

RIGHT TO EDUCATION IN THE SLOVAK REPUBLIC*

Doc. Dr. Michal Maslen

Faculty of Law, University of Trnava, Slovak Republic

e-mail: michal.maslen@truni.sk; <https://orcid.org/0000-0001-7496-2227>

Abstract. The paper analyzes the extent of transposition of the requirements of the right to education into the statutory legislation on education in the Czech Republic and Slovakia. The author includes also the conclusions and opinions arising from the case law of the European Court of Human Rights.

Keywords: education, school, convention, court, constitution, discretion, proportionality

1. CONSTITUTIONAL AND INTERNATIONAL LEGAL FRAMEWORK FOR THE RIGHT TO EDUCATION

The basic legal framework of the right to education can be found in the Constitution of the Slovak Republic. According to Article 42 of the Constitution of the Slovak Republic “(1) Everyone has the right to education. School attendance is compulsory. Its period and age limit shall be laid down by law. [...] (2) Citizens have the right to free education at primary and secondary schools and, depending on their abilities and society’s resources, also at higher educational establishments. [...] (3) Schools other than state schools may be established, and teaching in them provided, only under conditions laid down by law; education in such schools may be provided for a payment. [...] (4) A law shall lay down conditions under which citizens are entitled to assistance from the state in their studies.”

In its provision the Constitution of the Slovak Republic regulates the relationship to the international agreements which have been ratified and announced by the law before its entry into force by the Slovak Republic. A similar mechanism establishes the Constitution of the Slovak Republic in relation to constitutional laws, which were also adopted before the legal moment of the entry to the force of the Basic Law of the Slovak Republic. According to Article 154c(1) of the Constitution of the Slovak Republic “International treaties on human rights and fundamental freedoms that were ratified by the Slovak Republic and promulgated in a manner laid down by law before this constitutional law comes into effect are a part of its legal order and have primacy over the law, if that they provide greater scope of constitutional rights and freedoms.”

Likewise, according to Article 152(1) of the Constitution of the Slovak Republic “(1) Constitutional laws, laws, and other generally binding legal regula-

* This work was supported by the Slovak Research and Development Agency under the contract no. APVV-17-0022.

tions remain in force in the Slovak Republic unless they conflict with this Constitution. They can be amended and abolished by the relevant bodies of the Slovak Republic.”

In addition, the Slovak Republic is a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. The right to education is also regulated by the Article 2 of the Additional Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

The freedom of education and the freedom of academic scholarship are also governed by the Article 13 and 14 of the Charter of Fundamental Rights of the European Union. According to Article 13 of the Charter of Fundamental Rights of the European Union “The arts and scientific research shall be free of constraint. Academic freedom shall be respected.” According to Article 14 of the Charter of Fundamental Rights of the European Union “1. Everyone has the right to education and to have access to vocational and continuing training. [...] 2. This right includes the possibility to receive free compulsory education. [...] 3. 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.”

Finally, the Article 13 of the International Covenant on Economic and Social Rights regulates in considerable detail the right to education. Under this provision “1. The States Parties to the present Covenant recognize the right of everyone to education. They agree 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. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. [...] 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: [...] (a) Primary education shall be compulsory and available free to all; [...] (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; [...] (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; [...] (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole

period of their primary education; [...] (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. [...] 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. [...] 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

2. THE APPROACH OF THE STRASBOURG BODIES PROTECTING THE RIGHTS TO THE RIGHT TO EDUCATION

The creators of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”) considered the right to education at the time of its adoption for rather a social than a legal category. This approach was not sustainable. However, in drafting the text of the Convention, the political arguments against the inclusion of this right into the European system of human rights protection have prevailed. Change occurred with the adoption of the Additional Protocol no. 1 to the Convention, which guarantees everyone the right to education. Therefore this right, together with the right to peaceful enjoyment of property and the protection of the electoral rights have been included by the States Parties to the Convention guarantees and promoted by the Council of Europe in the framework of the Additional Protocol no. 1 to the Convention This initiative stemmed mainly from the decision of the Committee of Ministers of the Council of Europe [Svák 2006, 953].

The wording of Article 2 of the Additional Protocol no. 1 to the Convention constitutes an expression of a compromise between the traditional liberal and conservative view on the human rights and the social-democratic view. Therefore that document established in two sentences the three components of the right to education, that is: a) the guarantee that the state shall not interfere with the exercise of the right to education so that his intervention would actually deny the exercise of this right; b) the right to choose any form of education and training, while the government is obliged to guarantee this right to the extent of its possibilities, which means it does not guarantee for any education that has been chosen by an individual; c) the right of parents to respect their religious and philosophical convictions in the education of their children.

The concept of education and teaching has been analyzed in the case of *Campbell a Cosans v. United Kingdom*. In the judgement of February 25th 1982 (application no. 7511/76) the European court of Human rights said, that the second sentence of Article 2 of the Protocol no. 1 to the Convention implies, that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.

The general content of Article 2 of the Additional Protocol no. 1 to the Convention has been specified by the Court in connection with the case of the Belgian language (case relating to certain aspects of the use of languages in education in Belgium). According to the Strasbourg case-law the States Parties to the Convention do not recognize the right to education, which would require, at their own expenses finance and provide money for a particular type or brand of education, respectively a specific level of education. On the other hand, the States Parties have a positive obligation to ensure and respect the right to education as it is expressed by the Article 2 of the Additional Protocol no. 1 to the Convention.

The States Parties to the Convention have the obligation to guarantee to persons within its jurisdiction access to the right to education in the form of education existing at the concerned time. Convention does not provide for any specific requirement of promotion, organization or way of financing of the education. The right to education by its very nature calls for regulation by the State that is the regulation, which can vary in time and place according to the needs and resources of the society and individuals. It goes without saying that such a regulation must never injure the substance of the right to education and must not contradict other rights guaranteed by the Convention.

This approach has been confirmed by the Court in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*.¹ In this decision, the European Court of Human Rights clarified States' obligations regarding the freedom of parents to educate their children according to their religious and philosophical convictions as guaranteed by Article 2 of Protocol 1 (P1-2) to the European Convention on Human Rights. The Court found that compulsory sex education in public schools does not violate parental freedom.

In 1970, Denmark introduced compulsory sex education in State primary schools as part of the national curriculum, the aim of which was to, *inter alia*, reduce the increased prevalence of unwanted pregnancies and promote respect for others. This change in the curriculum was introduced by a Bill passed by Parliament (Act No. 235). The Minister of Education then requested the Curriculum Committee prepare a new guide on sex education. Subsequently, two Executive

¹ Decision of the Commission for Human rights of 7 December 1976, no. 1 EHRR 711.

Orders were issued and a new State Schools Act (Act No. 313) introduced that did not change the compulsory provision of sex education in State schools. When the Bill went before the Danish Parliament, the Christian People's Party tabled an amendment according to which parents would be allowed to ask that their children be exempted from sex education. This amendment was rejected by 103 votes to 24.

The applicants, who were the parents of State primary school students, were not satisfied that the provision of compulsory sex education was in conformity with their Christian convictions. They considered that sex education raised moral questions and so preferred to instruct their children in this sphere. They petitioned on multiple occasions to get their children exempted from sex education. However these requests were not met, resulting in some of the applicants withdrawing their children from their respective State schools.

The Court was invited to judge whether the introduction of integrated, and consequently compulsory, sex education in State primary schools by the Danish Act of 27 May 1970 constitutes, in respect of the applicants, a violation of the rights and freedoms guaranteed by the European Convention on Human Rights, and in particular those set out in Articles 8, 9 and 14 of the Convention and Article 2 of the First Protocol.

The Court held by 6 votes to 1 that there had not been a breach of the Right to Education as guaranteed by Protocol no. 1 to the Convention. The Court noted that the right set out in the second sentence of Article 2 Protocol 1 is an adjunct of the fundamental right to education, and thus corresponds to a responsibility closely linked to the enjoyment and exercise of the right to education. In addition, the Court recalled that the provisions of the Convention and Protocol must be read as a whole; so that the right to education, private and family life, and freedom of religion, thought, conscience, and information are all respected as far as is possible. In conformity with guaranteeing parental freedom, and protecting other Convention rights, parents are free to have their children educated at home or to send them to private institutions, to which the Danish government pays substantial subsidies. Private schools in Denmark are required, in principle, to cover all the topics obligatory at State schools. However, sex education is not mandatory: "Private schools are free to decide themselves to what extent they wish to align their teaching in this field with the rules applicable to State schools. However, they must include in the biology syllabus a course on the reproduction of man similar to that obligatory in State schools since 1960." This guarantee of parental freedom, however, does not mean that State schools fall outside the ambit of Article 2 Protocol 1 ECHR. The Court asserted that the second sentence of the Article 2 of the Protocol no 1 to the Convention applies not just to "religious instruction of a denominational character," as Denmark claimed, but that "the State's functions in relation to education and to teaching, 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, throu-

ghout the entire State education program. Arising out of reasons of expediency, the setting and planning of the national curriculum generally falls to the State. However, sentence two does not prevent States designing curricula that deal with philosophical or religious matters because most subjects have a philosophical or religious character, in one way or another. It follows that parents, for reasons of impracticality, cannot always object to the content of the curriculum. The religious and moral beliefs of the parents in this case were not altogether opposed to school education. The situation is more complex where religious beliefs are opposed to full-time formal school education. For example, where children are enrolled in religious schools and given religious instruction that is very different from the curriculum in a regular school. Different courts in different jurisdictions may hold differing views (i.e., such a practice should be exempted as a cultural right or it could be seen as a violation of a child's human right to primary education). A court's view in such a situation would depend on the Constitution and other legislation together with the cultural and political opinion of such education in that country or region.

Similar question as for the content of the education and teaching at the universities has been considered by the Court in the case *Leyla Şahin v. Turkey*.² A Turkish Muslim by the name Sahin alleged that the Republic of Turkey violated her rights and freedom under the Convention for the Protection of Human Rights and Fundamental Freedoms by banning the wearing of the Islamic headscarf in institutions of higher education. However the court came to the conclusion, that student's rights and freedom under the Convention for the Protection of Human Rights and Fundamental Freedoms are not violated when a secular country places a ban on wearing religious clothing in institutions of higher education.

The Council of Europe also stresses the key role and importance of higher education in the process of promoting human rights and fundamental freedoms and strengthening democracy. The instruments of enforcement are e.g. the Recommendation of the Committee of Ministers to member states no. R (98) 3 on access to higher education and the Recommendation of the Committee of Ministers to member states no. 1353 (1998) on access of minorities to higher education. Since the Convention and the case law to it recognized the higher education in the European area as a tool to develop skills and exceptionally rich cultural and scientific asset for both individuals and society. Therefore, the Strasbourg authorities argue, that it would be hard to imagine that higher education institutions would not fall into the scope of the first sentence of Article 2 of the Additional Protocol no. 1 to the Convention. Although that provision does not require the Contracting States to establish the institutions of higher education, each state has an obligation to ensure effective access to them.

² Decision of the European Court of Human rights of 10 November 1998, application no. 44774/98.

3. RIGHT TO EDUCATION IN CASE LAW OF THE CZECH AND SLOVAK COURTS

The Constitution of the Slovak Republic recognizes the legal restriction of the rights under Article 51 of the Constitution of the Slovak Republic. Under this provision “(1) The rights listed under Article 35, Article 36, Article 37, paragraph 4, Articles 38 to 42, and Articles 44 to 46 of this Constitution can be claimed only within the limits of the laws that execute those provisions. [...] (2) The conditions and scope of limitations of the basic rights and freedoms during war, under the state of war, martial state and state of emergency shall be laid down by the constitutional law.”

The method of claiming the protection under this law has been interpreted by the jurisprudence in the Czech Republic and in Slovakia. On the one hand, it concluded that a person may claim this right only in the limits of the laws, which implement its content. However, on the other hand, it refused the strict and formalistic approach that would require from the recipient of the right to education to point to a specific provision of the law implementing the content of the right to education. Such denial of a judicial or other legal protection on grounds of absence of the reference to specific statutory provision is a violation of Article 46 of the Constitution of the Slovak Republic, under which “(1) Everyone may claim his right in a manner laid down by law in an independent and impartial court and, in cases laid down by law, at another body of the Slovak Republic. [...] (2) Anyone who claims to have been deprived of his rights by a decision of a public administration body may turn to the court to have the lawfulness of such decision reviewed, unless laid down otherwise by law. The reviewed of decisions concerning basic rights and freedoms must not, however, be excluded from the competence of the courts. [...] (3) Everyone is entitled to compensation for damage incurred as a result of an unlawful decision by a court, or another state or public administrative body, or as a result of an incorrect official procedure. [...] (4) Conditions and details concerning judicial and other legal protection shall be laid down by law.” The idea that the recipient is in the exercise of the right to education before the state authorities are obliged to indicate the specific provisions of the legislation is disproportionate to the requirement to provide legal protection by the state authorities. It is therefore sufficient when the recipient of the right recalls a specific facts and legal grounds on which the application is built.³

Therefore the addressees of the right to education need not to argue with a specific legal provision, because the rule of law is the principles that the courts, as well as other state authorities know the legislation. If the addressee alleges the infringement of the right to education, the court or other state authority shall consider from the order set out in the Constitution of the Slovak Republic, whether

³ Judgement of the Supreme Administrative Court of the Czech Republic of 20 December 2005, ref. no. 2 Azs 92/2005–58.

there was a breach of “ordinary” law, which implements requirements of the Constitution of the Slovak Republic.⁴

Under the Article 13(4) of the Constitution of the Slovak Republic “When restricting basic rights and freedoms, attention must be paid to their essence and meaning. These restrictions may only be used for the prescribed purpose.”

For example, an individual may claim that during the admission procedure at the secondary school he was not given equal opportunity because of a failed concept test in mathematics, which did not reflect the different fields of study. In such a case it is the role of the authority of the State – particularly the court – to assess whether such allegations are true, and whether the resulting situation is contrary to the requirements of statutory legislation, the requirements of implementing rules and, where applicable to the requirements of the Article 42 of the Constitution.

Therefore the authorities cannot refuse to provide legal protection to individuals solely on the ground that his defense was not built on the specific provisions of the legislation. If the state does not follow this order, it may cause the violation of the right to education, because it did not fulfill the requirement of the Article 12(2) of the Constitution of the Slovak Republic, under which “Basic rights and freedoms on the territory of the Slovak Republic are guaranteed to everyone regardless of sex, race, color of skin, language, faith and religion, political, or other thoughts, national or social origin, affiliation to a nation, or ethnic group, property, descent, or any other status. No one may be harmed, preferred, or discriminated against on these grounds.”

4. POWER TO ISSUE THE STUDY PLANS AND SYLLABI

Czech jurisprudence has analyzed the issue of the power of the state authorities to prepare and to determine the content of the study plans and of the syllabi. The context of the case was the right of the parents to educate and teach their children. Parents of the children attending a certain school in Pardubice, Czech Republic objected the breach of their rights on the basis of the sexual education inclusion to the study plan of the ethic education. The school argued, that it had included into the syllabi on the ground of the Measure of the Minister of Education of the Czech Republic of 16 December 2009, no. 12586/2009–22. The parents objected, that the content of the subject actually prepared the children for their future sexual life. Parental arguments were built on the constitutional protection of the family. In the Slovak Republic the Article 41 of the Constitution of the Slovak Republic applies. Under this provision “(1) Marriage, parenthood and the family are under the protection of the law. The special protection of children and minors is guaranteed. [...] (3) Children born in and out of wedlock enjoy equal rights. [...] (4) Child care and upbringing are the rights of parents; children have the ri-

⁴ Judgement of the Supreme Administrative Court of the Czech Republic of 14 May 2009, ref. no. 1As 205/2008.

ght to parental care and upbringing. Parents' rights can be restricted and minors can be separated from their parents against their will only by a court ruling on the basis of law. [...] (5) Parents caring for children are entitled to assistance from the state. [...] (6) Details concerning rights under paragraphs 1 to 5 shall be laid down by law." The parents also argued with the content of the Article 3(2) of the Convention on the Rights of the Child, under which "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

Under the opinion of the parents the content of the sexual education falls strictly within the scope of the constitutionally guaranteed right of the parents to raise their own children and the children's rights to be raised by their own parents. The Ministry of Education argued with the content of the Article 2 of the Protocol no. 1 to the Convention. It stated that the case law of the European Court of Human Rights interprets the content of the Article 2 of the Protocol no. 1 to the Convention in way, that it does not prevent States designing curricula that deal with philosophical or religious matters because most subjects have a philosophical or religious character, in one way or another. It follows that parents, for reasons of impracticality, cannot always object to the content of the curriculum. Therefore the Ministry presented the opinion that the mere fact, that the sexual education is introduced into the general education program cannot establish an inconsistency with the parents' right to education of children.

The Supreme Administrative Court of the Czech Republic therefore accepted the opinion, that the Constitutional regulations, the Convention on the rights of the child and the protocol no. 1 to the Convention create important correctives of the public interest of the State to carry out the obligatory school attendance. However, creating curricula, belongs to the powers of the State and that provision of the Additional Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms does not prohibit the States to disseminate disputed information. The State may disseminate information in an objective, critical and pluralistic way. The Supreme Administrative Court of the Czech Republic further stated that that Framework Program was an internal act and therefore could not create rights, respectively obligation of external entities, such as school students.⁵

5. ESTABLISHMENT OF THE NON-STATE SCHOOLS

Under the Article 42(3) of the Constitution of the Slovak Republic "Schools other than state schools may be established, and teaching in them provided, only under conditions laid down by law; education in such schools may be provided

⁵ Judgement of the Supreme Administrative Court of the Czech Republic of 3 March 2011, ref. no. 1Ao 1/2011.

for a payment.” The case law has presented a relatively strict approach to the content of this provision. The constitutional regulations allow the private entities to establish the non-state schools. How, when establishing such schools, these entities have to fulfill the criteria set out by the law. When deciding on the inclusion of the proposed non-state school into the network of schools the Ministry has to consider the compliance of the conception of the proposed school with the long term intention of education and education network development. This material is an important instrument that forms the school system and education network. It names the basic directions and objectives of the future development of the education. It establishes the measure on the state level for the period of at least four years. Its objective is to unify the education policy of the regions with the education policy of the state. The basic principles on which it is based, is to improve quality and efficiency in education and to achieve competitiveness of the state.

Legislation classifies it among the strategic and policy documents drawn up by the Ministry. Private school, which in this case acted in a procedural position of the complainant considered this approach of the public authority unconstitutional and saw in it a breach of the right to education. However, the Supreme Administrative Court of the Czech Republic rejected the arguments of private school and commented that the assessment of the compatibility of the proposed concept of a private school with a long-term aim was a legal condition for the inclusion of a school into the school network. State authority saw the inconsistency with the concept of the proposed integration model schools of the Ministry of Education. In its decision it said that his intention was to include the exceptionally gifted students among peers in other classes in regular schools, not to exclude the talented students in specialized schools from the very beginning of their education, as foreseen in the concept of the proposed private school. When deciding the Supreme Administrative Court of the Czech Republic noted, that the view of the Ministry was defensible in terms of the conditions laid down by the constitutional regulations governing the right to education.⁶

CONCLUSION

The case law of the law enforcement authorities in Slovakia, but also and above all the judicial case law in the Czech Republic in a consistent manner reflects the conclusions of the case law and doctrine of the Strasbourg right protection organs. Implementation of safeguards for the protection of the right to education is perceived primarily through the principle of proportionality, and therefore in the adequacy of measures taken by public authorities to ensure the commitment no to deny addresses of the public authority their right to education.

Therefore the case law considers the practice of state, which establishes in the conceptual planning document the basic directions of the development of educa-

⁶ Judgement of the Supreme Administrative Court of the Czech Republic of 3 March 2011, ref. no. 7As 52/2007.

tion and then the given constraints laid down by law respects, when deciding on the issue of ensuring access to education for concordant and constitutionally lawful. Therefore, the specification of the general conclusions of the long-term strategy in particular case, according to the case law also lays also down the limits to the discretion of state authority when deciding on the inclusion or non-inclusion of the proposed school to school network. The same conclusions are accepted by the case law in the field of the study plans and syllabi creation.

The constitutional rules and the Convention Contracting States give the States quite a wide range of discretion in designing and applying the above documents. The limits of the protection of the right to education in relation to the individuals lay in an objective presentation of the information contained in those documents, respect for the rights of parents to bring up their children and equal access to education. If we wanted to generalize these conclusions, we would come to the conclusion that the nature of the right to education implies that it may be limited under the conditions laid down by law. However, a State performing its powers cannot make exercise of this right virtually impossible. The law must provide for clear, transparent and understandable terms of the provision of education. The reverse procedure of the State would then establish a situation of arbitrary decision-making.

REFERENCES

- Svák, Ján. 2006. *Ochrana ľudských práv. Z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práv*. 2nd edition. Žilina: Poradca podnikateľa spol.