

PROTECTING HUMAN RIGHTS: THE RIGHT TO EDUCATION IN AN EPIDEMIC

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With regard to the history of the constitutional protection of children's rights, more precisely, the right of children to education, one of the most outstanding dates is 1924. The nearly 100-year-old Geneva Convention is regarded as the first major international document on children's rights. The Convention was drawn up in the wake of a great international crisis, the First World War, and the ensuing difficult economic and social situation, as well as the raging of a large epidemic. The five short and concise points of the Convention are not simply a legal history document on fundamental rights, on which later conventions were built but they are still relevant and convey a clear message today. The Convention does not make any direct reference to the right to education but the idea, the spirit is there in almost every section. Pursuant to the Convention, children should always be helped first in any trouble. All the resources that are necessary for a child's normal physical and mental development should be ensured, children should be taught to be able to make their own living, and they should be raised in the spirit so that they would put their skills at the service of others in the future.¹

What does the concept of education encompass? According to the normative definition of UNESCO,

“it includes the entire process of social life with the help of which individuals and social groups study in order to develop their personal

* This paper was presented at the “Safe Schools and Education Rights in a (Post) Pandemic Era” online international conference organized by Ereky Public Law Research Center, Budapest and the European Association for Education Law and Policy, Antwerp on 16th October 2020. (ereky.jak.ppke.hu)

¹ See LUX Ágnes: A gyermekek jogai (The Rights of Children) – In: ANDRÁS Jakab – BALÁZS Fekete (ed.): *Internetes Jogtudományi Enciklopédia* 2018. (Internet Encyclopaedia on Legal Sciences 2018) – <https://ijoten.hu/szocikk/a-gyermekek-jogai>.

skills, attitudes, capabilities and knowledge consciously, within the framework of communities and for the benefit of these communities”²

Education is also a unique, multifaceted area if we approach it from the aspect of human rights. It is both a fundamental, enforceable and established right for children, recognized by numerous international conventions; and an institution that essentially determines the life and future of a child. It is a fundamental right that other rights stem from, such as personal development, the freedom of arts and science, and academic freedom. At the same time, it is also a service, which is essentially equally available, accessible and free of charge for all children in the majority of the countries. Furthermore, it is a fundamental and accountable obligation which appears in the form of compulsory education, and which is enforceable even against the will of the parents in the best interests of the child.

The purpose and function of education is perhaps best formulated by a key international human rights document of 1946, which was elaborated after another crisis, the Second World War: the Universal Declaration of Human Rights, which states the following:

[...] We agree that education shall be directed to the full development of the human personality and human dignity, and to the strengthening of respect for human rights and fundamental freedoms. [...] It shall make every person capable of becoming a useful member of a free society, and shall promote understanding, tolerance, friendship and peace.”³

Education is not simply a right, an obligation or an institution but it is also the space and custodian of the protection of children’s rights. The responsibilities of education include giving attention and care, ensuring children’s rights, rights awareness and the mastering of legal knowledge, providing support and assistance, as well as compensating any unequal opportunities between children. Education should not only stand up against harassment, abuse, or violence against and between children at school. Those working in education have increased responsibility in cases when children are endangered in other environments, for example, at home. If we think of education as the system of public institutions, what we mean is by far not only the enforcement of the right to education, i.e. ensuring and obliging school attendance. Education also plays a significant role in getting familiar with the right to human dignity and equal treatment as the moral frameworks and safeguards of the rule of law, e.g. the relations between the protection of the right to a fair procedure and other fundamental rights. Thus, education points beyond conveying information, knowledge or competences, it is also a bastion of democratic rights awareness, critical thinking and the fight against inequality. Schools represent a special space,

² See <https://ofi.oh.gov.hu/az-egesz-eleten-tarto-tanulas>.

³ See https://www.ohchr.org/en/udhr/documents/udhr_translations/hng.pdf.

as the events that occur there, through the children, may turn into matters that affect the entire community, indirectly even the local community or the whole society, i.e. they may become a public matter.

The second generation of fundamental rights includes economic, social and cultural rights, where the state undertakes an obligation to provide “services”, which cannot be enforced as a fundamental right by an individual. Cultural rights encompass the right to involvement in cultural activities, including the right to education. The right to participation in cultural activities consists of several elements pursuant to the Fundamental Law of Hungary, and the nature of constitutional protection is different in the case of the individual elements. The wording of the constitution defines cultural activities as a state goal, then it specifies the institutions and the fundamental requirements necessary for the enforcement of the right to education as one of the basic parts of this goal. Based on the Fundamental Law of Hungary, every Hungarian citizen is entitled to take part in cultural activities. Hungary ensures this right by extending and making community culture general, by providing free of charge and compulsory primary level education, free of charge secondary level education accessible to all, as well as higher education accessible to all based on their capabilities, furthermore, by providing financial support to those taking part in education as defined by the law.

In times of crises, taking care of children is a top priority, and this effort includes the creation and maintenance of the opportunity of taking part in education and being involved in the school community as much as possible. The key word here, as the experienced of the past year has shown, is “possible”, the circumstances, i.e. the risks posed by maintaining personal participation in education for children of different ages, not forgetting about the advantages and disadvantages of digital education, and ensuring to their parents the possibility to work. The pandemic situation caused by the coronavirus has created unprecedented and unforeseeable challenges, this is for sure. Initially, it is the area of health care that is in the focus of attention most of the time, which situation has not changed to date but as it became permanent, the state measures ordered to curb the pandemic all over the world have affect education, and through this, children’s rights as well. All the stakeholders consider the risks continuously – this is necessary because while there are strong arguments for the intensive restrictions, the effect of these cannot even be estimated yet.

It is for sure that the protection of fundamental rights, such as the significance and accessibility of rights protection by the Ombudsman are strengthening. We experience that the significance of the information provided to the complainant parents, teachers and children, as well as that of the inquiries and messages is gaining weight. These are natural parts of the Ombudsman’s activities in his normal, everyday work as well, however, there is an even higher need for moderate, objective, clear explanations that personally respond to the complainant’s situation now, which also take the rapidly changing statutory requirements into account.

Within the rights protection activity performed by the Hungarian Ombudsman, typically *5-6 percent* of the complaints submitted are related to education issues. Not all of these petitions are about the right to education but rather, they are individual or general complaints regarding issues or deficiencies experienced in the area of

education in the broadest sense of the word, from nursery school to higher education. The Commissioner for Fundamental Rights has the possibility to conduct inquiries not only on the basis and in the framework of complaints but he is also authorized to review problematic issues *ex officio*, in a comprehensive manner, and to formulate proposals both for the legislators and legal practitioners.

In his inquiries concerning the institutions providing education, the Ombudsman established the violation of the very right to education in several reports. Compulsory performance is a requirement with regard to primary level education, which in essence, partially means the above-mentioned compulsory education. Compulsory education is in fact performed by the child but as part of the right of children to protection and care, it makes it the parent's obligation to take care of the child's education. The state is obliged to ensure the personal and material conditions required for education as well, which means that the appropriate buildings and facilities should be available for education, that the operation thereof should be ensured, that the physical conditions for education should be available, furthermore, that the necessary personnel, i.e. the teachers and the staff assisting education should also be ensured. Being free of charge and being accessible are also key guarantees for the enforcement of elementary and secondary level education. These classical constitutional criteria and safeguards are also seen in a different light in a pandemic situation, i.e. it becomes important how the physical conditions of digital education can be ensured, and to which means of protection against the epidemic this free of charge attendance learning may extend to.

The institution of the Hungarian Ombudsman, the Commissioner for Fundamental Rights and his Office have continuously performed their tasks during the state of danger ordered due to the coronavirus as well. By relying on the means of electronic administration and communication, the Commissioner receives the complaints, gives them priority in responding to them, and in cases where he has competence, investigates into the problems and infringements related to the pandemic. This was the case in the area of education as well: in the spring, the Office received several reports on the difficulties and availability of online remote education. It was a typical problem signalled by the complainants that in needy families with a high number of children, who lived in backward settlements of the country, there were very few devices, if any, (typically telephones) with the use of which they could join remote education, and this caused the children to fall behind with the teaching material. Some inquiries were launched because there were some educational institutions that took action against students due to online "absence", while these students were not able to join education through no fault of their own. Those families who raise children with disabilities and special needs were put into an especially difficult situation. In many cases, data protection and personality rights issues also came up related to digital education.

In its policy statement, *the UN Committee on the Rights of the Child* drew attention to that online education should not increase the inequalities between the children, and it should not replace the student-teacher relationship. Online teaching should in fact be one creative form of classroom education, which poses a challenge to those children who have no, or only have limited internet access, or appropriate support from their parents. The Committee encouraged the application of alternative

solutions for these children, to ensure that they receive support and guidance from the teachers.⁴

UNESCO pointed out, in relation to the school closings, that the establishment, maintenance and development of remote education, as well as the difficulties posed by the teachers and parents unprepared for remote education and home schooling meant a great challenge. The adverse effects of school closings on healthy diets cannot be disregarded either, as many children are thus deprived of free of charge or reduced-price school meals. UNESCO mentions the effect of digital education on social relationships and mental health as another negative consequence.⁵

As has also been highlighted by *the Council of the European Union*, one of the greatest challenges was posed by inclusion and ensuring equal access to high standard remote education. There may be some students, teachers, instructors or families who do not possess the appropriate digital skills, have no access to the necessary technological devices or the internet, which is a major obstacle, mainly in the case of disadvantaged students, as well as students who live in the countryside, in remote, or highly urbanised areas. Furthermore, there are students with special needs who need consulting and further support with learning. It should also be added that although the switch to digital education had a key role in ensuring that the learning process is not interrupted, digital education cannot fully replace high standard personal teaching and learning.⁶

In addition to the inquiries, the Ombudsman has other, *extra-judicial means* to act as well. These are the Ombudsman's messages intended for the wider public and which may be concerned with education and the enforcement of the right to education as well.

In the Commissioner's message related to holding the final examinations in May 2020, an event of key importance for the future and the lives of the students, I recommended that with a view to safety, the rule of physical distancing should be adhered to during the entire process of the final exams and one classroom should preferably seat a maximum of ten students. We urged the issuance of a ministerial decree or a methodological recommendation containing the detailed rules in the shortest time possible. We requested that material conditions ensuring the reduction of risks and the appropriate protection of both the students and the teachers participating in the examinations be created. We urged that those students who signed up for advanced level school leaving examinations receive timely and

⁴ As quoted by Mrs. Eszter Tóth-Karczub in her study entitled "Az oktatáshoz való jog érvényesülése a COVID-19 okozta járványhelyzetben" ("The Enforcement of the Right to Education in the COVID-19 Pandemic"). See http://mfi.gov.hu/wp-content/uploads/2020/11/TKE_oktataseskoronavirus_vegleges.pdf

⁵ As quoted by Mrs. Eszter Tóth-Karczub in her study entitled "Az oktatáshoz való jog érvényesülése a COVID-19 okozta járványhelyzetben" ("The Enforcement of the Right to Education in the COVID-19 Pandemic"). See <https://en.unesco.org/covid19/educationresponse/consequences>

⁶ See COUNCIL CONCLUSIONS on countering the COVID-19 crisis in education and training 2020/C 212 I/03.

accurate information on the institution appointed for holding the exams, and the accessibility thereof.⁷

In another statement or message, we called public attention, as early as at the very beginning of the pandemic and the introduction of the related measures, to that both Hungarian and international experience had shown that one of the grave consequences of the restrictions related to the pandemic was that violence and abuse against vulnerable groups, especially children, were on the increase. The forced co-confinement for several months causes a high level of stress in itself, and the number and force of the already existing conflicts will grow in a high number of families. In this confinement, violent actions, instances of abuse against vulnerable groups, including children become more frequent, while it is also much more difficult to ask for help. The traditionally most important actors of the children's rights signalling system, including the schools cannot detect such cases either, as there are no personal encounters. What is more, in many cases, not even asking for help online or on the phone can prove to be a good solution either, due to the continuous control, as the affected persons find it very hard to ask for external help or support. We welcomed that the responsible ministry and the police had prepared several guidelines for handling the difficulties that may arise, for the child protection services and the teachers. The members of the signalling system continue to be obliged to forward the signals electronically or on the phone. On the other hand, the teachers may signal the problems that they become aware of in the context of digital education, even if in a limited way. We pointed out that it is important to continuously communicate that each instance of abuse against children is a serious matter, which will be investigated into, and that the victims should feel free to turn to the authorities.⁸

We tend to have very high expectations towards education. We expect it to help students master basic knowledge and literacy, play a role in the personal development of the students, and satisfy the justified needs of the economy. We want it to ensure social integration, provide customized services, and boost modernization. However, education should primarily be viewed from the aspect of the rights of the children, and of course, of their parents and teachers as well, in a child-centred approach, if you like. In the educational system of the twenty-first century, in the schools that operate in this spirit, learning is both a right and an obligation, and learning about rights and responsibilities, as well as learning through rights and other values such as democracy, autonomy and tolerance, go hand in hand.

In the current situation, maintaining a safe education for our children, i.e. the enforcement and accessibility of the right to education, require significant effort. This is especially true in the case of those children who are in a vulnerable position for some reason, due to the livelihood situation of their family, or on account of their disability or medical condition. Maintaining an appropriate-quality education is a

⁷ <http://www.ajbh.hu/-/az-alapveto-jogok-biztosa-a-2020-as-erettsegi-vizsgak-megszervezesenek-kerdeserol>

⁸ <http://www.ajbh.hu/-/veszelyhelyzettel-jaro-korlatozasok-idejen-kiemelt-figyelmet-kell-forditani-a-gyermekvedelmi-jelzorendszer-hatekony-mukodesere>

key issue from the perspective of our children. The cancellation or unpredictability of school education may expose further problems, with respect to school catering, the possibilities of physical exercise and sports at school, living in a community, psychological support and assistance. A delicate balance should be struck between the best interests of the children, their safety, and ensuring their right to education. Stronger than ever, cooperation, exchanges of ideas and common thinking are necessary between the state and the civil society, as well as between the national and international organizations. In my view, the Ombudsman can help to find child-centred solutions even in this situation, by taking each complaint and signal seriously and investigating into them. Through his proposals and messages, he can show that the right to education is a fundamental human right, the fundamental right of children, which is to be taken seriously.