

Occupational Health and Safety of Teachers under Conditions of Infectious Diseases: Does the Rule for Privacy Always Trump?

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1. Are 'Right to Privacy' Advocates Promoting Human Wrongs?

This ELA Conference on education, health and the law challenges us to increase awareness and understanding of various aspects of regulation concerning health-related issues in the school environment. As a human rights researcher with special interest in the right to education of marginalized groups I will, in this article, explore seriously the critics that some educators have posed on human rights advocacy. The original impetus for this undertaking came from the following argument presented in the context of a recent AIDS-related conference: 'The injudicious application of human rights (e.g. viewing them as unlimitable) such as the protection of people against discrimination and the right to privacy prevents identification of those infected or most vulnerable with a view to assistance or the prevention of possible infection.'¹ Such an argument made by a distinguished expert in education management deserves attention and response, because there is hardly a justification for any human rights activist to foolishly and carelessly defend human wrongs, as the quotation implicitly assumes.

Topics covered in this article include: first, an analysis of three international human rights norms that may potentially conflict with each other; second, their implementation in the Finnish jurisdiction; and third, one possible way to find balance between rights that seem to oppose each other. The three rights to be analyzed are the right to education, the right to privacy and the right to health. The binding character of each of these rights will first be discussed at the international level and then analyzed in the context of Finnish jurisprudence, including legislation that guarantees occupational safety for teachers and other school staff. One might wonder why we should bother to look at the Finnish legislation. Is not Finland just a small country up there somewhere, where infectious diseases that in many other parts of the world are pandemic are not considered even as endemic? Even so, as will be described, a rationale to look at the Finnish law is the peculiar role given to international human rights standards in the Constitution of Finland (731/1999), and the consequent challenge to the legislator to tackle conflicting human rights whenever such become discernible. The article concludes with a presentation of a method to balance between competing rights when the law remains obscure, or when the state constitution does not give such strong recognition of the international human rights law as does the Finnish jurisdiction.

2. Are Universal Human Rights Unlimitable?

All the human rights discussed in this paper are included in three legally-binding United Nations instruments, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social

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¹ Beckmann, J. (2002), 'Protecting the South African Education System against the HIV AIDS Pandemic', paper proposal to the NZEAS Conference of Rotorua, 9 to 12 January 2002. Available online at www.soe.waikato.ac.nz/nzeas/pdf/Abstract_JBeckmann.pdf. Similar arguments have been made by education professionals of other countries where HIV/AIDS is pandemic: the main argument goes that the human right to privacy of infected students should give way for public health arguments.

and Cultural Rights (ICESCR), both from 1966, and the Convention on the Rights of the Child (CRC) from 1989.² The fact that these instruments are legally binding means that we are not talking about mere moral commitments: any state party that ratifies these treaties commits itself to take measures for guaranteeing all the rights covered by them to all individuals under its jurisdiction. The measures to be taken consist, *inter alia*, of legislation that will give effect to the rights recognized in the conventions. But are the rights themselves expected to be unlimitable and inalienable? Let us look at what some leading provisions stipulate in this matter.

As regards *the right to education*, Article 13 of the ICESCR recognizes everybody's right to education, and makes primary education compulsory and available free to all. Article 28 of the CRC uses identical wording. A commonly shared understanding is that the call for compulsory education, for one thing, allows for punishment of parents that do not safeguard that their children get a certain amount of education. For another thing, and more importantly, the stipulation on compulsory education obliges the state to provide adequate schooling facilities to all children. These provisions, together with authoritative comments on their interpretation,³ put an end to any arguments that children in compulsory school age could be excluded from education due to such grounds as suspect health status or diagnosed disease. The right to primary education as universal human right is unlimitable.

The right to privacy is guaranteed in Article 17 of the ICCPR, which verbatim provides that 'No one shall be subjected to arbitrary or unlawful interference with his privacy...' Moreover, the provision stipulates that everyone has the right to the protection of the law against such interference. Once again the CRC, which was adopted years after the twin Covenants of 1966, reiterates in its Article 16 the privacy provision of the ICCPR word by word. A noteworthy fact to be discussed is that both of these instruments expressly mention 'the right to the protection of the law' against any attacks that may arbitrarily or unlawfully violate the privacy rule. In contrast, interference that is based on law is not prohibited. Thus, to put it simply, the privacy rule of the international human rights law is not unlimitable.⁴

The third entitlement under consideration, *the right to health*, is acknowledged literally in international human rights law as 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' This right is recognized in Article 12 of the ICESCR,⁵ as well as in Article 24 of the CRC.⁶ Both these provisions anticipate that the steps to be taken by the States Parties to achieve the full realization of this right shall include, *inter alia*, the prevention, treatment and control of epidemic and endemic diseases. A peculiarity of these provisions, as compared with the other two rights above, is that the wording used is expressly programmatic. Thus, the right to health is not an expressly individual right formulated in terms sufficiently specific to be justiciable, but merely to be implemented programmatically by appropriate legislative and administrative measures.

What was said above sounds axiomatic as it goes beyond the might of any person to guarantee an inalienable right to health for a single human being. Nevertheless, the vague phrasing of the right to health may have implications even concerning the tension between it and the two other rights under discussion. On the universal level the differences are not so strong, as none of the independent bodies of experts that monitor rights under the UN treaties has judicial power. At the European regional level, the right to privacy and the right to education are both included in the European Convention on Human Rights (ECHR), which is characterized by the collective guarantee of individual rights.⁷ In contrast, the right to health is recognized only as a programmatic obligation in the European Social Charter (ESC).⁸ Even the ECHR imparts the notion of health, but just as one potential

² In addition, they are all mentioned in the Universal Declaration of Human Rights (UDHR), which, although not a legally binding document, is widely cited and widely recognized as part of customary international law. See UDHR, Art. 12, 25, 26. Even instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), contain relevant provisions, but for the sake of conciseness they will not be discussed here.

³ See also Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The Right to education*, (Art. 13), U.N. Doc. E/C.12/1999/10, and Committee on the Rights of the Child, *General Comment No. 1, The Aims of Education*, CRC/GC/2001/1.

⁴ The UN Human Rights Committee expressly puts forward that the term 'unlawful' in Art. 17 of the CCPR means that no interference can take place except in cases envisaged by law. See CCPR (1988), *General Comment No. 16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, (Art. 17): 08/04/88, para. 3.

⁵ On the implementation of Art. 12, see Committee on Economic, Social and Cultural Rights (2000), *General Comment 14, The right to the highest attainable standard of health*, U.N. Doc. E/C.12/2000/4 (2000).

⁶ See also Committee on the Rights of the Child (2003), *General Comment No. 3, HIV/AIDS and the right of the child*, CRC/CG/2003/1.

⁷ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, para. 16.

⁸ Art. 11 of the revised ESC (1996) on the right to protection of health reads: 'With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organizations, to take appropriate measures designed *inter alia*: (1) to remove as far as possible the causes of ill-health; (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.' Note also that health is mentioned in many other provisions of the ESC. See Art. 2(4), 3, 7(1, 2), 8(5), 19(2), 22, 23.

law-based exception for the right to privacy: a public authority may interfere with this right only ‘in accordance with law’, ‘in the interest of public safety’, and ‘for the protection of health’, among other listed attributes.⁹

3. The Legal Bases for the Right to Education, the Right to Privacy and the Right to Health in the Finnish Law

All the universal human rights provisions reviewed above are of interest when we discuss the health risks of teachers working with marginalized populations in poverty-struck areas where ill health and ignorance often intersect with each other. Likewise, all the three human rights provisions under discussion are legally binding for any public service in Finland: according to section 22 of the Constitution the public authorities shall explicitly ‘guarantee the observance of basic rights and liberties and human rights.’¹⁰ All the three rights are also mentioned in the Constitution: section 16 provides that everyone has the right to basic education free of charge, section 10 stipulates that everyone’s private life, honour and the sanctity of the home are guaranteed, and section 19 on the right to social security mentions health services among other activities that aim to promote the health of the population.

Before moving to the discussion on conflicting interests, let us look at how these constitutional rules are incorporated into ordinary legislation. Firstly, as regards the right to basic education free of charge, the Constitution of Finland stipulates that provisions on the duty to receive education are laid down by an Act of Parliament. This arrangement is obliged to municipalities in the Basic Education Act (628/1998).¹¹ When a child lands in hospital, the starting point is that s/he nevertheless has right to receive tuition in conformity with her/his ability: in such cases the municipality where the hospital is situated is responsible for arranging the instruction.¹² Furthermore, pupils who are lagging behind instruction due to illness, absences for other reasons or temporary learning problems have the right to receive remedial instruction. This applies even to children that are not taken to hospital but shall due to sickness remain longer periods at home.¹³ The relatively unambiguous formulation of these provisions illustrate that the legislator of Finland has sought to guarantee the right to basic education for those in compulsory school age as an unlimitable and inalienable right, in conformity with international human rights norms discussed above.

Secondly, in accordance with the constitutional provision on the protection of personal data, the right to privacy is predominantly regulated in an Act of Parliament, that is, the Personal Data Act (523/1999). According to section 2 of the Personal Data Act, it shall apply to the processing of personal data unless otherwise provided elsewhere in the law. In the field of health care in large, the right to privacy has been used to ensure that personal information given to health personnel will remain confidential. On the other side, the privacy rule can be used to claims against breach of confidentiality, and the health care personnel that disclose their patient’s status without consent run the risk of being sued. Among school staff members, it is health professionals – school nurses or the like – that are to be held accountable for the standard that protects student confidentiality. The same privacy rules apply in the school setting as in the society in large. All health information must be treated in a confidential manner and shared with other school staff only when it is necessary to address a student’s potential emergency and health care needs, and only with the consent of the student in question. For situations where privacy rule can be disregarded in order to ensure the protection of other students and school personnel, separate stipulations shall be provided in the law. Such provisions are in Finland included in the public health legislation, as described below.

Thirdly, everybody’s right to enjoy the highest attainable standard of health is in the Finnish Constitution guaranteed programmatically, correspondingly with the universal human rights provisions. Accordingly, section 19 on the right to social security stipulates, among other things, that the public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population. The Public Health Care Act (66/1972) obliges municipalities to organize tax-funded

⁹ The ECHR, Art. 8(2). See also Art. 9(2), 10(2), and 11(2).

¹⁰ See also s. 1 of the Constitution, which engages Finland to participate in international co-operation for the protection of human rights, and s. 74, which calls for an analysis of legislative proposals in their relation to international human rights treaties. These provisions jointly with s. 22 give extraordinary strong recognition for the international human rights in the Finnish jurisdiction.

¹¹ Basic Education Act, Art. 4(1).

¹² Basic Education Act, Art. 4(3), 17(2), 18.

¹³ Basic Education Act, Art. 16.

school health care even for students that have their domicile somewhere else.¹⁴ In case there are employees or students in the school that may be carrying infectious diseases, the employer shall on grounds of the Occupational Safety and Health Act (738/2002) take measures to ensure that employees will not become subjected to infection. Any workplace covered by this law shall have a policy for action in order to promote safety and health of the employees. The objectives of the policy must be discussed with the employees or their representatives. In planning of the policy, the System of Occupational Health Services has a law-based mandate to serve as an advisory expert.¹⁵

Concerning crisis situations, there is neither specific legislation nor any separate national emergency plans for schools. The education sector is part of one and the same national emergency plan as all the other sectors of the society. According to the Act on Infectious Diseases (583/1986),¹⁶ infectious diseases are divided into generally dangerous diseases, notifiable diseases and other infectious diseases. Act 583/1986 obliges medical practitioners to file a report on a suspected or verified case of a generally dangerous infectious disease or a notifiable infectious disease. In case that there arises nation-wide uncertainty on the distinction between diseases that shall be reported, in accordance with the Act on Infectious Diseases, and the ones that do not need to be reported, the Ministry of Social Affairs and Health shall issue instructions, with the National Public Health Institute as a consultative expert organization.

Schools as workplaces are not considered to differ from other customary working environments as far as risk of infection is at stake, hence no special legislation has been enacted. Indeed, education legislation was amended as from August 2003 so that emergency preparedness shall be included in the school curricula, but infectious diseases are not separately mentioned in the amendment. The revised provision focuses on the need to guarantee a healthy and safe learning environment for all by means such as monitoring accidents and other dangerous or threatening situations in schools; intervening immediately in bullying; and reporting cases of non-attendance without permission to the guardians of the child.¹⁷ As far as potential anxiety created by infectious diseases or any other health risks of students is concerned, the primary responsibility lies on the school health care system.

4. When Interests Clash

Let us now turn to a hypothetical conflict that begins when a teacher prohibits access to the classroom from a child that spits blood. The parents challenge the prohibition, asserting that their child should not be labelled as transmitter because many people in the neighbourhood have similar symptoms and that without any promise neither for compensatory education nor of medical cure their child will just fall behind the others. Indeed, this is not just a hypothetical conflict in some Central and Eastern European countries. Cases are reported where the extremely poor living conditions and the lack of environmental hygiene of Roma settlements have lead to diseases such as tuberculosis, with blood-spitting among children as symptoms. When even local doctors reportedly refuse to treat infected children, it is no wonder if teachers prefer to exclude them from schools irrespective of what the universal human rights law might say about everybody's right to education.¹⁸ In what follows we examine how the Finnish law would solve this kind of conflicting interests between teachers that want to protect fellow students and themselves from infection on the one side, and infected pupils and their parents that are strongly committed to education on the other side.

The child together with her parents, thus challenge the exclusion by asserting that it is unconstitutional for several reasons. They complain, first, under section 6 of the Finnish Constitution and under several international instruments ratified by Finland that her right to equality before the law and her right to non-discrimination has been violated. Indeed, the Constitution of Finland provides in section 6 that no one shall, without an acceptable reason, be treated differently from other persons on the ground of health, among other things.¹⁹ Second, the

¹⁴ Art. 14(5) and 14(6), as amended 21.8.1998/647.

¹⁵ Occupational Safety and Health Act (738/2002), s. 10(2); Occupational Health Care Act (1383/2001).

¹⁶ Amended 76/1991, 770/1992.

¹⁷ Art. 29 of the Basic Education Act, as amended by Act 477/2003. Acts on general upper secondary and vocational education were amended correspondingly. The amended provision obliges National Board of Education to issue an order on how the emergency plan shall be drafted.

¹⁸ See field report by Sobotka, E. (2001), *Roma Rights*, No. 4. See also Written Comments of the ERRC concerning Poland for Consideration by the United Nations Committee on Economic, Social and Cultural Rights at Its 29th Session, 11-29 November, 2002.

¹⁹ As regard international instruments discussed above, only the European Social Charter expressly mentions health as a prohibited grounds for discrimination. See Part V, Art. E. Nevertheless, it is obvious that the notion 'other status' in the anti-discrimination clauses of the ICCPR (Art. 26), the ICESCR (Art. 2) and CRC (Art. 2) also include health. The non-discrimination provision of the ECHR (Art. 14) is more limited in its coverage, as it prohibits discrimination only in the enjoyment of the rights and freedoms guaranteed by the ECHR, which do not include the right to health.

child asserts her privacy rights in order to protect herself from stigmatizing action: the teacher should not label the child in front of all the others as being infected, and has neither the right to receive information on her health status nor to rumour on that issue. Third, the parents submit that by merely sending the child home is a matter of exposure that violates the child's subjective right to education. According to them, such a narrow-minded teacher should rather get fired, whereas their child should be guaranteed right to high-quality education from non-bigoted teaching staff and proper medical care from school health professionals.

The argumentation of the teacher reads as follows: the decision to kick out the child derives from the right to a safe working environment as guaranteed in the legislation over occupational safety, and from the right to a safe learning environment as guaranteed in the educational legislation. It was obviously not in the interest of anybody that the child in question was coughing up in school. The symptoms pointed to tuberculosis, which is transmitted by droplet spread, and thus virtually everyone in the school was at risk. Sending the child home was done out of pure public interest, in order to prevent an epidemic that could result otherwise. What is more, tuberculosis is according to the knowledge of the teacher often connected to HIV/AIDS, which is a lethal disease with no cure. Hence, he strengthens the claim for the right to safe working environment by arguing that as a matter of fact at issue is the right to life, which is a constitutional and universal right as much as is the right to non-discrimination.²⁰ Indeed, schoolmates can get infected through saliva of the girl under discussion, when she hugs and kisses them. Therefore it is only fair to seek to apply the provisions on health and life not only to those infected, but also to those in risk of infection. The teacher claims that everybody's right to life should weigh more than education and privacy right of those infected by HIV.

How would an impartial body with decisive power, be it administrative or legal, solve this situation where the parties not only claim that one right weighs more than another, but moreover add a chain of related arguments and make claims on their superior weight in relation to the arguments of the opposing party?

The excluded child and her parents use smartly cumulative reasoning, according to which, two reasons pulling at the same direction are jointly stronger than each of them alone. The claim for non-discrimination on the grounds of health together with the right to education constructs a powerful argument. As underlined by the Committee on Economic, Social and Cultural Rights: 'The prohibition against discrimination enshrined in article 2(2) of the [ICESCR] is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education'.²¹ The subjective right to education irrespective of the child's health status in the Finnish jurisdiction was described above. As concerns the limits of this right, the rehabilitation counsellors of seriously ill children argument strongly that continuation of schooling helps these children to maintain a 'normal' life and gives them faith in the future. According to them even dying children shall have a right to school education, whenever wished by him/her and the guardian(s).²² As far as the claim for right to privacy is concerned: the dissemination of information that stigmatizes the child obviously infringes on the right to non-discrimination, but the rumouring by the teacher would scarcely fall under privacy legislation.

In the defence of the teacher, reasoning is structured as a chain of arguments, which, intuitively, gives us more information than a mere cumulating of arguments would give. The chain 'exclusion because of safety because of right to life' makes much more sense than merely cumulating 'exclusion and safety and right to life'.²³ But does this kind of reasoning trump in legal sense over the individual rights of the opposing party? Apparently, infectious diseases put school personnel and children at risk whenever viruses are transmitted by air or through common human interaction. Nevertheless, the decision simply to bar the child from school cannot be justified merely by community interest that is deemed to overrule the rights of the infected person. In a matter as clear cut as this, the teacher should instead transfer the case for school health care professionals who not only have competence to make a correct diagnosis but, moreover, are bound by professional secrecy. Indeed, it is the health care professionals that are compelled by law to report to public health authorities patients they diagnose with dangerous diseases. In the case of tuberculosis, people can be rendered non-infectious by appropriate treatment, but never by mere segregation.

²⁰ S. 7 of the Constitution of Finland reads: 'Everyone has the right to life, personal liberty, integrity and security.' In the international human rights law the right to life is covered by Art. 6 of the ICCPR and by Art. 2 of the ECHR. The Human Rights Committee, which monitors compliance with the ICCPR, has noted that the right to life 'should not be interpreted narrowly', and that adoption of measures to eliminate epidemics is desirable for States parties in order to give substance for the right to life. See HRC (1994), *General Comment 6* (16th session, 1982), U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), paras 1 and 5.

²¹ Committee on Economic, Social and Cultural Rights (1999), *General comment 13, The right to education* (Art. 13): E/C.12/1999/10, para. 31.

²² See for example 'Kouluopas' – a guide for the schools of children with cancer. (Available only in Finnish at http://www.sylva.fi/index_1.htm.)

²³ On this kind of legal reasoning, see for example Peczenik, A. (1996), 'Jumps and Logic in the Law', *Artificial Intelligence and Law*, 4, No. 3-4. *Ibid.*, 'A Coherence Theory of Juristic Knowledge', available online at <http://www.ivr2003.net/peczenik.htm>.

A major weakness in the reasoning of the teacher is that he seems to be unaware of the division of responsibilities between different professionals working in the school setting. In the legislation the responsibilities of educational staff and health care staff are differentiated from each other. As far as safety of the learning environment is concerned, the education provider is liable for the clear division of responsibilities and for that all employees know what is within the scope of their authority. As regards protection of the public health, educators are liable primarily for the information of general nature, whereas health professionals are responsible for measures that infringe any person's basic human rights in the name of limiting the spread of serious infections. In other words, individuals with seriously infectious diseases, as defined by medical experts, may be quarantined by health care staff, but not isolated arbitrarily by teachers.

How about the argument that the child might be HIV-infected, and because HIV/AIDS has the attribute of being an incurable and fatal disease, the protection of other children should weigh more than the interest of the infected one? Apart from overstepping one's authority, as discussed above, the teacher would scarcely find approval for the exclusion of the child on this ground. It is so far uncontested that HIV is only spread in three ways: by blood (especially via needles and syringes), from mother to baby (before or during birth or through breast feeding) and by vaginal or anal sexual intercourse.²⁴ In the light of this knowledge, it sounds excess of justifiable defence to claim that children with HIV hugging other people might be a health risk. In Finland it seems that there is general agreement among health and human rights experts, as well as among labour market parties over the priority of the right to privacy of HIV-infected people. As far as it is known, there are no demands for legislation that would give those who take care of infected people the right to disclose their patients' conditions to third parties. Quite another thing is that health professionals are obliged by law to notify certain diseases to authorities that are responsible for national emergency plans. Thus, neither the argument for public interest,²⁵ nor the ones for safe working environment and other people's right to life would in this case be strong enough to override the rights of the infected child.²⁶

Summing up, we fleshed out the presumably most compelling arguments for each side in the construed conflict, and after reviewing the parents' claim for the best of their child against those proposed by the teacher, it turned out that the right to privacy is not unlimitable, but neither is there space for unauthorized use of public power. The short analysis suggests that the public health legislation of Finland specifies clearly enough the circumstances in which interference in an infected individual's private life is permitted and by whom.²⁷

5. Constructive Ways Forward

An enlightened decision-maker would pay attention to the fact that in our hypothetical case one important right is conspicuous by its absence. A right that concerns all the parties is the right to information, as confirmed in binding international human rights law,²⁸ and in several soft law documents.²⁹ Noteworthy in this context is above all Article 24(2)(e) of the CRC that requires states parties '[t]o ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health.' Equally important is to distinguish between private information and general information. Whenever health information deals with diseases that contain a fear factor of becoming stigmatized, maintenance of trust between health authorities and infected people is of outmost importance. The degree of dangerous of the disease does not break the privacy rule but puts added pressure on health authorities to ensure that the infected persons are objectively informed about the risks of transmission. On the other hand, excessive emphasis on confidentiality may lead to denial of the epidemic, as has been reported in the case of HIV/AIDS in many parts of the world.

²⁴ See Bradford, D. (1994), 'Get It Right! Human Rights!' A Human Rights Education Project, Discussion Paper No. 6, Victorian Council for Civil Liberties.

²⁵ Note, however that in some cases public interest may suffice. As an example serves the famous Belgian linguistic case where the European Court of Human rights, held that the non-discrimination clause of the ECHR (Art. 14) did not prohibit distinctions which, 'being based on the public interest, struck a fair balance between the protection of the interests of the community and freedoms safeguarded by the Convention.' *Belgian Linguistic Case* (No. 2) (1968) 1 EHRR 252. By its official title: The case 'relating to certain aspects of the laws on the use of languages in education in Belgium'.

²⁶ On the rights of HIV-infected children, see in particular: CRC (2003), *General Comment No. 3, HIV/AIDS and the right of the child*, UN Doc. CRC/GC/2003/1.

²⁷ Note also General Comment No. 16 of the Human Rights Committee, where it reads that even with regard lawful interferences with private life, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. Footnote 4 above, paras 7 and 8.

²⁸ Art. 19 of the ICCPR, Art. 13 of the CRC, and Ar. 10 of the ECHR all stipulate that the right to information shall include freedom to seek, receive and impart information and ideas of all kinds.

²⁹ The fact that access to information is essential to secure the right to the highest attainable standard of health is stated for example in by the Committee on Economic, Social and Cultural Rights in its General Comment No. 14. In addition, the committee advises that states have a legal obligation to refrain from 'enslaving, withholding or intentionally misrepresenting health-related information.' See Committee on Economic, Social and Cultural Rights, *General Comment 14 The Right to the Highest Attainable Standard of Health*, paras 12(b), 16, 34 and note 8.

It is generally acknowledged that ‘socially unacceptable’ diseases are much more easily surrounded by myths than tackled by unbiased information. In our case the decision-maker would thus carry on by initiating investigation on whether the responsibilities for providing information on sensitive health care issues – at individual as well as at general level – are defined clearly enough in the school community.

What has been said above is easy to become accepted in welfare states with smooth a interaction of international human rights and constitutional rights and with extensive public health legislation, as in Finland. But how about a country in which none of these attributes applies? Indeed, in some states the rejection of the legitimacy of international instruments protecting the right to health can itself provide reasons why human rights advocates may seem to over-emphasize privacy rights: it follows naturally that the advocates prefer to make use of rights that are clearly justiciable and thus have stronger impact in individual cases.

For states with a strong constitutional court, one potentially usable solution for the problem of weighing and balancing constitutionally protected legal goods has been introduced by the German legal theorist Robert Alexy. According to him, a strong constitutional court can always determine the weight of each right in order to decide a conflict between rights. Alexy suggests that there are two logically distinct categories of norms. The first category comprises *rules*, which are always either fulfilled or not; if a rule applies then the requirement is to do exactly what it says. The second category comprises *principles*, which requires that something be realized to the greatest extent possible given the legal and factual opportunities.³⁰ Accordingly, the first task is distinguish rules from principles, and then balance different principles by weighing two conflicting interests against each other. For this purpose Alexy introduces a specific formula, by use of which it is possible to rationally determine the weight of each right.³¹

Alexy’s solution has been widely accepted by constitutional theorists. Human rights scholars have not unreservedly accepted the formula as it in practice reduces constitutional rights into mere principles that can always be solved through refining the scales. A human rights approach would rather strive to identify for each and every human right the core content that should be granted the status of inviolability. This identification should be done not only for absolute, non-derogable rights (such as prohibition of torture), but also to rights that can be limited under explicit circumstances (such as right to liberty and security) and to qualified rights (such as right to health). A reason for mentioning the theory of Alexy in this context is to remind that there are advanced ways of reasoning to enable a constructive way forward in stalemate situations: debate over conflicting rights does not need to take form of shooting in darkness.

6. Concluding Remark

It appears that occupational health care of school staff in Finland even in exceptional situations is based on clear legal responsibilities. The applicable legislation safeguards not only that infectious diseases cannot be used as the alleged reason for unjustified violations of individual rights, but also that the occupational safety of teachers is under control. Is it nevertheless possible to point out some weaknesses and inconsistencies in the Finnish system as regards overall safeguarding of health protection in the educational setting? Public discussion has tackled the need to refurbish school-buildings suffering from mold, which may predispose to asthma both children and their teachers. Slowly evolving problems like this hardly ever draw the attention of human rights activists, but incongruities that remain uncorrected may in the long run grow to be a serious violation of the right to health for anybody residing in detrimental physical facilities.

Another issue worth concern is the (un)availability of health care and health education for those children that do not fit in the mainstream system. Out-of-school, unemployed, unskilled young people are more likely to be in danger of drug abusing patterns and risk behaviour linked to it, such as sharing of blood-contaminated needles

³⁰ For example, in the hypothetical case presented above the right to primary education free of charge would be a rule, whereas the right to highest attainable standard of health, which can be satisfied to varying degrees, would be a principle.

³¹ The formula reads: $WP_{i,jak}C = (IP,C.WP,A.RP,C) : (SP,C.WP,A.RP,C + SpkC.WPkA.RPkC)$

- Weight of principle P_i in relation to competing principles P_j and P_k in circumstances C
- I = intensity of interference (serious, moderate, low; intuitively represented by 4, 2 and 1)
- S = importance of satisfying the competing principle (s, m, l)
- WPA = abstract weight of a principle (s, m, l)
- RPC = reliability of empirical assumptions (s, m, l)

For further acquaintance see Alexy, R. (2002), *A Theory of Constitutional Rights*, Oxford University Press, Oxford.

or experimenting with unprotected sex. The need for health care and health education is certainly no less important in this group than among school students of the same age. Nevertheless, they unavoidably fall outside systems such as school health care. Many individuals falling into this risk group are difficult to reach due to the fact that they have weak or no skills in the official languages of the country.³² Moreover, charity and volunteer workers are often the only adults that search responsible contact with the most marginalized youngsters. When the applicability of occupational safety legislation to this group of workers is taken under scrutiny, it may turn out that the system of protection is weakest where it should be strongest. Yet, referring back to the quotation in the beginning of this article, it is difficult to see in which way wholehearted defence of non-discrimination and privacy rights might harm the assistance of the most vulnerable ones. Maybe further clarification of this particular concern would help human rights advocates and educational experts towards more productive co-operation.

³² Note how the Committee on the Rights of the child draws attention to the intersection of education denied and health care denied; to informal information channels targeted to street-children and institutionalized children; as well as services targeted to children belonging to minorities and indigenous children. See CRC General Comment No. 3, footnote 6 above, paras 5, 13, 18. The out-of-school children's right to information of general nature is recognized also in the U.N. Guidelines on HIV/AIDS and Human Rights. See *HIV/AIDS and Human Rights – International Guidelines*, U.N. Doc. HR/PUB/98/1, Geneva, 1998, para. 30(g).