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### Public Law and Social Human Rights

Areto A. Imoukuede

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Athens Institute for Education and Research  
2013

Public Law  
and  
Social Human Rights

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## Freedom from Ignorance: the International Duty to Provide Public Education<sup>1</sup>

*Areto A. Imoukhuede*

This paper argues that public education is an international human right that the U.S. ought to recognise and protect. Recognising a right to public education would correct a major inconsistency in U.S. law by bringing education rights doctrine more in line with international human rights law. This piece discusses how current U.S. education rights doctrine is inconsistent with U.S. tradition and legal precedent. It then demonstrates how international law recognises public education as a fundamental duty of government before arguing for why the U.S. is obligated to follow international law regarding the right to public education.

**Keywords:** Education – human rights - constitutional law – fundamental rights – fundamental duties – government obligations

### Introduction

Most in the world believe that government ought to ensure that there is an equal opportunity for everyone to succeed. In the U.S., as in many nations, this belief does not translate into a broad demand for economic and social equality, but instead there is an expectation of equal access to the tools necessary to effectively compete in a free market. Central to U.S. culture is a belief that each person ought to be able to ‘develop his [or her] talents to their full potential – unhampered by arbitrary barriers of race or birth or income.’<sup>2</sup>

Pervasive social and economic inequality, while undesirable, is frequently tolerated as the necessary result of a free market competition amongst individuals. However, in order for such a competition to be fair there must first exist an equitable distribution of the foundational tools required for a chance at succeeding in the free market.<sup>3</sup> Equal access to high quality public education is the cornerstone to the presumption of equal opportunity.<sup>4</sup>

In 1968, U.S. President Lyndon B. Johnson proclaimed in his address to a joint session of the United States Congress that the duty to provide public

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<sup>1</sup>This paper highlights the international issues raised in my article Imoukhuede (2011). I thank Nikeisha Williams and Erin Fortin for their research assistance.

<sup>2</sup>President Lyndon B. Johnson (1968).

<sup>3</sup>See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (‘it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education’).

<sup>4</sup>This article deals with primary and secondary education and does not attempt to address higher education.

education is an essential human right.<sup>1</sup> He referred to this right as ‘*the freedom from ignorance.*’<sup>2</sup> Despite President Johnson’s recognition of education as a human right, in 1973 the U.S. Supreme Court, in the infamous *San Antonio v. Rodriguez* case, proclaimed that the U.S. Constitution does not recognise a fundamental right to public education.

This piece makes the case for why public education is an international human right, which the U.S. government is obligated to fully protect. Part II discusses how current U.S. education rights doctrine is inconsistent with U.S. tradition and legal precedent. Part III demonstrates how international law recognises public education as a fundamental duty of government. Part IV explains why the U.S. is obligated to follow international law regarding the right to public education.

### **U.S. Education Rights Doctrine Is Inconsistent With U.S. Legal Precedent, History, And Tradition.**

The current U.S. education rights doctrine, that there is no fundamental right to public education, is inconsistent with U.S. history and traditions, which are central for defining fundamental rights under the U.S. Constitution.

Today, fundamental rights are defined as those rights that are so rooted in the nation’s history and traditions that the U.S. Supreme Court recognises them as fundamental.<sup>3</sup> Fundamental rights are not explicitly stated in the text of the Constitution, but are defined as unenumerated rights that are so important that they are nonetheless recognised as being of equal stature with enumerated rights. The right to public education clearly fits within the definition of a fundamental right being rooted in the nation’s history and traditions.

*San Antonio V. Rodriguez Was Inconsistent with Precedent from Brown V. Board of Education.*

When the U.S. Supreme Court held in *San Antonio v. Rodriguez* that there is no fundamental right to public education, it was widely criticised, even by members of the Court, for breaking with history and tradition. The holding was specifically criticised for breaking with precedent from *Brown v. Board of Education*. The *Rodriguez* case challenged a Texas school funding formula that adversely impacted a racial minority, Mexican-American school children. The facts of *Rodriguez* were not much unlike the seminal case of *Brown*, where the Court recognised that because of the importance of education to American

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<sup>1</sup>President Lyndon B. Johnson (1968).

<sup>2</sup>*Ibid.*

<sup>3</sup>Black (2006) 1343. 1409-10. see also *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-97 (1989) (the Due Process Clause’s purpose was to protect the people from the State and not to ensure that the State protected them from each other); and also *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (“the Constitution is a charter of negative rather than positive liberties”).

democracy, the systematic denial of quality education to a racial minority, African American children, was unconstitutional.<sup>1</sup>

The recognition from *Brown* that a denial of a quality education is tantamount to the denial of an individual's full citizenship rights was an explicit recognition of the importance of education to American democracy.<sup>2</sup> The *Rodriguez* holding is especially problematic because *Brown* can be fairly read as the culmination of an evolving fundamental rights doctrine regarding the right to public education. Given the general, consistent, and systematic relegation of inadequate resources, poorer facilities, and inferior services to non-whites, school segregation was a subtle way of describing blatant disproportionate resource allocations to schools.<sup>3</sup> That tradition is fairly observed in the official declarations and philosophies of America's founders and latter day educational philosophers.

### *The Normative Argument for a Right to Public Education in the U.S. Enjoys Centuries of Support*

U.S. political leaders and education philosophers have made the normative argument for a right to public education since the founding and have continued to do so since. Thomas Jefferson and other founders of the U.S. were supporters of free, public education and during their time sponsored initiatives to further public education.<sup>4</sup> Thomas Jefferson's several writings on the subject of public education and his Virginia 'Bill for the General Diffusion of Knowledge' of 1779, demonstrate his educational philosophy that there ought to be broad public involvement in public education.<sup>5</sup> His 1779 bill called for localised funding and maintenance of the schools and Jefferson's bill provided for the continued education of children of superior ability whose parents lacked the funds to pay for education beyond the three free years.<sup>6</sup> The rationale behind this provision was that children should not be deprived of an education simply because they come from poor families. Jefferson believed that society had a duty to educate children who could not afford education but had

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<sup>1</sup>*Brown* was brought to afford children an equal opportunity to develop their capabilities. 'Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities... [i]t is the very foundation of good citizenship... [i]t is doubtful that any child will be able to succeed in life if he is denied the opportunity to education.' *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>2</sup>See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting) ('the fundamental importance of education is amply indicated by the prior decisions of this Court... this Court's most famous statement on the subject is that contained in *Brown v. Board of Education*'); see Powell and Trucios-Haynes (2008).

<sup>3</sup>*Brown v. Bd. of Educ.*, 347 U.S. at 495 (holding public school segregation unconstitutional); see also Freeman (1978) 1049, 1059-61.

<sup>4</sup>Rush (1786); Knox (1799); see Cohen ed., (1974).

<sup>5</sup>A Virginia bill, sponsored by Thomas Jefferson, which called for a school system subsidised by the state. Cohen (1974).

<sup>6</sup>See *ibid*, 752.

demonstrated superior intellectual ability at the common expense.<sup>1</sup> Jefferson indicates a need for broad public involvement in funding public education. Reverend Samuel Knox, another leader in the American Revolutionary War, called for even broader government involvement than Jefferson.

Samuel Knox's 1799 writing, 'An Essay on the Best System of Liberal Education Adapted to the Genius of the Government of the United States' was perhaps the earliest call for a *national* system of education in America.<sup>2</sup> Knox, a republican thinker, called for a national system of education while making reference to the historical and illustrious characters of hallowed antiquity such as Cicero and other students of the academy in Athens.<sup>3</sup> Knox describes the historic superiority of public education over private education.<sup>4</sup> Knox recognised that given the size of the U.S., it would be difficult to establish a system capable of affording education equally to every individual in the nation. He analogised those difficulties with difficulties in forming a national government and concluded that such difficulties ought not to detract from the goal of a national education system.

*'It does not appear more impracticable to establish a uniform system of national education, than a system of legislation or civil government.'*<sup>5</sup>

This quote from Knox an important insight as to the way educational systems were originally organised. Although Knox's proposal was never formally enacted, his approach of paralleling the structure of educational systems to that of civil government was incorporated in Jefferson's bill.<sup>6</sup>

These early luminaries shared a liberal insight. They believed government could best encourage the education of all capable citizens, thereby accomplishing the fulfilment of a liberal vision of education that, at the time, was not underway or even being considered in Europe.<sup>7</sup> The modern day educational system of school districts and local control can be traced back to these early thinkers whose motivation was to provide public education in a manner that they thought would best assure widespread public education.

In the early twentieth century, the famous progressive era education reformer, John Dewey, developed a more contemporary education philosophy which stated that the ultimate aim of society should not be the mere production of goods, but the production of free human beings associated with one another on terms of equality.<sup>8</sup> The early twentieth century was a period of major

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<sup>1</sup>See *ibid*, 740.

<sup>2</sup>An essay advocating for a national system of public education. See *ibid*, 776 citing Knox (1799).

<sup>3</sup>See *ibid*.

<sup>4</sup>See *ibid*, 777.

<sup>5</sup>Cohen (1974) citing Thomas Jefferson's Bill for the More General Diffusion of Knowledge (1779).

<sup>6</sup>See *ibid*, 758-59.

<sup>7</sup>See *ibid*, 776.

<sup>8</sup>See Dewey (1967).

change borne from the industrial revolution. Dewey recognised that formal education had become increasingly important as the scope of resources, achievements, and responsibilities in society had grown more complex.<sup>1</sup> No longer could children get by with a mere three years of formal basic education and from there go on to apprentice themselves to adults. Today, Dewey's philosophy is even more relevant. The apprenticing that was the primary means of education in Jefferson and Knox's day is clearly not a viable means of successfully educating citizens for life in today's vastly more complex and intellectually demanding society.

Education is a necessity of life for Dewey because, 'what nutrition and reproduction are to physiological life, education is to social life' – a means of sustaining and perpetuating that which makes us human.<sup>2</sup> Democracy and education are linked because a democratic community is a form of social life where external authority is repudiated in favour of voluntary, interested deliberation.<sup>3</sup> In order to have an all-encompassing, interested deliberation, society needs a well-educated citizenry.

Dewey's philosophy is not limited to mere political socialization. He appreciated the human need to live and function as a fulfilled and contributing member of society.<sup>4</sup> Recognizing that there is more to the state's role in providing education than simply preparing its young citizens to govern, demonstrates an underlying belief in a positive view of the purpose of the state.<sup>5</sup> The state's purpose is not only to safeguard liberty, but also to provide the background opportunity by which individuals may fully develop their capabilities.<sup>6</sup>

In sum, American scholars and leaders have historically treated education as though it were an individual right. This is a vision that America has carried into the international arena as part of a broader understanding of international human rights.

### **Public Education is a Fundamental Duty of Government Under International Human Rights Law**

Several United Nations Conventions, including the U.N. Charter to which the United States is a party, describe the state's duty to promote higher standards of living and other fundamental freedoms necessary for the security

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<sup>1</sup>See *ibid*, 8.

<sup>2</sup>'[B]asic human needs . . . refer to the fundamental requirements of food, shelter, medical care, and education. Although education may not intuitively seem necessary to the sustenance of life, the concept of "basic needs", as applied in development literature, commonly includes education as one of the five basic needs of human beings.' See Dewey (1967) 9. see also Park (1987) 1263 n1.

<sup>3</sup>See *Dewey (1967)* 87.

<sup>4</sup>See *ibid*.

<sup>5</sup>See *ibid*, 183.

<sup>6</sup>See *ibid*, 183.

of human rights and fundamental freedoms.<sup>1</sup> The U.N. Charter states the broad goals of the United Nations, and depends upon later provisions, conventions, and treaties to bring full meaning to its general call for states to recognise and protect human rights.<sup>2</sup> One such convention is the Universal Declaration of Human Rights, of which the United States is a party.<sup>3</sup> Article 26 of the Universal Declaration describes the right to public education as a human right.<sup>4</sup>

Other authority for a right to public education under international law is the International Covenant on Economic, Social, and Cultural Rights,<sup>5</sup> which recognises a right to public education. The U.S. is a signatory, but has not yet ratified this covenant.<sup>6</sup> The U.S. is also a party to the Charter of the Organization of American States, which, among other things, recognises a right to public education.<sup>7</sup>

### **The U.S. is Obligated to Enforce the Human Right to Public Education**

U.S. courts ought to recognise the Universal Declaration of Human Rights as binding, both because the Universal Declaration has been ratified by the U.S. and because it is widely viewed to have now attained the status of customary international law its actual existence under federal law.<sup>8</sup>

Given that international treaties are on the same level as federal statutes on the domestic hierarchy of laws, the fact that the U.S. is a party to this Convention serves as more than a normative justification for the right, but describes its actual existence under federal law.<sup>9</sup> The *Paquete Habana* case of 1900 is the foundation for the domestic recognition of international law and ratified treaties are binding upon U.S. courts.<sup>10</sup> Despite *San Antonio v. Rodriguez*, the right to public education ought to at least be recognised as a right out of respect for existing treaty obligations, which carry the weight of federal statutory law. In fact, at least on state court in the U.S. has followed this approach. The West Virginia Supreme Court has held that education is a fundamental right under its state constitution and based part of its reasoning on a reading of the Universal Declaration of Human Rights.<sup>11</sup>

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<sup>1</sup>United Nations Charter, art. 55.

<sup>2</sup>Ibid.

<sup>3</sup>Universal Declaration of Human Rights, art. 26.,

<sup>4</sup>Ibid.

<sup>5</sup>International Covenant on Economic, Social and Cultural Rights

<sup>6</sup>Park (1987) 1221.

<sup>7</sup>'The Member States will exert the greatest efforts, in accordance with constitutional processes, to ensure the effective exercise of the right to education.' Charter of the Organization of American States, art. 47.

<sup>8</sup>See *Paquete Habana*, 175 U.S. 167 (1900). The *Paquete Habana* case of 1900 is the foundation for the domestic recognition of international law and ratified treaties as binding upon U.S. courts.

<sup>9</sup>Ibid.

<sup>10</sup>Ibid.

<sup>11</sup>*Pauley v. Kelly*, 255 S.E.2d 859, 863 (W.Va. 1979).

The significance of the U.S. being a signatory or a full party to so many international treaties that proclaim a right to public education is two-fold. First, as previously mentioned, ratification of such treaties makes the right a part of federal law, which has the significance of creating a statutory right to public education that ought to trump state laws, pursuant to the Supremacy Clause of Article VI to the U.S. Constitution.<sup>1</sup>

Second, the fact that the U.S. has entered into treaties and international agreements calling for international recognition and state protection of the right to public education is demonstrative of a national commitment to education as a human necessity that should not be denied.<sup>2</sup> Entering into these treaties is a mechanism through which the U.S. shares democratic and humanitarian values across the world. If the U.S. continues to be an advocate on the international stage for human rights, such as education, but leaves the protection of such rights to the local authority of its individual states, then the U.S. risks breaching its international commitments.

Unfortunately, the U.S. Supreme Court has never held that any international human rights treaty automatically supersedes inconsistent domestic law.<sup>3</sup> A U.S. court has held that, Article 47 of the amended Charter of the Organization of American States (OAS) does not impose an international obligation to provide public education.<sup>4</sup>

One U.S. court stated that, '[t]he right to education, while it represents an important international goal, has not acquired the status of customary international law.'<sup>5</sup> This is an inaccurate summary of the current status of international law. The broad and consistent recognition and codification of the right to public education internationally demonstrates that it is more than an important goal. Public education is a fundamental human right.

## Conclusion

In sum, American scholars and leaders have historically treated education as though it were an individual right to be protected and promoted by the state. This American insight has also shown itself in U.S. foreign policy as illustrated by the international conventions to which the U.S. is either a signatory or a full party. The Court paid homage to this tradition in *Brown v. Board of Education*<sup>6</sup> where it recognised the importance of education, but fatally undermined this

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<sup>1</sup>'This Constitution...and all Treaties made... under the authority of the United States, shall be the supreme Law of the Land.' U.S. Const. art. VI, cl. 2.

<sup>2</sup>See, e.g., Universal Declaration; International Convention on Economic, Social and Cultural Rights; Charter of the Organization of American States art. 47, 49.

<sup>3</sup>Donoho (2006).

<sup>4</sup>*Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976).

<sup>5</sup>In *re Alien Children Education Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980).

<sup>6</sup>*Brown v. Bd. of Educ.*, 347 U.S. at 495 (1954) (holding public school segregation unconstitutional).

recognition later in *Rodriguez*.<sup>1</sup> The U.S. ought to recognise and protect the right to public education as a fundamental right.

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