
SECTION 1

CURRENT ISSUES OF CONSTITUTIONAL AND LEGAL STATUS OF HUMAN AND CITIZEN

DOI <https://doi.org/10.24144/2663-5399.2024.1.01>
UDC 342.733

THE RIGHT TO EDUCATION OR FREEDOM OF EDUCATION: CONSTITUTIONAL AND SECTORAL ASPECTS

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Summary

This article analyses the distinction between the right to education and freedom of education in the decisions of the Constitutional Court of Ukraine and the European Court of Human Rights. The article deals with the issues of legislative regulation of the right to education. The author analyses international and national legal acts on the right to education, problems of reforming education and science in the context of the Association of Ukraine and the European Union. The author considers optimisation of the organisation and conduct of scientific research and general approaches to education reform aimed at innovative development of education.

In modern societies, we often hear that education is associated with the words “right” and “duty”, but not everyone knows what this means in practice. Although it seems easy to talk about education nowadays, this was not the case in the past and many reforms have taken place over the years to make this right and duty more and more relevant. First of all, it should be said that the right and obligation to education has modern roots in democratic societies that recognise and guarantee education for all individuals.

Theoretical issues related to the right to education have not yet been the subject of modern legal science have not yet been the subject of a multidimensional study. The study of the of the human right to education usually involves consideration of the issues of implementation as a public service in educational institutions of various types and the protection of the right by the state authorities of Ukraine. The human right to education regulates social relations related to any form of education and upbringing, has a programme and targeted nature, which is expressed in the need for continuous improvement of legislation on education and state activities related to the realisation of the right to to education. This process is carried out on the basis of joint activities of a person, the state and society represented by represented by commercial and state institutions, whose interests are united by a

single focus, and complement each other. Education is a human right in the modern international order. It is one of the so-called second-generation rights, i.e. rights that require the state to ensure positive fulfilment, to act in favour of their observance.

Key words: education; constitutional right to education; Constitutional Court of Ukraine; European Court of Human Rights; constitutional and legal regulation of the right to education; international and European standards of the right to education; Education in Ukraine; constitutional rights of man and citizen.

1. Introduction

Unlike the right to education or the right to education, freedom of education is rarely enshrined as such in international human rights instruments. The European Convention on Human Rights is no exception to the rule. This absence can be explained by the importance of involving public authorities in the establishment and operation of educational institutions, as well as by the caution of state parties regarding the obligations that may be imposed on them in terms of supporting private institutions. However, like other treaties, the European Convention contains provisions that directly or indirectly relate to such freedom. The main provisions are those of Article 2 of Additional Protocol № 1 (the right to education of the child and the obligation to respect the religious beliefs of the parents), but other articles of the Convention can also be mobilised: freedom of conscience and religion (Article 9); freedom of expression (Article 10); freedom of association (Article 11) and even the right to respect for private and family life (Article 8). This multiplicity of sources is due to the fact that freedom of education is of interest simultaneously to: the right to give and receive teaching; the freedom to teach; teaching and freedoms in education; the person being taught; his or her parents; and the teacher.

The following scholars have dealt with the issue of determining the legal nature of the right to education: B. Andrusyshin, V. Babkin, O. Batanov, Yu. Bysaha, S. Bobrovnyk, M. Kozyubra, A. Kolodiy, R. Kovalchuk, A. Krusyan, O. Kulinich, A. Oliynyk, N. Onishchenko, N. Parkhomenko, N. Petretska, V. Pohorilko, P. Rabinovych, O. Skakun, O. Skrypniuk, S. Stetsenko, O. Melnychuk, V. Fedorenko, V. Shapoval, R. Shapoval, Yu. Shemshuchenko and others.

2. Theoretical definitions of the right to education

P. Kovalchuk, argues that in today's globalised and informatised world, education is becoming a decisive factor in social progress and national security, an important component of the full development of the human personality, increasing respect for human rights and freedoms (Kovalchuk R.L., 2011, p. 292).

The right to education is a fundamental natural human right of the "second generation", a significant sphere of life of individuals, states and the entire world community, the realisation of which contributes

to socio-economic development and even the comprehensive development of the individual. The significance of ensuring the right to education is due to the fact that this right is considered in two aspects: as the right to education itself; as a means for the realisation of other human rights in connection with the goals of sustainable development (Pyroha I.S., 2023, p. 172).

The national educational system has traditional features: the decisive role of the state in the field of education; a significant number of academic disciplines and the volume of educational plans and programmes; a large role of education in the educational process (Andryeyeva D. Ye., 2011, p. 13).

The human right to education occupies a special place in the human rights system, being at the same time the core of the cultural segment of human rights, a "second generation" right, and a guarantee of the exercise of all other human rights - from the right to life to the right to healthcare (Yafonkina I.P., 2013, p. 240). It combines elements of "negative" and "positive" human freedom - every individual has the freedom to choose the forms and methods of education, should be protected from discrimination in education (negative aspect), but, in addition, has the right to demand from the state the creation of conditions necessary for the exercise of the right (positive aspect).

The purpose of exercising the human right to education is to form a full-fledged free personality and prepare him or her for life in society through the systematic transfer of knowledge and professional orientations, moral, ethical and legal standards, experience and the development of necessary skills. This goal is common to all participants in relations related to the realisation of the human right to education - the individual, the state and society represented by commercial and non-profit organisations. Educational relations are realised by their subjects jointly, on the basis of the principle of "participation", and the interests of the subjects of educational relations are united by a single focus, complement each other and should not have a hierarchy (Ya.M. Parpan, 2016, p. 94). The human right to education has a programme and targeted nature, i.e. it requires constant improvement of educational legislation, search for new forms and methods of ensuring the principles of the human

right to education. The main role in the realisation of the human right to education is played by the state, whose duties correspond to the right to education that belongs to each individual.

The constitutional right to education was considered in the context of its importance as a guarantee of personal freedom and development in Ukraine. In particular, the constitutional and legal aspects of this right, its importance for the self-realization of the individual and the support of a democratic society were analyzed, in particular:

– the constitutional right to education is an important element of guaranteeing the personal freedom of every citizen of Ukraine. The latter provides an opportunity to choose education according to one's own interests and needs.

– the right to education is a key factor in the development of the individual, improving his qualifications and participation in public life. Contributes to the formation of civic consciousness and an active civic position.- the current Constitution of Ukraine and legislation guarantee equal rights to education for all citizens, regardless of their origin, status or religious beliefs.

– ensuring accessibility and quality education remains an important task for Ukrainian society and the state. Ensuring access to education for all segments of the population, including persons with special needs (development of inclusive education) remains a priority direction.- the development of education in Ukraine is an integral part of building a democratic society and ensuring human rights to education. Education should be focused on the needs of society and contribute to its development (Bysaha Yu., 2023, p. 99).

3. Analysis of the case law of the Constitutional Court of Ukraine and the European Court of Human Rights

As an element of the constitutional right to education, the Basic Law of Ukraine defines the right of citizens belonging to national minorities to study in their native language or to learn their native language in state and communal educational institutions or through national cultural societies. Therefore, the constitutional provision enshrined in part five of Article 53 defines the essence of the content and scope of the right (as part of the constitutional right to education) to education in the native language in state and municipal educational institutions or through national cultural societies or to study it in these educational institutions or in national cultural societies, which is guaranteed by law (Decision of the Constitutional Court of Ukraine on July 16, 2019 № 10-p/2019).

Complete general secondary education is compulsory (Article 53(2) of the Constitution

of Ukraine). This provision imposes a positive obligation on the state to implement a responsible state policy in the field of education. Given the need to implement a responsible state policy in the field of education, to provide educational institutions with qualified teaching staff, the state must create working conditions within the educational process that will encourage both experienced teachers and those who have just started their teaching career to perform their teaching functions creatively. Only by maintaining an optimal balance in the provision of educational institutions with both young qualified and experienced teachers will the state be able to fulfil its function of organising an effective education system (Decision of the Constitutional Court of Ukraine on February 7, 2023 № 1-p/2023). Education is a national priority that ensures innovative, socio-economic and cultural development of society; financing education is an investment in human potential and sustainable development of society and the state.

Given the need to implement a responsible state policy in the field of education, to provide educational institutions with qualified teaching staff, the state should create such working conditions within the educational process that will encourage both experienced teachers and those who have just started their teaching career to perform pedagogical functions creatively. Only by maintaining an optimal balance in the provision of educational institutions with both young qualified and experienced teachers will the state be able to fulfil its function of organising an effective education system.

That is why the state should create appropriate conditions for comprehensive, thorough training of young teachers and for preserving the existing human resource of experienced teachers, in particular those who, regardless of age, meet the qualification requirements and are able to carry out teaching activities due to their physical and mental health.

The Constitutional Court of Ukraine considers that the provisions of Article 53 of the Constitution of Ukraine on ensuring free higher education in state and municipal educational institutions by the state should be considered in the context of the right to education guaranteed by the Basic Law of Ukraine and access of Ukrainian citizens to it in these educational institutions on a competitive basis. The provisions of this Article do not make higher education compulsory. In the Decision of the Constitutional Court of Ukraine of 21 November 2002 No. 18-rp/2002, it is the compulsory nature of complete general secondary education that is linked to its free of charge nature (Decision of the Constitutional Court of Ukraine on March 4, 2004 № 5-пп/2004).

In terms of constitutional interpretation, the provision of part three of Article 53 of the Constitution

of Ukraine “the state shall ensure accessibility and free of charge of pre-school, complete general secondary, vocational and higher education in state and municipal educational institutions” in the context of parts one, two, four of the said article should be understood as follows:

– accessibility of education as a constitutional guarantee of the right to education on the principles of equality defined in Article 24 of the Constitution of Ukraine means that no one can be denied the right to education, and the state must create opportunities for the realisation of this right;

– free education as a constitutional guarantee of the right to education means the possibility of obtaining education in state and municipal educational institutions without paying any form of fee for educational services of the level, content, scope and within the scope of those types of education, free of charge, provided for in part three of Article 53 of the Constitution of Ukraine.

Based on the provisions of parts two and three of Article 53 of the Constitution of Ukraine, which stipulate that complete general secondary education is compulsory and free of charge, the costs of providing the educational process in state and municipal general education institutions are covered on a regulatory basis at the expense of the relevant budgets in full.

Free higher education means that a citizen has the right to receive it in accordance with the standards of higher education without paying a fee in state and municipal educational institutions on a competitive basis (part four of Article 53 of the Constitution of Ukraine) within the scope of training specialists for public needs (state order).

Therefore, in order to give an idea of the European Court of Human Rights’ case law in this area, it is necessary to present it in relation to the right to education, the right of parents to respect for their religious and philosophical beliefs and the freedom of teachers (G. Gonzalez, 2021, p. 1003–1010). The first Additional Protocol of 20 March 1952, in its Article 2, at the end of a difficult genesis that testifies to the fierceness of the debate that existed at the time regarding the establishment and financial support of private schools, confirms this by reading the numerous interpretative declarations and reservations of the Contracting States. The generalised wording used in Additional Protocol №. 1 (“No one shall be denied the right to education”) does not prevent it from being regarded as a declaration of a genuine right, a “fundamental right” (ECHR, 7 November 1976, Kjeldsen et al. v. Denmark, App. № 5095/71, para. 50), which “in a democratic society ... [is] indispensable for the enjoyment of human rights” (ECHR, Grand Chamber, 10 November 2005, Leyla Shahin v. Turkey, Application no. 44774/98, para. 137).

The study of European case law shows the broad scope of application of the first sentence of Article 2 of Protocol №. 1 and the importance of the regulatory power of the state.

However, the Convention does not enshrine an absolute right to all forms of education: “The Contracting Parties do not recognise a right to education which would oblige them to organise at their own expense or to subsidise education of a given form or level”, but only the right “to make use, in principle, of the means of instruction currently available” - which does not mean “that the State does not have a positive obligation to ensure respect for this right” – and “to obtain in accordance with the rules in force in each State and in some form of official recognition of the studies completed” for the purpose of using the diplomas at a professional level (ECHR, 23 July 1968, Belgian Language Case, Application no. 1474/62, § 3-4). Isn’t the state obliged to subsidise the creation and management of private education? Although Article 2 of Protocol № 1 “essentially defines access to primary and secondary schools, there is no clear division between higher education and the field of training” (Leyla Sahin, op. cit., § 136). Although the Convention “does not oblige Contracting States to establish institutions of higher education”, if they do so, they are “obliged to ensure that individuals enjoy the right of effective access to them” (ibid., § 137). Although the right to education includes “the right to education in the national language or one of the national languages”, it does not guarantee, even in conjunction with Article 14 (the right to non-discrimination), the right to education in the language of one’s choice (Belgian Language Case, op.cit., §§ 3 and 11). The Court enshrines the positive obligation of states to take reasonable accommodation measures to enable children with disabilities to attend school (ECtHR, 23 February 2016, Cham v. Turkey, 23 February 2016, Application no. 51500/08: discriminatory refusal to enrol a blind child in a conservatory despite passing a competitive examination). Similarly, they should facilitate access to educational programmes in prisons, where they exist, including access to computer equipment (ECtHR, 18 June 2019, Mehmet Resit Arslan and Orhan Bingel v. Turkey, Application no. 47121/06).

The state may regulate the right to education, provided that it “never violates its essence” or “does not interfere with other rights enshrined in the Convention”. Such rules “may vary in time and space according to the needs and resources of the community and individuals” (Belgian Language Case, § 5), and the definition and organisation of programmes present “a problem of expediency on which the Court is not bound to rule and the solution of which may legitimately vary from country to country and from

time to time” (Kjeldsen et al., § 53). This breadth cannot justify discrimination in the exercise of the right to education on the grounds of ethnic origin (ECHR, Grand Chamber, 13 November 2007, D.H. et al. v. Czech Republic, App. № 57325/00, § 201; Grand Chamber, 16 March 2010, Orsus and Others v. Croatia, App. № 15766/03; 30 March 2023, Szolczan v. Hungary, App. No. 24408/16) (Roma students). The state may introduce compulsory schooling. The right to education “does not, in principle, exclude the application of disciplinary measures, including temporary or permanent exclusion from an educational institution” (Leyla Sahin, § 156). Aimed at “developing and moulding the character and mind” of pupils, discipline “constitutes an integral, even indispensable element of any educational system” (ECHR, 25 February 1982, Campbell and Cosans v. the United Kingdom, Application № 7511/76, paras. 33-34). In a broader sense, Article 2 of Protocol № 1 refers – whether in the case of public institutions or, by virtue of the principle of horizontal effect, private institutions – to “functions relating to the internal management of the school” which “cannot be regarded as ancillary to the educational process” (ECHR, 25 March 1993, Costello-Roberts v. the United Kingdom, App. № 13134/87, § 27). The European judge is sympathetic to states that invoke democratic values to justify, in certain contexts, prohibiting students from wearing conspicuous religious symbols. States may “limit the freedom to manifest a religion, such as the wearing of the Islamic headscarf, if the exercise of that freedom undermines the aim of protecting the rights and freedoms of others, public order and security” (ECHR, Grand Chamber, 13 February 2003, Refah Partisi et al. v. Turkey, application №. 413440/98, para. 92).

They may therefore deny access to students wearing the Islamic headscarf if the aim is to “preserve the secular character of the educational institutions” (Leyla Sahin, § 158), subject to a check that “the decision-making process for the application of internal rules [...] satisfies [...] the balance of the various interests at stake” (willingness to seek dialogue and negotiated solutions) and includes safeguards (principle of legality and judicial review) “appropriate to protect the interests” of the parties concerned (Leyla Sahin, § 159). The Leila Shaheen judgment confirms the existence of a great deal of autonomy for the state, as “the meaning or impact of acts consistent with the public expression of cooperation between religious institutions is not the same depending on time and context” and the regulation of the wearing of religious symbols in educational institutions “varies according to national traditions”, “European countries do not have a common understanding of the requirements of protection of the rights of others and public order”

(§ 109). Paying close attention to the principle of subsidiarity, the Strasbourg judge declared invalid the French measures aimed at banning the wearing of religious symbols in primary and secondary education (ECtHR, 4 December 2008, Dogru v. France, application №. 27058/05; judgment of 30 June 2009, Aktas v. France, application № 43563/08). The judgment in Dogru notes that “in France, as in Turkey or Switzerland, secularism is a constitutional principle, the foundation of the Republic” (§ 72), specifying that it is the duty of the public authorities to “ensure with great vigilance that, while respecting pluralism and the freedom of others students’ manifestation of their religious beliefs in schools does not turn into an ostentatious act that would constitute a source of pressure and exclusion” (§ 71) and notes that the persons concerned have “the opportunity to continue (their) education at a distance learning institution” (§ 76). However, the measure of temporary exclusion of a child who refuses to submit to corporal punishment in a public school, whose exclusion would mean that his parents are acting “against their convictions” (ECHR, 25 February 1982, Campbell and Cosans, op.cit., § 40: caning in Scottish state schools), the autonomy of the state finds a clear limit here to the extent that children should be able to exercise their right to education in accordance with their parents’ religious and philosophical beliefs.

4. Conclusions

Thus, the right to education is a fundamental right. At the universal level, there is a tendency for active international cooperation in various areas of the right to education, but the problem of ensuring access to education at all levels, from preschool to higher education and “third generation” education for all, remains unresolved. Numerous international legal instruments and mechanisms for ensuring the right to education do not fully reflect the multidimensional nature of the right to education and do not establish a single model of lifelong learning at different levels. It is believed that freedom of education implies the existence of private education that differs significantly from that provided by the state in terms of its content, content or methods. Freedom to organise and provide education is a manifestation of freedom of expression.

Education is the set of knowledge, skills and abilities that enable an individual to achieve high cultural levels, which society guarantees to the whole community through specialised bodies, both public and private, thereby enabling the individual to access and be included, in conditions of equality, in social life and the world of work.

Ukraine has a well-developed system of general secondary, higher and postgraduate education, which

provides opportunities for study at various levels and specialisations. In recent years, the Ukrainian education system has been actively introducing digital technologies into the educational process. Online courses, electronic resources and distance learning are becoming increasingly popular among students and adults.

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ПРАВО НА ОСВІТУ АБО СВОБОДА ОСВІТИ: КОНСТИТУЦІЙНІ ТА ГАЛУЗЕВІ АСПЕКТИ

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Анотація

У статті проаналізовано розмежування права на освіту та свободи освіти у рішеннях Конституційного Суду України та Європейського суду з прав людини. Розглядаються питання законодавчого регулювання права на освіту. Автор аналізує міжнародні та національні правові акти щодо права на освіту, проблеми реформування освіти і науки в контексті асоціації України з Європейським Союзом. Розглянуто питання оптимізації організації та проведення наукових досліджень, а також загальні підходи до реформування освіти, спрямовані на інноваційний розвиток освіти.

У сучасному суспільстві ми часто чуємо, що освіта асоціюється зі словами “право” та “обов’язок”, але не всі знають, що це означає на практиці. Хоча сьогодні говорити про освіту, здається, легко, в минулому це було не так, і за ці роки відбулося багато реформ, які зробили це право і обов’язок все більш і більш актуальними. Перш за все, слід сказати, що право і обов’язок на освіту мають сучасне коріння в демократичних суспільствах, які визнають і гарантують освіту для всіх людей.

Теоретичні питання, пов’язані з правом на освіту, ще не стали предметом багатоаспектного дослідження сучасної юридичної науки. Дослідження права людини на освіту зазвичай передбачає розгляд питань його реалізації як публічної послуги в навчальних закладах різних типів та захисту цього права органами державної влади України. Право людини на освіту регулює суспільні відносини, пов’язані з будь-якими формами навчання і виховання, має програмно-цільовий характер, що виражається в необхідності постійного вдосконалення законодавства про освіту і діяльності держави, пов’язаної з реалізацією права на освіту. Цей процес здійснюється на основі спільної діяльності людини, держави і суспільства в особі комерційних і державних інституцій, інтереси яких об’єднані єдиною спрямованістю і доповнюють один одного. У сучасному міжнародному порядку освіта є правом людини. Воно належить до так званих прав другого покоління, тобто прав, які вимагають від держави забезпечення позитивної реалізації, дій на користь їх дотримання.

Ключові слова: освіта; конституційне право на освіту; Конституційний Суд України; Європейський суд з прав людини; конституційно-правове регулювання права на освіту; міжнародні та європейські стандарти права на освіту; освіта в Україні; конституційні права людини і громадянина.