

LEGAL PROTECTION OF THE RIGHT TO EDUCATION IN ROMANIA AND EUROPEAN UNION

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Abstract

This year marks the 70th anniversary of the Universal Declaration of Human Rights, a document that formally recognized free and compulsory elementary education as a basic human right. Thus, the right to education is fundamental in the development of each individual and at the same time a key element in developing and enhancing wellbeing and quality of life for the whole European society. Considering the fact that education is both a human right in itself and an indispensable means of realizing other human rights, the objectives of this study are to identify barriers that need to be overcome and, at the same time, to raise public awareness on the right to education because, as is well known, if individuals know their rights they are empowered to claim them. The importance of this study consists in the fact that the analysis is focused, in a first stage, on clarifying the essential features of the right to education as a human right, so that, in a second stage, to be presented the European and Romanian legal frameworks protecting the right to education. As a novelty, this study attempts to outline how it is implemented the right to education in Romania, highlighting achievements, but without trying to avoid weaknesses and the less pleasant aspects.

Keywords: right to education; European legal framework; EU's Human Rights policy; human rights in Romania, legal framework of Romanian education.

1. Introduction

The year 2018 marks the 70th anniversary of the Universal Declaration of Human Rights, a document that formally recognized free and compulsory elementary education as a basic human right, the stated purpose being to pursue the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.¹

Since then, the right to education has been widely recognized and developed by a number of international normative instruments, among which we mention: Convention against Discrimination in Education (1960); International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on the Rights of the Child (1989).

Following global recognition of the right to education as a human right, the signatory States of these international normative instruments have a number of duties and responsibilities. Like all human rights, the right to education imposes three levels of obligation on States parties, respectively to respect, protect and fulfil the right to education.

Considering the fact that education is both a human right in itself and an indispensable means of realizing other human rights, the objectives of this study are to identify barriers that need to be overcome and, at the same time, to raise public awareness on the right to education because, as is well known, if

individuals know their rights they are empowered to claim them.

Although the specialized literature comprises many studies on this topic, I am convinced that a new study is necessary in the context in which, as evidenced by UNESCO, 264 million children and youth are still out of school around the world, the total includes 61 million children of primary school age, 62 million of lower secondary school age and 141 million of upper secondary age.²

Given this undesirable situation, the importance of this study consists in the fact that the analysis is focused, in a first stage, on clarifying the essential features of the right to education as a human right, so that, in a second stage, to be presented the European and Romanian legal frameworks protecting the right to education. As a novelty, this study attempts to outline how it is implemented the right to education in Romania, highlighting achievements, but without trying to avoid weaknesses and the less pleasant aspects.

2. Essential features of the right to education as a human right

Article 13 of the International Covenant on Economic, Social and Cultural Rights recognized "the right of everyone to education" and also affirmed that "education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms". In addition, Article 14 of the

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¹ Article 26 of Universal Declaration of Human Rights (UDHR)

² *Out-of-School Children and Youth* - <http://uis.unesco.org/en/topic/out-school-children-and-youth>, accessed on 18 February 2018

Covenant states that "each State Party which, at the time of becoming a Party, has not been able to secure in its territory compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all".³

For identified the status of the progressive realization of the right to education throughout the world, the Commission on Human Rights in its resolution 1998/33 of 17 April 1998 empowered Katarina Tomasevski (UN Special Rapporteur on the right to education) to report on the status, throughout the world, of the progressive realization of the right to education, including access to primary education, and the difficulties encountered in the implementation of this right. In her preliminary report to the Commission on Human Rights, the Special Rapporteur shown that there could be no right to education without corresponding obligations for governments. Moreover, she said that these obligations can be easily structured into a conceptual framework contain four essential features of the right to education, namely: availability, accessibility, acceptability and adaptability (also known as 4-A scheme)⁴.

As a first State obligation, availability relates to ensuring that primary schools are available for all children, which necessitates a considerable investment. Accessibility requires the State to ensuring access to available public schools, most importantly in accordance with the existing prohibition of discrimination. In light of the principle of acceptability, the State is obliged to ensure that all schools conform to the minimum criteria which it has developed as well as ascertaining that education is acceptable both to parents and to children. The usual approach regarding adaptability, the fourth principle, is to review the contents and process of learning from the viewpoint of the child as future adult, that's because the best interests of the individual child highlights the need for the educational system to become and remain adaptable.⁵

As it appears from the General Comment of Article 13 adopted by the Committee on Economic, Social and Cultural Rights in 1999, while the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the interrelated and essential features establish in 4-A scheme, as follows:

- a) Availability - functioning educational institutions and programs have to be available in sufficient quantity within the jurisdiction of the State party;
- b) Accessibility - educational institutions and programs have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions: Non-discrimination - education must be accessible to all, especially the most vulnerable groups; Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location or via modern technology; Economic accessibility - education has to be affordable to all;
- c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents;
- d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.⁶

At the same time, Committee on Economic, Social and Cultural Rights shown that the right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. Thus, the obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education, the obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education and the obligation to fulfil requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education (the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide).⁷

3. The EU legal framework for protection of the right to education

3.1. General provisions relating to the education

Pursuant to Article 6(e) of the Treaty on the Functioning of the European Union (TFEU), the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States in several areas, including education. Moreover,

³ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 - <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, accessed on 18 February 2018

⁴ Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33 (E/CN.4/1999/49, para. 50) - <http://repository.un.org/handle/11176/223172>, accessed on 18 February 2018

⁵ *Ibid.*, paras. 51, 57, 62 and 70.

⁶ General Comment No. 13: The Right to Education (Article 13 of the Covenant), (E/C.12/1999/10, para. 6), adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 - <http://www.refworld.org/pdfid/4538838c22.pdf>, accessed on 18 February 2018

⁷ *Ibid.*, paras. 46-47

Article 9 of TFEU states that, in defining and implementing its policies and activities, the Union shall take into account, among others, requirements linked to the promotion of a high level of education.

To this end, the Articles 165 of TFEU empowers the Union to contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity.

3.2. Guarantee of the right to education

The European Union is based on a common set of values, including respect for human rights whether civil and political, or economic, social and cultural⁸. More than that, the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (hereinafter: Charter), which shall have the same legal value as the Treaties.⁹

Thus, in Article 14 of the Charter is stipulated that "everyone has the right to education", this right includes the possibility to receive free compulsory education. Also, is provided the freedom "to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right". As shown in official explanations relating to the Charter, these provisions are based on the common constitutional traditions of Member States and on Article 2 of the Protocol no. 1 to the ECHR according to which "no person shall be denied the right to education"¹⁰.

4. Romanian legal framework protecting the right to education

4.1. Constitutional provisions

Basic principles regarding the education in Romania are established in Article 32 of the Constitution. Thus, according to the constitutional provisions, "the right to education is provided by the compulsory general education, by education in high schools and vocational schools, by higher education, as well as other forms of instruction and postgraduate improvement". In addition, it is shown that "State education shall be free, according to the law".¹¹

It should be noted that in accordance with Article 11 of Constitution, the Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to, that's because the treaties ratified by Parliament, according to the law, are part of national law. If we strictly refer to the provisions concerning the citizens' rights and liberties, under Article 20 of Constitution these "shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to" and "where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions".¹²

Moreover, the Romanian Constitution provides that, as a result of the Romania's accession to the European Union, "the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act"¹³

4.2. Legal basis for ensuring the right to education

As is apparent from the first article of the Law of National Education no. 1/2011, the purpose of this law is "to provide the legal framework for the exercise, under the authority of the Romanian state, of the fundamental right to lifelong education". In addition, the law provides that "the State guarantees to the citizens of Romania equal rights of access to all levels and forms of pre-university and higher education, as well as lifetime education without any form of discrimination, the same rights being equally acknowledged for the citizens of the other EU states and the states belonging to the European Economical space and Swiss confederation"¹⁴. The law also contains other provisions on guaranteeing the right to education, such as "equal right to education to all people with disabilities or with special education needs"¹⁵ and "lifelong education is a right guaranteed by law"¹⁶.

The right to education is also provided in the Law no. 272/2004 on the protection and promotion of the rights of the child, law according to which "the child has the right to receive an education which would allow him or her to develop his or her capacities and personality, in non-discriminatory conditions". Under the law, the Ministry of Education and Research, as a

⁸ Article 2 of the Treaty on European Union (TEU)

⁹ Article 6 (1) TEU

¹⁰ <http://fra.europa.eu/en/charterpedia/article/14-right-education>, accessed on 20 February 2018

¹¹ http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0sba32, accessed on 20 February 2018

¹² *Ibid*

¹³ Article 148 of Romanian Constitution

¹⁴ Article 2(4)-(5) of Law no. 1/2011

¹⁵ Article 12(6) of Law no. 1/2011

¹⁶ Article 13(1) of Law no. 1/2011

specialized institution of the central public authority, as well as the school inspectorates and the education institutions, as establishments of the local public administration, "must undertake all measures that are necessary for facilitating the access to pre-school education and providing regular obligatory tax-free education for all children"¹⁷.

Law no. 448/2006 regarding the protection and the promotion of the rights of persons with disabilities states that such persons benefit, inter alia, the right to education and training¹⁸. It specifically provides that "disabled persons shall have a free and equal access to any form of education, irrespective of their age, according to the handicap type, degree and the educational needs thereof". More than that, "the disabled persons shall be ensured permanent education and professional training throughout their life"¹⁹.

Hindering access to compulsory public education is incriminated by the Romanian Penal Code in Title VIII, Chapter II - Offenses against family. Thus, "a parent or a person to whom a juvenile was entrusted by law and who withdraws the juvenile from school or prevents them, by any means, from attending compulsory public education, shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine"²⁰.

5. Implementation of right to education in Romania

For a proper depiction of how it is implemented the right to education in Romania, our analysis should be focused on the way in which the Romanian government fulfils its obligations in education, in relation to 4-A scheme – making education available, accessible, acceptable and adaptable.

As Katarina Tomaševski pointed out in her work entitled *Right to education primers no. 3*, availability embodies two different governmental obligations: the right to education as a civil and political right requires the government to permit the establishment of educational institutions by non-state actors, while the right to education as a social and economic right requires the government to establish them, or fund them, or use a combination of these and other means so as to ensure that education is available.²¹

Referring to these obligations of the Romanian state, it must first of all be mentioned that there is a complete legislative framework providing adequate funding for the education. According to the provisions of the Law of National Education no. 1/2011, the State provides basic finance for all preschool children and pupils attending compulsory state, private and accredited religious education. The state also provides basic finance for the accredited vocational and high school state, private and religious education, as well as for state post high-school education. They shall be financed on the basis and within the limits of the standard cost per pupil or per preschool child, according to the methodology set by the Ministry of National Education. Public education is free of charge, in compliance with the law, but for certain educational activities, levels and curricula, taxes may be charged.²² More than that, the Law of National Education establishes that a minimum of 6% of the Gross domestic product (GDP) of the year in question is allotted annually from the state budget and from the budgets of the local authorities in order to finance national education. The educational institutions may also get and use their own income.²³

Despite these clear provisions, today, six years after the adoption of Law 1/2011, the Romanian state has not complied with its legal obligation to allocate a minimum of 6% of the GDP to finance national education, the term for the allocation of these funds being extended year by year through the Government Emergency Ordinance.²⁴

In accordance with Education and Training Monitor 2017 – Country analysis, Romania's general government expenditure on education as a proportion of GDP remains the lowest in the EU, underfunding being evidenced by the unusually large financial burden falling on Romanian households, which spend 35 % of what the government spends on education: this is the highest proportion in the EU.²⁵

The same state of affairs emerges from OECD evaluation in education (2017), according to which Romania's public expenditure on primary and secondary education is the lowest of all the EU countries, both in relative and absolute terms. In 2013, Romania had the lowest level of expenditure on education as a share of total government expenditure (7%), compared with an EU average of 11%. Also, the

¹⁷Articles 47(1) and 48(1) of Law no. 272/2004 on the protection and promotion of the rights of the child, Published in the Official Gazette, Part I no. 557 of 23 June 2004

¹⁸Article 6(b) of Law no. 448/2006 regarding the protection and the promotion of the rights of persons with disabilities, republished in the Official Gazette, Part I no. 1 of January 3, 2008

¹⁹Article 15 of Law no. 448/2006

²⁰Article 380(1) of the New Penal Code (Law 286/2009)

²¹Katarina Tomaševski, Right to Education Primers, no 3 - Human rights obligations: Making education available, accessible and adaptable, 2001, p. 13 – http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf, accessed on 23 February 2018

²²Article 9(2) and (3) of Law no. 1/2011

²³Article 8 of Law no. 1/2011

²⁴Most recently by Emergency Ordinance no. 9/2017 on some budgetary measures in 2017, the extension of some deadlines, as well as the modification and completion of some normative acts, Official Gazette no. 79 of 30 January 2017.

²⁵Education and Training Monitor 2017 - Country analysis, Romania, p. 250 – https://ec.europa.eu/education/sites/education/files/monitor2017-ro_en.pdf, accessed on 24 February 2018

2017 evaluation shows that Romania invests relatively less at all levels of education than other European countries, and allocates more resources to upper secondary and tertiary education than compulsory education.²⁶

Accessibility requires the Romanian State to secure access to education for all children in the compulsory education age-range, but not for secondary and higher education. Thus, post-compulsory education may entail the payment of tuition and other charges and could thus be subsumed under "affordability"²⁷. Access to public schools should be guided by the overriding principle of nondiscrimination, which is not subject to progressive realization but has to be secured immediately and fully. Respect of parental freedom of choice for the education of their children is also not subject to progressive realization but should be guaranteed fully and immediately.²⁸

Although the existing legal framework ensures for all citizens equal rights of access to all levels and forms of pre-university and higher education, in fact there are significant discrepancies in access to quality education between urban areas and rural areas, where 45% of Romania's school population (ISCED 1-2) is studying. If we refer only to the integration of Roma people in education, a recent survey by the European Agency for Fundamental Rights (FRA 2016) shows that only 38 % of Roma children attend ECEC, while 77 % of Roma aged 18-24 are early school leavers. This indicates that ECEC participation has worsened since 2011, when the figure was 45 %.²⁹

The OECD 2017 evaluation on Romania's education system shown that inequity in education overlaps closely with urban/rural disparities. Thus, students from socio-economically disadvantaged backgrounds are more likely to leave school before finishing upper secondary education. Boys in rural areas and from poorer quintiles are most at risk of dropping out before completion. Other vulnerable populations include Roma students and students with disabilities.³⁰

One important aspect of the acceptability of education is the fact that, besides available and accessible, education must also be of good quality. Thus, each State should enforce minimal standards regarding quality, safety, environmental health or professional requirements for teachers.

With regard to these issues, in Romania has been developed a consistent legal framework that covers all

aspects relating to quality assurance in education. Despite improvements over time, there are still a number of challenges especially that quality assurance in education is interconnected with education funding. Thus, increasing spending in education may help improve educational outcomes, support human capital development and economic growth.³¹

Adaptability of the education implies rejecting of any type of segregation or exclusion of the children with special educational needs.

As shown in National Strategy on Social Inclusion and Poverty Reduction (2015-2020), the Romanian Government's objective is that all citizens to be provided with an equal opportunity to participate in society, to feel valued and appreciated, to live in dignity and that their basic needs to be met and their differences respected. In terms of education, the Government's goal is ensuring equality of opportunity to quality education for all children, special attention should be paid to the quality of education and training and to their relevance to the needs of both the labor market and of individuals.³²

Also, an order issued by Ministry of Education and Research regarding the prohibition of any form of segregation in schools in Romania stipulates that education policy ensuring equity in educational system, in terms of equal access to all forms of education, but also in terms of quality education for all children without any discrimination caused by ethnicity or language maternal disability and/or special educational needs, socioeconomic status families, residence or school performance of primary education of the beneficiaries. Also, were established a series of legal obligations to various structures in the education system and provides specific penalties for failure to comply with these obligations.³³

These measures were taken as a result of general comment of the Committee on the Rights of Persons with Disabilities (CRPD) on the right to inclusive education, article 24 of the UN Convention on the Rights of Persons with Disabilities. In its comment the CRPD states unequivocally that the right to education of people with disabilities can only be adequately and effectively ensured only by inclusive education. The right to inclusive education imposes obligations on States parties to respect, protect and fulfil each of the

²⁶ OECD Reviews of Evaluation and Assessment in Education: Romania 2017, p. 58 - http://www.oecd-ilibrary.org/fr/education/romania-2017_9789264274051-en, accessed on 24 February 2018

²⁷ Katarina Tomaševski (2001), p. 13.

²⁸ *Ibid.*, p. 27

²⁹ Education and Training Monitor (2017), p. 250.

³⁰ OECD Reviews of Evaluation and Assessment in Education, Romania 2017, p. 56 - http://www.oecd-ilibrary.org/fr/education/romania-2017_9789264274051-en, accessed on 24 February 2018

³¹ Education and Training Monitor (2017), p. 251.

³² National Strategy on Social Inclusion and Poverty Reduction (2015-2020), p. 58 - http://www.mmuncii.ro/j33/images/Documente/Familie/2016/StrategyVoIIEN_web.pdf, accessed on 25 February 2018

³³ Order of the Ministry of Education and Research no. 6134 / 21.12.2016 on banning school segregation in school units, Official Gazette no. 27 of 10 January 2017

essential features of education: availability, accessibility, acceptability, adaptability.³⁴

6. Conclusions

As is apparent from the above, the access to education is not a privilege, it is a human right. Thus, as defined by the United Nations Committee on Economic, Social and Cultural Rights, "education is both a human right in itself and an indispensable means of realizing other human rights" and "as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities"³⁵.

In these circumstances, it can be said that the right to education is a powerful instrument for developing the full potential of each person, ensuring and respecting human dignity and, thereby, creating the premises for individual and collective wellbeing.

To overcome the perpetual crisis and achieve a state of general wellbeing, the Romanian society must

pay more attention to education at all levels. During the last years, Romania has developed a range of legislative and institutional tools destined to ensure implementation of right to education, but there are still a number of barriers to be surmounted. In my opinion, in order to ensure the access to quality primary and lower secondary education for all citizens, the Romanian authorities have to tackle inequalities and promoting an inclusive education, what it means to improve access to quality mainstream education, in particular for Roma and children in rural areas.

Also, given that funding for education is very low, it should be emphasized that quality educational outcomes are not being achieved with a very low level of spending. Following the same logic, I express my conviction that only by increasing spending in education the Romanian authorities may help improve the performance of the Romanian education system and, finally, even to achieve the objectives set out in the national project "Educated Romania", initiated and promoted by the Romanian President, who proposed beginning of "the repositioning of the society on values, the development of a success culture based on performance, work, talent, honesty and integrity".³⁶

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³⁴ UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 4 (2016), Article 24: Right to inclusive education, 2 September 2016 - <http://www.refworld.org/docid/57c977e34.html>, accessed 27 February 2018

³⁵ General Comment No. 13: The Right to Education (Article 13 of the Covenant), (E/C.12/1999/10, para. 6), adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 - <http://www.refworld.org/pdfid/4538838c22.pdf>, accessed on 28 February 2018

³⁶ <http://www.presidency.ro/ro/romania-educata>, accessed on 1 March 2018.

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 - <http://fra.europa.eu>;
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