Pázmány Law Review
4. 2016. • 95–124.

THE ROLE OF INTERNATIONAL HUMAN RIGHTS MECHANISMS IN STRENGTHENING JUSTICIABILITY OF THE RIGHT TO EDUCATION IN THE RUSSIAN FEDERATION[1]

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The right to education is a universally recognised human right. Article 26 of the Universal Declaration of Human Rights proclaims the right of everyone to education.[2] 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.[3] 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. For instance, the International Covenant on Civil and Political Rights contains non-discrimination provisions that are essential for the provision of education on the basis of equality of all.[4] These provisions correspond to UNESCO Convention against Discrimination in Education.[5]

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[1] This article is an updated, reduced and reworked version of my dissertation awarded LLM Exeter Club annual prize for the best LLM dissertation at the University of Exeter 2012/13. I am most grateful to Dr Ana Beduschi and Mr Michael Sanderson from the Law School of University of Exeter whose expert advice and insightful comments have led to innumerable improvements of the original version. The errors that remain are, of course, my own.

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[2] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR).

[3] International Covenant on Economic, Social and Cultural Rights (adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966) (ICESCR).

[4] International Covenant on Civil and Political Rights (adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966) (ICCPR). See arts. 20(2), 24(1), 26.

[5] UN Educational, Scientific and Cultural Organisation, Convention Against Discrimination in Education (adopted by UNESCO General Conference on 14 December 1960) (CADE).

International Convention on the Elimination of All Forms of Racial Discrimination contains a prohibition of race-related discrimination of the right to education and the urge to combat prejudices through education. [6] Convention on the Elimination of All Forms of Discrimination against Women comprises numerous provisions on equal rights of men and women in education,[7] while Convention on the Rights of the Child calls for recognition of the right to education of all children including those with disabilities, and for elimination of violence, exploitation and drug addiction through educational measures.[8] Furthermore, International Convention on the Rights of Persons with Disabilities urges governments to ensure 'inclusive education system at all levels and life long learning' for people with disabilities, [9] while International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 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'.[10] The Convention also establishes the right to education of migrant workers themselves and of members of their families.[11]

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'.[12] 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 it is also widely represented in binding regional conventions.[13] Moreover, the right to education is mentioned in the overwhelming majority – 90 per cent – of the world's constitutions.[14] With such worldwide recognition one may

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6 International Convention on the Elimination of All Forms of Racial Discrimination (adopted by General Assembly Resolution 2106 (XX) of 21 December 1965) (CERD). See paras 5(e)(v) and 7.

7 Convention on the Elimination of All Forms of Discrimination against Women (adopted by the United Nations General Assembly 18 December 1979) (CEDAW), arts 10, 14(2)(d), 16(1)(e).

8 Convention on the Rights of the Child (adopted by General Assembly Resolution 44/25 of 20 November 1989) (CRC). See art 23, arts 28, 29, arts 19, 32, 33.

9 International Convention on the Rights of Persons with Disabilities (adopted by General Assembly Resolution A/RES/61/177 of 20 December 2006) (CRPD), art 24.

10 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) (CMW), art 30.

11 See arts 43 (1)(a) and 45 (1)(a).

12 'Human Rights Bodies', www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx

13 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.

14 Comparative Constitutions Project, directed by Professors Zachary Elkins, Tom Ginsburg, and James Melton, www.comparativeconstitutionsproject.org. See also, Jan De Groof: Legal Framework for

assume that the right to education is universally realised and the situation with the protection is just as ideal.

However, the reality is different. Today 57 million children throughout the world still do not have access to schools.[15] 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.[16] 774 million adults are still illiterate.[17] Schools are still destroyed in military conflicts,[18] while corruption still devours lumps of educational budgets.[19]

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 jurisdiction clearly belong to the competence of a sovereign state,[20] the significance of unified effort taken through international cooperation and supranational mechanisms of monitoring and protection of human rights should not be underestimated.[21]

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'.[22] Moreover,

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Freedom of Education. In: Charles L. Glenn – Jan De Groof (eds.): *Balancing Freedom, Autonomy, and Accountability in Education.* Volume 1. Oisterwijk, Wolf Legal Publishers, 2012. 25.

15 Global Education First, the UN Secretary-General's Global Initiative on Education, www.globaleducationfirst.org/malaladay.html

16 See for example a film prepared by the Office of the United Nations Special Envoy for Global Education, http://educationenvoy.org

17 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

18 Abed Rahim Khatib: 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

19 Transparency International: Global Corruption Report: Education. http://blog.transparency.org/tag/global-corruption-report-education

20 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.

21 ICESCR art 2 (1).

22 Charter of the United Nations (signed on 26 June 1945 in San Francisco) (UN Charter). Preamble.

the goal of 'promotion of the economic and social advancement of all peoples' is intended to be reached through employment of 'international machinery'.[23]

As a matter of illustration it is worth mentioning the so called '4A' concept that originated from within the UN mechanism. It was proposed in 1999 by the first Special Rapporteur on the right to education Katarina Tomaševsky and was later duplicated in the ICESCR General Comment No. 13.[24] This test, due to its clarity and logical, systemic nature, became a framework for state reporting under ICESCR. Through the reporting procedure and General Comments cited throughout international and domestic case law this scheme was adopted by domestic legislation to define normative content of the right to education.[25]

The purpose of this paper is twofold. I will aim, first, to reveal how international human rights mechanisms contribute to shaping normative content of the right to education that can be effectively enforced through available system of judicial and quasi-judicial protection. In order to render precision to the paper and considering its limits I will choose examples from a particular domestic jurisdiction – Russian Federation. Second, I will focus on demonstrating 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.

The structure of this paper reflects its aims and purposes. The first section is dedicated to exploration of existing definitions of justiciability as a legal concept. It will particularly focus on challenges of justiciability of economic, social and cultural rights. The second section will in greater detail 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 positively affected by the practice of international human rights mechanisms.

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23 Ibid.

24 These are Availability, Accessibility, Acceptability and Adaptability of education, CESCR General Comment No. 13, para 6. See Katarina Tomaševski: Preliminary report of the Special Rapporteur on the right to education (adopted at the Fifty-fifth session of the UN Commission on Human Rights, E/CN.4/1999/49 of 13 January 1999). Para 50.

25 See for example *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; Constitutional Court of the Russian Federation Ruling on Admissibility No. 476-O of 16 November 2006 on *Borodina* claim; Constitutional Court of the Russian Federation Ruling on Merits No. 5-P of 15 May 2006. In Russian domestic legislation the 4A scheme is reproduced in some provisions of the Federal Law No. 273-FZ of 29 December 2012 'On Education in the Russian Federation' (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.

1. Defining Justiciability

This section will explore the definition of the term justiciability in its dual nature as a judicial tool and a legal doctrine.[26] I will briefly mention the former concept as it is very technical and geographically specific, moreover, its application to a civil law jurisdiction, such as Russia, is not uncontroversial. I will elaborate in more detail on the latter understanding of justiciability since it will lead me to adoption of a working definition for the purposes of this paper.

1.1. 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. This concept refers, in a very technical sense, to a procedural decision of a court on admissibility of a matter for adjudication.[27] 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.[28] Thus in common law jurisdictions justiciability is often understood as a statement of assessment,[29] 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.[30] According to Galloway, the What refers to crossing the threshold of adversity and non-collusion, it also aims at interception of political questions (such as 'disposition of nuclear armaments, national security, foreign relations and the distribution of scarce public resources,'[31] the 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.[32]

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[26] Thomas Barton: Justiciability: a Theory of Judicial Problem Solving. *B.C. L. Rev.,* vol. 24, (1982–1983) 505.

[27] Robert S. Summers: Justiciability. *The Modern Law Review,* vol. 26, no. 5, (1963) 581.; Erwin Spiro: Justiciability. *Comp. & Int'l L.J. S. Afr.,* vol. 15, (1982) 206. (regards justiciability as antimony of substantive law); Sisay Alemahu Yeshanew: The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia. *Afr. Hum. Rts. L. J.,* vol. 8, (2008) 273.

[28] Richard H. Fallon, Jr.: The Linkage between Justiciability and Remedies: And Their Connections to Substantive Rights. *Virginia Law Review* vol. 92, (2006) 633–634.

[29] Geoffrey Marshall: Justiciability. In: A. G. Guest (ed.): *Oxford Essays in Jurisprudence: a Collaborative Work.* Oxford, 1961. 267.

[30] Russell W. Galloway: Basic Justiciability Analysis. *Santa Clara L. Rev.* vol. 30, (1990) 912.

[31] B.V. Harris: Judicial Review, Justiciability and the Prerogative of Mercy. *Cambridge L. J.,* vol. 62, (2003) 631–634.

[32] Galloway op. cit. 912. See also Erwin Chemerinsky: A Unified Approach to Justiciability. *Conn. L. Rev.* vol. 22, (1989–1990) 677. On the doctrine of legal standing see also R. Craig Wood – George Lange Source: The Justiciability Doctrine and Selected State Education Finance Constitutional Challenges. *Journal of Education Finance.* vol. 32, no. 1, (2006) 1.; Maxwell L. Stearns: Standing Back from the Forest: Justiciability and Social Choice. *California Law Review*, vol. 83, no. 6, (1995)

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 his or her own case.[33] 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.

1.2. 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.

1.2.1. 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'.[34] Other definitions of justiciable imply being 'appropriate for or subject to court trial' or being able to be 'settled by law or a court of law'.[35] 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'.[36]

According to the doctrinal sources, 'justiciable' means 'liable to be tried in a court of justice; subject to jurisdiction';[37] 'peculiarly suited for judicial solution',[38] it is also explained as property of a right of being 'amenable to judicial review'.[39] A right is therefore justiciable if it is 'subject to test and remedy in the judicial system of

1309.; Jonathan R. Siegel: Theory of Justiciability. *Tex. L. Rev.,* vol. 86, (2007–2008) 73.; Charles H. Kennedy: Government Suits against In-Service Conscientious Objectors Who Have Received Educational Benefits: An Examination of Justiciability and Damages. *The University of Chicago Law Review,* vol. 42, no. 4, (1975) 749.; Lawrence Gerschwer: Informational Standing under NEPA: Justiciability and the Environmental Decisionmaking Process. *Columbia Law Review,* vol. 93, no. 4, (1993) 996.

33 Harris op. cit. 638.

34 *Black's Law Dictionary.* West Group, [9]2009.

35 *Random House Kernerman Webster's College Dictionary.* K Dictionaries Ltd., [4]2010.; *The American Heritage Dictionary of the English Language.* Houghton Mifflin Company, [4]2009.

36 *Collins English Dictionary – Complete and Unabridged.* HarperCollins Publishers, [5]2003.

37 Spiro op. cit. 206.

38 Summers op. cit. 530.

39 Gustavo Arosemena: 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.,* vol. 15, (2010–2011) 15.

courts and tribunals'.[40] In this narrow sense justiciability is thus synonymous with enforceability or enforcement.[41]

All these definitions, when read in synthesis, despite their apparent unanimity, leave some fundamental questions unanswered: is justiciability a property of a *right* or does it have to do with the ability of the *legal system* to protect the right? From another angle, is it a property of a *right* or of a certain *decision* implementing / violating the right or perhaps it is a characteristic of a *dispute*? [42] Is it a property of a *right* 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?[43] 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'.[44] 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.

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40 John Veit-Wilson: No Rights Without Remedies: Necessary Conditions for Abolishing Child Poverty. *Eur. J. Soc. Sec.,* vol. 8, (2006) 317.

41 Jose Ricardo Cunha: Human Rights and Justiciability: a Survey Conducted in Rio De Janeiro. *Int'l J. on Hum Rts.,* vol. 3 SUR (2005) 133.

42 Chris Finn: The Justiciability of Administrative Decisions: A Redundant Concept? *Fed. L. Rev.,* vol. 30, (2002) 239.

43 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 Peter Gordon Ingram: Justiciability. *Am. J. Juris.,* vol. 39, (1994) 353.

44 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).

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,'[45] and was only regarded in connection with the actions taken by the courts,[46] 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'.[47] 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.[48]

1.2.2. 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 claim 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 limited and that, while the courts have the 'opportunity to oversee the quality of the decision-making procedures used by the executive', there can be cases when rendering the matter non-justiciable 'can mean that an illegal decision […] may survive to perpetrate unfairness'.[49]

Thus, the contemporary understanding of justiciability adopts a somewhat extra-legal, or perhaps even socio-legal approach as it attempts to relate this legal doctrine 'to what actually happens in practice'. [50] As reasonably suggested by Barton, 'justiciability can be fully understood only by adopting a perspective beyond, rather than within, the closed system.'[51] He defines this concept 'as the many relationships between adjudicative procedures, and the problems such procedures are asked to

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45 Edwin Borchard: Justiciability. *The University of Chicago Law Review,* vol. 4, (1936) 1.

46 Summers op. cit. 581.

47 Michael K. Addo: The Justiciability of Economic, Cultural Right. *Commw. L. Bull.,* vol. 14, (1988) 1425.

48 On the need to go beyond purely legal definition of justiciability see also Olivier De Schutter: *International Human Rights Law: Cases, Materials, Commentary.* Cambridge–New York, CUP, 2010. 771.

49 Harris op. cit. 631–633.

50 William Twinning: Mapping Law: The Macdermott Lecture. *N. Ir. Legal Q.,* vol. 50, (1999) 12., 45. 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 David Maxwell Walker (ed.): *The Oxford companion to law.* Oxford, Clarendon, 1980. 1098.; Reza Banakar – Max Travers (eds.): *Theory and Method in Socio-Legal Research.* Oxford–Portland, Or., Hart Pub., 2005.; Brian Z. Tamanaha: *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law.* Oxford, Clarendon Press, 1997.; Richard A. Posner: The Present Situation in Legal Scholarship. *Yale L. J.,* vol. 90, (1980–1981) 1113.; Neil Sargent: The Possibilities and Perils of Legal Studies. *Can. J.L. & Soc.,* vol. 6, (1991) 1.; Alister A. Henskens: Legal Education: Black Letter, White Letter or Practical Law, *Newcastle L. Rev.,* vol. 9, (2005–2006) 81.

51 Barton op. cit. 507.

resolve. So understood, justiciability offers an original perspective from which the workings, capacities, and limitations of adjudication can be better explored.[52]

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,'[53] thus suggesting that by tackling inadequacies revealed through such mechanism justiciability evolves into a set of guarantees.[54]

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.

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

The nature of the existing debate on *whether* economic, social and cultural rights are justiciable in the narrow sense (hereinafter *judicially enforceable*) is precisely summarised by O'Connell.[55] From the principled side, there are arguments that 'socio-economic rights are simply not real rights, in any meaningful sense',[56] and on somewhat more practical side is the argument that their judicial enforcement is inconsistent with the doctrine of separation of powers.[57]

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'.[58]

For the purposes of justifying the unwillingness to adjudicate economic, social and cultural rights both doctrine and jurisprudence insist on identifying these rights

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52 Ibid. 505.

53 Addo (1988) op. cit. 1425.

54 Michael K. Addo: *The Legal Nature of International Human Rights.* Leiden–Boston, Martinus Nijhoff Publishers, 2010. 226.

55 Paul O'Connell: *Vindicating Socio-Economic Rights: International Standards and Comparative Experience.* Abingdon–New York, Routledge, 2012. 9.

56 Ibid. 9.

57 Some authors set institutional capacity of the courts apart from the separation of powers argument (see Aoife Nolan – Bruce Porter – Malcolm Langford: The Justiciability of Social and Economic Rights: an Updated Appraisal. *Center For Human Rights And Global Justice, Working Paper* no. 15, New York, 2007. 19.). However, for the purposes of this paper such over-elaboration is hardly justified.

58 Eric C. Christiansen: Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court. *Colum. Hum. Rts. L. Rev.*, vol. 38, (2006–2007) 344.

as positive rights 'imposing affirmative obligations' on the states,[59] vaguely worded and imprecise,[60] requiring resources for their implementation,[61] 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.[62]

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,'[63] – 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.[64] 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'.[65]

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59 The negative v. positive dichotomy has been criticised to the effect of regarding 'each right as having [both] negative and positive aspects' (Cristiansen (2006–2007) op. cit. 374., see also Nolan–Porter–Langford (2007) op. cit. 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.

60 Nolan–Porter–Langford (2007) op. cit. 9.

61 Ibid. 8.; De Schutter (2010) op. cit. 743.

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

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

64 On the function of judicial review see Thomas Henry Bingham: *The Rule of Law.* London, Allen Lane, 2010. 61.; Michael Vile: *Constitutionalism and the Separation of Powers.* Oxford, Clarendon Press, 1967. 13.; Thomas O. Sargentich: Contemporary Debate About Legislative-Executive Separation of Powers. *Cornell L. Rev.,* vol. 72, (1986–1987) 430., 434.

65 O'Connell (2012) op. cit. 201.

Practically speaking, the functions of the executive branch boil down to 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. At the same time, the judiciary mechanism focuses 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).

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'.[66] Having said that and adhering to the premise that all human rights are universal, indivisible, interdependent and interrelated,[67] 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. First, because 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 level and 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.

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 protection system.

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66 Christiansen (2006–2007) op. cit. 347.

67 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.

2.1. Preconditions of Justiciability of the Right to Education

International human rights instruments and doctrinal sources describe the right to education in a range of ways: as a self-standing right in its narrow sense,[68] or in a broader sense as the right to development,[69] as an empowerment right,[70] implicit in all other rights,[71] or pigeonholed to one of the three 'generations' of human rights;[72] perceived as a right or a freedom,[73] (positive or negative),[74] as a right to receive education and the right to choose education;[75] limited by other rights[76] or reinforced

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[68] Manfred Nowak: The Right to Education – Its Meaning, Significance and Limitations. *Neth. Q. Hum. Rts.,* vol. 9, (1991) 418.

[69] UN General Assembly, *Declaration on the Right to Development*, adopted by the General Assembly, 4 December 1986, A/RES/41/128; C. Raj Kumar: 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.,* vol. 12, (2004) 237.; Philip Alston – Mary Robinson (eds.): *Human Rights and Development: Towards Mutual Reinforcement.* Oxford–New York, OUP, 2005. 551.; Mesenbet Assefa Tadeg: Reflections on the Right to Development: Challenges and Prospects. *Afr. Hum. Rts. L. J.,* vol. 10, (2010) 325.; Mohammed Bedjaoui: The Right to Development, in International human rights. In: Philip Alston – Ryan Goodman (eds.): *Human Rights in Context: Laws, Politics and Morals: Text and Materials*. Oxford, OUP, 2012. 1532.

[70] CESCR General Comment No. 13 (1999) op. cit. 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; Kishore Singh: The Right to Education: International Legal Obligations. *Int'l J. Educ. L. & Pol'y*, vol. 1, (2005) 103., 107.

[71] Roland Winkler: 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,* vol. 1, (2005) 60., 62.; Gerhard van der Schyff: Classifying the Limitation of the Right to Education in the First Protocol to the European Convention. *Int'l J. Educ. L. & Pol'y*, vol. 2, (2006) 153.

[72] John C. Mubangizi: Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context. *Afr. Hum. Rts. L. J.,* vol. 4, (2004) 93.

[73] Winkler (2005) op. cit.; James Breese: *Freedom and Choice in Education.* RLE Edu K, Routledge, 2012.; Virgil C. Blum: *Freedom of choice in education.* Westport, Conn., Greenwood Press, 1977.; Charles L. Glenn: *Educational Freedom in Eastern Europe.* Washington, DC, Cato Institute, 1994.; Noel S. Anderson – Haroon Kharem (eds): *Education As Freedom: African American Educational Thought and Activism.* [Lexington Books] 2009. https://www.ebooks.com/466682/education-as-freedom/anderson-noel-s-kharem-haroon-akom-a-a-banks-ojeya/

[74] Ingo Richter: The Right to Education as a Constitutional Right. *Int'l J. Educ. L. & Pol'y,* vol. 5, (2009) 5.

[75] Fons Coomans – Fried van Hoof (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, 1995. 427.

[76] Religious freedom: Jan De Groof – Gracienne Lauwers: 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,* vol. 1, (2005) 132.; AnneBert Dijkstra – Ben Vermeulen: Islamic Schools in the Netherlands. *Int'l J. Educ. L. & Pol'y,* vol. 4, (2008) 16.; linguistic rights: Elize Kung – Pablo Meix: Legal Status of Languages in Education: The Cases of South Africa and Spain. *Int'l J. Educ. L. & Pol'y,* vol. 6, (2010) 33.

by the principles of non-discrimination and equality.[77] It is further regarded with disaggregation according to the level of education or organisational form (private[78] and public[79]) or through the prism of special categories of the subjects of this right (disabled,[80] minorities,[81] homeless,[82] women and girls[83]).

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 link between international recognition of the right to education and justiciability of 'any or all of its dimensions'.[84] 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' in case of violations.[85]

This system of guarantees includes quasi-judicial mechanisms of protection,[86] as well as preventive mechanisms allowing for special attention to vulnerable and marginalised groups.[87] It also accounts for the capacity of the legal system as a whole to effectively monitor and address gaps of protection or specific factors challenging

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77 Mark Jaffe – Kenneth Kersch: Guaranteeing a State Right to a Quality Education: The Judicial-Politial Dialogue in New Jersey. *J. L. & Educ.,* vol. 20, (1991) 271.; Brian P. Marron: Promoting Racial Equality through Equal Educational Opportunity: The Case for Progressive School-Choice. *BYU Educ. & L. J.,* (2002) 53.; Neville Harris: Equal Rights in Education in the UK (England). *Int'l J. Educ. L. & Pol'y,* vol. 4, (2008) 4.

78 Patricia M. Lines: Private Education Alternatives and State Regulation. *J.L. & Educ.,* vol. 120, (1983) 189.

79 Eileen N. Wagner: Public Responsibility for Special Education and Related Services in Private Schools. *J. L. & Educ.,* vol. 20, (1991) 43.; Tomiko Brown-Nagin: 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.,* vol. 27, (1998) 343.

80 Alexandra Natapoff: Anatomy of a Debate: Intersectionality and Equality for Deaf Children from Non-English Speaking Homes. *J.L. & Educ.*, vol. 24, (1995) 271.

81 Walter Kemp: Learning Integration: Minorities and Higher Education. *Special Issue Int'l J. Educ. L. & Pol'y* , (2004) 21.

82 James H. Stronge – Virginia M. Helm: Legal Barriers to the Education of Homeless Children and Youth: Residency and Guardianship Issues. *J.L. & Educ.,* vol. 20, (1991) 201.

83 Michael A. Rebell – Anne W. Murdaugh: National Values and Community Values Part I: Gender Equity in the Schools. *J. L. & Educ.,* vol. 21, (1992) 155.; Jennifer T. Sudduth: CEDAW's Flaws: A Critical Analysis of Why CEDLAW is Failing to Protect a Woman's Right to Education in Pakistan. *J. L. & Educ.,* vol. 38, (2009) 563.

84 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.

85 Singh (2013) op. cit. para 27.

86 Ibid. para 36–43.

87 Ibid. para 54–58.

justiciability, such as lack of awareness of the right, legal, cultural, procedural and financial barriers to full realisation and successful protection of the right.[88]

This important report that features a new broad approach to justiciability is long overdue: the current position of the CESCR expressed in 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.[89]

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'.[90] The Committee thus admits the possibility that some of the rights endorsed by the Covenant might not, in principle, 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)'.[91] 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 / update of an existing one is a complicated time-consuming procedure involving wide consultation with specialised agencies, civil society and academics followed by preparation of a draft for further discussion

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88 Ibid. paras 74–80.

89 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.

90 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.

91 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.

by the Committee and interested parties and formal adoption in plenary session.[92] Considering the time span between plenary sessions (they take place twice a year, in April and November), the fact that the last General Comment was adopted in 2009,[93] 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',[94] 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'.[95] Nevertheless, one can anticipate that the ambitious proposal of the Special Rapporteur to use a broader notion of justiciability will find its way into domestic practice through the Committee's monitoring procedure as it had happened before.[96]

2.2. 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'.[97] 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.[98]

In the Russian legal system the right to education is recognised on the constitutional level and is 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 Russia, I will outline those fundamental constitutional and legislative provisions that shape the foundation of justiciability of the right to education in Russia. In the following

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92 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.

93 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.

94 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.

95 Ibid. Rule 46.

96 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 as a benchmark of the states' obligations in respect of the right to education.

97 Singh (2013) op. cit. para 26.

98 Yeshanew (2008) op. cit. 273.

three subsections I will describe and evaluate the relevant provisions of the Russian Constitution and basic legislation. I will also list the existing judiciary and non-judiciary mechanisms of protection of the right to education.

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

It is generally accepted that recognition of a right at the constitutional level is essential for its domestic justiciability.[99] The relation between constitutional recognition of the right and its justiciability was reiterated by the CESCR in General Comment No. 3:[100]

> 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.[101] In line with international state obligations in the domain of education 'secondary and high vocational education' is generally accessible and provided free of charge 'in state or municipal educational establishments'.[102] 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.'[103] 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.[104]

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99 Addo (1988) op. cit. 1428; Christiansen (2006–2007) op. cit. 323.; Coomans (1995) op. cit. 427.; Singh (2013) op. cit. para 25.; Yeshanew (2008) op. cit. 274.; Salma Yusuf: Rise of Judicially Enforced Economic, Social & Cultural Rights – Refocusing Perspectives. *Seattle J. Soc. Just.,* vol. 10, (2011–2012) 784.; Julia A. Simon-Kerr – Robynn K. Sturmt: Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education. *Stan. J. C. R. & C. L.,* vol. 6, (2010) 83., 86.

100 CESCR General Comment No. 3 (1990) para 6 (emphasis added).

101 Constitution of the Russian Federation adopted by national referendum on 12 December 1993 (Russian Constitution).

102 Russian Constitution (1993) 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'.

103 Russian Constitution (1993) art 43(3) in conformity with ICESCR 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).

104 Federal Law on Education (2012) art 5 (3).

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, let alone of enrolled students. Moreover, universities cannot ask for a proof of existing qualifications. Nevertheless, the legislative limitation was considered by the Russian Constitutional Court (RCC) as fully compatible with the Constitution.[105]

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:[106] since 2008 all 10 years of schooling are compulsory and free of charge.[107]

Russian Constitution was adopted in 1993. Its preparation took place long after the ratification by the Soviet Union of the ICESCR in 1973, and the distinguished members of the Constitutional Council that was called by the President to discuss and edit the project have considered those international standards concerning the right to education that had been already in force.[108]

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',[109] nor the 'liberty of individuals and bodies to establish and direct educational institutions',[110] 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 subconstitutional educational legislation from their very early drafts,[111] there is no jurisprudence whatsoever on the issues of parental choice or the right to establish an educational institution. To be sure, there have been cases dealing with freedom

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105 Constitutional Court of the Russian Federation Ruling on Admissibility No. 187-O of 5 October 2001.

106 Russian Constitution (1993) art 43(4) in terms of established level of compulsory education exceeds the standard set by ICESCR art 14: 'compulsory *primary* education, free of charge' (emphasis added).

107 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'.

108 Decree of the President of Russian Federation No. 718 of 20 May 1993 on 'Convocation of the Constitutional Council for the Purpose of Finalising the Project of Constitution of Russian Federation'.

109 ICESCR art 13(3).

110 ICESCR art 13(4).

111 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), as well as the possibility to establish private educational institutions, art 12(3).

of religious education,[112] however the right to establish religious schools is protected by specific legislation.[113] Another case tangentially related to the freedom of school choice is the Supreme Court 2011 ruling on territorial accessibility of education, but it has more implications on accessibility of public schools than on free choice of schools in general.[114]

Therefore, we can conclude that although constitutional recognition is generally connected to guarantees of stronger justiciability,[115] in some cases the lack of relevant constitutional provisions does not necessarily lead to non-justiciability of a certain right or legitimate interest. In this situation adjudication of the claim will invoke other constitutional provisions and will 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 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 consists of general entitlements that are common for all levels and forms of education: non-discrimination,[116] general availability and accessibility of education,[117] obligation of public authorities to 'establish appropriate socio-economic conditions conducive to obtaining education and progressive widening of educational choices throughout life',[118] guarantees of language choice as appropriate,[119] guarantees of secular nature of education in public educational institutions,[120] freedom of choice in education (including the right to form the contents of one's educational program,[121] etc. It also includes 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 payment[122] or the right of

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112 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: Charles Russo (ed.): *International Perspectives on Education, Religion and Law*. Abingdon, Routledge, 2014. 181–194.

113 Federal Law No. 125-FZ of 26 September 1997 'On Freedom of Conscience and Religious Associations'.

114 Supreme Court of the Russian Federation in its Ruling No. 5-G11-106 of 15 June 2011 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.

115 See, for example, O'Connell (2012) op. cit. 7.

116 Federal Law on Education (2012) art 5(2).

117 Ibid. Art 5(3).

118 Ibid. Art 5(4).

119 Ibid. Art 14.

120 Ibid. Art 3(1)6.

121 Ibid. Art 34(1)4–7.

122 Ibid. Art 35.

public university students to receive monthly allowance from the relevant budget for academic achievements or as a means of social support.[123]

These entitlements are numerous, well-defined 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 extract those dimensions of the right to education that are protected by judicial and quasi-judicial or administrative methods.

2.2.2. 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.[124] 'State protection' includes but is not limited to 'judicial protection'[125] 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'.[126] 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.[127]

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, level of the court and type of applicant. For example, the rules of admissibility for judicial review of 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.[128] These rules expressly provide that in order to be admissible for judicial review 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.[129]

The right to education is also adjudicated through administrative, civil and criminal jurisprudence in relevant cases. The vast majority of all decisions (more

123 Ibid. Art 36.

124 Russian Constitution (1993) art 45 (1).

125 Ibid. Art 46 (1).

126 Ibid. Art 46 (2).

127 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 (2008) op. cit. 277 (emphasis added).

128 Federal Law No. 4866-1 of 27 April 1993 'On Judicial Review of Actions and Decisions Violating Rights and Freedoms of Citizens' (Federal Law on Judicial Review).

129 Ibid. Art 2.

than one-fourth) concern health and security issues,[130] while another significant part relates to physical integrity of students.[131]

Other dimensions of the right to education appearing on a common basis before Russian courts include the right to receive proper qualifications;[132] 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.[133] Less common are cases involving expulsion and enrolment;[134] equal treatment and fair assessment of knowledge;[135] non-discrimination in education on the basis of income and social origin and other.[136]

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 in a nursery for children under 6.6 years old. Lack of places has often led to creation of a virtual 'queue' parents had to sign into from the moment their child was born. Effectively, this situation has led to the expansion 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 has not been fulfilled. The Constitutional Court would have

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130 Primorsky Krai Regional Court decision No. 33-10985 of 20 December 2010, 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; Primorsky Krai Regional Court ruling No. 33-2282 of 16 March 2010.

131 Moskovskaya Oblast Regional Court ruling No. 33-21461/2010 of 9 November 2010 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.

132 Kirovskiy District Court decision of 24 September 2009 on non-pecuniary damages for delayed issuance of a diploma.

133 Constitutional Court of Russian Federation Ruling on Merits No. 16-P of 16 November 2004, on equal status of Russian language and official language of a federal subject (republic) in educational process. Similar decisions: Constitutional Court of Russian Federation Ruling on Merits No. 88-O-O of 27 January 2011; Supreme Court of Russian Federation Ruling No. 20-GO9-6 of 29 April 2009.

134 See, for example, Saint-Petersburg City Court Cassation Ruling No. 3112 of 9 March 2011, on expulsion for plagiarism or Saint-Petersburg City Court Ruling No. 10622 of 4 August 2010, on expulsion for drug dealing and consumption.

135 Supreme Court of Russian Federation Ruling No. 69-G10-14 of 22 December 2010, on equal payment for holders of similar qualifications.

136 On the analysis of the cases see Vladimir V. Nasonkin: The Constitutional Right to Education in Russian Jurisprudence: Searching for Balance between Private and Public Interests. *Yearbook of Russian Educational Legislation,* vol. 6, (2011) 153.

immediately invalidated such a provision. Moreover, in the majority of cases the courts ruled that the existence of the queue *per se* is just an organisational measure and not an indication of failure to provide access to free pre-school education.[137]

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 inaction of municipal authorities in 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.[138] Now in most of the regions transparent online mechanisms of registration for pre-school education have been introduced to decrease corruption in this sphere and improve visibility of and access to the right to pre-school education.[139]

Quality of education is a significant dimension of the right to education as one of the major characteristics defining its acceptability.[140] The mode of adjudicating quality education in Russia is rather formalised and straightforward and is based on evaluating of, first, conditions in which education is provided against those benchmarks that are set in the license issued to a particular educational institution and, second, 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: [141]

- 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 Science[142] 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;

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137 On queue-free access to pre-school education see Permsky Krai Court Ruling No. 33-9598/2010 of 2 November 2010; Moskovskaya Oblast Regional Court Ruling No. 33-15552 of 10 August 2010.

138 Cassation Ruling of Perm Krai Court No. 33-6889 of 11 July 2011.

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

140 As expressly referred to by CESCR General Comment No. 13 (1999) para 6(c).

141 Federal Arbitrage Court of North-Western District Decision No. A56-26788/2007 of 17 June 2008.

142 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'.

- the classes are overcrowded;[143]
- 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).[144]

2.2.3. 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' for enhancing the protection of the right to education on domestic level.[145] As suggested by Yeshanew '[s]uch institutions ensure the justiciability of human rights through quasi-judicial procedures.'[146]

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 Science with a mandate to consider individual complaints under the relevant procedure established by the law. [147] 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.[148]

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. 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

143 Okoneshnikovsky District Court of Omskaya Oblast Decision of 4 February 2010.

144 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; Supreme Court of Russian Federation Ruling No. 56-G03-6 of 20 May 2003; Federal Arbitrage Court of Uralskiy District Decision No. A76-5435/2009-50-80; Federal Arbitrage Court of Povolzhsky District Decision No. A55-10197/2008 of 11 November 2008; Supreme Court of Karelia Republic Cassation Ruling No. 33-3527/2011 of 29 November 2011; Moscow Oblast Court Ruling No. 33-24297; Vologodsky Oblast Court Cassation Ruling No. 33-5036/2011 of 2 November 2011.

145 Singh (2013) op. cit. para 30., 36.

146 Yeshanew (2008) op. cit. 289.

147 Regulations on the Federal Service for Supervision in Education and Science, approved by the Government Decree No. 594 of 15 July 2013, para 5.32. Such claims are filed in accordance with the Federal Law No. 59-FZ of 2 May 2006 'On the Procedure Concerning Consideration of Communications of Citizens of Russian Federation'.

148 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

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. This office is very active in extra-judicial protection of the right to education through consideration of individual claims and initiating field checks on the basis of complaints received. [149] 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 to bring an administrative action against the violator as per specialised article of the Code of Administrative Offenses (violation of the right to education),[150] be it a state (federal or regional) or local (municipal) authority, or management of an educational organisation.[151]

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 a public nursery;[152] failure of local education authorities to provide free textbooks for public schools and charging parents instead;[153] violations of established procedures of enrolment to a program of higher education (obligatory paid preparatory classes ensuring access to a university);[154] 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,[155] failure of local authorities to ensure record of migrant children not receiving compulsory education and provide access to compulsory education to these children accordingly[156] etc.

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149 Federal Law No. 2202-1 of 17 January 1992 'On Public Prosecution Office of Russian Federation', arts 10, 21 (2), 27.

150 Code of Administrative Offenses of Russian Federation No. 195-FZ of 30 December 2001, art 5.57 (1).

151 Federal Law 'On Public Prosecution Office' art 26.

152 'Prosecutor's Office of Kurgan Region Provided Remedy for Violated Rights to Accessible and Free Pre-School Education', 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; '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/

153 'Prosecutor's Office in Komi Republic Takes Action to Secure Constitutional Rights of Citizens for Free Education', 16 September 2013. www.prockomi.ru/news/index.php?ELEMENT_ID=5357

154 'Prosecutor's Office Disclosed Violations of the Right of Citizens to Higher Professional Education', 6 February 2012. http://udmproc.ru/news/show/prokuraturoj-vyyavleny-narusheniya-prav-grazhdan-na-vysshee-professionalnoe-obrazovanie

155 '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', 24 April 2013. http://severdv.ru/news/show/?id=71085

156 'Kineshma City Prosecutor's Office Disclosed Violations of the Rights to Education of Migrant Children', 27 May 2013. http://prokuratura.ivanovo.ru/кинешемской-городской-прокуратурой-16/

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;[157] providing free textbooks to pupils of public schools;[158] opening of final two classes of compulsory schooling for a group of children insufficient for a full class,[159] and so forth.

Field checks conducted by the General Prosecutor's Office on the account of implementation of the priority national project 'Education' 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.[160]

Among other non-judicial mechanisms of redress the Commissioner for Human Rights in the Russian Federation,[161] a National Human Rights Institution with ECOSOC status A,[162] plays a very important role. Annually, it considers nearly 200 claims concerning the right to education.[163] The Russian Civic Chamber plays a similar role.[164] Its 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

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157 'In the City Bolshoy Kamen after a Prosecutor's Intervention 85 Illegally Expelled Children Were Readmitted to the Programs of Non-Formal Learning', 13 May 2013. http://prosecutor.ru/news/prokuratura-zato-bolshoykamen/2013-05-13--2.htm

158 Sergey Kuzbassky: Non-Free Right to Education: Authorities of Udmurtia Do Not Provide Textbooks. *Gazeta* No. 33, (1144) 4 September 2013. http://netreforme.org/news/nebesplatnoe-pravo-na-obrazovanie-vlasti-udmurtii-uchebniki-ne-dayut/

159 'Prosecutor Asserted the Right of Children to Continue Education in the 10th Grade in their 'Own' School', 6 September 2013. http://udmproc.ru/news/show/prokuror-otstoyal-pravo-detej-prodolzhit-obuchenie-v-10-klasse-v-svoej-rodnoj-shkole

160 'General Prosecutor's Office Analysed the Realisation of Rule of Law in the Process of Implementation of the Priority National Project 'Education'', 25 February 2013. http://genproc.gov.ru/smi/news/genproc/news-81254/. 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

161 Acting on the basis of Russian Constitution (1993) art 103 (e); Federal Constitutional Law No.1-FKZ of 26 February 1997 'On the Commissioner for Human Rights of Russian Federation'.

162 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

163 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

164 Acting on the basis of Federal Law 'On the Civic Chamber of the Russian Federation' No. 32-FZ of 4 April 2005.

development, to ensure national security, and to defend the rights and freedoms of citizens of Russia'.[165] With regard to the right to education such defence is included in the mandate of the Council's Commission on Development of Education.[166]

These examples demonstrate how non-judicial methods of redress for violations of the right to education in Russia contribute to strengthening of inquisitorial justiciability at the 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. For example, 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 courtroom. However, 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, engagement with these extra-judicial procedures does not require any special legal knowledge, nor payment of fees, decisions of these authorities take immediate effect. Therefore, 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.

2.3. 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. Domestic justiciability is '*usually* undertaken by the courts of law', while at the level of international law 'judicialism […] is not always necessary'. 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 mechanism of a monitoring (treaty) body.[167]

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.[168] Among them the European Court of Human Rights, the 'crown jewel of the world's most advanced international system

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165 See the information of the Council's official website: www.oprf.ru/en

166 On the activities of the Commission see: www.oprf.ru/1449/1512

167 Addo (1988) op. cit. 1426.

168 Addo (2010) op. cit. 226. For assessment and analysis of regional human rights mechanisms see also, inter alia, Takele Soboka Bulto: 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.,* vol. 29, (2010) 142.; Tara J. Melish: '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.,* vol. 39, (2006–2007) 385.

for protecting civil and political liberties',[169] 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'.[170] 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 legal norms, on the contrary, according to this definition, a matter would be considered internationally justiciable if legal 'principles' can be applied to resolve it.[171]

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'.[172]

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 nature 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).[173] 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' due to their well-known 'positive and progressive aspects'.[174]

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169 Laurence R. Helfer: Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. *Eur J Int Law,* vol. 19, no. 1, (2008) 125.

170 Ingram (1994) op. cit. 354 (emphasis added).

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

172 Leyla Choukroune: 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.,* vol. 19, (2005–2006) 31.

173 On political limitations of supranational human rights mechanisms see, for example, David Marcus: The Normative Development of Socioeconomic Rights through Supranational Adjudication. *Stan. J. Int'l L.,* vol. 42, (2006) 53., 68.

174 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 (2006) op. cit. 87.

In Russia 'international treaties and agreements [… constitute] a component part of its legal system'.[175] 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 levels,[176] as recommended by the CESCR.[177] 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.[178] 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.[179]

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

Treaty bodies monitoring procedures 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.[180] However, they do not *per se* provide a forum for appealing decisions

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175 Russian Constitution (1993) art 15(3).

176 See, for example, Tomsk Regional Court Appellate Decision No. 33-2696/2012 of 26 October 2012, concerning arrears in the payment of wages.

177 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.

178 Russian Constitution (1993) art 46(3).

179 In *Timishev v. Russia* (Applications nos. 55762/00 and 55974/00, final judgment of 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 *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 Transdniestria due to the fact that Russia exercised effective control over that territory by virtue of its continued military, economic and political support (para 150).

180 See for example highly detailed concluding observations of the Committee on the Rights of the Child in the 2005 Russian report adopted at the 40th Session of CRC (12 - 30 September 2005) No. CRC/C/125/Add.5. The Committee has produced recommendations: 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

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.[181] The most relevant procedure for the right to education would be the one envisaged by the Optional Protocol to ICESCR allowing consideration of individual complaints.[182] 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. Similarly, the 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.[183]

As opposed to treaty bodies individual complaints, complaint procedure of the Human Rights Council, as established by the Institution-Building Resolution 5/1 to replace the previously existing 1503 procedure,[184] is strictly confidential and only concerns 'consistent patterns of gross and reliably attested violations of all human

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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).

181 Such procedures have been established under Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 December 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, 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); International Convention on the Elimination of All Forms of Racial Discrimination (adopted by General Assembly Resolution 2106 (XX) of 21 December 1965) 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.

182 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.

183 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.

184 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.

rights and all fundamental freedoms' communicated by individuals and / or civil society.[185] A number of individual communications from different countries resulted in serious and immediate action of the Human Rights Council, including passing of country-specific resolutions, urgent debates, establishing of country mandates of special procedures.[186] However, this complaint mechanism still remains a process behind closed doors unavailable for analysis.

Effectively, the complaint 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'.[187]

However, the number of communications regarding the right to education sent to the states by the Special Rapporteur remains consistently low. In 2013 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.[188] In the last three years the Special Rapporteur has not sent a single communication to Russia concerning the right to education.[189] However, this situation is in line with general lack of cooperation with this mandate on the part of Russian government.[190]

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185 Human Rights Council Resolution 5/1 of 17 June 2007 'Institution-building of the United Nations Human Rights Council', para 85.

186 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

187 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).

188 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.

189 See communications reports of Special Procedures 2011–2013: www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx

190 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, see Special Procedures Standing Invitations: www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx

3. Conclusion

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.