protocol 1 does not guarantee a right to ensure that public authorities create a particular kind of educational establishment, a State which had set up an establishment is prohibited from laying down entrance requirements that are discriminatory. As such, there had though been a violation of Article 14 of the Convention (anti-discrimination) in conjunction with Article 2 of Protocol 1 as the legislation prevented children from having access to French-language schools in certain communes of Brussels, solely on the basis of the residence of their parents. In contrast this was not the case for Dutch-language schools and thus constituted discriminatory treatment.

The Court also noted that not all types of differential treatment in the provision of rights and freedoms constitute prohibited discrimination under the Convention. The Court decided the following would indicate prohibited discrimination had taken place: (a) the facts disclose a differential treatment; (b) the distinction does not have an aim, that is, it has no objective and reasonable justification having regard to the aim and effects of the measure under consideration; and (c) there is no reasonable proportionality between the means employed and the aim sought to be realised.

This was one of the first cases at international level to consider how broad the principle of non-discrimination on the basis of language in multicultural society is in practice. Even if certain children are being treated differently, those bringing a case would normally need to prove points b. and c. above as well to be successful.

Similarly in the Canadian case of *Davidson and McIntyre v Canada*, Human Rights Committee Communications nos. 359/1989, views of the committee, 31 March 1993, U.N. doc. CCPR/C/47/D/359/1989/385/1989, paragraph 11.4, which concerned the use of French and English language in public schools, it was held that “A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one’s choice”. This case suggests that in any given school (public life) a State may be allowed to decide which language classes are to be given in, but the State is not allowed to prohibit students

from freely expressing themselves in another language in social context with the school premises.

In Australia the case of *Clarke v. Catholic Education Office & Another*, [2003] FCA 1085 (8 Oct. 2003) (Australia) concerned a child's special educational needs, compensation, accessibility, entrance requirements, and indirect discrimination. A student with a severe hearing impairment enrolled at a Catholic secondary college. The student depended on the Auslan signing system to understand language and communication and the learning support model proposed by the college did not include the services of an Auslan interpreter. The school stated its belief that the learning support model was appropriate for his educational needs. But that they could not afford it.

The parents offered to provide the school with \$15,000 to relieve any financial restraints that may have limited their son's opportunities at school. They suggested the grant might be used to provide support for a teacher or teacher aide to be trained in the use of Auslan, provide support for excursions or apply for Commonwealth grants. The school rejected the offer of financial support from the parents because the school thinks that this particular offer may be considered inequitable for other students in the school, whose parents may not afford such financial support.

The Court held that the school had indirectly discriminated against the student and ordered payment of \$20,000 in compensation with \$6,000 interest. Damages included the child's perceptions of rejection and the frustration involved in changing schools and moving away from his friends and other Auslan speakers. The court stated that the condition of the child's entry precluded access and participation in the educational experience by the student with the disability and it was not reasonable when all the circumstances of the case were considered, because on the facts and circumstances of the case a condition of enrolment was established by the college that the child and his parents accept a model of support that did not include Auslan. The education authority can be found to have unlawfully discriminated even if they didn't hold that intention. This is indirect discrimination.

The volatility of the political situation in a significant number of African countries continues to work against efforts to realise universal access to primary and secondary education in the affected states or regions. According to the “Global Report on Conflict, Governance and State Fragility 2007” (Marshall and Goldstone 2007, p. 15-19) more than 18 African countries fell in the highly fragile category, six of which were (then) currently in active conflicts of different kinds, while more than 27 other countries had a previous major conflicts or violence which its post violence/war reconciliation efforts, still not yielding desired results.

In the Namibia case of *Diergaardt et al. v Namibia*, Human Rights committee – communication no 760/1997, views of the committee, 25 July 2000 UN doc. A/55/40, vol. II p. 140. 10.10. The issue was a local language that had been banned from being used in public places or official documents. The applicants claimed that the lack of language legislation in Namibia has lead to their being denied the use of their mother tongue in administration, justice, education and public life. The government had instructed civil servants not to reply to the authors’ written or oral communications including simple telephone conversations with the authorities in the Afrikaans language, even when they were perfectly capable of doing so. The Committee found that such instructions were intentionally targeted against the possibility to use Afrikaans when dealing with public authorities and as such a violation of Article 26 of International Convention on Civil and Political Rights.

The Committee ordered that a Bill be passed in the Namibia Assembly to push for legislations that will allow these people to use their languages as a means of teaching and learning in schools. This is a typical case of direct discrimination against a certain group of people which the Committee rightly recognized and dealt with. Up till today there have been no law to effect this change but many schools, teachers and students have since this decision been carrying out their teaching and learning in the Afrikaans language, regardless of government’s threats of punishments.

The Canadian Supreme court in the case of *Mahé v. Alberta* 1990] 1 S.C.R. 342 Supreme Court of Canada, concerned the Canadian Charter of Rights and Freedoms that guarantees “the right of citizens of Canada inter alia, to have their children receive primary and secondary school instruction in the language of the English or French

linguistic minority population of a province wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction”.

The Francophone parents of children attending school in a predominantly Anglophone province of approximately 16,800 students in the area protested. About 3,750 of these children use French as their first language. They petitioned the measure, as well as requested to be allowed into the schools governing board. The government argued that “the purpose of section 23 is to preserve and promote Canada’s two official languages, French and English“. The Court in taking the potential cost to government into account and the small percentage of children involved, decided not to give the parents full control of the educational facilities or an independent school board. Instead, the Court held that Francophone parents had a right to guaranteed representation and special powers on an existing school board.

The Court noted the limiting clause that makes up the second half of the provision in section 23: there must be enough children requiring the special language provision. The law takes into account the need for public funds to be used appropriately. If there were only very small numbers of children requiring the special language provision, the law acknowledges that public funds could be better spent on other services.

Governing Body of Mikro Primary School & Anor. v. The Western Cape Minister of Education & Others is a South African Supreme Court of Appeal Case No. 140/05 (27 June 2005). According to section 29(2) South African Constitution: “Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable”. South Africa has many languages but eleven of these languages are accepted as official languages of the country. Most schools teach in one or more languages but some teach only in the English language.

The Head of Department at Mikro Primary School had issued a Directive instructing the Governing Body to admit certain learners and teach them in English as that was their native tongue. Initially the High Court agreed that the learners should be

taught in English, by interpreting Section 29(2) of the Constitution to mean that everyone had the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable.

However, in reversing the lower court's decision, the Supreme Court of Appeal held that in terms of Section 29(2), the constitutional right to receive education in an official language at a public educational institution was not a right to receive such education at each and every public educational institution, subject only to it being reasonably practicable to do so. In other words the legal question was whether or not at each and every level of compulsory education, given the facts and circumstances of each case, can a public school "reasonably practice multilingual teaching"

After due consideration of the reasonableness of the circumstances at Mikro Primary School, the Supreme Court of Appeal, held *inter alia*, that"Even if it was reasonably practicable to provide such education at the Mikro Primary School, the children did not have a constitutional right to receive education in English at that particular school, but simply a right to be educated in English at any other school where it is reasonably practicable. Such children were to be sent to another suitable school or schools on a permanent basis as soon as was reasonably practicable. The placement of the children at another suitable school was to be done taking into account the best interests of the children. The Court ordered that the affected children be placed at a public school that conducts its lessons in English.

Racial discrimination in accessing education

Certain groups of people could because of government measures lose their community schools and have to attend schools that may hinder their education. That was the situation in *Traeger Park School v. Minister of Education Northern Territory of Australia*, HREOCA 4, 26 February (1992), where the Australia's Human Rights and Equal Opportunity Commission in conjunction with the Aboriginal Students Support & Parents Awareness Committee, complained that the closure of a school attended by aboriginal children in Australia (138 out of 142 learners were indigenous) which was justified by budgetary savings and by declining enrolments in those schools and low attendance, was contrary to their right to education. The Australian Human Rights and

Equal Opportunity Commission found and argued that the one important reason for closing the school was its image of 'an aboriginal enclave.' Also that the closure of those schools would trigger dispersal of the indigenous learners in the neighbouring schools. The Commission asked how they would have been absorbed and whether these 'Traeger Park children' would be additionally disadvantaged.

In order for the Australian government to have breached the Racial Discrimination Act 1975, the Commission decided there would have to have been an act which involves a distinction, exclusion, restriction or preference which is based on race, colour, etc. and actions or inactions which have the purpose or effect of nullifying or impairing recognition, enjoyment or exercise on an equal footing of any human right such as the right to education and training. The Commission found that the decision was one based on race. However, the Commission also determined that the Australian Education Minister's subjective purpose was for the maintenance of educational opportunities and services for those children.

As a result the Commissioner determined that the Minister's decision was based on the view that mainstreaming the students would be in their longer term interests and not made with the 'purpose or effect of nullifying or impairing recognition, enjoyment or exercise on an equal footing of any human right'. This case also stated that if children could easily attend other schools that met their needs, the State would not have breached discrimination laws because the students' rights to education were, in the Commissioner's interpretation of the Act, sufficiently protected so long as they had access to some form of education. Their rights did not seem to extend to the form that their education took. The commission's reasoning could be deduced to mean that so long as there was an alternative acceptable educational provision to the complainants, the state had not violated the complainants right to education within the meaning of *Brown v Board of Education*, or *Les Témoins de Jehovah v. Zaire*.

Few will doubt that primary and secondary education plays a significant role in enhancing egalitarianism and integration in any society so that separate treatment of children from the same country is bound to be discriminatory and counterproductive. Segregation of school children, school facilities, school staff, extracurricular activities etc, on grounds of students skin colour was the situation in America for many years

until the famous case of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) which concerned various issues including racial discrimination, accessibility, equality, USA, constitution, segregation, and educational opportunities. Before this case most State laws permitted or required the segregation of white and black children in public schools. A number of black children's representatives argued that the legislation violated the constitutional requirement of equal protection of laws, even where schools for black children provided equal facilities. Since education is critical for success in life, the State, where it has undertaken to provide education, must make it available on equal terms. The Court found that 'separate educational facilities are inherently unequal. Even where physical facilities and other objective factors are equal; a segregated school system has the effect of denying equal educational opportunities to the minority group.'

Whilst *Brown* was a clear case of direct racial discrimination, some cases show an example of indirect racial discrimination as was in *D.H. and Others v Czech Republic*, European Court of Human Rights, 14 November 2007, where, European Roma Rights Centre (ERRC) a think tank research institution based in the city of Ostrava in the Czech Republic, fought for the right of children to education by demonstrating through litigation that school selection processes frequently discriminate on the basis of race. The background to this case was that:

- Over half of the Romani child population is schooled in remedial special schools.
- Over half of the population of remedial special schools is Romani.

Any randomly chosen Romani child is more than 27 times more likely to be placed in schools for the learning disabled than a similarly situated non-Romani child. Even where Romani children manage to avoid the trap of placement in remedial special schooling, they are most often schooled in substandard and predominantly Romani suburban schools. In addition, tests used to assess the children's mental ability were culturally biased against Czech Roma, and placement procedures allowed for the influence of racial prejudice on the part of educational authorities.

The think tank centre relied on Article 14 of the European Convention (prohibiting discrimination), taken together with Article 2 of Protocol No. 1 (securing the right to education) to sue the government of Czech Republic at ECHR in Strasbourg, France.

In 1999, the ERRC together with local lawyers filed unsuccessful complaints in the Czech courts on behalf of eighteen Roma children. In 2000, the applicants turned to the European Court of Human Rights, alleging that their assignment to “special schools” for children with learning disabilities contravened the European Convention.

The Court held, by a vote of 13 to 4, that segregating Roma students into special schools was indeed a form of unlawful discrimination in breach of Article 14 of the European Convention (prohibiting discrimination), taken together with Article 2 of Protocol No. 1 (securing the right to education). The Court awarded 4,000 Euros to each of the applicants in respect of non-pecuniary damage and 10,000 Euros jointly in respect of costs and expenses.

Despite the positive judgment, racial segregation in education remains widespread throughout the Czech Republic and in neighbouring countries. European Roma Rights Centre field research in five countries has consistently documented the separate and discriminatory education of Roma, as well as additional practices by educational authorities that result in the segregation of Roma in schools. A violation of Article 14 of the Convention can occur in relation to a pattern of discrimination as well as a specific act. Different treatment as a result of legislation can amount to indirect discrimination even if there was no intent on the part of the State to discriminate. Even where the wording of a particular law is neutral, its application in a racially disproportionate manner without justification which places members of a particular racial or ethnic group at a significant disadvantage may amount to discrimination.

It must however be noted that those in local authorities are acting on behalf of the State just as much as those who draft the laws – if they apply the law in a discriminatory manner, it is the State that is acting in a discriminatory manner. The Court stated that where an applicant alleging indirect discrimination makes a reasonable argument that the effect of a measure or practice is discriminatory, the

burden of proof then shifts to the State to show that the difference in treatment is not discriminatory. As the prohibition of racial discrimination is so important, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest i.e. an individual cannot state that they accept being discriminated against on the basis of their race. The Court noted that as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority who require special protection.

Similarly in the Bulgarian case of *European Roma Rights Centre v. Ministry of Education*, Case 11630/2004 decided on 25 October 2005, it was alleged that 100 per cent of the student body of School 103 in Sofia was Romani. There were substandard material conditions in the school, lower expectations of the students' performance compared with other schools in the area, lack of training for teachers working with bilingual children, and a lack of control on school attendance.

Article 29(1) of the Bulgarian Protection against Discrimination Act (2003) states: "The Minister of Education and Science, and local government bodies shall take such measures as are necessary to exclude racial segregation in educational institutions".

The Court referred to the Bulgarian anti-discrimination Act in force since January 2004 which explicitly defines racial segregation as a type of racial discrimination. It held that racial segregation consists in actions or inaction leading to coercive separation, distinction or isolation of a person on grounds of race, ethnic belonging or colour of skin.

The Court accepted that the separation of the Romani children in School 103 was the result of lack of opportunity to attend other schools caused by residential segregation in an all-Romani neighbourhood, obstacles for enrolment in other schools, and fear of racist abuse by non-Romani children. The Court found that the poor material conditions in School 103, the low educational results of the children, and the failure of the school authorities to exert control on truancy were a clear indication of unequal and degrading treatment of the children. This violated the prohibition on racial segregation enshrined in the Protection against Discrimination Act.

Even though the national standard educational requirements were applicable to the school, it was apparent that the Romani children could not meet these requirements to a degree comparable with that of children in other schools. The evidence of this was sufficient to prove a violation of their right to equal and integrated education. This is an example of indirect discrimination – even though there was no direct legislation that discriminated against the applicants (as in the above case of *D.H. and Others v Czech Republic*), the State had not done enough to create equality between schools.

Even where the State provided a basic level of education for every child suggesting an element of acceptability, nevertheless if as in this case, the level of education was clearly not at an acceptable level compared with what the majority gets, then there can be indirect discrimination on the basis of race, skin, or colour.

Inequality in financing district schools

How the government or its agencies plan for or finance schools can have damaging consequences on some group of students. School financing, strategic litigations have proved to be a very good way to reform school budgetary and financing in many parts of the world, particularly in the USA. School financing lawsuits have appeared in 45 states and plaintiffs have won in 26 of these 45 cases that have reached judicial decision stages (Koski, 2007). As noticed by Reed (2001), courts decisions in school financing litigations, have traditionally issued vague orders and guidelines to state legislatures about how to restructure their school funding system. However, as reported by (Superfine 2010, pp.118), few courts indeed issued precise orders about how states should restructures their school funding across its districts, (e.g *Abbott v Burke*, 1990), and such courts do precisely indicate factors that future courts should take into account when making decisions about how to restructure education funding systems, (e.g., *Lake View School District No.25 v Huckabee* (2001); *Montoy v State* (2005)).

San Antonio Independent School District v. Demetrio P. Rodriguez et al, 411 US 1 (1973) States Supreme Court was a class action brought on behalf of children residing in a school district having a low property tax base, ninety-eight per cent of whom were Mexican-American. Relaying on the same strategies adopted by the

previous 26 victorious litigants, the applicants in San Antonio, challenged the state of Texas' reliance on local property taxes to finance its schools, by alleging that such reliance on property taxation as a way of financing public schools was discriminatory and contrary to the national legislation on equal protection of all children as required by the Equal Protection Clause of the US Constitution.

But the Supreme Court found that the Equal Protection Clause of the U.S Constitution does not provide a valid basis for challenging educational funding disparities from district to district. The court took the view that the state and local school boards are in better position than other federal institutions to set educational policies and that the Supreme Court should not overturn the decisions of these local institutions. The Court in short concluded that the regime was constitutional. The financing system assured basic education for every child in the state, permitted and encouraged participation in and significant control of each district's schools at the local level, and had a rational relationship to a legitimate state purpose. The Court found the evidence regarding who was being discriminated against and of the discrimination itself as being too vague to be termed unconstitutional as alleged by the applicants.

Unlike previous similar litigations, the San Antonio case indicates a narrow approach to the interpretation of equal protection rights, because since all children had access to same basic education, (despite there being disparity in the level of education received) the Court was not prepared to apply strict scrutiny to the funding mechanism.

Other forms of inequality in school funding include the uninformed use of the voucher system in schools. This has been proved to be part of the many factors of inequality that affected children's human right to education and opponents of voucher programme have not failed to challenge its policy in court. In the USA for example, the case of *Bush v Holmes* (2006) 767 So. 2d 668, 675. (Fla. SC) concerned the state of Florida's Opportunity Scholarship Program (OSP). This program provided vouchers to students enrolled in public and some private schools that the state considered as a "failing" school. The Florida Supreme Court was called upon to consider the legality of the OSP. The court found that because under the state's constitution's education clauses, which among other things, provided that Florida must maintain a "uniform" school system, this means that the OSP was unconstitutional.

The majority in the Florida Supreme Court concluded that because the OSP funded schools subject to less regulation than public schools, the OSP would prevent the Florida state school system from being uniform, i.e. equal in its school funding- thereby prejudicing children's fundamental rights to education in the cases of children whose parents are unable for one reason or the other to meet the demands of schools not considered as "failing" schools. In particular the court focused on the fact that the OSP would permit public funds to be allocated to private schools that under state law are not required to implement standardized state curriculum or teachers certification requirements and that do not receive direct oversight from the state (Superfine 2010, p.128).

Discrimination on the basis of nationality in access to education

The effect of globalization is not only felt in commerce and industries, but education has a fair share of its own globalization problems, so that when parents move, their children sometimes encounter problem getting into local schools because of their foreign nationality. That was the problem in the strange case of Dilcia Yean and Violeta Bosica v. Dominican Republic, Inter-American Commission on Human Rights. Report 28/01, Case 12.189; 22 February 2001.

In 1997, Dilcia aged 10 and Violeta aged 12, were refused their request for birth certificates by the Dominican civil registry. Both girls are Dominican-born but of Haitian descent. Without a birth certificate, Dilcia and Violeta were effectively being denied their right to a nationality and to related civil, economic, political and social rights including a right to free education in Dominican Republic public schools. They were expelled from one school after another school, as only children with Dominican birth certificates are allowed to study in public schools and since their parents could not afford the expensive private schools, their chances of getting primary and secondary education was in trouble.

The case was brought on the grounds that the girls' civil rights had been breached, specifically their right to identity and nationality and by extension their right to education. The American Convention on Human Rights Article 3 made it clear that "Every person has the right to recognition as a person before the law". Also the

American Convention on Human Rights Article 20.1, states that “Every Person born in Dominican Republic has the right to a nationality in accordance with nationality acquisition processes”. International courts are less happy to directly rule on economic, social and cultural rights, as these are thought to be policy related and therefore to be decided by national government. However, by drawing links between the breach of civil rights and their impact on other rights, specifically health and education, the breach is given a human dimension, and this can help to bring pressure on the concerned public authority following the media publicity and public outcry that usually follows.

The Movement for Dominican Women of Haitian Descent (MUDHA), together with the Centre for Justice and International Law, and the Human Rights Law Clinic at the University of California, Berkeley filed a complaint before the Inter-American Commission on Human Rights, alleging multiple violations of the American Convention on Human Rights. This international route was chosen as it was felt that the level of national discrimination against those of Haitian descent was so high that the national judiciary would, on public policy, be biased. It was also hoped that by taking the case to an international court, the issue would get international coverage and debate. It was also believed that international courts might be the best route to widespread national discrimination against a particular group and because it may be easier to get more publicity on an international setting.

As always in international disputes a crucial rule governing the admissibility of a complaint is that you must, in general, have exhausted all remedies in the state where the violation occurred before bringing a claim to an international body. This usually includes pursuing your claim through the local court system. There are, however, exceptions to this rule. If the exhaustion of remedies is unreasonably prolonged, or plainly ineffective or otherwise unavailable to you (i.e. in this case, the level of discrimination was so high that the national courts would be biased), you may not be required to exhaust domestic remedies.

Due to the high number of cases submitted to the Inter-American Commission on Human Rights (about 2,000-3,000 per year) it took five years for the case to be referred to the Inter-American Court of Human Rights, and another two years for it to be tried

and for the Court to reach a verdict. In September 2005, the Court found that the Dominican Republic had violated a wide range of rights enshrined in the American Convention, and held that because the Dominican Constitution has the *jus soli* rule of nationality (nationality is granted based on place of birth) the process applied to the two girls was discriminatory.

Both international and domestic courts are generally more willing to recognise that discrimination has taken place rather than decide specifically on a breach of the right to education. It is useful therefore to find victims who have clearly been treated completely different for reasons of race, religion, gender, disability, nationality etc. compared with other people who have had their right to education fulfilled. During the litigation process those taking the case distributed a press packet and press releases to ensure wide media coverage and publicity. The government's reaction was unanticipated and hostile. They launched a press campaign to discredit the case, building on the prejudice which already existed against Haitians.

The court held that a breach of the right to identity and nationality had taken place and awarded each of the girls \$8,000 for damages. It also ordered the government to circulate the judgment publicly, offer a public apology to the victims, and institute a broad range of institutional reforms, relating to nationality and access to education, to ensure that the violation did not happen again.

The effect of this case to children's right to education in Dominican Republic and hopefully internationally is that the government has not complied with any of these judgements, and has yet to publicly apologise or pay the \$8,000 but they have issued birth certificates to the affected girls and also allowed the girls access to schooling. Even without the implementation of the Court's ruling the girls, and others of Haitian descent, have gained significantly through the proceeding. They have gained legitimacy for the right they have been fighting for years, to be legally recognised as Dominican. This case also has shown that courts, especially international courts, can be prepared to see that a breach of civil rights can have a serious effect on socio-economic rights such as the right to education. The Courts are also more likely to rule a breach of a socio-economic right when such a claim is brought together with allegations of discrimination. Where, as this case shows, a breach of a civil right such as identity and

nationality has prevented a child accessing education, a court may be persuaded to order that the right to education must also be fulfilled.

Parental wishes on how their children are educated

The UN declaration which formed the starting point of this report took parental wishes into account, and this empowered the applicant parents in Denmark to uphold their right in court, in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*. 1 E.H.R.R. 737 (Application no. 5095/71; 5920/72; 5926/72), 7 December 1976 which was decided by the European Court of Human Rights, on the legal basis of European Convention on Human Rights. The contested legal issue was whether a state i.e. Denmark, had violated a child's right to education within the meaning of paragraph three of Article 26 of UDHR, i.e. acceptance of parent's wishes, regarding sex education, and freedom of parents to educate their children on, their choice of religious and moral views.

The build up to the case was that Article 76 of the Danish Constitution stated that "All children of school age shall be entitled to free instruction in primary schools". Despite this, through a Bill passed by Danish Parliament, Denmark had introduced compulsory sex education in State primary schools as part of the curriculum, with guidelines for teachers to safeguard (1) showing pornography, (2) teaching sex education to pupils when they were alone, (3) giving information on methods of sexual intercourse and (4) using vulgar languages while imparting sex education. The applicants in this case were parents of children attending state primary schools, who were not satisfied that the guidelines and safe guides sufficiently protected their children.

After several petitions to exempt their children from sex education in concerned state schools were unsuccessful, these parents withdrew their children from those schools, relying on Article 2 of Protocol No.1 to the European Convention of Human Rights, which stated that "No person shall be denied the right to education." Also that in the exercise of any function which a state assumes in relation to education and to teaching, the state shall respect the rights of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions, these

parents unsuccessfully argued that the Danish Government had violated Article 2 of Protocol No. 1 to the European Convention on Human Rights by refusing to exempt the applicants' children from compulsory sex education lessons in school. The Danish government however successfully counter argued, that Article 2 only relates to religious instruction and not all forms of instruction such as sex education.

The Court in recognition of parental rights held that any teaching should respect parents' religious and moral convictions. It stated that the State "must take care that information or knowledge included in this curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions." i.e. Article 2 would be violated only if while imparting sex education, the teachers advocated sex at a particular age or particular type of sexual behaviour. However, the sex education lessons, which the legislation had intended to be imparted to pupils, did not amount to indoctrination or advocacy of a specific kind of sexual behaviours. Moreover, the parents still had the freedom to educate their children at home to install their own religious convictions and beliefs and therefore, imparting sex education in itself was not a violation of Article 2.

The effect of this decision in furthering children's right to education and protection of parental wishes is that the religious and moral beliefs of the parents in this case were not altogether opposed to school education. The situation is more complex where religious beliefs are opposed to full-time formal school education. For example, where children are enrolled in religious schools and given religious instruction which is very different from the curriculum in a regular school. Different courts in different countries may hold differing views i.e. such a practice should be exempted as a cultural right or it could be seen as a violation of a child's human right to primary education. A court's view in such a situation would depend on the constitution and other legislation together with the cultural and political opinion of such education in that country or region.

Earlier the Philippine Supreme court dealt with similar case in *Philippine Association of Colleges v Secretary of Education*, Supreme Court G.R. No. L-5279, 31 October 1955, which involved restrictions upon the parental right to educate their

children according to their own values and an alleged diminution of rights and liberties of private school owners and teachers, because of Philippine government's restriction on the rights of private school owners access to justice. The Philippine's Supreme Court rejected the argument that parental freedom and freedom of establishing and running private educational institutions should be protected against interference by the State. It upheld the constitutionally affirmed power of the State to control education so as to safeguard human rights of all involved as well as the public interest which education should promote in a democratic society. But the Court further added that any intervention by the State ought to be accompanied by adequate access to justice so as to enable private school owners to challenge any alleged abuse of this power of the State. The Philippine Supreme Court drew similar conclusions as the ECHR in Danish case of Kjeldsen above in providing the State with the presumption that it decides what should be in the curriculum but maintaining that parents should have the ability to challenge the State's decisions in this area.

Whilst states may fail to provide adequate schooling for children, however private individuals or organizations willing to step in must satisfy minimum standards of necessities. That was the situation in the case of *State of Maharashtra v Vikas Sahebrao Roundale and Others*. Supreme Court of India 11 August 1992. Here "This Court judicially noted mushroom growth of ill-equipped and understaffed unrecognized educational institutions in Andhra Pradesh, Bihar, Tamil Nadu and Maharashtra and other States in India." Obviously the field of education is notorious to be fertile, perennial and profitable business adventure for unscrupulous individuals and organization, with least capital outlay. This case is one of such case from the State of Maharashtra. To a lay man it would appear that individuals or societies, without complying with the statutory requirements, can establish educational or training institutions ill-equipped to impart education and have students admitted. In some instances despite warnings by the State Government and in some instances without knowledge of the State Government concerned, but with connivance at lower Educational Authority levels, these ill-equipped and ill-housed institutions and sub-standard staff therein are counter-productive and detrimental to inculcating spirit of intellectual, inquiry and excellence in the students.

The Court in this case noted correctly that disregard of statutory compliance would amount to letting loose of innocent and unwary children. The Court affirmed the power and responsibility of the state to ensure that educational institutions conform to minimum standards (safety, water, sanitation or qualifications of teachers.) Without meeting such standards, those schools would be unacceptable.

Availability of educational institutions

In the 1990 Jomtien conference on “Education for All” (EFA) decisions were made to solidify the human rights-based justification for expanding primary education. Attenuated by roughly 1,500 delegates from 155 countries and 150 representatives of non-governmental organizations, the meeting called on nations to universalize primary education so as to massively reduce illiteracy by the year 2000, (UNESCO 1990, as cited in Omwami M.E and Keller E.J 2010, p.12). The follow-up, UNESCO-sponsored conference held in Dakar, Senegal, in 2000 reaffirmed the commitment of developing countries, civil society groups and donor community to achieving UPE. Strong support was given by donor countries and international NGOs to enable developing countries to realise universal access for all nationals to all countries that had the requisite political will and a serious action plans to achieve education for all (UNESCO 2000).

Yet many factors such as, insecurity which is a grave danger to everybody, in particular to children’s right to education, closure of school, regular teacher strikes, war, conflicts, corruption, mismanagement of public funds, violence against educational establishments are just few of the many external factors that continue to affect children’s right to education, because under these conditions school are not always available to those who needed it. This was the circumstances leading to the landmark case of *Les Témoins de Jehovah v. Zaire*, Communication. No. 25/89, 47/90, 56/91, 100/93; 1 October 2005. Here the African Commission on Human and People's Rights took note of the alleged gross mismanagement of public finances by the government leading to degrading conditions, shortages of medicine, education and basic services. The government allegedly failed to provide these services impairing its people from obtaining adequate medical treatment and from accessing basic education. Indeed there was a two year long closure of universities and secondary schools and

nine months closure of many primary schools. In addition the applicants alleged that the government was involved in torture, arbitrary arrests and arbitrary detentions, extra-judicial executions, unfair trials, severe restrictions placed on the right to association and peaceful assembly, (including in schools) as well as suppression of the freedom of the press. But this case was specifically brought because the applicants alleged that the closure of primary and secondary schools violated the right to education (under Article 17) of the African Charter on Human and People's Rights, which *inter alia*, provided that 'Every individual shall have the right to education.'

The claim was brought by four NGOs against former Zaire (now Democratic Republic of the Congo). The Commission, considering there to have been a grave and massive violation of human rights, brought the matter to the Organization of African Union's Assembly of the Heads of State and requested that Zaire receive a mission of two of its members to discover the extent and cause of the violations. There was no response to this request or to the communications and the Commission found them inadmissible as the vast and varied scope of the violations alleged and the general situation prevailing in Zaire made it impractical or undesirable for the domestic courts to adjudicate the alleged violations.

As discussed in above cases the applicants had an obstacle to overcome which is the rule of exhaustion of domestic remedies. See also the cases of *D.H & Others v Czech Republic* in the Racial Discrimination case and also *Dilcia Yean & Others v Dominican Republic* in the discrimination on the basis of nationality. Having satisfied the court that it has successfully exhausted its domestic remedies, the African Commission on Human and People's Rights held amongst other things that, in the absence of a substantive response from Zaire, it must decide on the facts submitted by the complainants and treat them as given; that the closure of schools and universities also described in that submission was a violation of Article 17, as well as a breach of right to education. The Commission ruled that the failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine constitutes a violation of the right to enjoy the best state of physical and mental health (Article 16). Besides violations of economic and social rights, the Commission found the government of Zaire guilty of violating the right to life (Article 4), the prohibition

of torture and inhuman or degrading treatment, the right to liberty and security of person (Article 6), the right to have one's cause heard (Article 7) and the right to freedom of conscience, religion and belief (Article 8), all of which directly or indirectly impacted on the children's right to education as alleged by the complainants.

Since this decision, Zaire (today Democratic Republic of the Congo) has been in a state of war ever since. Despite various peace accords and even though democratic recognized elections took place in 2006, the country has been struck by strife and civil war. On 23 January 2008 a peace deal ending the Kivu conflict was signed. While this formally ended all conflicts in DRC, the effectiveness of the deal and therefore the implementation of the decision remains doubtful.

However for the purpose of this report, this decision provided the Commission a golden opportunity to reinforce the universality and indivisibility of all human rights by treating economic, social and cultural rights, such as the right to education, in the same way as civil and political rights. The Commission reiterated that closing schools is a retrogressive measure should be seen as the opposite of fulfilling the right to education and will often be seen by courts as such.

In the United Kingdom case of *R v Inner London Education Authority, ex parte Ali*, [1990] C.O.D 317 [1990] 2 Admin. L.R. 822, 828B, the court was called upon to examine the duty of local education authority to secure sufficient places at school for all children within the compulsory school age where children were deprived of primary education because of a shortage of teachers. On the facts and circumstances of this particular case the court held that the authority adequately did whatever was in its powers to rectify the un-availability of education and was thus not in breach of its statutory duty.

Conclusion and possible recommendations

In the USA for example, during the desegregation era the courts played better reforming and facilitator roles by actively mobilizing other organs of governments (executives & legislatures) and the broader society (citizens, local committees etc) and rapid results were achieved. But with societies becoming more and more fragmented making social mobilization on a particular issue more complex and complicated, I

believe that the we are at a point in time when the court must use its command and control, or facilitators position to use this kind of mobilization now to ensure its decisions are effective in implementing children's fundamental rights to education at street level.

In view of these points, it is suggested here that courts should open up the judicial process by taking into account the roles of other stakeholders in education most of whom are affected by these kinds of litigations. As (Dyson, 2000) noted, some courts in USA have extensively employed local citizen committees to help advice the judges , develop school discriminatory remedies, monitor implementations of courts orders, improve community relationships, serve as mediators in resolving education disputes, as in (e.g., Little Rock School District v Pulaski Country Special District No. 1, 1988; Morgan v Nucci 1985; Smiley v Vollert 1978; United States v Mississippi 1985; San Francisco NAACP v San Francisco Unified School District 1983)).

As can be seen from the above reported cases, strategic litigation as a legal means of address children's right to education has been effective and the court has been proactive in tackling this problem.

It is hoped that through the above discussions of various cases and their impact on children rights to education, a more general understanding of the roles of courts and strategic litigations in developing and shaping the concept of education as a fundamental human right have been made by this report.

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