

The Role of International Human Rights Mechanisms in Strengthening Justiciability of the Right to Education in Russian Federation

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On 12 July 2013 a 16 years old Pakistani schoolgirl Malala Yousafzai, a brave advocate of the right to education of children deprived of access to schools throughout the world, delivered a strikingly moving speech at the United Nations Headquarters in New York.¹ This powerful statement² was dedicated to the importance of universal access to education for every boy and girl on the planet. Malala's outcry to the governments to ensure 'free compulsory education for every child all over the world'³ and her own experience of suffering from violence triggered by her desire to go to school inspired the UN leaders to proclaim 12 July the 'Malala Day'.⁴

The right to education is a universally recognised human right. Article 26 of the Universal Declaration of Human Rights⁵ proclaims the right of everyone to education. Article 13 of the International Covenant on Economic, Social and Cultural Rights recognises the right to education and sets out its main dimensions with the view of their progressive realisation.⁶

Apart from these two most obvious standards, other universal human rights instruments also reflect a certain aspect of the right to education. Although they are often neglected, they are indispensable for a comprehensive analysis of all dimensions of this right. Thus, the International Covenant on Civil and Political Rights⁷ contains non-discrimination provisions that are essential for the provision of education on the basis of equality of all⁸ and are in-line with the UNESCO Convention against Discrimination in Education.⁹ International Convention on the Elimination of All Forms of Racial Discrimination¹⁰ contains a prohibition of race-related discrimination of the right to education¹¹ and

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1 'Malala Day, Friday 12 July 2013 "Malala is Doing Her Part, Governments Must do Theirs" – UN Special Rapporteur on Education' (OHCHR press release, Geneva 12 July 2013) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13533&LangID=E> accessed 22 January 2014.

2 The full text of the speech is available on the website of the global platform 'A World at School' <<https://secure.aworldatschool.org/page/content/the-text-of-malala-yousafzais-speech-at-the-united-nations/>> accessed 22 January 2014.

3 *ibid.*

4 'At UN, Malala Yousafzai Rallies Youth to Stand up for Universal Education' (UN News Centre, 12 July 2013) <www.un.org/apps/news/story.asp?NewsID=45395#.Ui98GBZnCZ0> accessed 22 January 2014.

5 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (UDHR).

6 *International Covenant on Economic, Social and Cultural Rights* (adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976) (ICESCR).

7 *International Covenant on Civil and Political Rights* (adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976) (ICCPR).

8 ICCPR (n 7) arts 20(2), 24(1), 26.

9 UN Educational, Scientific and Cultural Organisation, *Convention Against Discrimination in Education*, adopted by UNESCO General Conference on 14 December 1960, entry into force 22 May 1962 (CADE).

10 *International Convention on the Elimination of All Forms of Racial Discrimination* adopted by General Assembly Resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969 (CERD).

11 *ibid* art 5(e)(v).

the urge to combat prejudices through education.¹² Convention on the Elimination of All Forms of Discrimination against Women comprises numerous provisions on equal rights of men and women in education,¹³ while Convention on the Rights of the Child¹⁴ calls for recognition of the right to education of all children¹⁵ including those with disabilities,¹⁶ and for elimination of violence, exploitation and drug addiction through educational measures.¹⁷ International Convention on the Rights of Persons with Disabilities¹⁸ urges governments to ensure ‘inclusive education system at all levels and life-long learning’ for people with disabilities,¹⁹ while International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families²⁰ specifically mentions children of migrant workers and their ‘basic right of access to education on the basis of equality of treatment with nationals of the State concerned’,²¹ as well as the right to education of migrant workers themselves²² and members of their families.²³

According to the OHCHR since the adoption of the UDHR in 1948, ‘all UN Member States have ratified at least one core international human rights treaty, and 80 per cent have ratified four or more.’²⁴ The right to education is, thus, truly universally recognised and has been shaped in all its complexity by the binding acquis of international human rights treaties.

Not only the right to education is globally endorsed, but also it is widely represented in binding regional conventions²⁵ and in the overwhelming majority – 90 per cent – of the world’s constitutions.²⁶ With such worldwide recognition one may assume that the right to education is universally realised and the situation with the protection is just as ideal.

However, the reality is far from that. 57 million children throughout the world do not have access to schools.²⁷ These are children involved in illegal labour and soldier children, girls who were forced to marry at an early age or dropped out of school due to early pregnancy, children of refugees and asylum seekers, children belonging to ethnic, national, linguistic, cultural minorities, indigenous peoples, victims of trafficking and slavery.²⁸ Elimination of this gap is one of the Millennium Development

12 *ibid* art 7.

13 *Convention on the Elimination of All Forms of Discrimination against Women* adopted by the United Nations General Assembly 18 December 1979 entry into force 3 September 1981 (CEDAW), arts 10, 14(2)(d), 16(1)(e).

14 *Convention on the Rights of the Child* adopted by General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990 (CRC).

15 CRC (n 14) arts 28, 29.

16 *ibid* art 23.

17 *ibid* arts 19, 32, 33.

18 *International Convention on the Rights of Persons with Disabilities* adopted by General Assembly Resolution A/RES/61/177 of 20 December 2006 entry into force 23 December 2010 (CRPD).

19 CRPD (n 18) art 24.

20 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* adopted by General Assembly resolution 45/158 of 18 December 1990 entry into force 1 July 2003 (CMW).

21 CMW (n 20) art 30.

22 *ibid* art 43 (1)(a).

23 *ibid* art 45 (1)(a).

24 ‘Human Rights Bodies’ (OHCHR, Geneva) <www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> accessed 22 January 2014.

25 *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), Rome, 4 November 1950, art 2 of the Protocol 1 (Paris 20 March 1952) as amended by Protocol No. 11; Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, arts 7 (1) and (3), 10 (1), 15 (1), 17 (1)(a) and (2), 30 (a); *American Convention on Human Rights* ‘Pact of San Jose, Costa Rica’ (B-32), arts 12 (4), 26; *African Charter on Human and Peoples’ Rights* (‘Banjul Charter’), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art 17.

26 Comparative Constitutions Project, directed by Professors Zachary Elkins, University of Texas, Tom Ginsburg, University of Chicago, and James Melton, IMT Institute for Advanced Studies <www.comparativeconstitutionsproject.org> accessed 22 January 2014; See also, De Groof, J. (2012), ‘Legal Framework for Freedom of Education’, in: Glenn, C.L. and De Groof, J. (eds.), *Balancing Freedom, Autonomy, and Accountability in Education, 1*, Wolf Legal Publishers p.25.

27 ‘Global Education First’, the UN Secretary-General’s Global Initiative on Education <www.globaleducationfirst.org/malaladay.html> accessed 22 January 2014.

28 See for example a film prepared by the Office of the United Nations Special Envoy for Global Education <<http://educationenvoy.org>> accessed 22 January 2014.

Goals²⁹ with less than 1,000 days left for its achievement. 774 million adults are illiterate.³⁰ Schools are still destroyed in military conflicts³¹ and corruption still devours lumps of educational budgets,³² and, as witnessed by Malala, students and teachers are killed in war zones and the schools are blasted every day.³³

From these devastating examples a conclusion can be drawn that inadequacy of efforts made by individual states and international community as a whole to respect, protect and fulfil the right of everyone to education is indeed a worldwide problem. And although both provision of education and protection of the rights of people within state's jurisdiction³⁴ clearly belong to the competence of a sovereign state, the significance of unified effort taken through international cooperation³⁵ and supranational mechanisms of monitoring and protection of human rights cannot be underestimated.

In fact, the role that international human rights mechanisms play in strengthening the sense of accountability of states for respecting, protecting and fulfilling human rights of people within their jurisdiction is tremendous. The whole plethora of methods from dialogue, awareness raising and capacity-building to monitoring of compliance with binding human rights instruments and supranational judicial review – all count towards reinforcing national systems of realisation and protection of human rights. After all, the peoples of the world have united for the purpose of reaffirming 'faith in fundamental human rights, in the dignity and worth of the human person'³⁶ and the goal of 'promotion of the economic and social advancement of all peoples' is intended to be reached through employment of 'international machinery'.³⁷

The purpose of this paper is to reveal (1) how international human rights mechanisms contribute to shaping normative content of the right to education³⁸ that can be effectively enforced through available system of judicial and quasi-judicial protection, and (2) how these mechanisms can be used to indicate and address inadequacies of implementation of the internationally recognised right to education and to bridge existing gaps of protection of this right.

As a matter of illustration it is worth mentioning the so called '4A'³⁹ concept that originated from within the UN mechanism, as it was proposed in 1999 by the first Special Rapporteur on the right to education Katarina Tomaševsky⁴⁰ and later duplicated in the General Comment No. 13. This test, due to its clarity and logical, systemic nature, became a framework for state reporting under ICESCR. Through the

29 Target 2.A: 'Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling' <www.mdgmonitor.org/goal2.cfm> accessed 22 January 2014.

30 'International Literacy Day 2013: Literacy Rates are Rising, but Women and Girls Continue to Lag Behind', (UNESCO Institute for Statistics, Paris 30 August 2013) <www.uis.unesco.org/literacy/Pages/data-release-map-2013.aspx?SPSLanguage=EN> accessed 22 January 2014.

31 Rahim Khatib, A. (2009), 'Islamic School was Destroyed During Israeli Military Offensive, in Gaza'; Demotix, 30 December 2009 <www.demotix.com/photo/214324/islamic-school-was-destroyed-during-israeli-military-offensive-gaza-214324> accessed 22 January 2014.

32 Transparency International: Global Corruption Report: *Education* <<http://blog.transparency.org/tag/global-corruption-report-education/>> accessed 22 January 2014.

33 *Malala's speech* (n 2).

34 See 'General Legal Obligations' and 'Specific Legal Obligations' in the CESCR General Comment No. 13 on the Right to Education adopted at the Twenty-first session of the Committee, E/C.12/1999/10 of 8 December 1999, arts 43-57.

35 ICESCR (n 6) art 2 (1).

36 *Charter of the United Nations* signed on 26 June 1945 in San Francisco entered into force on 24 October 1945 (UN Charter) Preamble.

37 *ibid.*

38 In order to render precision to the paper and considering its limits I will choose examples from a particular domestic jurisdiction – Russian Federation.

39 These are Availability, Accessibility, Acceptability and Adaptability of education, *CESCR General Comment No. 13* (n 34) art 6.

40 *Preliminary report of the Special Rapporteur on the right to education* by Ms. Katarina Tomaševski submitted in accordance with Commission on Human Rights resolution 1998/33, adopted at the Fifty-fifth session of the UN Commission on Human Rights, E/CN.4/1999/49 of 13 January 1999, art 50.

reporting procedure and General Comments cited throughout international⁴¹ and domestic⁴² case law this scheme was adopted by domestic legislation to define normative content of the right to education.⁴³

The structure of this paper reflects its aims and purposes. The first section is dedicated to exploration of existing concepts to define justiciability. It will focus particularly on challenges of justiciability of economic, social and cultural rights. The second section will in greater details analyse the applicability of different concepts of justiciability to the right to education disaggregated by dimensions of the right to education at both international and domestic levels.

This structure will support the main argument of this paper: the idea that justiciability of the right to education in its various dimensions can be affected by the practice of international human rights mechanisms.

1. Defining Justiciability

This section will explore the definition of the term justiciability in its dual nature as a legal doctrine and a judicial tool.⁴⁴ I will briefly mention the latter concept as it is very technical and geographically specific, moreover, it cannot be applied to a civil law jurisdiction, such as Russia. I will elaborate in more detail on the former understanding of justiciability since it will lead me to adoption of a working definition for the purpose of this paper.

A. Justiciability as a Judicial Tool

Considering purposes and limitations of this paper this section will only briefly outline the concept of justiciability as a judicial tool, which refers, in a very technical sense, to a procedural (as opposed to substantive)⁴⁵ decision of a court on admissibility of a matter for adjudication. As summarised by Fallon lawsuits have three stages: first, the court determines justiciability, second, if the suit is justiciable, the court rules on the merits and, finally, determines the remedy.⁴⁶ Thus in common law jurisdictions justiciability is often understood as a statement of assessment,⁴⁷ synonymous to that of admissibility of a case.

Galloway cites a practical toolset for basic analysis of justiciability: ‘the What, the When, and the Who’ justiciability test.⁴⁸ According to Galloway, the What refers to crossing the threshold of adversity and non-collusion, it also aims at interception political questions (such as ‘disposition of nuclear armaments, national security, foreign relations and the distribution of scarce public resources’,⁴⁹ the

41 See for example *Case of Tarantino and Others v. Italy* (Applications nos. 25851/09, 29284/09 and 64090/09) Judgment of 2 April 2013 notes 2, 4, 16, 32, 33.

42 See for example *Constitutional Court of Russian Federation ruling* No. 476-O of 16 November 2006 on *Borodina* claim <www.lexed.ru/sud3/01/01/11/?4.html> accessed 22 January 2014; *Constitutional Court of Russian Federation decision* No. 5-P of 15 May 2006 <www.lexed.ru/sud2/01/4/?5-P.html> accessed 22 January 2014.

43 Although a comprehensive review of how the 4A scheme is reproduced in domestic legislation and practice requires a thorough research, some examples can be given: Federal Law on Education in Russian Federation No. 273-FZ of 29 December 2012, as amended by the Federal Law No. 203-FZ of 23 July 2013 (2012) 303 *Rossiiskaya Gazeta* (Federal Law on Education): availability is ensured by public responsibility in education (arts 5(5), 6-9); accessibility is guaranteed in arts 3(1)2, 5(3), 5(5)1, 28(6)1, 41(1)8; acceptability is implied in arts 2(29); 9(1)1, 10(1)1, 11); adaptability is ensured in arts 2(1)1, 2(1)27, 3(1)7, 11(1)3.

44 Barton, T/ (1982-1983), ‘Justiciability: a Theory of Judicial Problem Solving’, *B.C. L. Rev.*, 24, p. 505.

45 . Summers, R. S. (1963), ‘Justiciability’, *The Modern Law Review*, 26 (5) pp. 530,581; Spiro, E. (1982), ‘Justiciability’, *Comp. & Int’l L.J. S. Afr.*,15, p. 206 (who regards justiciability as antimony of substantive law); Yeshanew, S. A. (2008), ‘The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia’, *Afr. Hum. Rts. L.J.*, 8, p.273.

46 Fallon, R. H. Jr (2006), ‘The Linkage between Justiciability and Remedies: And Their Connections to Substantive Rights’, *Virginia Law Review*, 92, pp.633, 634.

47 Marshall, G. (1961), ‘Justiciability’, in. Guest, A.G (eds) *Oxford Essays In Jurisprudence: a Colaborative Work* pp.265-269, 267.

48 Galloway, R. W. (1990), ‘Basic Justiciability Analysis’, *Santa Clara L. Rev.*,30, p. 912.

49 Harris, B.V. (2003), ‘Judicial Review, Justiciability and the Prerogative of Mercy’, *Cambridge L.J.*, 62 , pp.631, 634.

latter being, arguably, one of the challenges of judicial protection of economic, social and cultural rights). The *When* implies meeting the requirements of ripeness, mootness and necessity, while the *Who* refers to the doctrine of legal standing.⁵⁰

Generally speaking, it is easy to agree with Harris who expresses his discomfort ‘about the courts deciding the limits of their own competence’ – a situation akin to one being a judge in its own case.⁵¹ Considering lack of consistency in application of the ‘*What. When. Who*’ test leading to failures of justiciability a more solid legislative approach is needed to narrow down the margin of discretion given to the courts in order to guarantee equal access to a unified standard of justice in a democratic manner.

B. Justiciability as a Legal Doctrine

As a legal doctrine justiciability is explained in two different ways: in its narrow sense, as an ability of a right or its certain dimension to be brought before a competent court and, in a wider sense, as a complex system of guarantees comprising domestic, regional and international mechanisms derived from ratified obligations of the state and designed to protect a certain right in a certain country.

1. Justiciability in a Narrow Sense, as an Ability to be Brought before the Court

Traditional definition of justiciability has a direct connection with the ability of a matter to ‘be properly brought before a court and [to be] capable of being disposed judicially.’⁵² Other law dictionaries agree on the definition of justiciable as ‘appropriate for or subject to court trial’ or being able to be ‘settled by law or a court of law.’⁵³ Justiciable law is understood as ‘capable of being determined by a court of law’ or ‘liable to be brought before a court for trial; subject to jurisdiction.’⁵⁴

According to the doctrinal sources ‘justiciable’ means ‘liable to be tried in a court of justice; subject to jurisdiction’;⁵⁵ ‘peculiarly suited for judicial solution’;⁵⁶ it is also explained as property of a right of being ‘amenable to judicial review.’⁵⁷ A right is therefore justiciable if it is ‘subject to test and remedy in the judicial system of courts and tribunals.’⁵⁸ In this narrow sense justiciability is thus synonymous with enforceability or enforcement.⁵⁹

All these definitions, when read in synthesis, despite their apparent unanimity, leave some fundamental questions unanswered: is justiciability really a property of a *right* or does it have to do with the ability of the *system* to protect the right? From another angle, is it a property of a *right* or of a certain *decision*⁶⁰ implementing / violating the right or perhaps it is a characteristic of a *dispute*? Is it a property of a *right*

50 Galloway (n 48) 912. See also Chemerinsky, E. (1989-1990), ‘A Unified Approach to Justiciability’, *Conn. L. Rev.*, 22, p. 677. On the doctrine of legal standing see also Wood R. C. and Lange G. (2006) Source, ‘The Justiciability Doctrine and Selected State Education Finance Constitutional Challenges’, *Journal of Education Finance*, 32 (1) p.1.; Stearns, M. L. (1995), ‘Standing Back from the Forest: Justiciability and Social Choice’, *California Law Review*, 83 (6), p. 1309; R. Siegel J. (2007-2008), ‘Theory of Justiciability’, *Tex. L. Rev.*, 86, p. 73; Kennedy, C. H. (1975), ‘Government Suits against In-Service Conscientious Objectors Who Have Received Educational Benefits: An Examination of Justiciability and Damages’ *The University of Chicago Law Review*, 42 (4) p. 749; Gerschwer, L. (1993), ‘Informational Standing under NEPA: Justiciability and the Environmental Decisionmaking Process’ *Columbia Law Review*, 93 (4) p.996.

51 Harris (n 49) p. 638.

52 *Black’s Law Dictionary* (9th ed. West Group, 2009).

53 *Random House Kernerman Webster’s College Dictionary* (4th ed. K Dictionaries Ltd. 2010); *The American Heritage Dictionary of the English Language* (4th ed. Houghton Mifflin Company, 2009).

54 *Collins English Dictionary – Complete and Unabridged* (5th ed. HarperCollins Publishers, 2003).

55 Spiro (n 45) p. 206.

56 Summers (n 45) p. 530.

57 Arosemena, G. (2010-2011), ‘Balancing the Right to a Remedy and the Needs of Governance: The Doctrine of Limitation of Rights as a Framework for the Development of Domestic Remedies for Economic, Social and Cultural Rights’, *Tilburg L. Rev.*, 15, p.15.

58 Veit-Wilson, J. (2006), ‘No Rights Without Remedies: Necessary Conditions for Abolishing Child Poverty’ *Eur. J. Soc. Sec.*, 8, p. 317.

59 Cunha, J. R. (2005), ‘Human Rights and Justiciability: a Survey Conducted in Rio De Janeiro’, *SUR - Int’l J. on Hum Rts.*, 3, p. 133.

60 Finn, C. (2002), ‘The Justiciability of Administrative Decisions: A Redundant Concept?’ *Fed. L. Rev.*, 30, p.239.

or of a *legal norm* endorsing it? How can the gap be explained between being *able* to be brought before court and being *appropriate* for such action?⁶¹ Which authority is capable of deciding the latter or setting criteria for the former? How can one definition accommodate the ability of a matter to be settled both *by law* and by the *action of a court* when these are two separate processes involving independent authorities?

All these questions lead to a conclusion that existing understanding of justiciability as a synthetic doctrinal concept referring to the capacity of a matter (a right, a law endorsing the right, a decision implementing the right, or a dispute over a violation of a right) to be able (or appropriate) to be brought before the court (or being settled by the court) – is quite vague and can be interpreted in many different ways depending on the legal system and legal tradition.

Stepping aside from jurisprudence-related doctrine is the interpretation of justiciability suggested by the International Commission of Jurists. In the Commission's report justiciability refers to 'the ability to claim a remedy before an *independent and impartial body* when a violation of a right has occurred or is likely to occur'.⁶² The definition provided by the Commission has two significant differences from those analysed above. First, it reduces justiciability of a right to justiciability of a claim; and second, it widens the scope of application of justiciability as, pursuant to the definition, the remedy can be claimed before any independent and impartial body, not necessarily a court of justice. Additionally, it renders justiciability a certain preventive function ('likely to occur').

Despite this broader interpretation, the Commission's definition still applies only to remedial justice and excludes from the notion of justiciability any implications of guarantees ensuring better realisation of a right.

The concept of justiciability has evolved with time. While in mid-XX century it used to be viewed as 'the very foundation of the judicial function'⁶³ and was only regarded in connection with the actions taken by the courts,⁶⁴ by the end of the century the term received a broader interpretation as a 'juridical mechanism triggered off by the inadequacies in the enforceability or execution of human rights'.⁶⁵ This definition is truly revolutionary: not only it regards justiciability as a mechanism of protection, rather than an attribute of a right, but it also for the first time goes beyond strictly judicial context of this term, suggesting that juridical is wider than judicial.⁶⁶

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2. Justiciability in a Broader Sense as a System of Guarantees

By this manner the concept of justiciability has evolved from a mere reaction of a court to a certain characteristic of a right or a claim⁶⁷ into a mechanism recognising the gaps of protection, analysing their reasons and consequences and elaborating means to address these gaps. The modern concept of justiciability recognises that the capabilities of courts are limited⁶⁸ and that, while the courts have the 'opportunity to oversee the quality of the decision-making procedures used by the executive',⁶⁹

61 On the dichotomy of legal and extra-legal justiciability and the difference between matters that are 'proper' for decision by court and 'capable' of being adjudicated see Ingram, P. G. (1994), 'Justiciability', *Am. J. Juris.*, 39, p. 353.

62 International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability* (ICJ, Geneva, 2008) 6 (emphasis added).

63 Borchar, E. (1936), 'Justiciability', *The University of Chicago Law Review*, 4, p. 1.

64 *Summers* (n 45) p. 581.

65 Addo, M. K (1988), 'The Justiciability of Economic, Cultural Rights' *Commw. L. Bull.*, 14, p. 1425.

66 On the need to go beyond purely legal definition of justiciability see also De Schutter, O., (2010), *International human rights law: cases, materials, commentary*, CUP, Cambridge; New York p.771.

67 It can be argued that these two approaches are different, albeit closely interrelated. A right is justiciable when a claim concerning its violation can potentially be brought before a relevant body, whereas justiciability of a claim would require matching a set of additional procedural criteria. In effect, the difference between justiciability of a right and a claim is along the lines of the differentiation between substantive and procedural matter, respectively.

68 *Harris* (n 49) p. 631.

69 *ibid.*

there can be cases when rendering the matter non-justiciable 'can mean that an illegal decision ... may survive to perpetrate unfairness.'⁷⁰

Thus, the contemporary understanding of justiciability adopts a somewhat extra-legal, or perhaps even socio-legal approach⁷¹ as it attempts to relate this legal doctrine 'to what actually happens in practice.'⁷² As reasonably suggested by Barton, 'justiciability can be fully understood only by adopting a perspective beyond, rather than within, the closed system.'⁷³ He defines this concept 'as the many relationships between adjudicative procedures, and the problems such procedures are asked to resolve. So understood, justiciability offers an original perspective from which the workings, capacities, and limitations of adjudication can be better explored.'⁷⁴

The same – more pragmatic – approach is advocated by Addo, who argues that justiciability 'presupposes the existence of a review mechanism to determine non-compliance with the terms of the legal regime'⁷⁵ thus suggesting that by tackling inadequacies revealed through such mechanism justiciability evolves into a set of guarantees.⁷⁶

This broader understanding of justiciability forms the basis of synthesised working definition of this concept adopted for the purposes of this paper whereby justiciability of a right within the framework of a certain domestic legal order is regarded as a complex characteristic of the respective legal order that allows for systemic employment of international and domestic legal and extra-legal mechanisms with a view to identify, assess and address the inadequacies of recognition, protection and full realisation of the right in question.

C. Justiciability of Economic, Social and Cultural Rights: Myths and Challenges

This paper has no aim to engage into discussions *whether* economic, social and cultural rights are justiciable in the narrow sense (hereinafter *judicially enforceable*). I share the position that by now this statement has become axiomatic⁷⁷ taking into account the abundance of existing in-depth studies on

70 *ibid* p.633.

71 Socio-legal approach differs from doctrinal research in law in that it situates legal phenomena in a broader context, namely, in economic, political and social contexts. See *The Oxford companion to law*. David Maxwell Walker (ed.) (1980), Clarendon, Oxford p.1098; Banakar, R. and Travers, M.(eds.) (2005), *Theory and Method in Socio-Legal Research*, Or.: Hart Pub., Oxford; Portland; Tamanaha, B. Z. (1997); *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*, Clarendon Press, Oxford; Posner, R. A. (1980-1981), 'The Present Situation in Legal Scholarship' *Yale L.J.*, 90, p. 1113; Sargent, N. (1991), 'The Possibilities and Perils of Legal Studies' *Can. J.L. & Soc.*, 6, p.1; Henskens, A. A. (2005-2006), 'Legal Education: Black Letter, White Letter or Practical Law' *Newcastle L. Rev.*, 9, p.81.

72 Twining, W. (1999), 'Mapping Law: The Macdermott Lecture', *N. Ir. Legal Q.* 12, 50, p.45.

73 *Barton* (n 44) p. 507.

74 *ibid* p. 505.

75 *Addo, Justiciability* (n 65) p. 1425.

76 Addo, M. K. *The (2010), Legal Nature of International Human Rights*, Martinus Nijhoff Publishers Leiden; Boston, p.226.

77 See Philip Alston, Foreword to Malcolm Langford (ed) (2008), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, CUP XV., Cambridge: See also Scott, C. and Macklem, P. (1992), 'Constitutional Ropes of Sand or Justiciable Guarantees?' *University of Pennsylvania Law Review*, 141, p. 35-36; Coomans F. and Van Hoof, F.(eds), *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights held from 25-28 January 1995 in Utrecht*, SIM Special No. 18, Utrecht; Squires, J., Langford M., and Thiele, B. (2005), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights*, Australian Human Rights Centre and University of NSW Press, Sydney; Nolan, A., Porter, B., Langford, M. (2007), *The Justiciability of Social and Economic Rights: an Updated Appraisal*, Center For Human Rights And Global Justice Working Paper Number 15, New York, 19.

this subject⁷⁸ and more than compelling jurisprudence concerning different sets of economic, social and cultural rights⁷⁹ worldwide.⁸⁰ Having said that, I will nevertheless sketch current strands of the debate with the only purpose of distilling those core generic elements of economic, social and cultural rights that are essential to understanding of the legal nature of the right to education, its place in the pantheon of human rights and the factors that may affect both its judicial enforceability and its justiciability in broader sense.

The nature of the existing debate on justiciability⁸¹ of economic, social and cultural rights is precisely summarised by O'Connell.⁸² From the principled side, there are arguments that 'socio-economic rights are simply not real rights, in any meaningful sense',⁸³ and on somewhat more practical side is the argument that their judicial enforcement is inconsistent with the doctrine of separation of powers.⁸⁴

78 See, among others, Alston, P. (1994), *Economic and Social Rights, in Human Rights: An Agenda for the Next Century*, Henkin, L. & Hargrove, J. L. (eds.); *Addo, Justiciability* (n 65) 1425; *De Schutter* (n 66) 740-744. See also Gutto, S. B. O. (1994), *Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa* *Buff. Hum. Rts. L. Rev.*, 4, p. 79; Mapulanga-Hulston, J. K. (2002), 'Examining the Justiciability of Economic, Social and Cultural Rights' *Int'l J. Hum. Rts.*, 6, p. 29.; Vandenhole, W. (2003), 'Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights', *Neth. Q. Hum. Rts.*, 21, p.423; Dennis M. J. and Stewart, D. P. (2004), 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' *The American Journal of International Law*, 98 (3), p. 462; Choukroune L. (2005-2006), 'Justiciability of Economic, Social, and Cultural Rights: The UN Committee on Economic, Social and Cultural Rights' Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights', *Colum. J. Asian L.*, 19, p. 30; Christiansen, E. C. (2006-2007), 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court', *Colum. Hum. Rts. L. Rev.*, 38, p. 321; Melish, T. J., (2006-2007), 'Justice vs. Justiciability?: Normative Neutrality and Technical Precision, the Role of the Lawyer in Supranational Social Rights Litigation', *N.Y.U. J. Int'l L. & Pol.*, 39, p.385; Tinta, M. F. (2007), 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' *Human Rights Quarterly*, 29 (2), p.431; Desai, D. (2009-2010) 'Courting Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights?', *Interdisc. J. Hum. Rts. L.*, 4, p. 25; Bulto, T. S. (2010), 'The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights', *U. Tas. L. Rev.*, 29, p. 142; Yusuf, S. (2011-2012), 'Rise of Judicially Enforced Economic, Social & Cultural Rights – Refocusing Perspectives', *Seattle J. Soc. Just.*, 10, p. 753.

79 For example, one of the classic socio-economic rights, the right to the highest attainable standard of health: Sullivan, D. J. (1995), 'The Nature and Scope of Human Rights Obligations concerning Women's Right to Health' 1 *Health and Human Rights*, p. 368; Sellin, J. (2009), 'Justiciability of the Right to Health - Access to Medicines: the South African and Indian Experience', *Erasmus L. Rev.*, 2, p.445.; Young, K. G. and Lemaitre, J. (2013), 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa', *Harv. Hum. Rts. J.*, 26, p.179; or newer development-connected rights, such as the right to water: 'What Price for the Priceless?: Implementing the Justiciability of the Right to Water' (2007) *Harvard Law Review*, 120, p. 1067; Narain, V/ (2009-2010), 'Water as a Fundamental Right: A Perspective From India', *Vt. L. Rev.*, 34, p. 917; Williams, L. A. (2010), 'The Justiciability of Water Rights: *Mazibuko v. City of Johannesburg*', *Willamette J. Int'l L. & Dis. Res.*, 18, p. 211; the right to food: Cohen, M. J. and Brown, M. A. (2005-2006) 'Access to Justice and the Right to Adequate Food: Implementing Millennium Development Goal One', *Sustainable Dev. L. & Pol'y*, 6, p.54.

80 See examples from South Africa, India, South Asia, Columbia, Argentina, Brazil, Venezuela, Canada, The United States, Hungary, France, United Kingdom, Ireland in Langford M. (ed) (2008), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, CUP, Cambridge. See also detailed reviews on domestic jurisprudence on economic, social and cultural rights in *De Schutter* (n 66) 751-771; *Yeshanew* (n 45) 273; *Young and Lemaitre* (n 79) 179; Ibe, S. (2007) 'Beyond Justiciability: Realising the Promise of Socio-Economic Rights', in: Nigeria' *Afr. Hum. Rts. L.J.*, 7, p. 225; Young, R. (2008), 'Justiciable Socio-Economic Rights? South African Insights into Australia's Debate', *Austl. Int'l L.J.*, 15, p.181; Remember Miamingi, (2009) 'Inclusion by exclusion? An Assessment of the Justiciability of Socio-Economic Rights under the 2005 Interim National Constitution of Sudan', *Afr. Hum. Rts. L.J.*, 9, p. 76.

81 On the variety of non-justiciability arguments see *Nolan, Porter and Langford* (n 77); Mureinik, E. (1992), 'Beyond a Charter of Luxuries: Economic Rights in the Constitution', *S. Afr. J. on Hum. Rts.*, 8, p. 464; Davis, D. (1992), 'The Case against Inclusion of Socio-economic Demands in a Bill of Rights except as Directive Principles', *S. Afr. J. on Hum. Rts.*, 8, p.475; Fabre, C. (1998), 'Constitutionalising Social Rights', *J. Pol. Phil.*, 6, p. 263.

82 O'Connell, P. (2012), *Vindicating Socio-Economic Rights: International Standards and Comparative Experience*, Routledge, Abingdon; New York, p.9.

83 O'Connell (n 82) p. 9.

84 Some authors (see *Nolan, Porter and Langford* (n 77)) set institutional capacity of the courts apart from the separation of powers argument. However, for the purposes of this paper such over-elaboration is unjustified.

In a nutshell, the first argument refers to the 'special nature' of economic, social and cultural rights. By 'special nature' of socio-economic rights both the doctrine and the practice understand their 'fundamental difference' from civil and political rights derived from their placement in two separate legal instruments: the ICESCR and the ICCPR which was in fact 'neither an originally-intended nor a necessary separation'.⁸⁵

For the purposes of justifying the unwillingness to adjudicate economic, social and cultural rights both doctrine and jurisprudence insist on identifying these rights as positive rights⁸⁶ 'imposing affirmative obligations'⁸⁷ on the states, vaguely worded and imprecise,⁸⁸ requiring resources for their implementation⁸⁹ and not even creating immediate obligations, but only an indefinite need to ensure their progressive realisation. All these arguments against justiciability of economic, social and cultural rights have long since been rebutted.⁹⁰

The second line of argument insists that judicial enforcement of economic and social rights undermines the democratic doctrine of separation of powers by allowing the judiciary to interfere with budget allocation, since the court must engage in prioritising resources by 'putting a person either in or out of a job, a house or school'⁹¹ – a function belonging to the competence of the executive branch.

However, when one thinks about the doctrine of separation of powers as a holistic concept it is evident that judicial review of executive functions is an essential element of the principle of checks and balances lying in the core of the concept.⁹² If some executive decisions were deemed outside the scope of judicial review it would clearly impede on the principle of equality and fair access to justice. Thus, the position of O'Connell appears fully justified as he insists on reinventing the separation of powers as a 'dynamic and ongoing interaction between the different branches of government' where the courts engage not only 'in an exacting examination of state policies with respect to socio-economic rights', but also in the 'normative development of the content ... [thereof], drawing where appropriate on international and comparative standards'.⁹³

Practically speaking, the function of the executive branch would be defining minimum core obligations of socio-economic rights and designing plans for their progressive realisation in accordance with principles set out by the legislature pursuant to international obligations of the state, whereas the internal judiciary mechanism would focus on non-compliance with established standards. The question of adequacy of the standard itself, as well as assessment of the extent to which it meets the 'progressive realisation' criteria should be left for external monitoring bodies, such as UN Committee on Economic, Social and Cultural Rights (CESCR).

85 Christiansen (n 78) p.344.

86 The negative v. positive dichotomy has been criticised to the effect of regarding 'each right as having [both] negative and positive aspects' (Christiansen (n 78) 374, see also Nolan, Porter and Langford (n 77) 7), the latter implying providing means to fulfil the rights while the former pertaining to the obligation to respect and protect the right on the basis of non-discrimination and appreciation of human dignity.

87 See Christiansen (n 78) 344.

88 Nolan, Porter and Langford (n 77) 9.

89 Nolan, Porter and Langford (n 77) 8; De Schutter (n 66) 743.

90 See for the overview of rebutting arguments Langford, M. (2008), 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, CUP, p. 30. See also: van Hoof, G.J.H. (1984), 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views', in: Alston, P. and Tomasevsky K. (eds) (1984) *The Right to Food*, Martinus Nijhoff, The Hague, pp. 97, 99. On universality of budgetary implications for implementation of all human rights see Coomans (n 77) 427; Benvenuto Lima Jayme Jr. (2002), 'The Expanding Nature of Human Rights and the Affirmation of their Indivisibility and Enforceability' in Goldewijk, B. K., Baspineiro, A. C., Carbonari, P. C. (eds), *Dignity and Human Rights: the Implementation of Economic, Social and Cultural Rights*, Intersentia, Antwerp; New York, p.58.

91 Vierdag, E. V. (1978), 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' *Netherlands Yearbook of International Law*, 9, 69, p.103.

92 On the function of judicial review see Bingham, T. H. (2010), *The Rule of Law*, Allen Lane, London, p.61; Vile, M. (1967), *Constitutionalism and the Separation of Powers*, Clarendon Press, Oxford, p.13; Sargentich, T. O. (1986-1987), 'Contemporary Debate About Legislative-Executive Separation of Powers', *Cornell L. Rev.*, 72, p. 430, 434.

93 O'Connell (n 82) p.201.

To summarise, both ‘special nature’ and ‘capacity’ arguments appear rather artificial. In this regard the reasoning of Christiansen seems perfectly justified as he concludes that ‘[t]he nature of the rights themselves is not a legitimate basis for rejecting their justiciability.’⁹⁴ Indeed, non-recognition of economic, social and cultural rights is often merely political and ideological rather than scientific⁹⁵ and non-justiciability of these rights is merely ‘a perception.’⁹⁶ The ‘revolutionary and heroic’⁹⁷ example of South Africa with its political willingness to adjudicate socio-economic rights⁹⁸ based on the Constitution and reinforced by the judiciary ruthlessly demolishes the ‘impossibility’ argument.

Having said that and adhering to the premise that all human rights are universal, indivisible, interdependent and interrelated⁹⁹ I will reiterate that the question of *whether* disputes concerning economic, social and cultural rights are capable of being resolved by courts to the same extent as claims concerning other rights is of little relevance for the purposes of present paper because, first, it has long since been affirmatively answered by contemporary scholarship as demonstrated above and, second, it refers to the concept of justiciability in its narrow sense. Although essential for adequate protection, the enforceability of a right amounts only to one of many dimensions of justiciability in the broader sense that would also include all other legal and non-legal mechanisms available within a particular legal order for securing its proper fulfilment.

2. Justiciable Dimensions of the Right to Education at International and Domestic Levels in Russia

Having analysed different approaches that exist to define justiciability as a judicial tool and a legal doctrine in both narrow and broad senses, and having supplemented this analysis by the reference to specificities of justiciability of economic, social and cultural rights I will now proceed with narrowing down the focus of my research to justiciability of the right to education.

46

In this section I will outline the elements of justiciability of the right to education, its preconditions and challenges, as well as dimensions of the right to education that are part of its justiciable normative content both at the domestic level in Russia and through international system of protection.

94 *Christiansen* (n 78) p.347.

95 Piovesan, F. (2002), ‘The Implementation of Economic, Social and Cultural Rights: Practices and Experiences’, in: Goldewijk, B. K., Baspineiro, A. C., Carbonari P. C. (eds), *Dignity and Human Rights: the Implementation of Economic, Social and Cultural Rights*, Intersentia Antwerp, New York, p.113.

96 Marcus, D. (2006), ‘The Normative Development of Socioeconomic Rights through Supranational Adjudication’ (2006), *Stan. J. Int’l L.*, 42, 53, p.101.

97 *Christiansen* (n 78) p.323.

98 See for example Gutto (n 78) 79; Young (n 80) 181; Sachs, A. (1989-1990) ‘A Bill of Rights for South Africa: Areas of Agreement and Disagreement’, *Colum. Hum. Rts. L. Rev.*, 21, p.13; Desierto, D. A. (2009-2010), ‘Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa’, *APLPJ*, 11 p. 114.

99 *Vienna Declaration and Programme of Action* adopted at the World Conference on Human Rights on 25 June 1993, endorsed by General Assembly resolution A/CONF.157/23 of 12 July 1993, art 5; *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, (1998) 20 Hum. Rts. Q. 691, para 4. See also scholarly works investigating interdependence, universality, indivisible of all human rights, *Tinta* (n 78) 434-443, 459; *Desierto* (n 98); *Desai* (n 78); *Piovesan* (n 95) 116; Jayme Benvenuto Lima Jr. (2002), ‘The Expanding Nature of Human Rights and the Affirmation of their Indivisibility and Enforceability’ in Goldewijk, B. K., Baspineiro, A. C., Carbonari, P.C. (eds), *Dignity and Human Rights: the Implementation of Economic, Social and Cultural Rights* Intersentia, Antwerp; New Yor, p.45; Koch, I. E. (2003), ‘The Justiciability of Indivisible Rights’ *Nordic J. Int’l L.*, 72, p.3; Klaaren, J. (2005), ‘A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights’ *Human Rights Quarterly*, 27, p.539.

A. Preconditions of Justiciability of the Right to Education

International human rights instruments and doctrinal sources may describe the right to education as a self-standing right in its narrow sense¹⁰⁰ or in a broader sense as the right to development¹⁰¹ and an empowerment right,¹⁰² implicit in all other rights¹⁰³ or pigeonholed to one of the three 'generations' of human rights,¹⁰⁴ perceived as a right or a freedom¹⁰⁵ (positive or negative),¹⁰⁶ as a right to receive education and the right to choose education,¹⁰⁷ limited by other rights¹⁰⁸ or reinforced by the principles of non-discrimination and equality;¹⁰⁹ disaggregated by level of education or organisational form (private¹¹⁰ and public¹¹¹) or regarded through the prism of special categories of the subjects of this right (disabled,¹¹² minorities,¹¹³ homeless,¹¹⁴ women and girls¹¹⁵).

The UN Special Rapporteur on the right to education Kishore Singh in his annual report to the Human Rights Council in June 2013 made a direct causal link between international recognition of the right to education and justiciability of 'any or all of its dimensions.'¹¹⁶ At the first blush this approach

- 100 Nowak, M. (1991), 'The Right to Education - Its Meaning, Significance and Limitations' *Neth. Q. Hum. Rts.*, 9, p.418.
- 101 UN General Assembly, *Declaration on the Right to Development*, adopted by the General Assembly, 4 December 1986, A/RES/41/128; Kumar, C. R. (2004), 'International Human Rights Perspectives on the Fundamental Right to Education - Integration of Human Rights and Human Development in the Indian Constitution' *Tul. J. Int'l & Comp. L.*, 12, p.237; Alston, P. and Robinson M. (eds) (2005) *Human Rights and Development: Towards Mutual Reinforcement*, OUP Oxford; New York, p.551; Tadeg, M. A. (2010), 'Reflections on the Right to Development: Challenges and Prospects' *Afr. Hum. Rts. L.J.*, 10, p.325; Bedjaoui, M. (2012), 'The Right to Development, in International human rights' in Alston P. and Goodman R. (eds) (2010), *Human Rights in Context: Laws, Politics and Morals: Text and Materials*, OUP, Oxford, p. 1532.
- 102 CESCR *General Comment No. 13* (n 34) para 1; UNESCO's Medium-Term Strategy 2002-2007, (31 C/4, para. 62), UNESCO, Paris <<http://unesdoc.unesco.org/images/0012/001254/125434e.pdf>> accessed 22 January 2014; Kishore Singh, 'The Right to Education: International Legal Obligations' (2005) 1 *Int'l J. Educ. L. & Pol'y* 103, 107.
- 103 Winkler, R. (2005), 'The Right to Education according to Article 14 of the Charter of Fundamental Rights of the European Union' *Int'l J. Educ. L. & Pol'y*, 1, pp.60, 62; van der Schyff, G. (2006), 'Classifying the Limitation of the Right to Education in the First Protocol to the European Convention', *Int'l J. Educ. L. & Pol'y*, 2, p.153.
- 104 Mubangizi, J. C. (2004), 'Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context', *Afr. Hum. Rts. L.J.*, 4, p. 93.
- 105 Winkler (n 103); Breese, J. (2012), *Freedom and Choice in Education*, RLE Edu K, Routledge; Blum, V. C. (1977), *Freedom of choice in education*, Westport, Conn.: Greenwood Press; Glenn, C. L. (1994), *Educational Freedom in Eastern Europe*, Cato Institute, Washington, DC; Anderson, N.S. and Kharem H. (eds.) (2009), *Education As Freedom: African American Educational Thought and Activism*, Lexington Book; Glenn, C. L. and De Groof, J. (eds.) (2012), *Balancing freedom, autonomy and accountability in education*, volumes 1-4, Wolf Legal Publishers.
- 106 Richter, I. (2009), 'The Right to Education as a Constitutional Right' (2009) *Int'l J. Educ. L. & Pol'y*, 5, p. 5.
- 107 Coomans (n 77), p.427.
- 108 Religious freedom: De Groof J. and Lauwers, G. (2005), 'Nobody Can Be Denied the Right to (an Own Identity in) Education: Legal Bottlenecks in National and International Law concerning the Freedom of Religious Expression: The Case of the Headscarf in Education' , *Int'l J. Educ. L. & Pol'y*, 1, p.132; Dijkstra, A. and Vermeulen, B. (2008), 'Islamic Schools in the Netherlands', *Int'l J. Educ. L. & Pol'y*, 4, p. 16; linguistic rights: Kung, E. and Meix, P. (2010), 'Legal Status of Languages in Education: The Cases of South Africa and Spain', *Int'l J. Educ. L. & Pol'y*, 6, p. 33.
- 109 Jaffe M. and Kersch K. (1991), 'Guaranteeing a State Right to a Quality Education: The Judicial-Political Dialogue in New Jersey', *J.L. & Educ.*, 20, p. 271; Marron, B. P. (2002), 'Promoting Racial Equality through Equal Educational Opportunity: The Case for Progressive School-Choice', *BYU Educ. & L.J.*, p. 53; Harris, N. (2008), 'Equal Rights in Education in the UK (England)', *Int'l J. Educ. L. & Pol'y*, 4, p. 4.
- 110 Lines, P. M. (1983), 'Private Education Alternatives and State Regulation', *J.L. & Educ.*, 12, p. 189.
- 111 Wagner, E. N. (1991), 'Public Responsibility for Special Education and Related Services in Private Schools', *J.L. & Educ.*, 20, p.43; Brown-Nagin, T. (1998), 'Broad Ownership of the Public Schools: An Analysis of the T-Formation Process Model for Achieving Educational Adequacy and Its Implications for Contemporary School Reform Efforts', *J.L. & Educ.*, 27, p.343.
- 112 Natapoff, A. (1995), 'Anatomy of a Debate: Intersectionality and Equality for Deaf Children from Non-English Speaking Homes', *J.L. & Educ.*, 24, p.271.
- 113 Kemp, W. (2004), 'Learning Integration: Minorities and Higher Education' , *Special Issue Int'l J. Educ. L. & Pol'y*, p. 21.
- 114 Stronge, J. H. and Helm, V. M. (1991), 'Legal Barriers to the Education of Homeless Children and Youth: Residency and Guardianship Issues', *J.L. & Educ.*, 20, p. 201.
- 115 Rebell, M. A., Murdaugh, A. W. (1992), 'National Values and Community Values Part I: Gender Equity in the Schools', *J.L. & Educ.*, 21, p.155; Sudduth, J. T. (2009), 'CEDAW's Flaws: A Critical Analysis of Why CEDAW is Failing to Protect a Woman's Right to Education in Pakistan', *J.L. & Educ.*, 38, p. 563.
- 116 Report of the Special Rapporteur on the right to education, Kishore Singh, *Justiciability of the right to education* presented at the Twenty-third session of the UN Human Rights Council, A/HRC/23/35 of 10 May 2013 para 27.

appears rather schematic: such understanding requires *at least* universal ratification of all international instruments concerned with the right to education, as well as complete convergence of domestic practice with international standards of respect, protection and fulfilment of this right.

However, at the same time we realise, that in his statement Singh appeals to the broader understanding of the term justiciability as described in earlier in this paper. By asserting that the right to education is justiciable so long as it is internationally recognised Singh, according to the synthetic analysis of the whole text of the report, implies a complex set of guarantees: from ‘existing constitutional or legislative provisions on the right to education’ to the possibility ‘to have legal recourse before the law courts on the basis of international legal obligations’¹¹⁷ in case of violations.

This system of guarantees also includes quasi-judicial mechanisms of protection¹¹⁸ and preventive mechanisms allowing for special attention to vulnerable and marginalised groups¹¹⁹ as well as capacity of the system to effectively monitor and address gaps of protection or specific factors challenging justiciability, such as lack of awareness of the right, legal, cultural, procedural and financial barriers¹²⁰ to full realisation and successful protection of the right.

This important report promoting a new, broader, approach to justiciability is long overdue: the current position of the CESCR as per the Committee’s General Comments concerning justiciability of economic, social and cultural rights including the right to education is outdated from both doctrinal and practical points of view. The Committee still acts on the premises confirming partial (or conditional) justiciability of economic, social and cultural rights thus lowering the standard of protection of these rights in states parties to the Covenant.¹²¹

For example, among the appropriate measures the General Comment No. 3 on the nature of state obligations mentions ‘provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable’.¹²² The Committee thus admits the possibility that some of the rights endorsed by the Covenant can, in principle, not be considered justiciable. This narrow interpretation of justiciability creates a closed circuit system where the rights must first be considered justiciable (by which authority?) and then judicial remedies should be provided for their protection. However, without legislative provision of appropriate judicial remedies these rights will never become justiciable.

Another example of outdated approach to justiciability featured by CESCR is paragraph 10 of General Comment No. 9 that distinguishes between ‘justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration)’.¹²³ These two definitions appear confusing, because being self-executing is a prerequisite condition for justiciability and not an opposing category as it is implied in paragraph 10 of the Comment.

It is understandable that the Committee will be hesitant about immediate adoption of any daring initiatives due to its institutional and political constraints. First, adoption of a new General Comment or revision or update of an existing one is a complicated time-consuming procedure involving wide consultations with specialised agencies, civil society and academics followed by preparation of a

117 Singh, *Justiciability* (n 116) para 27.

118 *ibid* paras 36-43.

119 *ibid* paras 54-58.

120 *ibid* paras 74-80.

121 The use of CESCR General Comments as a benchmark for the state parties reporting procedure has been established in a number of the Committee’s reports, see for example UN Committee on Economic, Social and Cultural Rights: *Report on the Thirtieth and Thirty-First Sessions* (5-23 May 2003, 10-28 November 2003) E/2004/22 E/C.12/2003/14 (Economic and Social Council Official Records, 2004, suppl No. 2) para 52.

122 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties’ Obligations* (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23 para 5.

123 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant* adopted at the 51st meeting on 1 December 1998 (Nineteenth session) E/C.12/1998/24.

draft for further discussion by the Committee and interested parties and formal adoption in plenary session.¹²⁴ Considering the time span between plenary sessions (they take place twice a year, in April and November),¹²⁵ the fact that the last General Comment was adopted in 2009¹²⁶ and that none of the Comments have ever been updated or revised, the lack of intensity in this process suggests inability of this mechanism to accommodate upcoming issues.

Second, political constraints of the Committee's reluctance to immediately adopt new approaches have to do with hyper-sensitivity of the states towards their reporting obligations. Since General Comments are designed 'with a view to assisting States parties in fulfilling their reporting obligations',¹²⁷ all changes will be subject to extreme scrutiny and political negotiations further complicated by the Committee's general inclination to 'work on the basis of the principle of consensus'.¹²⁸ Nevertheless, one can anticipate that the ambitious proposal of the Special Rapporteur to use a broader notion of justiciability will find its way to domestic practice through the Committee's monitoring procedure as it had happened before.¹²⁹

CESCR General Comment No. 9 on domestic application of the Covenant outlines a mechanism to ensure implementation of the Covenant in countries with dualist and monist legal systems¹³⁰ while mentioning that direct incorporation of the Covenant is strongly encouraged but is not formally obligatory.¹³¹

Being mindful of this reasonably balanced approach to incorporation of the Covenant rights adhered to by the Committee one is caught unawares by the formula proposed by the Special Rapporteur. In his report cited above Singh insists that justiciability of the right to education 'should be publicly acknowledged, and reaffirmed by governments in the constitution and domestic legislation'.¹³² This request goes beyond mere recognition of the *right itself* in domestic legislation – what is implied is a gap between recognition of the right and its justiciability leading to the need to implicitly affirm the latter separately in the legislation.

124 Follow-up to the recommendations of the Twenty-fourth meeting of chairpersons of the human rights treaty bodies, including harmonization of the working methods: other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process. Twenty-fifth meeting of chairpersons of the human rights treaty bodies, Geneva, 24–28 June 2013. Item 4 of the provisional agenda, HRI/MC/2013/3 of 22 April 2013, para 15.

125 For the schedule of sessions see <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR> accessed 22 January 2014.

126 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 21: *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/21 of 21 December 2009.

127 UN Committee on Economic, Social and Cultural Rights (CESCR), Rules of Procedure of the Committee: Provisional rules of procedure adopted by the Committee at its third session (1989), E/C.12/1990/4/Rev.1 of 1 September 1993, rule 65.

128 *ibid* rule 46.

129 In 1999 the 4A scheme – Availability, Accessibility, Acceptability and Adaptability of education suggested by the Special Rapporteur on the right to education was adopted by the CESCR *General Comment No. 13* (n 34) as a benchmark of the states obligations in respect of the right to education.

130 See Crawford, J. (2010), *Brownlie's principles of public international law*, 8th ed., OUP, Oxford pp.48-50.

131 *General Comment No. 9* (n 123) para 8.

132 *Singh, Justiciability* (n 116) para 81.

Apart from recognition, another precondition of justiciability, indispensable for measuring compliance with human rights standards and for attributing liability for violations are human rights indicators.¹³³ Indicators are needed to give substantial content to the otherwise uncertain obligations to respect, protect and fulfil a specific human right. The use of indicators is particularly relevant for economic, social and cultural rights for two reasons.

First, most of the requirements of the ICESCR are couched in quantitative – measurable – terms ('maximum of its available resources', 'achieving progressively',¹³⁴ 'steady economic, social and cultural development',¹³⁵ 'progressive introduction of free education',¹³⁶ 'material conditions of teaching staff shall be continuously improved',¹³⁷ 'conform to ... minimum educational standards',¹³⁸ '...undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all'¹³⁹ and so forth).

Second, use of indicators helps to address alleged vagueness of normative provisions concerning economic, social and cultural rights,¹⁴⁰ including the right to education, through setting concrete numerical values to achieve the 'minimum core obligations'.¹⁴¹ As precisely appraised by Vandenhole '[t]he minimum core content is the essence and core substance of a right, without which that right and its fulfilment or enjoyment would have no meaning, and which may therefore not be violated. For that reason, it is a general and universal minimum standard'.¹⁴² Use of concrete indicators (such as percentage of school enrolment ratio; statistical data disaggregated by age, gender, place of residence, ethnical background; early drop-out rate; pupil-teacher ratio etc.), thus, tackles the problem of

133 One encounters the concept of indicators and benchmarks in connection with economic, social and cultural rights in a number of UN documents. Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mr. Danilo Türk in his Progress Report E/CN.4/Sub.2/1990/19 emphasised the 'diverse and useful role of indicators in the realization and assessment of economic, social and cultural rights'. The Commission on Human Rights in its Resolution 1994/20 para 7 recognised 'the importance of using indicators as a means of measuring or assessing progress in the realization of human rights, as referred to in the Vienna Declaration and Programme of Action'. The CESCR in their Report on the twentieth and twenty-first sessions E/2000/22, E/C.12/1999/11 (26 April-14 May 1999, 15 November-3 December 1999), Annex VIII proposed to organise a workshop on indicators, benchmarks and the right to education mindful of their 'important role ... in monitoring the implementation of human rights, especially economic, social and cultural rights' (para 1). Moreover, indicators and benchmarks are considered indispensable for reporting obligations of the states and are included in the CESCR's Outline for drafting general comments on specific rights of the International Covenant on Economic, Social and Cultural rights (Annex IX to the Report). In connection with the right to education the CESCR requires the States to design national educational strategies that would include 'mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored' (see CESCR *General Comment No. 13* (n 34) para 52). See also *Framework in practice implementing and monitoring rights. V. Using indicators for human rights* <www.ohchr.org/Documents/Issues/HRIndicators/AGuideMeasurementImplementationChapterV_en.pdf> accessed 22 January 2014.

134 ICESCR (n 6) art 2(1) (emphasis added).

135 *ibid* art 6(1) (emphasis added).

136 *ibid* arts 13(2)(b) and 13(2)(c) (emphasis added).

137 *ibid* art 13(2)(e) (emphasis added).

138 *ibid* arts 13(3) and 13(4) (emphasis added).

139 *ibid* art 14 (emphases added).

140 As noted by some scholars, see, for example, *Arosemena* (n 57) 23-26; *Christiansen* (n 78) 345; *Koch* (n 99) 4-12; *Marcus* (n 96) 59-60; *Tinta* (n 78) 433; *Yusuf* (n 78) 784; Alston, P. (1987), 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social, and Cultural Rights', *Hum. Rts. Q.*, 9, pp. 332, 351; Alston, P. (1991), 'No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant', in: Eide A. & Helgesen J. (eds), *The Future of Human rights Protection in a Changing World*, p.86; Klein, A. (2008), 'Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights', *Colum. Hum. Rts. L. Rev.*, 39, pp.351, 353-4; Young, K.G. (2008) 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' *Yale J. Int'l L.* 33, pp. 113, 166.

141 As defined by *General Comment No. 3* (n 122) para 10 and *General Comment No. 13* (n 34) para 57, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2000/13, 2 October 2000 (1987) 9 Hum. Rts. Q. 122, Limburg Principle No. 25. See also Young, *The Minimum Core* (n 140) 113.

142 Vandenhole (n 78) 438.

vagueness that is considered, albeit not unanimously,¹⁴³ as one of the reasons of non-justiciability of this category of rights.¹⁴⁴

Reporting guidelines of the UN Committee on the Rights of the Child (CRC)¹⁴⁵ are, undoubtedly, an example of best practice when it comes to drafting a questionnaire for monitoring of states compliance with their international obligations. These guidelines are very practically oriented and include concrete questions aimed at obtaining and assessing quantitative data. For example, with regard to progressive realisation of the right to education the Committee requests reporting countries to disclose the following qualitative data:¹⁴⁶

The proportion of the overall budget at all levels 'devoted to children and allocated to the various levels of education...

The rate of illiteracy below and over 18 years, and the rate of enrolment in literacy classes, including by age, gender, region, rural/urban area, and social and ethnic origin...

The changes that have occurred in the education system (including with regard to ... enrolment, drop-out and literacy);

Other relevant disaggregated data on the children concerned, including on education outcomes, inter alia by gender, age, region, rural/urban area, and national, ethnic and social origin.'

Other requirements of this document are couched in similar strictly practical and highly detailed terms. As a result, reports of this Committee appear more profound and comprehensive than those of the CESCR, despite the latter being devised for monitoring the right to education among the other rights endorsed by the Covenant.

For example, if one compares Russia's third periodic report submitted to CRC in 2005¹⁴⁷ with her fifth CESCR report of 2011,¹⁴⁸ it will be the CRC report that not only has technically more articles dealing with the right to education (93 clauses against 30 in CESCR report), but also is considerably more detailed on the issues of the right to education with more in-depth investigation of inadequacies.

143 A closer look into this issue reveals dissenting conclusions, see for example *Marcus* (n 96) 87.

144 See, for example, UN Doc. A/HRC/23/NGO/18 of 16 May 2013 *Joint written statement submitted by Istituto Internazionale Maria Ausiliatrice (IIMA), the International Volunteerism Organization for Women, Education, Development (VIDES), the Association Points-Cœur, Edmund Rice International, the International Federation of University Women (IFUW), the International Catholic Child Bureau (ICCB), the Dominicans for Justice and Peace (Order of Preachers), Organisation internationale pour le droit à l'éducation et la liberté d'enseignement (OIDEL), Associazione Comunità Papa Giovanni XXIII, Apprentissages Sans Frontières (ASF), the Teresian Association and the Marist International Solidarity Foundation (FMSI), non-governmental organizations in special consultative status; the Soka Gakkai International (SGI) and Mouvement contre le Racisme et pour l'Amitié entre les Peuples (MRAP), non-governmental organizations on the roster to the 23rd Session of the Human Rights Council, A/HRC/23/NGO/18 of 16 May 2013 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/138/48/PDF/G1313848.pdf?OpenElement>> accessed 22 January 2014.*

145 UN Committee of the Rights of the Child *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1 (B), of the Convention*, Adopted by the Committee at its 343rd meeting (thirteenth session) on 11 October 1996, CRC/C/58 20 November 1996 (CRC Reporting Guidelines).

146 *CRC Reporting Guidelines* (n 145) para 106.

147 40th Session of CRC (12 - 30 September 2005). *Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Third periodic reports of States parties due in 2001: Russian Federation* No. CRC/C/125/Add.5 15 November 2004 of 18 August 2003 (CRC Report).

148 46th Session of CESCR (2-20 May 2011). *Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth periodic reports submitted by States parties in accordance with articles 16 and 17 of the Covenant: Russian Federation*. No. E/C.12/RUS/5 of 3 June 2008.

Without attempting to produce a comprehensive overview of existing research¹⁴⁹ or practical approaches¹⁵⁰ to the use of indicators as a tool to enhance recognition and protection of the right to education, I have nevertheless demonstrated that the more highly elaborated and detailed quantitative indicators are used for monitoring and reporting purposes, the better is the quality of the data provided by the state and, consequently, the higher visibility of the violations. If this method works in international forum it should be equally practicable on the domestic level.

B. Justiciable Dimensions of the Right to Education in Russia at the Domestic Level

According to Singh 'justiciability of the right to education ... has its bases in national legal systems.'¹⁵¹ For its effective protection in the framework of domestic justiciability the content of the right must be clearly defined and subjected to judicial and quasi-judicial mechanisms of enforcement.¹⁵²

In Russian legal system the right to education is recognised on the constitutional level and are further developed in both federal and regional legislation. The right to education is protected by the judicial system and non-judicial mechanisms as well.

Without aiming at providing a full review of education law and policies in Russia¹⁵³ I will only outline those basic constitutional and legislative provisions that shape the foundation of justiciability of the right to education in Russia. In the following three subsections I will describe and evaluate the relevant Constitution articles and basic legislation, as well as judiciary and non-judiciary mechanisms of protection of the right to education.

1. Justiciable Dimensions of the Right to Education in Russia as Articulated by Constitutional and Legislative Provisions

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It is generally accepted that recognition of a right at the constitutional level is essential for its domestic justiciability.¹⁵⁴ The main principle of direct correspondence between constitutional recognition of the right and its justiciability was reiterated by the CESCR in their General Comment No. 3:¹⁵⁵

149 For a very detailed overview of existing research on this topic see Kalantry, S., Getgen, J.E., Koh, S. A. (2010), 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR', *Hum. Rts. Q.*, 32, pp.257, 280.

150 Singh, *Justiciability* (n 116) 74; UN Committee on Economic, Social and Cultural Rights, *Report on the forty-sixth and forty-seventh sessions* (2–20 May 2011, 14 November–2 December 2011) Economic and Social Council Official Records, 2012, Supplement No. 2, E/2012/22, E/C.12/2011/3, Annex VII, *Report of the eleventh meeting of the Joint Expert Group UNESCO (Committee on Conventions and Recommendations)/Economic and Social Council (Committee on Economic, Social and Cultural Rights) on the Monitoring of the Right to Education*, paras 6-9; Ten Education for All *Global Monitoring Reports* prepared by Joint Expert Group of CESCR and UNESCO (2002-2012) <www.unesco.org/new/en/education/themes/leading-the-international-agenda/efareport/reports/> accessed 22 January 2014; *Statistics and indicators for the post-2015 development agenda* (UN System Task Team on the Post-2015 UN Development Agenda, 2013) <www.un.org/en/development/desa/policy/untaskteam_undf/UNTT_MonitoringReport_WEB.pdf> accessed 22 January 2014; *Human Rights Indicators, A Guide to Measurement and Implementation* (OHCHR, 2012) <www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx> accessed 22 January 2014.

151 Singh, *Justiciability* (n 116) para 26.

152 Yeshanew (n 45) 273.

153 A comprehensive general description of the system of education in Russia and educational legislation is featured in Smirnova, M. (2012), 'Russian Federation', in: Glenn, C. L. and De Groof, J. (eds.), *Balancing Freedom, Autonomy, and Accountability in Education*, Volume 4, Wolf Legal Publishers, p.199; see also on higher education in Russia, Smirnova, M. (2013), 'Comparative Legal Analysis of the Legislation on Higher Education in Russian Federation', in: Russo, C. ed.) (2013), *Handbook of Comparative Higher Education Law*, Rowman and Littlefield Publishing Group (R&L), pp. 255-273; on education law and newest benchmarks of education policy, Smirnova, M. (2012), 'Education Law in Russia', *The Yearbook of Education Law*, Dayton University, Ohio, pp. 349-356.

154 Addo, *Justiciability* (n 65) 1428; Christiansen (n 78) 323; Coomans (n 77) 427; Singh, *Justiciability* (n 116) para 25; Yeshanew (n 45) 274; Yusuf (n 78) 784; Simon-Kerr, J. A. and Sturmt, R. K. (2010), 'Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education', *Stan. J. C.R. & C.L.*, 6, pp.83, 86.

155 CESCR *General Comment No. 3* (n 122) para 6 (emphasis added).

In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information *as to the extent to which* these rights are considered to be justiciable (i.e. able to be invoked before the courts).

By invoking the extent to which the rights recognised by the constitution are considered justiciable the Committee presumes that it's not the question *whether* they are, but only the *extent to which* they are.

In Russia the right of every person to education is ensured by Article 43 (1) of the Constitution.¹⁵⁶ In line with international state obligations in the domain of education 'secondary and high vocational education' is generally accessible and provided free of charge¹⁵⁷ 'in state or municipal educational establishments and at enterprises'. The article also places pre-school education under the same standard of accessibility.

Free higher education is guaranteed 'on competitive basis' in a 'state or municipal educational establishment and at an enterprise'.¹⁵⁸ Competitive access and institutional limitations are further complemented on legislative level by an additional condition: only first higher education can be exempt from tuition fees, provided all other requirements met.¹⁵⁹

This provision is very controversial: the law does not make clear what, in fact, is considered 'first' higher education: the first finished university degree or the first one applied for and/or enrolled to (considering expulsions, or voluntary abandoning of the course). There is no unified official database of issued diplomas whatsoever, let alone of enrolled students. Moreover, universities cannot ask for a proof of existing qualifications. Nevertheless, the legislative limitation was considered by the Constitutional Court of Russian Federation as fully compatible with the Constitution¹⁶⁰ and, particularly, with its 'limitation clause'.¹⁶¹

The Constitution guarantees that 'the basic general education shall be free of charge'. It also imposes responsibility on the parents for ensuring compulsory basic general education for their children:¹⁶² since 2008 all 10 years of schooling are compulsory and free of charge.¹⁶³

Russian Constitution was adopted in 1993. Its preparation took place long after the ratification by the Soviet Union of the ICESCR¹⁶⁴ and the distinguished members of the Constitutional Meeting that was

156 Constitution of Russian Federation, as adopted by national referendum on 12 December 1993 (1993) 237 *Rossiiskaya Gazeta* (as amended by Federal Constitutional Laws on Amendments to the Constitution of Russian Federation No. 6-FKZ and No. 7-FKZ of 30 December 2008, (2009) 7 *Rossiiskaya Gazeta* <www.constitution.ru/en/10003000-01.htm> accessed 22 January 2014 (Russian Constitution).

157 *Russian Constitution* (n 156) art 43(2) in conformity with ICESCR art 13(2)b: 'Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.'

158 *Russian Constitution* (n 156) art 43(3) in conformity with ICESCR (n 6) art 13(2)c: 'Higher education shall be made equally accessible to all, *on the basis of capacity*, by every appropriate means, and in particular by the progressive introduction of free education' (emphasis added).

159 *Federal Law on Education* (n 43) art 5 (3). The Law entered into force on 1 September 2013.

160 *Constitutional Court of Russian Federation ruling* No. 187-O of 5 October 5 2001 <www.lexed.ru/sud/11/?15.html> accessed 22 January 2014.

161 According to *Russian Constitution* (n 156) art 55(3) 'The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.'

162 *Russian Constitution* (n 156) art 43(4) in terms of established level of compulsory education exceeds the standard set by ICESCR (n 6) art 14: 'compulsory *primary* education, free of charge' (emphasis added).

163 Compulsory level of school education was lifted from 9 grades of secondary education to 11 grades of complete general education as per the Federal Law No. 194-FZ of 21 July 2007 *On Amending Certain Legislative Acts of Russian Federation due to Establishment of Compulsory General Education* (as amended by the Federal Law No. 273-FZ of 29 December 2012) (2007) 159 *Rossiiskaya Gazeta*.

164 Russia's legal predecessor, the Soviet Union, ratified the Covenant by the Decree of the Presidium of the Supreme Council of the USSR No. 4812-VIII of 16 October 1973, (1973) 40 *Vedomosti VS USSR* 564.

called by the President to discuss and edit the project¹⁶⁵ have considered those international standards concerning the right to education that had been already in force.

Therefore, the fact that the Constitution does not guarantee directly neither freedom of education and 'liberty of parents ... to choose for their children schools, other than those established by the public authorities'¹⁶⁶ nor the 'liberty of individuals and bodies to establish and direct educational institutions'¹⁶⁷ means that these provisions have been deliberately omitted due to particular political, economic and/or social concerns.

Although the relevant provisions were, nevertheless, included in the acts of educational legislation from their very first drafts,¹⁶⁸ there is no jurisprudence whatsoever on the issues of parental choice or the right to establish an educational institution (apart from the cases dealing with religious education¹⁶⁹ protected by the appropriate legislation¹⁷⁰ and the case of territorial accessibility of education dealt with by the Supreme Court in 2011¹⁷¹). By this we can conclude that although constitutional recognition is generally connected to guarantees of stronger justiciability,¹⁷² in some cases the lack of relevant constitutional provisions does not necessarily lead to non-justiciability of a certain right or legitimate interest.

However, in such case adjudication of the claim will invoke other constitutional provisions and lead to indirect justiciability. For example, although the right to establish a private educational institution is not directly mentioned in Russian Constitution, it is implicit in other provisions, namely, Article 34 on freedom of economic activities, Article 35 on the right of private property, Article 44 on academic freedom.

As a federal state of 83 regions (federal subjects) Russia has a tiered legislative and judicial system. Federal subjects have a residual margin of appreciation: their competence¹⁷³ covers all issues that are not explicitly included in the scope of federal state power or joint jurisdiction of federal and regional authorities as established by the Constitution in general¹⁷⁴ and by educational legislation in particular.¹⁷⁵

165 Decree of the President of Russian Federation No. 718 of 20 May 1993 on *Convocation of the Constitutional Meeting for the Purpose of Finalising the Project of Constitution of Russian Federation* <www.businesspravo.ru/Docum/DocumShow_DocumID_55958.html> accessed 22 January 2014.

166 ICESCR (n 6) art 13(3).

167 ICESCR (n 6) art 13(4).

168 The right to choose forms of education and educational institutions was included into the very first *Law on Education* No. 3266-1 of 10 July 1992 (1992) 172 *Rossiiskaya Gazeta*, art 52(1), as well as the possibility to establish private educational institutions, art 12(3).

169 On Russian case law concerning establishment of religious educational institutions see Maria Smirnova 'Freedom of Conscience and the Right to Education in Russia – a Secular Country of Cultural and Religious Diversity' in Russo, C. (ed.) (2013), *The Law on Religion and Education: International Perspectives*, Routledge / Taylor & Francis Group.

170 *Federal Law on Freedom of Conscience and Religious Associations* No. 125-FZ of 26 September 1997 (1997) 190 *Rossiiskaya Gazeta*, as amended by the Federal Law No. 180-FZ of 2 July 2013 (2013) 145 *Rossiiskaya Gazeta*.

171 *Supreme Court of Russian Federation* in its ruling No. 5-G11-106 of 15 June 2011 <www.lexed.ru/sud4/?3810.html> accessed 22 January 2014 confirmed that any regional law establishing priority access to enrolment to the first grade of school for children living in close proximity to the relevant institutions, is to be regarded as a purely organisational measure aimed at meeting the requirements of federal legislation and cannot be assessed as discriminatory or restricting access to education.

172 See, for example, *O'Connell* (n 82) 7.

173 On compatibility of educational legislation of federal subjects with the federal legislation see Syrikh, V. M. (2009), 'Improving the Educational Legislation of the Federal Subjects of Russian Federation at the Present Stage: Theoretical and Methodological Approaches', *Yearbook of Russian Educational Legislation*, 4, p.101.

174 *Russian Constitution* (n 156) art 73.

175 *Federal Law on Education* (n 43) arts 6 and 7.

The Constitution includes 'regulation and protection of the rights and freedoms of man and citizen' into the scope of federal jurisdiction,¹⁷⁶ while the joint jurisdiction also covers 'protection of the rights and freedoms of man and citizen'¹⁷⁷ as well as 'general issues of upbringing, education, science'.¹⁷⁸

In the former case federal laws are adopted with direct nationwide application, while with regard to joint jurisdiction the federal subjects are allowed to produce laws and regulations in conformity with federal legislation.

Educational legislation in Russia consists of the main Federal Law on Education aimed at integrating educational legislation at all levels. Prior to its adoption in 2012 educational law in Russia reminded a patchwork of poorly organised norms focused mainly on economics, management and administration of education, rather than on pure educational relationships involving interaction between a school, a teacher and a student in the process of transmitting and acquiring knowledge and skills brought together without any holistic concept, let alone human rights-based approach.

Prior to adoption of this new law many of the important rights and responsibilities of students and teachers used to be regulated by sub-legal normative acts, or by regional or municipal acts. Moreover, procedural issues were provided with poor legislative support, if any. As a result, judicial remedies of infringed rights were far from adequate or effective. Claims of alleged violations could not be sustained and were turned down by courts on the basis that the rights were not guaranteed on the legislative level.¹⁷⁹ Thus, it can be assumed that, although absence of constitutional provision does not affect justiciability too dramatically, lack of legislative support to a certain element of a right obstructs procedural guarantees of its protection.

Therefore, one of the most remarkable accomplishments of the new Russian Federal Law on Education is rendering legal force to those rights and freedoms of participants of education process that were previously regulated only by sub-legal acts. This transformation secures advanced justiciability under the law and protects from illegal suspension and dismissal, from violations during admission, attestation, licensing, accreditation, and other procedures.

Chapter 11 of the Law contains twelve articles, each devoted to a particular category of students and / or educational programs previously lacking any legislative provision at all or regulated by acts of subordinate legislation. By this token, higher legal guarantees have been provided to foreign students, children with disabilities, students with outstanding abilities, students of military academies and flight schools, art schools, medical schools, to name but the few.

As to summarise, justiciable dimensions of the right to education as set forth by the Russian Constitution and educational legislation comprise a comprehensive codified system. This system features a combination of general entitlements that are common for all levels and forms of education (such as non-discrimination,¹⁸⁰ general availability and accessibility of education,¹⁸¹ obligation of public authorities to 'establish appropriate socio-economic conditions conducive to obtaining education and progressive widening of educational choices throughout life',¹⁸² guarantees of language choice as appropriate,¹⁸³ guarantees of secular nature of education in public educational institutions,¹⁸⁴ freedom of choice in education (including the right to form the contents of one's educational program¹⁸⁵) and academic

176 *Russian Constitution* (n 156) art 71(c).

177 *ibid* art 72(1)c.

178 *ibid* art 72(1)f.

179 See for example *Supreme Court of Russian Federation decision* No. GKPI2002-1170 of 26 November 2002 <www.lexed.ru/sud/24/?45.html> accessed 22 January 2014; *17th Arbitrage Court of Appeal decision* No. 17AP-6945/2009-AK of 6 April 2010 <www.lexed.ru/sud3/03/03/32/?328.html> accessed 22 January 2014.

180 *Federal Law on Education* (n 43) art 5(2).

181 *ibid* art 5(3).

182 *ibid* art 5(4).

183 *ibid* art 14.

184 *ibid* art 3(1)6.

185 *ibid* art 34(1)4-7.

freedoms,¹⁸⁶ combination of formal, non-formal and informal education throughout life,¹⁸⁷ guarantees of information rights in education,¹⁸⁸ democratic participation in management of an educational institution¹⁸⁹ and many other definitive rights) as well as specific entitlements for particular categories of participants of education process (such as the right of public school pupils to use textbooks and teaching aids during the course of their studies without payment¹⁹⁰ or the right of public university students to receive monthly allowance from the relevant budget for academic achievements or as a means of social support¹⁹¹).

These entitlements are numerous, rather definite and relatively detailed, moreover, they are set forth on the legislative (not sub-legal) level: these qualities render particular rights in education susceptible for judicial and non-judicial protection. In the next two sections I will attempt to extract those dimensions of the right to education that are protected by judicial and quasi-judicial or administrative methods. The task of comparing them to those dimensions that are guaranteed at the legislative level is complicated by the fact that the Federal Law on Education cited above is relatively new – it entered into force on 1 September 2013 – and the case law involving its new provisions has not formed yet. However, most of these provisions were present in previous legislative acts in similar form, therefore, when referring to the relevant norms I will take note of their past and current status.

2. Justiciable Dimensions of the Right to Education in Russia as per Domestic Case Law

In Russia '[s]tate protection of the rights and freedoms of man and citizen ... [is] guaranteed' by the Constitution.¹⁹² 'State protection' includes but is not limited to 'judicial protection'¹⁹³ of rights, which involves, inter alia, judicial review of '[d]ecisions and actions (or inaction) of bodies of state authority and local self-government, public associations and officials.'¹⁹⁴ It is important that the Constitution does not contain any limitation to Article 46 (1) on judicial protection of all rights and freedoms. For example, it could only refer to rights and freedoms recognised by the Constitution and/or current legislation, or limit the application of judicial protection to only *justiciable* rights and freedoms.¹⁹⁵

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Thus, theoretically, all rights and freedoms of all individuals are subject to judicial protection. However, certain limitations can be imposed at the legislative level depending on the type of adjudication, judiciary tier and type of applicant. For example, the rules of admissibility for judicial appeal of illegal decisions or actions of state or municipal authorities or civil servants violating the applicant's rights or freedoms are made clear in a dedicated law.¹⁹⁶ These rules explicitly provide that in order to be admissible for a judicial appeal such decisions or actions must constitute a violation of rights and freedoms of the applicant or inhibit their realisation or impose illegal obligations or invoke unjustified responsibility.¹⁹⁷ The same requirements apply to non-judicial (administrative) complaints filed with an institution or an official of a higher rank than the alleged violator.¹⁹⁸

186 *ibid* arts 3(1)7 and 3(1)9; 34(1)1.

187 *ibid* art 17.

188 *ibid* art 29.

189 *ibid* art 34(1)17.

190 *ibid* art 35.

191 *ibid* art 36.

192 *Russian Constitution* (n 156) art 45 (1).

193 *ibid* art 46 (1).

194 *ibid* art 46 (2).

195 For example, art 37(1) of the Constitution of Ethiopia limits the scope of protection by providing that 'everyone has the right to *bring a justiciable matter to court*', see *Yeshanew* (n 45) 277 (emphasis added).

196 Federal Law No. 4866-1 of 27 April 1993 on *Judicial Appeal of Actions and Decisions Violating Rights and Freedoms of Citizens*, as amended by the Federal Law No. 4-FZ of 9 February 2009 (1993) 89 *Rossiiskaya Gazeta*, <<http://pravo.gov.ru/proxy/ips/?docbody=&nd=102022773&intelsearch=4866-1+>> accessed 22 January 2014 (Federal Law on Judicial Appeal).

197 *Federal Law on Judicial Appeal* (n 196) art 2.

198 *ibid* art 4.

The right to education is also adjudicated through administrative, civil and criminal jurisprudence in relevant cases. Brief analysis of the database on Russian case law concerning the right to education¹⁹⁹ demonstrates that the vast majority of all decisions (more than one-fourth) concern health and security issues²⁰⁰ and physical integrity of students.²⁰¹

Other dimensions of the right to education appearing on a common basis before Russian courts include the right to receive proper qualifications;²⁰² the right to access to free pre-school education; the right to combine work and study; the right to receive education in one's native language.²⁰³ Less common are the cases involving expulsion²⁰⁴ and enrolment; equal treatment and fair assessment of knowledge;²⁰⁵ distance learning technologies; eligibility for deferment from military service for the duration of study at an educational institution; non-discrimination in education on the basis of income and social origin and so forth.²⁰⁶

The limits of this paper do not provide for discussion of all of these categories in great detail, therefore, I will pick the most salient cases whereby the dimensions of the right to education have been significantly amended or altered and if the outcome of the case is still relevant according to the newest legislation.

One of the challenges of Russian education system is ensuring adequate availability of pre-school education. For years it has been a serious problem with thousands of parents nationwide not being able to secure a place at a kindergarten for their children. Lack of places has often led to creation of a virtual 'queue' parents had to sign into from the moment their child was born and, effectively, to flourishing of corrupt practices aimed at securing a place in the queue when it appeared to be full.

Understandably, the right to be put in the queue or a right to keep a certain place on the queue was not supported by any legislative provisions, therefore, was not enforceable. By adopting respective legislation the government would have confirmed that the constitutional obligation to ensure availability of pre-school education to all eligible children is not fulfilled: the Constitutional Court would immediately invalidate such a provision. Moreover, in the majority of cases the courts ruled that the existence of the

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- 199 See the dedicated portal of the Federal Centre for Educational Legislation <www.lexed.ru/sud.html> accessed 22 January 2014.
- 200 *Primorsky Krai Regional Court decision No. 33-10985* of 20 December 2010 <www.lexed.ru/sud2011/03/35/?351.html> accessed 22 January 2014, on failure of a school to comply with fire safety regulations due to budget cuts. The court prioritised public safety and ruled on liability of the local authorities to install necessary equipment. Similar decisions: *Leningradskaya Oblast Regional Court ruling No. 33-5318/2010* of 3 November 2010 <www.lexed.ru/sud2011/03/35/?352.html> accessed 22 January 2014; *Primorsky Krai Regional Court ruling No. 33-2282* of 16 March 2010 <www.lexed.ru/sud2011/03/35/?355.html> accessed 22 January 2014.
- 201 *Moskovskaya Oblast Regional Court ruling No. 33-21461/2010* of 9 November 2010 <www.lexed.ru/sud2011/03/35/?356.html> accessed 22 January 2014 on liability of a school for injuries received by a student during the time he was under care of the institution. Similar decision: *Supreme Court of Khakassia Republic No. 33-1485/2009* <www.lexed.ru/sud2011/03/35/?358.html> accessed 22 January 2014.
- 202 *Kirovskiy District Court decision* of 24 September 2009 <www.lexed.ru/sud2011/03/31/?315.html> accessed 22 January 2014, on non-pecuniary damages for late issuance of a diploma.
- 203 *Constitutional Court of Russian Federation decision No. 16-P* of 16 November 2004 <www.lexed.ru/monitoring/2004/11/november2004_36.html> accessed 22 January 2014, on equal status of Russian language and official language of a federal subject (Republic) in educational process. Similar decisions: *Constitutional Court of Russian Federation decision No. 88-O-O* of 27 January 2011 <www.lexed.ru/sud2011/01/11/?111.html> accessed 22 January 2014; *Supreme Court of Russian Federation ruling No. 20-GO9-6* of 29 April 2009 <www.lexed.ru/sud2011/03/33/?331.html> accessed 22 January 2014.
- 204 See, for example, *Saint-Petersburg City Court Cassation ruling No. 3112* of 9 March 2011 <www.lexed.ru/sud2011/03/32/?322.html> accessed 22 January 2014, on expulsion for plagiarism or *Saint-Petersburg City Court ruling No. 10622* of 4 August 2010 <www.lexed.ru/sud2011/03/32/?323.html> accessed 22 January 2014, on expulsion for drug dealing and consumption.
- 205 *Supreme Court of Russian Federation ruling No. 69-G10-14* of 22 December 2010 <www.lexed.ru/sud4/?311.html> accessed 22 January 2014, on equal payment for holders of similar qualifications.
- 206 On the analysis of the cases see Nasonkin, V. V. (2011), *The Constitutional Right to Education in Russian Jurisprudence: Searching for Balance between Private and Public Interests*, *Yearbook of Russian Educational Legislation*, 6, p. 153.

queue *per se* is just an organisational measure and not an indication of failure to provide access to free pre-school education.²⁰⁷

Thus, without due legislative and judicial support those parents who were not able to secure a place in the kindergarten for their children could only justify their claims by appealing to the obligation of public authorities to provide access to free pre-school education. Some claims were successful and the courts confirmed illegal omission of municipal authorities for not creating enough spaces for all children of relevant age entitled to free pre-school education and residing in the territory governed by these authorities.²⁰⁸ Now in most of the regions transparent online mechanisms of registration for pre-school education²⁰⁹ have been introduced to decrease corruption in this sphere and improve visibility of and access to the right to pre-school education.

Quality of education is a significant dimension of the right to education as one of the major characteristics defining its acceptability.²¹⁰ The mode of adjudicating quality education in Russia is rather formalised and straightforward and is based on evaluating of (1) conditions in which education is provided against those benchmarks that are set in the license issued to a particular educational institution and (2) contents of education – against requirements of state educational standard of the relevant level, as stipulated in its certificate of state accreditation.

In a selection of cases the following inadequacies were recognised as violations of the right to quality education for the purposes of claim validity:²¹¹

- formal qualifications of teachers are not matching the requirements for teaching profession;
- textbooks are used that are not included in the list of textbooks and teaching materials approved by the Ministry of Education and Science²¹² for use in educational process in accredited educational institutions of the appropriate level;
- in-class and extra-curriculum workload exceeds the normative, while the number of hours for compulsory subjects is significantly lower than envisaged by the standard;
- the classes are overcrowded;²¹³

207 On queue-free access to pre-school education see *Permsky Krai Court ruling* No. 33-9598/2010 of 2 November 2010 <www.lexed.ru/sud2011/03/37/?371.html> accessed 22 January 2014; *Moskovskaya Oblast Regional Court ruling* No. 33-15552 of 10 August 2010 <www.lexed.ru/sud4/?372.html> accessed 22 January 2014.

208 *Cassation Ruling of Perm Krai Court* No. 33-6889 of 11 July 2011 <www.lexed.ru/sud2011/03/37/?377.html> accessed 22 January 2014.

209 See among many others examples from Moscow <http://ec.mosedu.ru/norm_docs/> accessed 22 January 2014; Tatarstan Republic <<https://uslugi.tatar.ru/cei>> accessed 22 January 2014; Bashkortostan Republic <<https://edu-rb.ru>> accessed 22 January 2014; Chelyabinsk <www.sadiki74.ru> accessed 22 January 2014; Lipetsk <http://lipetskcity.ru/lipetsk/menu.php?i=3&page=page_3.5.1.3.10.php&text_pod_menu=pic57> accessed 22 January 2014.

210 As explicitly referred to by *CESCR General Comment No. 13* (n 34) para 6(c).

211 *Federal Arbitrage Court of North-Western District decision* No. A56-26788/2007 of 17 June 2008 <www.lexed.ru/sud3/02/02/22/?221.html> accessed 22 January 2014.

212 See for example the Order of the Ministry of Education and Science of Russian Federation No. 1067 of 19 December 2012 on *Approval of Federal List of Textbooks Recommended (Allowed) to Use in Educational Process in State-Accredited Educational Institutions Implementing Educational Program of General Education in 2013/14 Academic Year*, as amended by the Order of the Ministry of Education and Science No. 544 of 10 July 2013 <www.lexed.ru/doc.php?id=5007#> accessed 22 January 2014.

213 *Okoneshnikovskiy District Court of Omskaya Oblast decision* of 4 February 2010 <www.lexed.ru/sud2011/03/35/?3511.html> accessed 10 September 2010.

- there are no pre-drafted plans of fire safety and evacuation and no fire extinguishing equipment, premises of the educational institution do not correspond to the requirements of physical safety (no fence around the territory, no CCTV).²¹⁴

3. Dimensions of the Right to Education in Russia that Are Protected through Non-Judicial Methods

Special Rapporteur on the right to education in his report also highlights the importance of ‘quasi-judicial mechanisms such as local administrative bodies, national human rights institutions, such as ombudspersons or human rights commissions’²¹⁵ for enhancing the protection of the right to education on domestic level. As suggested by Yeshanew ‘[s]uch institutions ensure the justiciability of human rights through quasi-judicial procedures.’²¹⁶

Among the authorities responsible for addressing violations of the right to education in Russia with inquisitorial rather than adversarial functions one will find the Federal Service for Supervision in Education and Science²¹⁷ with a mandate²¹⁸ to consider individual complaints²¹⁹ under the relevant procedure established by the law.²²⁰ Most of the claims concern social benefits, enrolment and expulsion, illegal actions of administration of educational institutions and education authorities, resolution of conflict situations between participants of education process, award of qualifications and other issues.²²¹

The statistics of these complaints are, indeed, very indicative. Of 8,763 complaints filed in 2012 twelve per cent were passed on to the Federal Service from the Administration of the President and nearly the same number – from the Ministry of Education and Science.²²² It means that public awareness of the system of protection of the right to education is very low and victims of violations keep sending claims to the authorities that have the highest profile in media and not to those directly responsible for consideration of such claims.

Response normally provided by the Federal Service includes several types of actions, such as explanation or clarification of the relevant law to the claimant, passing the issue on to the regional authority or to the competent federal authority, such as the Public Prosecutor Office, initiating field checks, or court proceedings.

Public Prosecutor Office is another example of extra-judicial protection of the right to education. Although the relevant article is positioned in Chapter 7 of the Constitution (on judicial branch of

214 Other cases on safety of educational process as a characteristic attributable to its quality include, *inter alia*, *Supreme Court of Russian Federation ruling* No. 58-G02-38 of 26 November 2002 <www.lexed.ru/sud2/02/3/?58.html> accessed 22 January 2014; *Supreme Court of Russian Federation ruling* No. 56-G03-6 of 20 May 2003 <www.lexed.ru/sud2/02/3/?56.html> accessed 22 January 2014; *Federal Arbitrage Court of Uralskiy District decision* No. A76-5435/2009-50-80 <www.lexed.ru/sud3/02/03/31/?311.html> accessed 22 January 2014; *Federal Arbitrage Court of Povolzhsky District decision* No. A55-10197/2008 of 11 November 2008 <www.lexed.ru/sud3/02/03/33/?331.html> accessed 22 January 2014; *Supreme Court of Karelia Republic cassation ruling* No. 33-3527/2011 of 29 November 2011 <www.lexed.ru/sud2011/03/35/?3516.html> accessed 22 January 2014; *Moscow Oblast Court ruling* No. 33-24297 <www.lexed.ru/sud2011/03/35/?3517.html> accessed 22 January 2014; *Vologodsky Oblast Court cassation ruling* No. 33-5036/2011 of 2 November 2011 <www.lexed.ru/sud2011/03/35/?3518.html> accessed 22 January 2014.

215 *Singh, Justiciability* (n 116) paras 30, 36.

216 *Yeshanew* (n 45) 289.

217 *Regulations on the Federal Service for Supervision in Education and Science*, approved by the Government Decree No. 594 of 15 July 2013 (2013) SZ RF 3971 <<http://pravo.gov.ru/proxy/ips/?docbody=&nd=102338790&intelsearch=594>> accessed 22 January 2014.

218 *ibid*, para 5.32.

219 See the examples of complaints <<http://obrnadzor.livejournal.com>> accessed 22 January 2014.

220 Federal Law No. 59-FZ of 2 May 2006 *On the Procedure Concerning Consideration of Communications of Citizens of Russian Federation* (as amended by the Federal Law No 182-FZ of 2 July 2013) (2006) 95 *Rossiiskaya Gazeta* <<http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102337366&backlink=1&&nd=102106372>> accessed 22 January 2014.

221 *Information on complaints filed by public in 2012* (Federal Service for Supervision in Education and Science, 2012) <http://obrnadzor.gov.ru/common/upload/obrashcheniya_grazhdan_2012_g.pdf> accessed 22 January 2014.

222 *ibid*.

government), Public Prosecutor Office is a 'single centralised structure'²²³ independent of the judiciary. This office is very active in extra-judicial protection of the right to education through consideration of claims²²⁴ and initiating field checks on the basis of complaints received.²²⁵ This office has a direct effect on wider justiciability of the right to education due to its mandate to act immediately in case of detection of a violation and bring an administrative action against the violator as per specialised article of the Code of Administrative Offenses (violation of the right to education)²²⁶ be it a state (federal or regional) or local (municipal) authority, or management of an educational organisation.²²⁷

Examples when Public Prosecutor Office takes action against violations of the right to education are numerous. Some of the recent violations acted upon concerned, for instance, lack of due care on the part of local authorities failing to provide heating in public kindergarten facilities;²²⁸ failure of local education authorities to provide free textbooks for public schools and charging parents instead;²²⁹ violations of established procedures of enrolment to a program of higher education (obligatory paid preparatory classes ensuring access to a university);²³⁰ closure of rural schools without proper democratic procedure of obtaining consent of the majority of residents of the village and without organising transport access of the children to other schools,²³¹ failure of local authorities to ensure record of migrant children not receiving compulsory education and provide access to compulsory education to these children accordingly²³² etc.

Public prosecutors in the regions are quite efficient in terms of providing immediate extra-judicial remedy for violations of the right to education. Their interventions result in readmitting expelled students;²³³ providing free textbooks to pupils of public schools;²³⁴ opening of final two classes of compulsory schooling for a group of children insufficient for a full class²³⁵ and so forth.

223 *Russian Constitution* (n 156) art 129.

224 Federal Law No. 2202-1 of 17 January 1992 *On Public Prosecution Office of Russian Federation* (as amended by the Federal Law No. 185-FZ of 23 July 2013) (1992) 39 *Rossiiskaya Gazeta* <<http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102338205&backlink=1&&nd=102013860>> arts 10, 27.

225 *ibid* art 21 (2).

226 *Code of Administrative Offenses of Russian Federation* No. 195-FZ of 30 December 2001 (2001) 256 *Rossiiskaya Gazeta* (as amended by the Federal Law No. 252-FZ of 23 July 2013 (2013) 172 *Rossiiskaya Gazeta* <<http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102339738&backlink=1&&nd=102073985>> art 5.57 (1).

227 *Federal Law On Public Prosecution Office* (No. 224) art 26.

228 'Prosecutor's Office of Kurgan Region Provided Remedy for Violated Rights to Accessible and Free Pre-School Education' (Prosecutor's Office of Kurgan Region, 29 August 2013) <www.kurganproc.ru/index.php?option=com_content&view=article&id=4560:2013-08-29-06-25-20&catid=38:news-c&Itemid=166> accessed 22 January 2014; 'In Sverdlovsk Region the Prosecutor's Office Protects Children's Rights to Accessible Preschool Education' (22 January 2014) <www.genproc.gov.ru/smi/news/genproc/news-84587/> accessed 22 January 2014.

229 'Prosecutor's Office in Komi Republic Takes Action to Secure Constitutional Rights of Citizens for Free Education' (Prosecutor's Office of Komi Republic, 16 September 2013) <www.prockomi.ru/news/index.php?ELEMENT_ID=5357> accessed 22 January 2014.

230 'Prosecutor's Office Disclosed Violations of the Right of Citizens to Higher Professional Education' (Prosecutor's Office of Udmurtskaya Republic, 6 February 2012) <<http://udmproc.ru/news/show/prokuraturoj-vyavleny-narusheniya-prav-grazhdan-na-vysshee-professionalnoe-obrazovanie>> accessed 22 January 2014.

231 'Prosecutor's Office in the Court Asserted the Rights of Ust'-Kamchatsky Children to Education: Local Administration's Decisions on Closure of Two Schools Were Deemed Illegal' (Prosecutor's Office of Kamchatskaya Oblast, 24 April 2013) <<http://severdv.ru/news/show?id=71085>> accessed 22 January 2014.

232 'Kineshma city Prosecutor's Office Disclosed Violations of the Rights to Education of Migrant Children' (Kineshma city Prosecutor's Office, 27 May 2013) <<http://prokuratura.ivanovo.ru/кинешемской-городской-прокуратурой-16/>> accessed 22 January 2014.

233 'In the city Bolshoy Kamen after a prosecutor's intervention 85 illegally expelled children were readmitted to the programs of non-formal learning' (Prosecutor's Office of Primorsky Krai, 13 May 2013) <<http://prosecutor.ru/news/prokuratura-zato-bolshoykamen/2013-05-13--2.htm>> accessed 22 January 2014.

234 Kuzbassky, S. (2013), 'Non-Free Right to Education: Authorities of Udmurtia Do Not Provide Textbooks' *Gazeta No. 33* (1144) (4 September) <<http://netreforme.org/news/nebesplatnoe-pravo-na-obrazovanie-vlasti-udmurtii-uchebniki-ne-dayut/>> accessed 22 January 2014.

235 'Prosecutor Asserted the Right of Children to Continue Education in the 10th Grade in their 'Own' School' (Prosecutor's Office of Udmurtia Republic, 6 September 2013) <<http://udmproc.ru/news/show/prokuror-otstoyal-pravo-detej-prodolzhit-obuchenie-v-10-klasse-v-svoej-rodnoj-shkole>> accessed 22 January 2014.

Field checks conducted by the General Prosecutor's Office on the account of implementation of the priority national project 'Education'²³⁶ in 2012 revealed more than 80,000 violations of the right to education and management of education activities, including misappropriation of funds allocated for equipment of public schools, reconstruction and renovation of public school premises, failure to remunerate class leaders, to provide access to distance learning for disabled children, or to filter out restricted Internet content of pornographic or extremist nature.²³⁷

Other non-judicial methods of redress include Commissioner for Human Rights in the Russian Federation²³⁸ (a National Human Rights Institution with ECOSOC status A)²³⁹ with nearly 200 claims²⁴⁰ annually concerning the right to education²⁴¹ and Russian Civic Chamber²⁴² whose functions include, inter alia, facilitation of 'coordination between the socially significant interests of citizens of Russia, NGOs, and national and local authorities, in order to resolve the most important problems of economic and social development, to ensure national security, and to defend the rights and freedoms of citizens of Russia.'²⁴³ With regard to the right to education such defence is included in the mandate of the Council's Commission on Development of Education.²⁴⁴

These examples demonstrate how non-judicial methods of redress for violations of the right to education in Russia contribute to strengthening of inquisitorial justiciability on domestic level. Although the thematic issues of complaints filed with the authorities briefly listed above are similar to those that appear in the courtroom, some elements of the right to education are only present in non-judicial proceedings. These elements, named below, indicate possible gaps of judicial enforcement that can be further analysed.

Violence in education connected with violation of human dignity, religious rights in education and corrupt practices comprise, perhaps, the main areas of divergence. These types of misconduct are highly latent and rarely reach the courts, but since non-judicial authorities do have, in most cases, the right to initiate checks and investigations, some of the latent cases tend to be disclosed through these procedures. Furthermore, since they don't require special legal knowledge or judicial fees and are immediately effective, cases that require instant reaction of authorities are most likely to appear before a public prosecutor or a regional supervision authority than before a court.

236 Priority National Project 'Education' started on 5 September 2005 to address the most sensitive areas of Russian education system: class leaders, school lunches, school buses, revelation and support of best teachers and gifted children, education of military officers, see the Project's page on the Ministry of Education and Science website <<http://минобрнауки.рф/проекты/пнпо>> accessed 22 January 2014.

237 'General Prosecutor's Office Analysed the Realisation of Rule of Law in the Process of Implementation of the Priority National Project "Education"' (General Prosecutor's Office, 25 February 2013) <<http://genproc.gov.ru/smi/news/genproc/news-81254/>> accessed 22 January 2014.

238 Acting on the basis of *Russian Constitution* (n 156) art 103 (e); Federal Constitutional Law No.1-FKZ of 26 February 1997 *On the Commissioner for Human Rights of Russian Federation* (as amended by Federal Constitutional Law No. 8-FKZ of 28 December 2010) (1997) 34-44 *Rossiiskaya Gazeta*, <<http://ombudsmanrf.org>> accessed 22 January 2014.

239 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Chart of the Status of National Institutions Accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, accreditation status as of 11 February 2013 <www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf> accessed 22 January 2014.

240 To view the most recent claims and question <<http://ombudsmanrf.org/component/search/?searchword=образование&ordering=newest&searchphrase=all&limit=20>> accessed 22 January 2014.

241 Report of the Commissioner For Human Rights in the Russian Federation on Consideration of claims in 2012 <http://ombudsmanrf.org/images/stories/word/prilogenie_doc_2012.doc> accessed 22 January 2014.

242 Acting on the basis of *Federal Law on the Civic Chamber of the Russian Federation* No. 32-FZ of 4 April 2005 (as amended by the Federal Law No. 235-FZ of 23 July 2013) (2005) 70 *Rossiiskaya Gazeta* <<http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102339223&backlink=1&&nd=102091471>> accessed 22 January 2014.

243 See the information of the Council's official website <www.oprf.ru/en> accessed 22 January 2014.

244 On the activities of the Commission see <www.oprf.ru/1449/1512/> accessed 22 January 2014.

Despite explicit legislative provisions against violation of physical integrity of children,²⁴⁵ supported by civil,²⁴⁶ administrative²⁴⁷ and criminal²⁴⁸ sanctions, violence in education remains fairly widespread and includes both teacher's violence (cases of verbal abuse, humiliating treatment, physical, sexual abuse, unlawful children abortions, incitement to suicide, neglect of child care, causing death, forcing children to unpaid and overloading extracurricular labour) and pupils' violence (physical aggression, beating and terrorising classmates, extorting money from them, hate speech and hate crimes, intended use of guns and knives, sexual abuse, bullying, Internet mobbing).

Cases on violence could have been more numerous, however, their latency can be explained by the unwillingness from both sides of the conflict to expose the details – school administration tries to protect its reputation and to keep the records clean, while the parents of the victims usually believe it's more important to stay at the same school.

A number of other explanations of inertness of protection against violence in schools can be offered from both social and legal points of view, such as extremely low teachers' salaries, lack of enthusiasm in teacher's work, lack of respect to teachers and their profession as a whole, lack of motivation to go to school (the schools are poor, boring, annoying, emotionally depressing), lack of psychological and emotional support from the school's administration and almost absolute impunity of pupils: most of them are not criminally or administratively liable for their violent actions, the school education is compulsory, therefore the administration cannot expel a misbehaving minor who needs to finish 10 years of school whatever happens.

Religious rights in education are often connected with emotional abuse, physical violence and hate speech towards those pupils or students who are different from the mainstream.²⁴⁹ These violations are also rarely brought before the courts and if they are, the courts often bounce them back to the school regulations.²⁵⁰

62 Corruption in education comprises the third category of most latent misconduct affecting the full realisation of the right to education. The degrading effect of corruption is particularly dangerous in the system of education that not only suffers from this deteriorating practice but also reproduces it through

245 See the *Federal Law on Education* (n 43) arts 34(1)9 and 43(3): 'Students enjoy the academic rights to ... respect for human dignity, protection from all forms of physical or mental violence, verbal abuse, protection of life and health, and 'discipline in the organisation performing education activity is supported on the basis of respect for the human dignity of students, teachers. The use of physical and (or) mental violence against students is prohibited'.

246 *Civil Code of Russian Federation*, Part III, No. 146-FZ of 26 November 2001, as amended by the Federal Law No. 223-FZ of 23 July 2013) (2001) 233 *Rossiiskaya Gazeta* <<http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=146192;div=LAW;rnd=0.26645950553938746>> accessed 22 January 2014, art. 1073 on liability of parents or guardians for the injury inflicted by minors under 14. Moral damage caused by physical or emotional abuse can be financially compensated according to Civil Code art 151.

247 *Russian Code of Administrative Offenses* (n 226) art 5.57 implies liability for violation of the right to education; art 20.1. imposing administrative fine or administrative arrest for up to 15 days on a minor violator for disorderly conduct (violation of public order in the form of open disrespect of the society, accompanied by foul language in public places, abusive pestering of the people or destruction or damage caused to other people's property); art 7.17 imposing an administrative fine for destruction of school property.

248 *Criminal Code of Russian Federation* No. 63-FZ of 13 June 1996, as amended by the Federal Law No. 245-FZ of 23 July 2013 (1996) 113 *Rossiiskaya Gazeta* <<http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=148581;div=LAW;rnd=0.9286545405630022>> accessed 22 January 2014 art 156 on wilful neglect of duty to upbringing a child (50 % of all registered cases imply this legal provision); arts 111-117 imposing liability for physical abuse.

249 Such cases include, for example, illegal violent coercion of non-Muslim women to wear a headscarf in Chechen Republic with 94 % of the population being Muslims without any action taken by the authorities to investigate these repeated incidents.<www.kavkaz-uzel.ru/articles/182092/> accessed 22 January 2014; the opposite cases: in 2010 in Dagestan Republic a high-school girl was not allowed to exams and was expelled from classes for wearing the Islamic headscarf <http://az-zahra.ru/news/ossijskij_khidzhab_pod_znakom_zhenskoj_solidarnosti/2010-06-19-156> accessed 22 January 2014; In 2010 in Karabulak, Ingushetia Republic, a 10-year-old girl was not allowed to the classes in the hijab. According to the policy of the public school even common headscarves were forbidden. The girl's mother has filed a petition to the prosecutor <http://az-zahra.ru/news/v_ingushetii_mat_otstaivaet_pravo_docheri_nosit_khidzhab_v_shkole/2010-09-05-309> accessed 22 January 2014.

250 Emelyanova, S. (2013), 'Supreme Court Against the Hijabs in Schools', *Rossiiskaya Gazeta*, (July 10) <www.reg.ru/2013/07/10/reg-skfo/chidgab.html> accessed 22 January 2014.

preparing children and young people to condone this malicious custom or even to use it as a tool for surpassing legal, cultural, financial and procedural barriers.

The seven most common economic crimes connected to corrupt practices in the sphere of education are as follows:

1. inappropriate use of budget funds;
2. abuse and exceeding of official capacity by heads of state and municipal educational institutions as well as by officials of state authorities;
3. active and passive bribery on all levels (from pre-school to postgraduate);
4. manufacture and sale of forged diplomas;
5. using fake diplomas to secure employment;
6. combination of state and municipal civil service with the positions in commercial organisations.²⁵¹

Cases of inappropriate use of budget funds are common and well-documented both in courts and administrative practice. For example, cases of this category include violating tender procedures for the purpose of securing construction or procurement contracts with commercial companies affiliated with the university management.²⁵²

Abuse of official capacity may include contribution to, condoning of or covering of creation of a fictive private educational institution that only exists on paper and does not in fact engage in educational activities. 'Students' of such institutions pay for being enrolled for the duration of a course of study and receive a diploma which has the same status as any other diploma of a fully licensed and accredited university.

Other examples of corrupt activities in education in Russia include admission bribes, extortion of illegal payment for transfer to the last two years of compulsory high school,²⁵³ illegal payments to pass the exams, payment for illegal and undocumented additional classes with the same teacher or professor that is teaching the course (either factual tutoring or pseudo-tutoring), buying coursework prepared (or plagiarised) by someone else, selling textbooks and teaching aids that are supposed to be distributed for free, bribing dissertation council members, renting out university premises without the owner's explicit consent as required by the legislation, nepotism.²⁵⁴

Currently, national efforts include legislative action, as well as judicial and administrative measures.

251 Corruption in Education in Modern Russia, a report by All-Russian Public Organization 'Protection of Educational Services Consumers Society' <<http://www.ozppou.ru/news/27-methodical/171--q-q?tmpl=component&print=1&layout=default&page=>> accessed 22 January 2014, 4.

252 Corruption in Universities: Reasons, Types and Perspectives, <<http://kapital-rus.ru/articles/article/174089>> accessed 22 January 2014.

253 See, for example, *Chelyabinskaya Oblast Court cassation ruling* of 28 May 2009 <www.lexed.ru/sud3/02/08/82/?822.html> accessed 22 January 2014, whereby a school principle was banned from administrative positions for the period of three years for forcing the parents to pay for transfer of their children to the last two years of compulsory schooling.

254 Corruption in the Universities of Post-Soviet Russia (18 June 2010) <http://www.memoid.ru/node/Korrupciya_v_vuzah_postsovetskoy_Rossii> accessed 22 January 2014.

Legislative measures include ratification of the relevant international treaties,²⁵⁵ adoption of a dedicated Federal Law²⁵⁶ and policy instruments²⁵⁷ and criminalisation of corrupt practices (such as fraud,²⁵⁸ appropriation and embezzlement of funds and property,²⁵⁹ abuse of official capacity,²⁶⁰ passive²⁶¹ and active²⁶² bribery, forgery, issuing of or trading in forged documents²⁶³).

Liability for administrative offense related to corrupt practices in education can be imputed on organisations. According to Article 19.23. of the Code of Administrative Offenses²⁶⁴ forgery of documents, forms, seals as well as use of such documents and their distribution or trade incurs liability for organisations in the form of an administrative fine.

Article 19.30. concerns violations of the requirements for educational process and includes corruption-sensitive offenses, such as violation of the regulations concerning paid educational services (applicable when a professor suggests tutoring bypassing the university financial system), illegal denial of qualifications (applicable when the university charges students for issuing of the state diploma), deliberate tampering of the results of state graduate examinations, violation of admission regulations (applicable in cases of extortion of bribes for admission).

Thorough legislative regulation on corruption is supported by judicial action.²⁶⁵ The main problem in early cases on corruption in education was the incompatibility of legal definition of corruption as an act committed by a 'person acting in official capacity' and the fact that university staff members were not (and still are not) considered civil servants according to the law.

However, this incompatibility was resolved by the Supreme Court in 1998 in *Krasilnikov* case.²⁶⁶ The Court stated that since the professor accused of bribery was appointed to perform a certain function in the admissions commission, he could be regarded as possessing organisational and decision-making functions to the same extent as a person acting in official capacity. Therefore, his illegal actions (bribery for allowing unprepared students to pass the entrance exams) were qualified by the court as the crime of bribery with three years of imprisonment and two years of prohibition to be appointed to teaching positions.²⁶⁷ The determining argument in assessing whether a person is charged with decision-making

255 *United Nations Convention against Corruption* adopted by General Assembly resolution 58/4 of 31 October 2003 (UNCAC) was ratified by the Federal Law No. 40-FZ of 8 March 2006 on *Ratification of the United Nations Convention against Corruption* (2006) 56 *Rossiiskaya Gazeta* <<http://pravo.gov.ru/proxy/ips/?docbody=&nd=102105278&intelsearch=40-%F4%E7>> accessed 22 January 2014; Council of Europe *Criminal Law Convention on Corruption* (ETS N 173) adopted in Strasbourg on 27 January 1999 <<http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>> accessed 22 January 2014, ratified by Russia: Federal Law No. 125-FZ of 25 July 2006 on *Ratification of Convention on Criminal Liability for Corruption* (2006) 164 *Rossiiskaya Gazeta* <<http://pravo.gov.ru/proxy/ips/?docbody=&vkart=card&nd=102108133&rdk=&intelsearch=125-%F4%E7>> accessed 22 January 2014.

256 *Federal Law on Combatting Corruption* No. 273-FZ of 30 December 2008 (2008) 4823 *Rossiiskaya Gazeta*, as amended by Federal Law No. 102-FZ of 7 May 2013 <<http://pravo.gov.ru/proxy/ips/?docbody=&nd=102126779&intelsearch=273-%F4%E7+>> accessed 22 January 2014.

257 *National Strategy for Combatting Corruption and National Plan for Combatting Corruption* in 2010-2011 as approved by Presidential Decree No. 460 of 13 April 2010 (2010) 79 *Rossiiskaya Gazeta* <<http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102306136&backlink=1&nd=102137641>> accessed 22 January 2014; *National Plan for Combatting Corruption in 2012-2013* as approved by Presidential Decree No. 297 of 13 March 2012 (2012) 12 *SZRF* 1391 <<http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102331906&backlink=1&nd=102306136>> accessed 22 January 2014.

258 *Criminal Code of Russian Federation* (n 248) art 159.3.

259 *ibid* art 160.4.

260 *ibid* art 285.

261 *ibid* art 290.2.

262 *ibid* art 291.

263 *ibid* art 327.1.

264 *Russian Code of Administrative Offenses* (n 226).

265 For a non-exhaustive list of recent cases see <http://www.memoid.ru/node/Korruptsiya_v_vuzah_postsovetskoy_Rossii> accessed 22 January 2014.

266 *Supreme Court of Russian Federation decision* No. 1180-98, Court Order No. 29-098-15 on *Krasilnikov*, as referred to in the Review of Judicial Practice of the Supreme Court for 3rd quarter of 1998 (criminal cases), as approved by the Resolution of the Presidium of the Supreme Court of 2 December 1998 (1999) 3 *Bulletin of the Supreme Court of Russian Federation* 18.

267 Chaplygina, A.Yu. 'Corruption in Educational Institutions: Problems of Qualification.'

capacity is, thus, the potential ability of his or her legally significant acts of administrative nature to entail generation, alteration and/or termination of legal relationships.

Administrative measures include creation of dedicated agencies and institutional mechanisms to address corruption in general and, particularly, in education. Combating corruption is one of the main functions of the Chief Branch of Economic Security and Combatting Corruption of the Ministry of Internal Affairs.²⁶⁸ National Anti-Corruption Council is an autonomous non-state non-profit organisation aimed at publicising the President's anti-corruption policies and conducting research activities and opinion polls on the negative effect of corruption on the enjoyment of human rights.²⁶⁹ There are 26 civil society initiatives that focus on combating corruption and are listed on the Council's website.²⁷⁰ At the local level in some universities specialised anti-corruption commissions have been established as internal supervisory bodies with the mandate to consider individual claims.²⁷¹

C. International Justiciability of the Right to Education

According to Addo the two levels of justiciability – domestic and international – differ from the perspective of both institutional capacity and procedural basis.²⁷² Domestic justiciability is 'usually undertaken by the courts of law', while at the level of international law 'judicialism ... is not always necessary'.²⁷³ From the procedural point of view the former type – adversarial justiciability – is achieved, as suggested by the term, through a dispute of opposing parties, whereas the latter – inquisitorial justiciability – proceeds mainly through an enquiry mechanism²⁷⁴ of a monitoring (treaty) body.

Regional systems of international protection of human rights are, by and large, more substantially and procedurally elaborated and are generally considered more effective than universal enquiry mechanisms.²⁷⁵ Among them the European Court of Human Rights, the 'crown jewel of the world's most advanced international system for protecting civil and political liberties',²⁷⁶ is perhaps the most prominent and, effectively, the only adversarial tool of international redress for Russian citizens.

According to Ingram, in relation to international law 'justiciability' is defined as the 'quality of being capable of *being considered legally* and determined by the application of *legal principles* and techniques'.²⁷⁷ We can see that this definition is much more generous in terms of application – there are no institutional or procedural restrictions whatsoever, moreover, there is no reference to formalised

268 Chief Branch of Economic Security and Combatting Corruption of the Ministry of Internal Affairs' <http://mvd.ru/mvd/structure1/Glavnie_upravlenija/Glavnoe_upravlenie_jekonomicheskoi_bezop> accessed 22 January 2014.

269 National Anti-Corruption Council <<http://www.korupcii.net>> accessed 22 January 2014.

270 List of Civil Society Initiatives for Combating Corruption <<http://www.korupcii.net/index.php?s=9>> accessed 22 January 2014.

271 See, for example, Commission to Combat Corruption of Saint-Petersburg State Agrarian University <<http://spbgau.ru/about/antikor/position/node/1476>> accessed 22 January 2014; Anti-Corruption Commission of the Kazan (Privolzhsky) Federal University <<http://old.kpfu.ru/akd/index.php?id=8&idm=12&num=3>> accessed 22 January 2014; Anti-Corruption Commission of the Federal State Budget Institution of Higher Education 'Udmurtskiy State University' <<http://udsu.ru/official/ak>> accessed 22 January 2014; Anti-Corruption Commission of the Ryazan State Medical University in the name of Academic I. P. Pavlov <www.rzgmu.ru/subdivisions/anticorruption/> accessed 22 January 2014; Commission to Combat Corruption of Kazan National Research Technical Institute in the name of A. N. Tupolev <www.kai.ru/info/anticor/> accessed 22 January 2014.

272 Addo, *Justiciability* (n 65) 1426.

273 *ibid* (emphasis added).

274 *ibid*.

275 Addo, 'The Legal Nature' (n 76) 226. For assessment and analysis of regional human rights mechanisms see also, *inter alia*, Bulto (78) 142; Melish (n 78) 385.

276 Helfer, L. R (2008), 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', *Eur J Int Law*, 19 (1), p.125.

277 Ingram (n 61) 354 (emphasis added).

legal norms, on the contrary, according to this definition, a matter would be considered internationally justiciable if legal 'principles'²⁷⁸ can be applied to resolve it.

A somewhat narrower approach is taken by scholars to define international justiciability with reference to a particular mechanism. For example, with respect to ICESCR justiciability is defined as the possibility for domestic courts to 'take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant'.²⁷⁹

Whatever the approach, the capacity of a right to be protected on the international level is not as important *per se* as in its connection with those limitations of economic, social or political nature²⁸⁰ that undermine the right's justiciability. The limitations can also be substantial in essence. As researched in great detail by Marcus, justiciability of human rights at international level differs in scope not only for different types of rights (civil and political or socio-economic), but also for different state obligations (respect, protect and fulfil).²⁸¹ According to Marcus violations of obligations to *respect* economic, social and cultural rights were more successful in being addressed by both judicial and quasi-judicial bodies at supranational level, whereas the obligations to protect or fulfil still 'resist international judicial scrutiny'²⁸² due to their well-known 'positive and progressive aspects'.²⁸³

In Russia 'international treaties and agreements ... [constitute] a component part of its legal system'.²⁸⁴ They do not require incorporation; they have precedence over national law in cases of legal collision and are directly referred to by domestic courts even at the lowest levels²⁸⁵ as recommended by the CESCR.²⁸⁶ Thus it can be argued that all dimensions of the right to education recognised at the international level and confirmed through international case law are potentially justiciable in Russia through direct reference to the treaties and their interpretation.

In Russia the right of everyone to appeal to 'international bodies for the protection of human rights and freedoms, if all the existing internal state means of legal protection have been exhausted' is guaranteed by Constitution.²⁸⁷ Traditionally, the work of the European Court of Human Rights is referred to under this provision. However, the only two cases on the right to education in Russia that have been considered by the court do not provide much material for analysis.²⁸⁸

278 For the definition of legal principles and the way they differ from legal rules and standards see, *inter alia*, Dworkin, R. M. (1967), *The Model of Rules*, Yale Law School; H.L.A. Hart, *The concept of law* (2nd ed. Oxford: OUP 1997); Joseph Raz, 'Legal Principles and the Limits of Law' (1971-1972) 81 Yale. L.J. 823; Thomas R. Kearns, 'Rules, Principles, and the Law' (1973) 18 Am. J. Juris. 114.

279 *Choukroune* (n 78) 31.

280 On political limitations of supranational human rights mechanisms see, for example, *Marcus* (n 96) 68.

281 *Marcus* (n 96) 68.

282 As asserted by Marcus the practice of international human rights tribunals supports this conclusion as the ECJ is clear on the issue that 'obligations to fulfil are beyond its judicial competence' while the ECHR has addressed positive obligations only when overlapping domestic norms provide legal cover, see *Marcus* (n 96) 87.

283 *Marcus* (n 96) 68.

284 *Russian Constitution* (n 156) art 15(3).

285 See, for example, *Tomsk Regional Court Appellate Decision*, No. 33-2696/2012 of 26 October 2012 <<http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=SOJ;n=458246;dst=0;ts=65B0A4855C75FE33DAD934F16FEAE982>> accessed 22 January 2014, concerning arrears in the payment of wages.

286 CESCR expressed their concern, *inter alia*, with poor referencing to the text of the Covenant by national courts, see para 301, Committee on Economic, Social and Cultural Rights: *Report on the Thirtieth and Thirty-First Sessions* (5-23 May 2003, 10-28 November 2003) E/2004/22 E/C.12/2003/14. Economic and Social Council Official Records, 2004. Supplement No. 2.

287 *Russian Constitution* (n 156) art 46(3).

288 In the Case of *Timishev v. Russia* (Applications nos. 55762/00 and 55974/00) Final Judgment 13 March 2006 the Court held that the applicant's children were unlawfully denied the right to education provided for by domestic law due to the fact that the right to education was made conditional on the registration of their parents' residence (para 66). In the Case of *Catan and Others v. Moldova and Russia* (Applications nos. 43370/04, 8252/05 and 18454/06) Judgment of 19 October 2012 Russia was held accountable for the violation of the applicants' rights to education on the contested territory of Transdnistria due to the fact that Russia exercised effective control over that territory by virtue of its continued military, economic and political support (para 150).

It should be noted that this constitutional norm does not limit the possibilities of Russian citizens to only adversarial international protection, but also includes, potentially, quasi-judicial procedures, such as treaty monitoring bodies and complaints procedures.

Treaty bodies monitoring procedures, although directly affect justiciability of the right to education at domestic level by giving highly compelling, albeit not binding, recommendations to improve legal, judicial and organisational guarantees of its protection,²⁸⁹ nevertheless, do not *per se* provide a forum for appealing decisions taken at domestic level. In other words, for the purpose of this research, a victim of violation of the right to education cannot directly apply to a treaty body to remedy the violation, but in the long run cumulative effect of similar violations communicated through NGOs or expert mechanisms may give rise to an action from a treaty body that may, in turn, affect the situation on the ground.

Some of the treaty bodies have established their own complaints procedures allowing for consideration of individual communications from victims of violations of human rights enshrined in the relevant treaties.²⁹⁰ The most relevant procedure for the right to education would be the one envisaged by the Optional Protocol to ICESCR²⁹¹ allowing consideration of individual complaints. However, since the Protocol only entered into force on 5 May 2013 and Russia is not among the countries that ratified it by now, there are no relevant cases to cite. Optional Protocol to the Convention on the Rights of the Child on a communications procedure has not yet entered into force, and Russia is also not among the state parties.²⁹²

As opposed to treaty bodies individual complaints, complaint procedure of the Human Rights Council, as established by the Institution-Building Resolution 5/1²⁹³ to replace the previously existing 1503 procedure²⁹⁴ is strictly confidential and only concerns 'consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms'²⁹⁵ communicated by individuals and / or civil society. Although a number of individual communications from different countries after

289 See for example highly detailed recommendations Committee on the Rights of the Child in the report of the *CRC Report 2005* (n 147): on the right of children to take part in the administration of education (para 88) and forming of its contents (para 92) including through freedom of association (para 103); human rights (paras 90, 262) and patriotic (para 260) education at schools; prohibition from 'physical and mental' violence in education and protection of children from it (paras 168-170); administrative liability of parents for non-fulfilment of their responsibilities to provide education to their children (para 168); 'educational colonies' (para 178) and 'corrective colonies' (para 290) as specific detain facilities for juvenile criminals, 'compulsory educational measures' as alternative to detention (para 292); compulsory basic general education (para 247); home education for children who cannot attend general education schools regularly (because of long-term illness, family circumstances, etc.) (para 251); the right to be instructed in one's national language (paras 254, 368); right to education of internally displaced persons and registration of migrant children with the view to providing them with access to education (para 278); access to schools in Chechen Republic (paras 286-287).

290 Such procedures have been established under *Optional Protocol to the International Covenant on Civil and Political Rights*, New York, 16 December 1966 (1966) 999 United Nations, Treaty Series 171 (ratified by Russia on 1 October 1991); *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, New York, 6 October 1999 (1999) 2131 United Nations, Treaty Series 83 (ratified by Russia on 28 Jul 2004); *Optional Protocol to the Convention on the Rights of Persons with Disabilities* adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 (not ratified by Russia); *CERD* (n 10) art 14; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 10 December 1984, (1984) 1465 United Nations, Treaty Series 85 (ratified by Russia on 3 Mar 1987) art 22; *International Convention for the Protection from Enforced Disappearance*, New York, 20 December 2006 Doc.A/61/488. C.N.737.2008.TREATIES-12 of 2 October 2008 (not ratified by Russia) art 31.

291 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, New York, 10 December 2008, adopted by General Assembly resolution A/RES/63/117, Doc.A/63/435; C.N.869.2009.TREATIES-34 of 11 December 2009.

292 *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* adopted at the sixty-sixth session of the General Assembly of the United Nations by resolution 66/138 of 19 December 2011. In accordance with article 19(1) the Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

293 Human Rights Council Resolution 5/1 of 17 June 2007 *Institution-building of the United Nations Human Rights Council*.

294 Economic and Social Council Resolution 1503(XLVIII) of 27 May 1970 on *Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms* adopted at 1693rd plenary meeting.

295 *HRC Resolution 5/1* (n 293) para 85.

consideration by the Working Group for Communications²⁹⁶ and the Working Group on Situations²⁹⁷ resulted in serious and immediate action of the Human Rights Council (passing of country-specific resolutions, urgent debates, establishing of country mandates of special procedures),²⁹⁸ this complaint mechanism remains a process behind closed doors unavailable for analysis.

Effectively, this procedure is more focused on cooperation with the states aiming at improving a particular human rights situation rather than on resolving individual issues. Thus, it affects the justiciability indirectly, by calling the states to attest their accountability for gross human rights violations and to adopt legislative, judicial and organisational measures accordingly.

As a part of their mandates some special procedures of the Human Rights Council receive communications, for which they are entitled to react with urgent appeals and letters of allegations. The Special Rapporteur on the right to education in his or her work takes into account 'information and comments received from Governments, organizations and bodies of the United Nations system, other relevant international organizations and nongovernmental organizations.'²⁹⁹

However, the number of communications sent to the states by the Special Rapporteur remains consistently low. In 2013 (March-May) only one communication has been sent (compared to an average of 40 for each mandate covering torture, human rights defenders, freedom of expression and freedom of assembly sent in the same period by the respective special procedures). In the previous five years the rate remained consistent: 39 communications on the right to education against an average of 1,100 of the same categories.³⁰⁰ For the last three years the Special Rapporteur has not sent a single communication to Russia concerning the right to education.³⁰¹ However, this situation is in line with general lack of cooperation with this mandate on the part of Russian government.³⁰²

It is clear that international cooperation in all multiplicity of its methods – from interactive dialogue, capacity building and awareness-raising to monitoring compliance with international obligations – is a powerful tool that can be used to enhance domestic justiciability of all human rights, including the right to education. Inevitably, the effectiveness of this important instrument is often curtailed by political attitudes. Unwillingness to accord appropriate significance or visibility to recommendations issued by treaty bodies or special procedures is often explained by such categories as 'national interests', 'state sovereignty', 'legal culture', 'particularities of the legal system' or even by imperfection of human rights situation in other countries.

Such a defensive attitude does not make allowances for taking into account concrete indications of gaps of protection detected by international experts, whereas a somewhat more pragmatic approach to the results of thorough investigation of the state's legislation and factual situation would build up political assets of the state and, which is more, be beneficial to its citizens. Although study of these attitudes and their effect on realisation of human rights are not in the ambit of the present research, they deserve a dedicated close attention.

296 *ibid* paras 91-95.

297 *ibid* paras 96-99.

298 For the full list of actions taken by the Council see *List of Situations Referred to the Human Rights Council under the Complaint Procedure since 2006* <www.ohchr.org/Documents/HRBodies/HRCouncil/SituationsconsideredHRCJan2013.pdf> accessed 22 January 2014.

299 UN Commission on Human Rights resolution 1998/33 of 17 April 1998, *Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems which the Developing Countries Face in their Efforts to Achieve these Human Rights* para 6 (a) (i) to (viii).

300 Communications report of Special Procedures: Communications sent, 1 March 2013 to 31 May 2013; Replies received, 1 May to 31 July 2013, A/HRC/24/21 of 22 August 2013.

301 See communications reports of Special Procedures 2011-2013 <www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx> accessed 22 January 2014.

302 Special Rapporteur on the right to education has not been able to secure a country visit to Russia for the whole period of time since the mandate's establishment in 1998, and Russia is not listed among the countries that provide standing invitation, OHCHR: Special Procedures Standing Invitations <www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx> accessed 22 January 2014.