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THE RIGHT TO EDUCATION – EUROPEAN APPROACH

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INTRODUCTION

Relevance of the Topic. Education is one of the fundamental social, economic and cultural rights. Education is one of the most important and powerful tools for spread of democratic values, promotion of human rights, and attainment of self-esteem and self-realization. The right to education is foreseen in many international legal instruments. A large number of standard-setting instruments - conventions, declarations, recommendations, frameworks for action, charters – elaborated at international and regional level, provide a normative framework for the right to education. European Convention on Protection of Human Right and Fundamental Freedoms also protects the right to education, and there exists quite broad practice of the European Court of Human Right regarding the protection of this right.

The Object of the Research. The content of the right to education in European Convention on Human Rights.

The Objective of the Research. The *aim* of this discourse is to disclose the content and the scope of the right to education foreseen in European Convention of Human Rights and to reveal possible obstacles for the realization of this right.

In order to achieve the determined aim the following *tasks* will be settled:

– to analyze the Convention provisions regulating the right to education;

– to define the obligations of the states prescribed in the Convention in respect to the right to education;

– to discover and to analyze the standards and principles of the right to education;

Methodology of the Research. In the course of reaching the objective of the research both theoretical and empirical methods of scientific research were employed—the methods of comparative, systemic, analytical-critical, and linguistic analysis. In addition, the methods of documentary analysis and generalization were used.

1. THE CONTENT OF THE RIGHT TO EDUCATION

Education in all forms and at all levels must exhibit the following features: *availability*, meaning that there must be functioning educational institutions and that programmes must be available in sufficient quantity within the jurisdiction of the State Party; *accessibility*, which has three overlapping dimensions: non-discrimination, physical accessibility, and economic accessibility; and *acceptability* and *adaptability*, whereby education must be flexible so that it may adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings[1].

Expressed for the first time in The International Covenant on Economic, Social and Cultural Rights (1966)[2], and then reaffirmed almost in all treaties or other documents related to human rights, the quantitative and qualitative scope of the right to education consists of four "A's"– availability, accessibility, acceptability and adaptability**.** This conceptual framework is the minimum standard and, at the same time, the goal implementing the right to education throughout the world[3]. The achievement of these provisions defines a process as well as an end, and they challenge inequalities and abuse.

Availability means that states must ensure a free and compulsory, good quality education available for all children up to a defined age minimum, with safe schools and appropriate infrastructure and facilities, especially with trained teachers. Accessibility obliges the state to eliminate any discrimination on the basis of internationally prohibited grounds: legal and administrative barriers, ethnicity, economic status, disability, gender obstacles. In addition, education must be free and physically accessible. Acceptability requires that states ensure that education is acceptable to children, parents and teachers, with relevant content and methods, respecting everyone's rights. It includes parental choice of education for their children and the enforcement of minimal standards (quality, safety, environmental health). Adaptability imposes the obligation to ensure that education is adaptable to the child's specific situation and ability (especially for minority, indigenous, working children, children with disabilities, child migrants).

[1] *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier* [interactive]. Geneva: COHRE, 2006, p. 110 [visited 2010-06-06].
<http://www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners%20Dossier.pdf>.
[2] *International Covenant on Economic, Social and Cultural Rights (*adopted in 16 December, 1966, entered into force in 3 January, 1976). 993 UNTS 3.
[3] The concept of these four "As" was developed by the former UN Special Rapporteur on the Right to Education, Katarina Tomaševski, and it is one of the best ways to assess and act upon the situation.

The possible barriers for the implementation of the availability clause may be, for example, lack of qualified teaching personnel, not enough schools in rural areas, a prohibition to establish private schools (thus operation of the accreditation and/or licensing systems for private educational institutions in the states does not constitute violation), or discrimination of achieved education in these kinds of teaching institutions. The availability requirements usually apply to primary education and secondary education.

The accessibility indicator requires that education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any grounds, including race, colour, sex, language, religion, opinion, origin, economic status, birth, social status, minority or indigenous status, and disability. Possible violation: failure of a government to prohibit the segregation of indigenous children in separate schools or girls being denied access to education because they are working in the home or were married early. Education also has to be within safe physical reach – transport facilities should be provided or residential facilities should be provided to children who do not have access to schools within their neighbourhoods. Education must be affordable to all. This includes not only the elimination of school fees but also of indirect costs such as textbooks and uniforms. Whereas primary education should be available "free to all", states are required to progressively introduce free secondary and higher education. Because financial aspects are indicators of the content of the right to education, there are no strict provisions imposing clear and unambiguous requirements upon states – this could be understood as a goal.

Acceptability requires that the content of education should be pluralistic, relevant, non-discriminatory, culturally appropriate, and of corresponding quality. Education should be pluralistic and guarantee the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions. There must be minimum standards in law for the quality of education – it must be relevant, culturally appropriate, non discriminatory and the contents of curricula, textbooks and methods of instruction must be of good quality to students and, in appropriate cases, parents. Additionally, these guarantees have to be set, monitored and enforced by the government throughout the education system, whether the institutions are public or private. Schools must be safe (including the exclusion of violence in schools, especially the prohibition of corporal punishment) and environmental health standards must be adhered to[4]. Not all issues regarding acceptability are clear and

[4] Right to Education Project. Promoting Mobilisation and Legal Accountability [interactive]. [visited 2010-06-08]. <http://www.right-to-education.org/node/229>.

unambiguous. For example, in a European Court of Human Rights case a complaint concerning a girl who was suspended from school because of her refusal to participate in a parade was examined. She regarded it as a commemoration of war, and her religious convictions prevented her from participating in an event that would glorify warfare. The Court took note of the parents' pacifist convictions but found no human rights violation[5]. From the rights of the child perspective, the obligation to make primary school acceptable goes far beyond parental freedom of choice or the language of instruction and poses a great deal of challenge for all states. Restrictions upon school discipline are a good example because they have considerably increased in the past decade to protect the child's dignity against humiliation or degradation. They were, and are likely to remain, subject to litigation[6].

Adaptability of the right to education means that education can evolve with the changing needs of society and contribute to the challenging of inequalities, such as gender discrimination, and that it can be adapted locally to suit specific contexts. It imposes an obligation to adapt education to the best interests of each child, especially regarding children with disabilities, or minority and indigenous children. This facet of the right to education could be violated when, for example, schools fail to accommodate special religious or cultural holidays, so that students are penalized for missing school, or states do not provide educationally adequate means for members of linguistic and/or cultural minorities to learn the national language. A very important indicator of the implementation of adaptability issue is whether state's legal provisions consider a link between the school leaving age and the minimum age for employment, marriage, military recruitment, and criminal responsibility. But in this case the relativity of human rights must always be taken into consideration, as the western approach to human rights has to be adapted to local reality. And "it may be that realizing certain of the values of individualism is incompatible with realizing certain values of community"[7]. For example, the adaptability of the right to education for working children does not mean that children must not work until they attend school. Creating opportunities for working children to "learn and earn" have been grounded in the necessity for poor people, including children, to work so as to be able to survive.

[5] *Efstratiou v. Greece*, 18 December 1996, *Reports* 1996-VI. Also see *Valsamis v. Greece,* 18 December 1996, § 28, *Reports* 1996-VI.
[6] Tomaševski, K. *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable. Right to Education Primers No.3* [interactive]. 2001. p. 31 [visited 2010-06-08]. <http://www.right-to-education.org/sites/r2e.gn.apc.org/files/B6g%20Primer.pdf>.
[7] Griffin, J. *On Human Rights*. Oxford University Press, 2008, p. 133.

However, it should be noted from the outset that these four "As" are not definitive, nor peremptory. Though they are a very convenient and transparent method for explaining the right to education in terms of tangible factors, they are not necessarily the standard used in every international treaty and as such should not be treated as a generic, comprehensive and sole possible guide to what the right to education means under every law. This framework of the four "As" can become an instrument to empower duty-bearers and others to think through what the right to education means, how it is implemented in some specific areas, and to compare their current reality to this conceptual aspiration.

2. THE RIGHT TO EDUCATION: EUROPEAN APPROACH

There are quite a lot of regional documents regarding the protection of human rights. Several of them are directly dedicated to the right to education or at least focus specific emphasis on this right. As regional human rights documents pay more attention and respect regarding specific cultural, religious, moral issues, and the protection of human rights in the particular geographic areas, it could be presumed that imposing these documents should not discontent the governments of the states and those to whom the corresponding provisions are dedicated. However, the understanding of the content and application issues of the provisions of the regional documents regarding the right to education is not less complicated than those of the international legal documents. This could be explained by the presence of multicultural and multi-religious environments in the regions of, for example, Africa or America. Thus, "what it one culture taught as true and non-negotiable standards of conduct may in other cultures be understood merely as pieces of advice or recommendations"[8].

The first regional document indicating the right to education was *The European Convention on Human Rights*[9], specifically the First Protocol of the Convention. Article 2 of the Protocol, in general terms, briefly foresees that "No person shall be denied the right to education. In the exercise of any functions which assumes in relation to education and to teaching, the States shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions". By comparison with other articles in the Convention, the right to education is rather terse and is phrased in very general terms. In fact, it was difficult even to draft it, taking into consideration the

[8] Almqvist, J. *Human Rights, Culture and the Rule of Law*. Oxford and Portland, 2005. p. 94.
[9] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 213 UNTS 221 (ECHR).

"defensiveness of many states over features of their own educational system"[10]. Many states were reluctant to proclaim that everyone has a right to education, not wishing to impose an open-ended duty on the states to provide education, and they instead adopted a negative formulation[11]. Therefore, the decisions of the former European Commission on Human Rights and the European Court on Human Rights have had a great impact on analyzing and explaining the scope of the right to education.

According to different decisions of the Court, states have a very broad margin of appreciation of the right to education provided in a particular state. The case—law rarely allows applicants to use the provisions of the Convention in order to obtain certain redress for alleged violations of the right to education. The Court unambiguously declares violations of Article 2 of Protocol No. 1 to the Convention only in cases where the right is violated because of racial, national or other discriminatory issues. For example, in the case *Timishev v. Russia*[12] the Court stated that a differential treatment of persons in relevantly similar situations without an objective and reasonable justification constitutes discrimination. By binding themselves not to "[deny] the right to education" under Article 2 of Protocol No. 1, the states guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time and the possibility of drawing, by official recognition of the studies which he or she has completed, profit from the education received. In this decision the Court equates the right to education to the right to life (Article 2) and the right not to be tortured (Article 3), which, according the Court "together enshrine the most fundamental values of democratic societies" (Par. 64). The Court, explaining the scope of the right to education, indicates that "In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision".

[10] Janis, M.W., Kay, R.S., et al.(ed.). *European Human Rights Law. Text and Materials*. Oxford University Press, 2008, p. 569.
[11] *Ibid*, p. 569.
[12] *Timishev v. Russia*, no. 55762/00 and 55974/00, §§ 56-58, ECHR *Reports of Judgments and Decisions* 2005-XII.
The applicant's nine-year-old son and seven-year-old daughter were refused admission to their school in Nalchik because the applicant could not produce his migrant's card, a local document confirming his residence in Nalchik and his status as a forced migrant from Chechnya. The applicant had had to turn in his migrant's card in exchange for compensation for the property he lost in the Chechen Republic. The headmaster agreed to admit the children informally, but advised the applicant that the children would be immediately suspended if the education department discovered the arrangement.

On the other hand, The Court found no violations of the Convention in a very similar case of *DH and Others v. Czech Republic*[13], in which several Roma families alleged that Roma children of average or above-average intelligence level had been placed is "special schools" intended for children with learning difficulties. So-called "special classes" or even "special schools" (which were sometimes meant for mentally disabled pupils but have often been used disproportionally for Roma children due to an erroneously generalized perception of their inability to follow instruction in the "regular" school system). The Court had established that the system of special schools in the Czech Republic had not been introduced solely to cater for Roma children and that considerable efforts had been made in those schools to help certain categories of pupils to acquire a basic education. Therefore, the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes, and disabilities of the children. This decision of the Court was reversed by the Great Chamber on 13 November, 2007, and it was stated that the applicants were being placed in special schools where they had, without objective and reasonable justification, been treated less favourably than non-Roma children in a comparable situation, and therefore their rights to adequate education had been violated. Consequently, Article 2 (despite its negative formulation) does impose positive obligations upon a state to ensure that primary and secondary education is available for all children.

However, in regard to the second part of Article 2 of Protocol No. 1 ("the States shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions"), the Court decisions have a tendency to interpret the rights of the parents quite narrowly in order not to interfere or to disorder the educational systems of the states. For example, in the *Belgian Linguistic case*[14], the Court stated that this provision does not require the states to respect parents "linguistic preferences, but only their religious and philosophical convictions", and the explanation of this condition

[13] *DH and Others v. Czech Republic,* No. 57325/00, 7 February 2006, *Selected for publication in Reports of Judgments and Decisions (ECHR).*
The applicants (18 Czech nationals of Roma origin) alleged that, as a result of their Roma origin, they were assigned to special schools. Under the law, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests to measure the child's intellectual capacity carried out in an educational psychology centre.

[14] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education In Belgium" v. Belgium,* 23 July 1968, §§ 3-5, Series A no. 6.
A group of French-speaking parents claimed that the Belgian educational system did not permit their children to be educated at French-speaking schools unless they went to schools a long way from their homes.

may not be construed in an expansive way. The Court conceded to the meaning of "philosophical and religious convictions" the cautious approach. Therefore, in the case *Kjeldsen, Busk Madsen and Pedersen v. Denmark*[15] the Court stated that though Article 2 of Protocol No.1 "does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme. It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions", nevertheless "the Article 2 of does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications" (Par. 53). Similarly the Court interpreted Article 2 of Protocol No. 1 in other cases, for example, *Campbell and Cosans v. United Kingdom*[16].

Though there have been few decisions by the European Court of Human Rights on the scope of the right to education, in comparison with a huge amount of cases regarding other rights, the European approach to the right to education is quite definite and explicitly explained by the Court. In this regard other regional legal instruments instituting the right to education are not so unambiguous nor easily implemented or conventional in their understanding, notwithstanding the clearness of the wording of the provisions themselves.

CONCLUSIONS

1. The conceptual framework of the four "A's" (availability, accessibility, acceptability and adaptability) was drafted as a minimum standard of the right to education, though these guidelines are not expressed in any international or regional legal instrument. Though they are

[15] *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* 7 December, 1976*,* § 52, Series A no. 23.
Three couples, having children of school age, objected to integrated, and hence compulsory, sex education as introduced into state primary schools, challenged the manner in which sex education in state primary schools had been integrated into the curriculum. Mr. and Mrs. Kjeldsen had asked for free education in private school in order to avoid sex education in state school, but this was refused, so they withdrew their daughter from municipal school and taught her at home. Mr. and Mrs. Busk Madsen had been unsuccessful in asking for their children to be exempted from sex instructions. Mr and Mrs Pedersen sent four of their five children to private schools to avoid them having to follow sex education courses.

[16] *Campbell and Cosans v. United Kingdom,* 25 February 1982, §§ 27-28, § 33, §§ 36-37, Series A no. 48.
Violation of Article 2 Protocol No. 1 was established.

a very convenient and transparent method of explaining the right to education in terms of tangible factors, they are not necessarily the standard used in every international treaty and, as such, should not be treated as a generic, comprehensive nor the only possible guide to what the right to education means under every legal domestic or international instrument.

2. According to different decisions of the Court, states have a very broad margin of appreciation of the right to education provided in a particular state. The case—law rarely allows applicants to use the provisions of the Convention in order to obtain certain redress for alleged violations of the right to education. The Court unambiguously declares violations of Article 2 of Protocol No. 1 to the Convention only in cases where the right is violated because of racial, national or other discriminatory issues.

3. According the Court, the Article 2 of does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.

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