

# Another Strategy for Justice: Repair the Broken Knowledge Ladder

Päivi Gynther\*

## 1. An Enlightening Scheme

The aim of this article is to share with the readership of the *International Journal for Education Law and Policy* some results of my research on systemic discrimination in education, to which I have been committed the last five years. More precisely, this article presents the so-called 4R-scheme, by use of which it can be analysed whether the national legislation on education is in unity with the leading international standards on human rights, minority rights and non-discrimination.<sup>1</sup> The 4R-scheme in question is anticipated to be a tool with wider applicability, *inter alia*, for the following reasons:

- (i) The scheme has proven to be clear and logical; this is in contrast to many typologies that remain useless due to their internal overlaps.
- (ii) Each aspect of the scheme is easily broken down into sub-themes, and the scheme is therefore also more easily put into practice.
- (iii) The scheme is applicable to the analysis of law on several sectors of society, even if its first concrete application deals just with certain parts of the educational sector.

The main advantage of the 4R-scheme is that it helps to analyse the national law of education from a holistic viewpoint. It suggests four interconnected sub-areas of education legislation, disregard of which cumulatively create and maintain exclusion of individuals of disadvantaged groups from education with proper functional value for them and their communities. The four aspects of which the scheme is composed are: rights, recognition, resources and representation.<sup>2</sup> The premise is that if some crucial rights are not provided by law, some right-holders are left invisible, some of the important resources are withdrawn arbitrarily, and most crucial decisions are made top-down without respect to genuine dialogue between diverse stakeholders, then, more or less inevitably, systemic discrimination in education will occur.<sup>3</sup>

\* Ms. Päivi Gynther is currently a visiting researcher at the University of Leipzig, Faculty of Law.

<sup>1</sup> The first version of my 4R-scheme was introduced in Gynther, P. (2001d), 'On Systemic Discrimination', Paper presented at Research Workshop on Non-Discrimination and Minority Rights, Åbo Akademi University, 22 November 2001. For the first published version see Gynther, P. (2003a), 'On the Doctrine of Systemic Discrimination and its Usability in the Field of Education', *International Journal on Minority and Group Rights*, 10, pp. 45-54. During the course of the years, the four components of the scheme have been presented to wider audience in several seminars and conferences. The author is grateful for all the comments given by participants in each of them. For the for a where the scheme has been discussed, see the references in respective footnotes below.

<sup>2</sup> It should be noted that this 4R-scheme is by no means meant to challenge the so-called '4A-scheme,' commonly used, for instance, by the UN Committee on Economic, Social and Cultural Rights. The use of conceptual short-cuts based on the alphabet seems to be common in the creation of analytical frameworks. For example, Kwame Nimako introduces the 'Four Ds' of deficit, difference, discrimination and diversity in order to identify key policy approaches to ethnic integration. (Quoted in Essed 2002.) Likewise, Neville Harris (1998) uses the concept of "Three Rs" – i.e. rights, remedies and regulation – when describing the increasingly complex legal framework surrounding educational provision in the UK, just to mention a few examples. Interestingly, the European Commission also launched on 2 June 2005 the 'European Year of Equal Opportunities for All' that uses the rhetorical device of rights, recognition, representation and respect. Even in this case, according to a letter dated 22 June 2005 and signed by the Director General Odile Quintin, the similarity with my 4R-scheme is simply coincidental.

<sup>3</sup> In my study, the concept of 'systemic discrimination' has a particular, specifically defined, meaning. That is, the 'system' refers merely to the legal and administrative norms of the social order. The presence or absence of black-and-white norms forms the core of systemic discrimination. For elaboration of this concept, see Gynther, P. (2001b), 'On Discrimination', Paper presented at the Graduate School on Cultural Interaction and Integration, Turku University, 4 May 2001. See also Gynther, P. (2001d) and (2003a) above. For a more thorough conceptualisation of systemic discrimination, see my forthcoming doctoral thesis.

## 2. Assessable Components

The overall goal that the 4R-scheme aims to serve is to promote the fulfillment of the universal right to good quality education. However, such a commonly stated goal by itself does not conceptualise the amount, level or extent of education that should be provided for everybody. In place of that, the strategy described below works to achieve a number of quantifiable components under each of the four main aspects of the 4R-scheme, namely those of rights, recognition, resources and representation.

R1. The four key components that are proposed to make the *rights-aspect* of educational legislation more measurable are: (i) the right to basic skills; (ii) the right to language skills; (iii) the right to vocational skills; and (iv) the right to cultural skills. The main argument for this composition is that each of the four skills can be considered as necessary for the full development of human personality and self-sustainable life.<sup>4</sup>

R2. The *recognition-aspect* of the law on education draws attention to the fact that state parties to international human rights law are obliged to pay due attention to all subjects of educational rights under their jurisdiction. The four components that are suggested as components for a deeper analysis are: (i) age, (ii) language, (iii) gender and (iv) ethnicity. Biases or lacunae in the legislation vis-à-vis any of these identity attributes may establish multiply oppressive situations for the educationally most disadvantaged parts of the population.<sup>5</sup>

R3. The *resource-aspect* of the analytical scheme deals with the effects that the right to education has on the corresponding state obligations. Again, the key aspect is divided to four different components, that is: (i) human resources, (ii) financial resources; (iii) technology resources, and (iv) information resources. The reasoning is built upon an integrative approach that obliges member states of international human rights law to pay due attention to two dimensions simultaneously: to fulfil the universal right to education for everybody, and to pay due attention to the recognition of difference.<sup>6</sup>

R4. The *representation-aspect* of the analytical scheme asks who is expected to speak for whom in educational standard-setting, and with what authority. In particular, it raises the question as to whether the educationally most disadvantaged individuals are provided with a guarantee of adequate representation. Here attention is drawn to how the legislature of a so-called pluralist society takes into account the importance of interest groups in intra-sectoral processes.<sup>7</sup>

## 3. Attention to Holistic and Functional Skills Acquisition

Some main conclusions drawn from the application of the 4R-scheme are introduced next. These conclusions are based first of all on the principles of the universality, indivisibility, interconnectedness and interdependency of human rights. That is to say, *inter alia*, that, when drawing the conclusions presented below, I have taken into account the interconnectedness of three more or less distinct regimes. One of them prohibits discrimination, another provides for a substantive right to education, and a third aims to protect and promote the separate identity of diverse minority groups.

### 3.1 Take the Right to Education as a Holistic Concept

One of my conclusions with regard to the rights-aspect is that all the four components – the right to basic skills, the right to language skills, the right to vocational skills and the right to cultural skills – shall be acknowledged in due manner by the legislature of any state that takes its international obligations on the right to education seriously. All the four skills dimensions are indeed recognised as rights in the international legally binding

<sup>4</sup> For an early elaboration of the rights-aspect, see Gynther, P. (2001a), 'The Progressive Realization of the Right to Vocational Education: What to Measure and How?', Seminar paper presented at the Institute of Human Rights, Åbo Akademi University, 30 January 2001.

<sup>5</sup> For elaborations of the recognition-aspect, see Gynther, P. (2001c), 'Consequences of Ethnic Insensitivity', Paper presented at the seminar 'Rethinking and Developing Strategies against Racism and Ethnic Intolerance', Åbo Akademi University, 6 June 2001. See also Gynther, P. (2003b), 'Recognition', Paper presented at the Nordic Human Rights Research Course, Åbo Akademi University, 2-7 June 2003.

<sup>6</sup> See Gynther, P. (2005), 'Recognition of Difference & Fair Redistribution of Resources: Is an Equation Impossible?', Paper presented at the Pluralism & Equality Conference, Helsinki 20 June 2005.

<sup>7</sup> Gynther, P. (2004b), 'Voices That Shall be Heard: On Fragmentation, Polarization and Representation in Post-Compulsory Education', Paper presented in the Education Law and Policy Stream of the Annual Conference of the Socio-Legal Studies Association, Glasgow, 7 April 2004.

instruments. However, the vague formulation of many provisions on the right to education does leave space for interpretation as to what precisely is covered and what they do not cover. In any case, the factual grounds of societies shall be taken into account when estimating what the core of educational rights to be guaranteed by the state actually is. The human right to education in the so-called knowledge societies shall be defined in accordance with the right of the educationally most disadvantaged individuals to learn skills that enable self-sustainable life.

### 3.2 Monitor Skills Deficiency and Progress

A major conclusion that I draw on the aspect of recognition is that we should in data collection and monitoring move from the focus on sameness or difference *per se* onto the recognition of functional disability and the progressive realisation of functional ability. Ignoring ethnicity, gender, or age differences and refusing to accommodate them may become a denial of equal access and opportunity, but it is the ignoring of fundamental educational disadvantage that most probably excludes individuals from any advancement in the so-called knowledge society. The main human rights concern should therefore be how legal categories act and interact to recognise concrete functional disadvantages, such as illiteracy, language deficiency, vocational deficiency or cultural insensitivity. This suggestion does not deny the importance of the recognition of difference between diverse groups of society. Rather, it says that the recognition of difference, for instance, between ethnic, religious or cultural groups may not lead to the ignoring, playing down or denial of features such as illiteracy, language deficit, etc. A point to be borne in mind is that there are several general provisions in the binding international human rights law which prohibit the use of biased classifications leading to non-identification of individuals in most disadvantaged positions.

### 3.3 Respect for Pluralism Shall Not Tread Underfoot those Most Disadvantaged

The major conclusion than I draw from an analysis of the international human rights law on resources in education is twofold. Firstly, it is apparent that a narrow focus on the reallocation of funds is not enough when discussing the fulfilment of the right to education. Instead, an unbiased reallocation of all four forms of resources in a socially contextualised way is needed to safeguard adequacy as the standard to which all education provision should be held. That is to say, the strategy for justice in education does not call merely for the reallocation of money. Education law that is human rights accountable shall recognise also the central role of human resources, such as the training and availability of qualified teachers even for the most marginalised parts of the student population. Likewise, information resources shall be reflective of the people they are designed to serve. That is, information on educational options shall be comprehensible and intelligible, not only for those who send the message, but also for the addressees. If there only is a will, modern information technology opens the way to fulfill this requirement more easily than ever before. The point is that the concept of resources shall be comprehended in a wide sense, including even human, technology, and information resources.

The other dimension to be taken into account here is that any state party to the international human rights law is challenged by a holistic reading of universal, individual rights on the one hand and of particular minority rights on the other hand. I propose an argument for an integrative approach that obliges state parties to pay due attention to both dimensions simultaneously. No state shall purely in the name of diversity deliver resources for different 'cultural' or 'other' groups if it meanwhile turns its back upon the reduction of the functional skills deficiency that exists in any of these particularistic groups. The very idea of human rights accountability goes along with the idea that the fulfilment of at least the core content of educational rights must be guaranteed by the state. If the legislature then decides to exclude some categories by neglect, by recognising them neither in law nor in policy, it is also a decision that the government should be able to expressly justify to both the domestic and international bodies that monitor the fulfilment of the right to education.

### 3.4 From Elitist Networks to True Agency

The fourth aspect of the strategy under discussion ultimately calls attention to the right of each individual to be the subject of her or his own life. Undoubtedly, no enlightened reader holds the belief that a small number of specialists from the dominant group of the society have the right to impose their restricted version of educational truth on all publicly funded education. Law on education that respects this fundamental idea of subjecthood may in no case adhere to an ideology of difference that serves to reproduce inequality between individuals. The international human rights framework clearly urges states to have multilateral dialogues concerning the desirable

outcomes of education. This demand is justified both in the name of equality as well as in the name of the ethno-cultural diversity of plural societies. Also, several minority rights provisions challenge the objective and neutral stance of education law towards the plural society: instead it calls for the recognition of difference and for the right of minority communities to speak for themselves.

A major conclusion to be drawn from the existing international standards at this point is that attention shall be focused on the strongly-fragmented character of decision-making in many sub-sectors of education. Relevant international provisions indicate, for instance, that the regulation on the right to representation in post-compulsory education consists of two parallel schemes of ruling. On the one side, there is an international legal framework that governs tripartite processes with selected trade unions, employers' organisations and the state government as three official parties. On the other hand, there are provisions on the minority right to representation in the governance of the public education. This fragmentation of the legal systems is in itself a challenge for a modern nation state, as different international regimes may be pulling in opposite directions and the most vulnerable individuals and groups may be at increasing risk of falling between them.

The idea of fragmented governance, manifesting itself in fora for social partnership and for minority participation, does not as such need to be at odds with individual human rights. What is crucial is that neither the call for competitiveness nor the call for additional minority rights shall lead to the negligence of those basic educational rights that belong to everybody. Consequently, I suggest that the task that specifically falls on the state government is to lay the foundation for an overall national system that protects the most vulnerable and at-risk individuals from remaining unrecognised 'out-laws', whatever their group affiliations may be.

#### 4. Application in Progress

The conclusions presented above are based on a holistic reading of international human rights law and minority rights law on the right to education. When selecting the sources of my study, I have focused on a number of so called hard-law parts of the international human rights law and analysed what tools they, when brought together, offer for the fulfillment of the right to education of individuals above compulsory school age with low educational level.<sup>8</sup> For the purposes of contextualisation, my work in progress examines how national law on education, or its deficiency or biased character, relates to the marginalisation of Roma, who all over Europe are reported to suffer the effects of educational disadvantage more than the population on average.<sup>9</sup> The results of that study are, however, a topic for another article. The general presentation of the 4R-strategy in this article is meant to evoke ideas and feedback on what needs to be done to enhance a more equal, fair and democratic education system for pluralist societies that take human rights talk seriously. The author welcomes constructive comments from the readership.<sup>10</sup>

---

<sup>8</sup> The question posed by some scholars in international and constitutional law of whether and when international law is really binding falls beyond the scope of this article.

<sup>9</sup> The lack of the definite article 'the' before 'Roma' in my writings is deliberate. The main reason is to avoid an overexaggerated essentialisation of Roma people as if they were just a homogeneous group with homogeneous concerns. For a more thorough explanation of this conceptual choice, see my forthcoming doctoral dissertation.

<sup>10</sup> Correspondence can be addressed to gynther@iki.fi.

## Selected Bibliography

- Dahl, T.S. (1987), *Women's Law: An Introduction to Feminist Jurisprudence*, Norwegian University Press, Oslo
- Essed, P. (2002), 'Cloning Cultural Homogeneity While Talking Diversity: Old Wine in New Bottles', *Transforming Anthropology* 11(1), pp. 2-12
- Essed, P. and Goldberg, D.T. (2002), 'Cloning Cultures: The Social Injustice of Sameness', *Ethnic and Racial Studies*, 26, pp. 1066-1082
- Fraser, N. (1997), *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition*, Routledge, New York
- Fraser, N. (2000), 'Rethinking Recognition', *New Left Review*, 3, pp. 107-120, available online at <http://www.newleftreview.net/NLR23707.shtml>
- Gynther, P. (2001a), 'The Progressive Realization of the Right to Vocational Education: What to Measure and How?', Seminar paper presented at the Institute for Human Rights, Åbo Akademi University, 30 January 2001
- Gynther, P. (2001b), 'On Discrimination', Paper presented at the Graduate School on Cultural Interaction and Integration, Turku University, 4 May 2001
- Gynther, P. (2001c), 'Consequences of Ethnic Insensitivity', Paper presented at the seminar 'Rethinking and Developing Strategies against Racism and Ethnic Intolerance', Institute for Human Rights at Åbo Akademi University, 6 June 2001
- Gynther, P. (2001d), 'On Systemic Discrimination', Paper presented at Research Workshop on Non-Discrimination and Minority Rights, Åbo Akademi University, 22 November 2001
- Gynther, P. (2003a), 'On the Doctrine of Systemic Discrimination and its Usability in the Field of Education', *International Journal on Minority and Group Rights*, 10, pp. 45-54
- Gynther, P. (2003b), 'Recognition', Paper presented at the Nordic Human Rights Research Course, Institute for Human Rights at Åbo Akademi University, 2-7 June 2003
- Gynther, P. (2004a), 'Which Should Be Put in the Headline: Nation-State or Nation Without a State?', Paper presented at the London Post-Graduate Romani Seminar, University of Greenwich, 16 January 2004
- Gynther, P. (2004b), 'Voices That Shall be Heard: On Fragmentation, Polarization and Representation in Post-Compulsory Education', Paper presented in the Education Law and Policy Stream of the Annual Conference of the Socio-Legal Studies Association, Glasgow, 7 April 2004
- Gynther, P. (2005). 'Recognition of Difference & Fair Redistribution of Resources: Is an Equation Impossible?', Paper presented at the Pluralism & Equality Conference, Helsinki 20 June 2005
- Harris, N. (1998), 'The Three "R's" – Rights, Remedies and Regulation: The Legal Frontiers of Education in the 1990s', *Liverpool Law Review* XX/1, pp. 7-40
- Rawls, J. (1971/1999 rev.), *A Theory of Justice*, Oxford University Press, Oxford