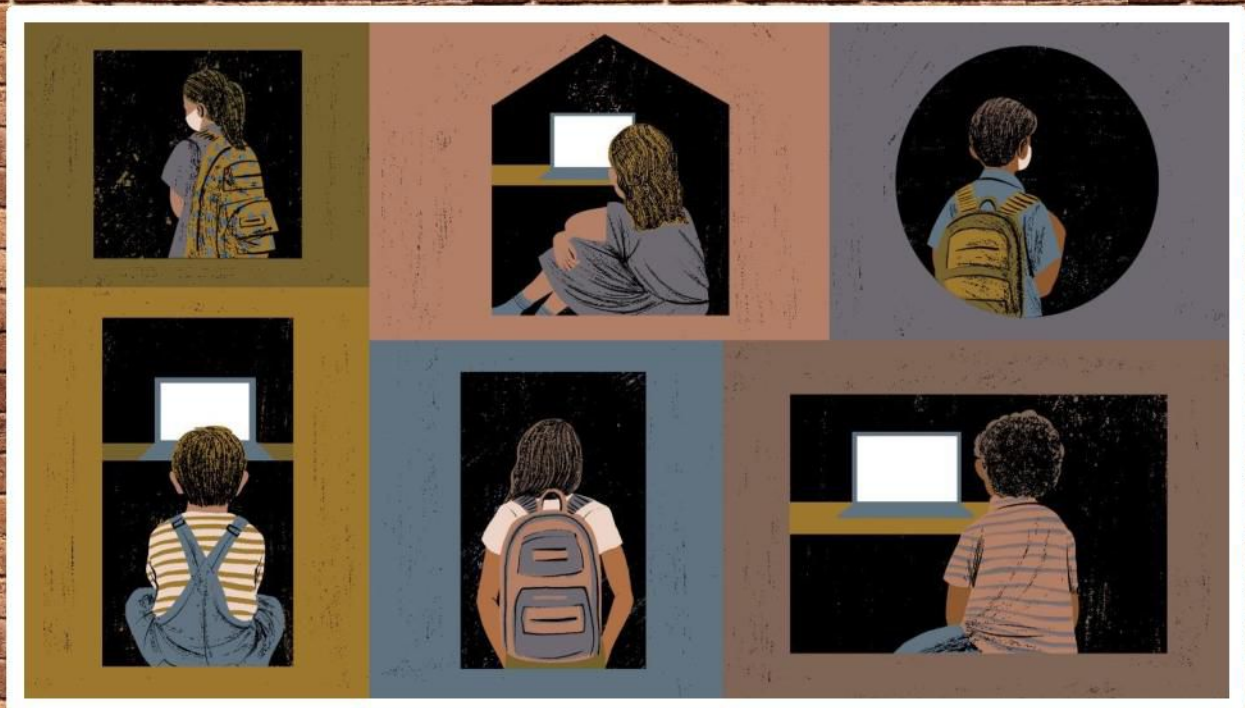


WE DON'T NEED NO COVIDUCATION



TEAM HUNGARY

ZSÓFIA BELHÁZY

PÉTER UDVARDY

ANNA LIVIA KOVÁCS

TUTOR

BÁLINT KOVÁCS

We don't need no COVIDUCATION

1. Introduction

Every child's best interest is to combat Covid-19 and make it disappear once and for all. This dramatic plea, however, cannot be a focus of a legal paper, as it cannot be influenced with legal instruments - at least for the time being.

Covid-19 has not only confined European children to their respective countries but, in most cases, caged them up among the four walls of their homes. The pandemic has deprived children of their relationships with their peers as well as with their teachers, and the only place they can continue to live and thrive is cyberspace.

This paper attempts to shed some light on the question to what extent online teaching calls for a reconsideration of the right to education [RTE], one of the fundamental human rights enshrined in the European Convention on Human Rights [ECHR]. This question cannot be explored without first briefly introducing international guidelines that stipulate the protection of these fundamental rights. As the next step, the paper shall attempt to investigate what the term RTE may entail, what rights are incorporated, and what principles need to be taken into account when identifying the semantics of the term. As part of this scrutiny, we shall investigate which of these rights impose on European states "an obligation to act" (*status positivus*), i.e. rights that need to be guaranteed and safeguarded by states. At the same time, the paper will briefly discuss some of the civil liberties that states are not entitled to intervene (*status negativus*).¹ These rights and fractional entitlements will be discussed in relation to the distorting effects of the Covid-19 pandemic. The topic is so vast that the scope of our investigation had to be limited to public education; the inspection of rights related to higher education had to be abandoned.

Beyond our effort to offer a descriptive analysis of the semantic content of the term RTE, the paper applies the so-called 4A method, a measurement tool adopted by the Committee on Economic, Social and Cultural Rights to test how effectively the principle of RTE is adhered to in public education during the Covid-19 pandemic, with primary consideration given to children's rights.

2. A need for simultaneous and proportionate restrictions in the field of fundamental rights during the pandemic

The EU's legal instrument was specifically designed to create a protective regime for fundamental rights that, on the one hand, comply with international guidelines, and on the other hand, does not restrict the member states in their effort to define their own constitutional identity. One important method applied at EU and member state level to ensure that these principles are upheld was an assessment method referred to as the test of necessity and proportionality.

The first major hypothesis put forward in this paper is that Covid-19 has brought about such momentous changes on the architecture of human rights and fundamental rights in Europe that have shifted the focus from certain fundamental rights to others. In the wake of the pandemic, expectations have changed considerably as to what obligations member states are to comply with to guarantee these fundamental rights, and how these safeguards to citizens should be provided by the states

¹ Georg, JELLINEK, *System der subjektiven öffentlichen Rechte*. Tübingen: J. C. B. Mohr, 1919, at 87, 94. Individuals can claim several rights against the state. Jellinek differentiates between two statuses in terms of the individuals' position versus the state. Status negativus refers to individuals' freedom which the state cannot interfere with. The other category, status positivus, means that without the state's support individuals cannot guarantee their freedom as they are dependent on the state, on the services it provides and on the protection it offers.

(individually, or in cooperation with one another). Quite clearly, the focus has shifted towards the primacy of right to health and physical integrity that necessitated higher levels of regulation (i.e. tighter restrictions) than was previously permitted. Lockdowns, travel bans, sending employees to home office and switching to online education were such new regulatory instruments that put the interpretation of fundamental rights and legal institutions (e.g. Schengen borders, free movement of labour, freedom of services, right to work, right family life, etc.) into a whole new context. During the pandemic, the major issue for states to consider is whether there is any social interest or state objective to be met which would require a proportionate legal restriction of the right to health and physical integrity simultaneously with the restriction of other fundamental rights.

Instead of introducing simultaneous and proportionate restrictions, most states chose to safeguard their citizens' rights to life, health and physical integrity over other fundamental rights. It is understandable that under the current circumstances most states took measures where saving lives prevailed over other matters.² This paper highlights that due to these measures, RTE was violated. The second hypothesis, put forward in this paper, is that fundamental rights need to be safeguarded simultaneously: any measures introducing restrictions should comply with the criteria of necessity and proportionality.

To prove the two hypotheses highlighted above, the paper shall endeavour to describe the relevant international and European legal tools that safeguard RTE and will attempt to elucidate the substantive content of RTE in an EU context. As part of this investigation the paper will also discuss how particular fundamental rights were restricted during the pandemic in exchange for the safeguarding of other fundamental rights.

The 4A method as “interrelated and essential features”³ helps us draw the boundaries of necessary and proportionate restrictions in terms of substantive content taking “equal access” into center stage.

3. The evolution of RTE in international, European and national sources of law, and the essence of the 4A test

RTE is recognized as a human right and is understood as a principle that establishes an entitlement to education.⁴ It is also fundamental for exercising other human rights as it is the cornerstone in accessing them. According to the traditional classification of the Universal Declaration of Human Rights⁵ [UDHR], RTE is part of second- generation human rights, referred to as economic, social and cultural rights.⁶ This set of rights focuses on the concept of equality and is sought to ensure that every human being has equal access to social, economic and cultural goods and services and therefore it delegates a positive responsibility onto governments to fulfil these requirements. In addition to this, the right of education is a vital tool for empowering individuals – either adults or children – to escape poverty and obtain the means to fully participate in their communities.

² *Right to Education in Emergency Situations*, Report of the Special Rapporteur (Vernor Muñoz) on the right to education, UN Doc. A/HRC/8/10, available at: <https://www.ohchr.org/en/issues/education/sreducation/pages/annualreports.aspx>, page 10.

³ General Comment No. 13: The Right to Education (Art. 13) of the Committee on Economic, Social and Cultural Rights [CESCR], available at: <https://www.refworld.org/pdfid/4538838c22.pdf>, paragraph 6.

⁴ *About educational rights*, available at: educationalrights.weebly.com, first sentence.

⁵ UN General Assembly, 217/A, Universal Declaration of Human Rights, 1948, available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>; Article 26

⁶ The division of human rights into three generations was initially proposed in the late 1970s by the Czech jurist Karel Vasak at the International Institute of Human Rights in Strasbourg.

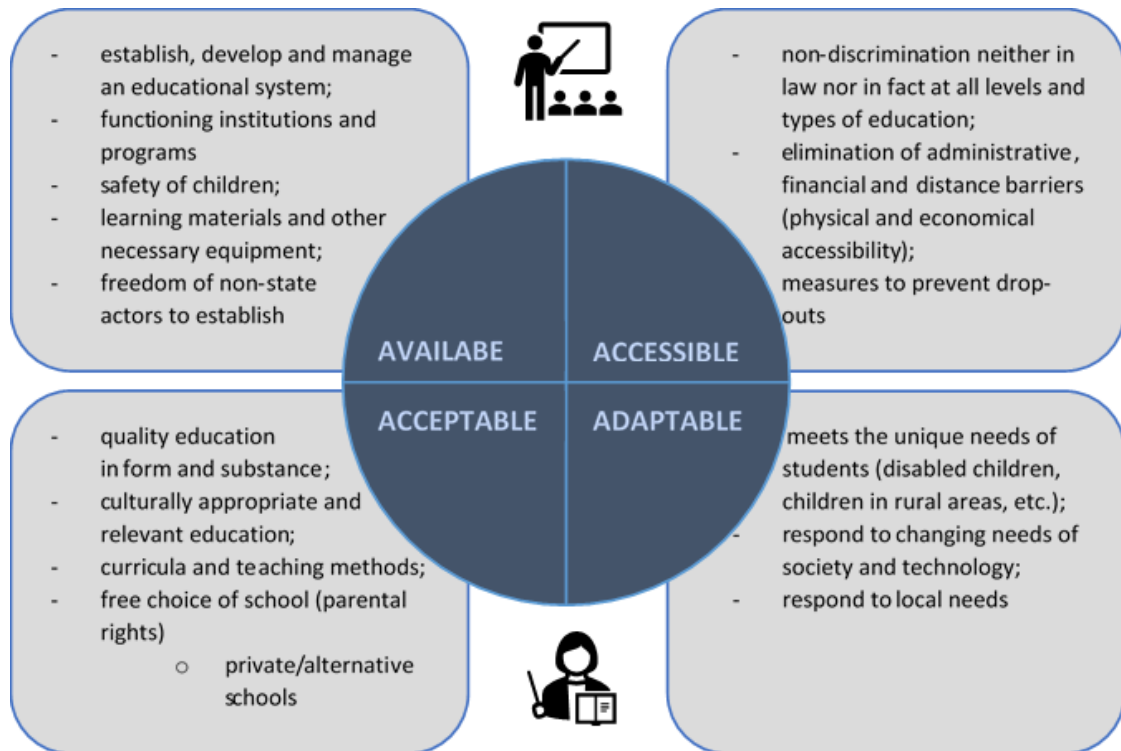
RTE materialises at various levels of legislation: international, regional and national. The first international document which contained a regulation on RTE was the UDHR adopted in 1948 by the United Nations. The declaration has been one of the most quoted sources of human rights since it was signed by the 192 member states of the United Nations. The first sentence of Article 26, which says ‘Everyone has the right to education’ has become a key element and point of reference for future conventions and treaties.

The International Covenant on Economic, Social and Cultural Rights [ICESCR], adopted by the UN in 1966, provides a thorough analysis and sets an effective objective on the RTE, recognising the right through expressing its realisation without any kind of discrimination and providing a framework for different levels of education.⁷ The ICESCR also sets out an obligation for the State Parties to elaborate an action plan which must contain adequate legislative measures in order to fulfil the purpose of the right. However, when legislative measures are not sufficient to ensure compliance with the ICESCR, state parties are expected to provide judicial remedies in addition to taking administrative, financial, educational, and social measures as well. In 1999, to portray the complexity of Governmental obligations corresponding to the right to education enshrined in the Article 13 of the ICESCR, Katarina Tomasevski the Special Rapporteur on the Right to Education structured them in the 4A scheme, “denoting the four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability.” Regarding the normative content of Article 13, however, the General Comment No. 13 on the RTE expanded these obligations to all forms and levels of education, with the remark that the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular state.

- Availability means that a sufficient number of functioning educational institutions and/or programmes (incorporating an educational system) are required to be available within the jurisdiction of the state. The proper functioning of the educational system depends on several factors taking into account the development of the state, region or town, however, there are some universal requirements such as suitable buildings, sanitation, protection and trained teaching staff. Additionally, under this feature, a state needs to make it possible for non-state actors and stakeholders to establish and maintain schools.
- Accessibility means that educational institutions and programmes have to be accessible to everyone, without any discrimination, either legal or factual, based on e.g. sex, language, religion, political or other opinion. That is, on the one hand, educational facilities need to be in close physical reach, at a convenient geographic location (physical accessibility) and, on the other hand, education has to be affordable to all without unnecessary administrative barriers (economic accessibility). The General Comment also remarked that physical accessibility can be provided either by attendance or via modern technology.⁸
- Acceptability means that the form and substance of education (including curricula and methods of teaching) must be acceptable both to students and parents. Education needs to be relevant, culturally appropriate and of good quality. Moreover, states are obliged to set minimal standards of health and safety and professional requirements for teachers.
- Adaptability ensures the flexibility of education, so that it can adapt to the changing needs of a society and better respond to the individual and shared necessities of students within diverse social and cultural settings.

⁷ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 2200A, 1966, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, Articles 13 and 14.

⁸ CESCR, General Comment No. 13 on Art. 13, paragraph 6(a).

(Figure 1)⁹

Another multilateral treaty was adopted by UNESCO in 1960 referred to as the Convention against Discrimination in Education, focusing solely on RTE.¹⁰ The key objective was to combat inequality with preventive measures and appropriate legal instruments. This treaty does not allow Member States any reservations, which means once ratified by a state, all rights and obligations need to be complied with.

The Convention on the Rights of the Child [CRC] was another milestone in the development of human rights in 1989.¹¹ It addresses children under the age of 18 and covers the full spectrum of social, economic, political, civil and cultural rights. RTE is included in Articles 28 and 29 of the Convention: the former article signifies the importance of RTE and lists the different levels of education based on availability and accessibility from primary education to higher education, while the latter article details the aim of education as well as the liberty of parents to determine the type of education they want their children to participate.

⁹ *Right to education handbook*, UNESCO, 2019, available at: https://unesdoc.unesco.org/in/documentViewer.xhtml?v=2.1.196&id=p::usmarcdef_0000366556&file=/in/rest/annotationSVC/DownloadWatermarkedAttachment/attach_import_2691991b-d5ca-4449-a0c6-0f638a350b19%3F_%3D366556eng.pdf&locale=en&multi=true&ark=/ark:/48223/pf0000366556/PDF/366556eng.pdf#1474_19_ED_handbook_right_to_ED_INT_E.indd%3A.51839%3A497, page 76.

¹⁰ UNESCO, *Convention against Discrimination in Education*, 1960, available at: http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹¹ UN General Assembly, *Convention on the Rights of the Child*, 44/25, 1989, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>, Articles 28 and 29.

At a European regional level, the ECHR and the Charter of Fundamental Rights [Charter] adopted by the EU in 2000 should also be mentioned, as well as the provisions which serve to draw the boundary between the scope of the Charter, that of national constitutions and the ECHR.¹²

Article 2 of Protocol 1 of the ECHR declares a prohibition stating that no person shall be denied the RTE; in addition, it emphasises the right of parents to choose the proper form of education with respect to their family's cultural and religious beliefs. It is particularly important that in order to obtain a full scope of RTE, Article 2 of Protocol 1 be read and interpreted together with Articles 8, 9, 10 and 14 of the ECHR, and in harmony with the above-mentioned provisions of international law serve as guidelines for the Convention. That is, a contracting state to the Protocol 1 of ECHR is under an obligation to grant a non-discriminatory and effective right of access to educational institutions.¹³

For EU Member States, the Charter deserves mention in the context of fundamental rights such as RTE. Article 14 declares everyone's RTE, adding that everyone needs to have access to vocational and continuing training. The possibility to receive free compulsory education is particularly stated.

According to Article 6 (1) of the Treaty on the EU [TEU], the Charter acquires the same legal value between EU member countries as the Treaties (referring to TEU and Treaty on the Functioning of the EU [TFEU] that established the internal market with free movement of persons).¹⁴ That is, the Charter is a binding source of EU primary law with the limit that it shall not go beyond the competences of the EU as defined in the Treaties. Therefore, the Charter shall be applied by EU institutions and bodies and, when they act to implement EU law, by the Member States.

The Charter is related to ECHR to the extent that if the fundamental rights guaranteed by the Charter correspond to those set out in the Convention, as in the case of RTE, then their meaning and scope shall be the same. This correspondence is declared by the Charter itself, based on the legal regime established by the Treaties.¹⁵ However, the EU (at will of the MSs) may provide a wider protection any time (with its above-mentioned limit of jurisdiction).

According to EU law, the limitation of recognised fundamental rights can be justified only if it is provided for by law and respect the essence of that particular right. Subject to the principle of proportionality, limitations may be made only if they necessarily and genuinely meet the objectives of general interest recognised by the EU or satisfy the need to protect the rights and freedoms of others. This provision, set by Article 52 (1) of Charter, is hereinafter referred to as the test of necessity and proportionality.

Based on the above, this test should be administered by the MSs when they implement EU law, also when applying general principles of EU law or EU Directives transposed into national law.¹⁶ However, in legal cases with purely Member State elements, the Charta does not apply.

¹² Council of Europe, European Convention on Human Rights, 1953, available at: https://www.echr.coe.int/documents/convention_eng.pdf

¹³ Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, available at: https://www.echr.coe.int/documents/guide_art_2_protocol_1_eng.pdf, paragraph 9 and 10.

¹⁴ The legal basis of the free movement of persons: Article 3(2) of the TEU; Article 21 of the TFEU; Titles IV and V of the TFEU; Article 45 of the Charter.

¹⁵ Article 6 (2) of TEU.

¹⁶ Judgement of 18 December 1997, Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio, C-309/96, ECLI:EU:C:1997:631, case-law from the EU Court of Justice is available at <https://eur-lex.europa.eu/collection/eu-law/eu-case-law.html>

4. Partial powers granted in RTE

After giving a thorough review of the materialization of RTE in various sources of law and introducing the 4A method, in this chapter we are focusing on the individual segments which constitute RTE, while trying to give a comprehensive analysis on the complications and challenges the epidemiological crisis generated. The items which require action on the side of the state in respect of RTE include the right to learning, compulsory schooling, neutrality of education, establishing and maintaining educational institutions. However, what this paper also needs to address is the non-interventional side of RTE, which includes the freedom of education that can be captured in three basic freedoms in terms of the subject concerned: firstly, the freedom of learning (referring to children's rights), secondly, the freedom of teaching (teachers' rights), and thirdly, the freedom of establishing a school as well as academic freedom (referring to collective or institutional rights).

4.1. Right to learning

Right to learning is a status positivus component, derives directly from the very essence of RTE. That is to say to put it plainly, Member States are not allowed to arbitrarily impede someone's access to available educational institutions or other possibilities to study. It needs to be recalled, that despite the structure of Article 2 of Protocol No. 1 to ECHR, which in its negative wording is different from other international (regional) agreements,¹⁷ it implies the exact same level of protection.¹⁸ Consequently, under the international and EU law regime the citizens' right to learning is based on the requirement on the government for establishing an institutional and legal background that ensures equal access to education without discrimination.

Equal access to education is a central goal of RTE from the perspective of both positive and negative status. Discrimination may occur on account of several circumstances. Some of the factors are related to the child's social and/or economic circumstances (internal factors), whereas some are linked to the opportunities (teaching, infrastructural, etc.) an educational institution can afford and provide (external factors). Consequently, equal access to education will depend on the child's economic situation, housing and living conditions, family background, ethnicity, whether it is an immigrant and last but not least, its mental and intellectual abilities. External factors also include key components such as the teacher's skills, the quality of education, and the infrastructural facilities provided by the school.

Under RTE provided for by the EU, member states have an obligation to safeguard citizens' right to equal access to learning. Under the so-called 4A requirements this implies making education available and accessible to anyone who wishes to benefit from the right.¹⁹ Thus, it should be stressed that the holders of the right are not just children. However, the states are not obliged to guarantee the participation of everyone at all levels of education, whether it is public or private, formal or non-formal.

In fact, the right to learning is required to apply differently at each level of institutional education, correlated with the possible restrictions (i. e. the margin of appreciation) by Member States. This indicates that the right to learning (and all the other components of RTE) are not absolute, they may

¹⁷ Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, paragraph 3.

¹⁸ In the light of the practice of the ECtHR, this can be interpreted as states must ensure the pluralism of public education. However, the negative wording suggests a degree of caution regarding recognition of RTE as an individual right, as it would mean a disproportionate burden on the MSs.

¹⁹ Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, paragraph 12.

be limited and restricted. Still, the imposed restrictions never can curtail the RTE (even if it is affected by the current changes) to such an extent to impair its very essence and deprive it of its effectiveness.²⁰

Discrimination always originates from some kind of restriction or distinction by the state. Restrictions can also be external (objective limitations) or internal (subjective limitations), depending on if the limitation derives from either external circumstances (e.g. *numerus clausus* in education or tuition fees) or the ability of the individual (e.g. admission criteria, entrance examinations), however, there are obvious overlaps between them.

Most importantly, all limitations must be foreseeable²¹ for the ones concerned and pursue a legitimate aim (e. g. improving the standard of university studies). Although, since there is not a normative list of “legitimate aims” under the international conventions, the state enjoys a certain margin of appreciation in such matters.²²

According to international sources and EU law, primary (basic/fundamental) education shall be compulsory and free for all. Consequently, regarding elementary schooling, neither objective, nor subjective restrictions are allowed on RTE; also given the fact that school attendance is made compulsory by the states themselves. That is to say, a state is obliged to maintain as many places in elementary schools as many children are of compulsory school age in a community (see compulsory education below) to comply with the requirements of 4A.

Requirements (the state’s obligations) for secondary and tertiary education may be significantly lower. At a higher level of education, the state fulfills its international obligation only by providing objective conditions and making participation available and accessible to all, depending on one’s ability or capacity. Nevertheless, the selection criteria of adequate capability are required to be defined in a differentiated and normative way by the government or the institution itself. Thus, participation in higher education can be legitimately limited, but any difference in treatment must be foreseeable and proportionate (in the case of implementing EU law, subject to the rules of the Charter as well) to the valid aim pursued to be justified, and, obviously, it cannot constitute a discrimination in itself (*X. v. the United Kingdom, X. and Others v. Austria*).²³

Measures adopted to counteract the effects of Covid-19 have, however, undermined the principle of non-discrimination at all levels of education. Lockdowns were imposed to protect the individual’s rights but restricted their access to classroom education. Due to remote learning, availability and accessibility were considerably harmed, mainly because access to internet and hardware is limited and is distributed highly unequally between high and low income countries and between rural and urban areas.²⁴ This problem is inextricably linked to the principles of free movement of people and

²⁰ *ibid*, paragraph 5.

²¹ The unforeseeability of a new restriction can be avoided by introducing appropriate transitional corrective measures. In this context, it is worth mentioning, by way of example, that the ECtHR ruled, among others, fixing a maximum duration for university studies by the state or excluding one’s possibility to repeat the first year of university studies on account of the lack of sufficient level due to failure and absence, is a proportionate and legitimate restriction. In contrast, the annulment of a positive result in the entrance examination in view of one’s poor previous performance violated the proportionality.

²² Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights, paragraphs 6 and 23.

²³ ECtHR, *X. v. the United Kingdom*, Appl. no. 8416/78, Judgement of 10 December 1979; ECtHR, *X. and Others v. Austria*, Appl. No. 8278/78, Judgement of 24 April 2007. All ECtHR decisions are available at: <http://hudoc.echr.coe.int/>

²⁴ *COVID-19: Towards a Digital Fragmentation of the Right to Education?* Kristin Bergtora Sandvik, Ingunn Ikdahl, Available at: <https://www.yjil.yale.edu/covid-19-towards-a-digital-fragmentation-of-the-right-to-education/>

the issue of migration since, besides minority and disabled children, migrant children and minors who study in a country other than their country of residence, are the most affected in the current situation.

Approximately nearly one-third of students around the world have fundamental problems accessing remote learning for various reasons.²⁵ Problems could occur even in well-to-do families as children may not have access to an appropriate device (e.g. a personal computer or laptop), or may not have a separate and quiet place (an own room) to study.

Nevertheless, this digital divide applies not only to children but adult learners and teachers as well, in addition, they are generally less digitally savvy. Many of them are struggling with online communication and collaboration tools and related applications or simply lack adequate computer skills, while others, typically in rural or less well-off areas, do not have a reliable internet connection, or any connection at all. Teachers rarely have a business laptop only for work, however, it is questionable whether using their own devices can be permitted or made obligatory by the school or the state itself.

In addition, privacy issues also arise with digital education due to virtual class attendance, taking exams and handing in homework online. At a time when even extracurricular activities take place online, monitoring and controlling the children's use of digital devices prove extremely difficult.

It should be also taken into account that various types of information is (yet) simply not available or much more difficult, maybe impossible to obtain online (e.g. the basics of literacy, numeracy or, to offer a striking example, how to operate heavy equipment).

As we can see, the abrupt but inadequate shift to online teaching obviously poses completely different challenges in a state's quest to combat discrimination, given rise to the question of what the states' and schools' legal and moral responsibilities are (if any) in respect of online teaching, however, there are currently no relevant policies or guidelines in place. This paper argues that states need to fulfil their obligation, even via online means, to create the best opportunities for intellectual development of their citizens (i. e. ensure RTE under international law). Therefore the state is required, at least, to find (technical and financial) sources in order to avoid the deepening of pre-existing inequalities in the field of education. That is, choosing or developing a proper online learning platform (i.e. the so-called platformization) to make education accessible, but also providing devices and free connectivity to the most exposed and incorporating digital skills and learning into education systems to make education available. In the event of success, education will also meet the requirements of adaptability and acceptability. This issue needs to be tackled with international cooperation: unless RTE enjoys the support of states in a uniform manner, the gap between regions may further widen.

4.2. Compulsory schooling

Another status positivus obligation of the state - compulsory schooling - is responsible for maintaining limitless and non-discriminatory legal and institutional systems that are the most fundamental and enforceable in case of elementary schooling.

Although the idea of lifelong learning is supported by the RTE as it is stated above, compulsory education is provided on a "discrimination" by age and pertaining only to children. In this connection it is necessary to highlight that the rights of children are third generation human rights providing special cover for children as a group entitled to subsidiary protection. Consequently, in the event a protected right (which in this sense may be the child's RTE) is invoked, other actors are required to

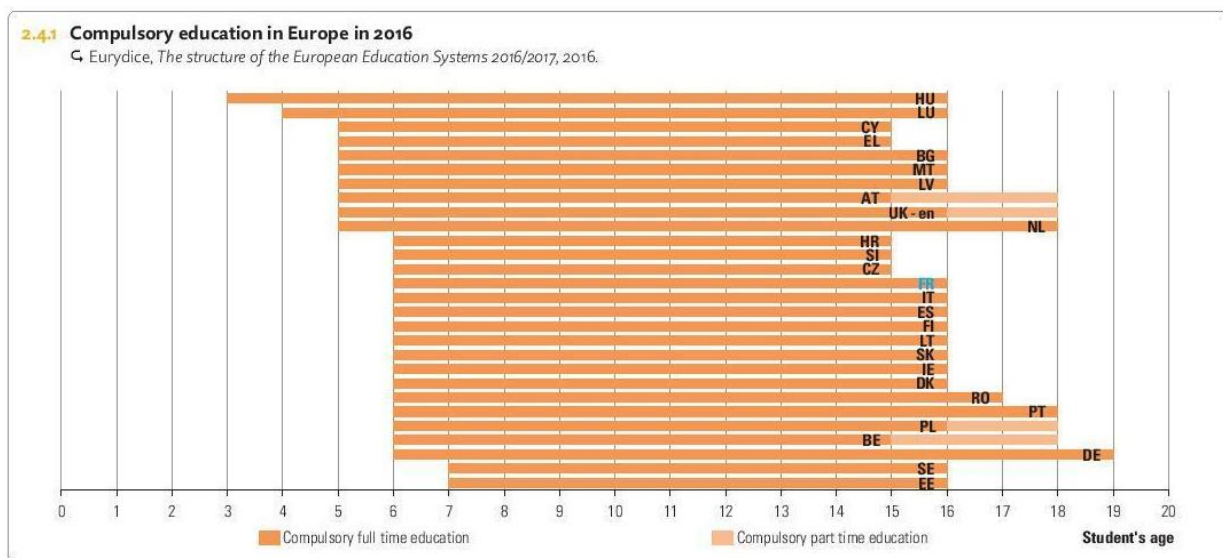
²⁵ *One year into COVID-19 education disruption: Where do we stand?*, UNESCO Report, available at: <https://reliefweb.int/report/world/one-year-covid-19-education-disruption-where-do-we-stand>

take into consideration the best interest of the child. In this context, that is, neither parents, nor guardians, nor states are entitled to treat optional whether a child should attend primary school.²⁶

The European Court of Human Rights (ECtHR, Court) even held that Italy had violated an autistic girl's rights to non-discrimination and education under ECHR when it failed to pay for a support teacher required by domestic law as the girl had been unable to continue to attend primary school in conditions equivalent to those enjoyed by non-disabled pupils (*G.L. v. Italy*).²⁷

In essence, the judgment stated that, although a Member State still has discretion in regard to enacting the RTE, in the event of its prior commitment, the State certainly must do its utmost, to ensure participation in (primary) education under the same conditions to all subjects of its commitment, even if it requires a special action of the state. Member States can no longer invoke lack of financial resources in relation to their own commitments, especially when it comes to primary education. All this seems to point to the likelihood that the human right and binding nature of RTE, at least in respect of elementary schooling, is enhancing.

The abovementioned international conventions consistently and explicitly place the requirement of compulsory schooling on Member States; however, it is up to a state to decide the age of entry and the length of the compulsion. Figure 2 below shows that regulation in this area differs even within EU states.

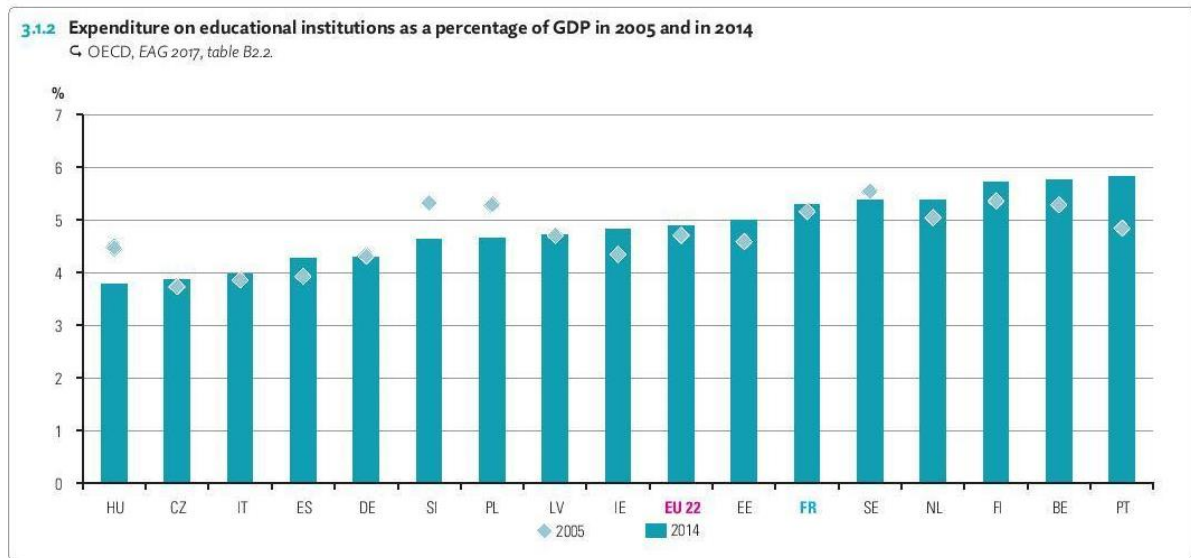


(Figure 2)

It is vital to acknowledge that this is a great commitment undertaken by the Member States, which involves heavy expenditure (see Figure 3 below) and in certain cases even struggles with other actors (e. g. parents). Consequently, it is necessary to give Member States a degree of discretion (margin of appreciation) in choosing their own methods to achieve the goals set by the community in the international conventions.

²⁶ CESCR, General Comment No. 11 on Article 14, E/C.12/1999/4, 10 May 1999, available at: [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/c\)GeneralCommentNo11Plansofacti onforprimaryeducation\(article14\)\(1999\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/c)GeneralCommentNo11Plansofacti onforprimaryeducation(article14)(1999).aspx), paragraph 6.

²⁷ ECtHR, *G.L. v. Italy*, Appl. no. 59751/15, Judgement of 10 September 2020. All ECtHR decisions are available at: <http://hudoc.echr.coe.int/>



(Figure 3)

The most fundamental goal of compulsory education (laid down by both the UDHR, the ICESCR and the CRC) is the following: “*education shall be directed to the full development of the human personality*”.²⁸ Therefore, the provided education both in public and private schools is required to be adequate in quality and quantity to the child (i. e. education is acceptable under the 4A), and promote the realization of the child's other rights, as well as the development and enforceability of his personal features and ambition (i. e. education is adaptable under the 4A).²⁹ According to the World Declaration on Education for All: “*primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community*”³⁰ (i. e. education is adaptable under the 4A).

In view of the above, compulsory schooling is much more than securing children’s right to learning. It is not only about the acquisition of knowledge but integration and socialization as well as a general interest of the child to learn communication, tolerance, assertiveness and the society to avoid parallel groups of minorities based on separate philosophical convictions. This is what we mean practically when we say that RTE is an empowerment right.³¹

The question of whether the compulsion of elementary schooling should apply to learning or attendance arises, and there appears to be no consensus among the Member States about that.³² The ECtHR assessed the suitability of homeschooling v. compulsory attendance at primary school in two cases against Germany, where homeschooling has been illegal since 1919. The Court stated that home education cannot meet all the abovementioned demands, even if it allows children to acquire the same standard of knowledge. Since children clearly benefit from being exposed to influences other than the ones at their parental home, the Court recognized the possibility of a MS to completely ban home-

²⁸ UDHR, Article 26, Section 2; ICESCR Article 13, Section 1.; CRC Section 1 a)-b) of Article 29.; CESCR, General Comment No. 13, paragraph 4.

²⁹ CESCR, General Comment No. 13, paragraphs 5 and 6

³⁰ World Conference on Education for All Meeting Basic Learning Needs, World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs [World Declaration on Education for All], ED-90/CONF.205 Arts. 1–7 (Mar. 9, 1990), available at: https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNESCO_World_Declaration_For_All_1990_En.pdf, page 6

³¹ *ibid*, paragraph 1

³² Guide Article 2 of Protocol No. 1 to the European Convention on Human Rights; paragraph 64.

schooling and did not find violation of ECHR by Germany. The Court even accepted (and thus sanctified) child removal as a sanction of violating the rules of compulsory school attendance by the parents. (*Wunderlich v. Germany; Konrad v. Germany*)³³

The World Declaration on Education for All confirms the approach of compulsory attendance by stating that “*Learning does not take place in isolation.*”³⁴ However, in March 2021, still two-thirds³⁵ of the student population were affected by full or partial school closures due to Covid-19 and among them at least 10 million children are never returning to school.³⁶

It is fair to say that due to the pandemic, compulsory education raises even more problems than non-discrimination (i.e. the right to learning) discussed above, since ensuring the compulsory nature of RTE necessarily conflicts with the obligation of the state to protect right to life, physical integrity and health. The fundamental issue is whether the state can force teachers and students to be (or possibly not to be) present at schools despite the health risk and, perhaps, against their will. The question in both cases is what type of measures need to be taken by a state to comply with its obligation under RTE, if it allows schools to remain open, or decides to shift to remote learning. Finally, if digital learning had already been introduced, at what point and on the basis of what data the state can rule to return to contact education.

While we consider it obvious that RTE can be limited in favour of the right to life, health and physical integrity, this paper proposes that a common and proportional limitation might be an alternative in the long term. However, the terms of this limitation should be argued at national and international levels in order to the best enforcement of the conflicting fundamental rights.

Besides that, the worldwide epidemiological situation has brought about the collision of two major liabilities of the state: to protect right to life and RTE, the need for the inevitable restriction of freedom of movement. Consider a scenario where a state or a school forces contact education on all of its students (including cross-border commuters), but the borders are closed, or the host state or region (or city) is under lockdown. This situation can easily lead to the truancy of students who attend primary school in their neighboring country or region that in the worst-case scenario might have to repeat the school years and may even, eventually, drop out.

Whether screening cross-border commuters (both students and their guardians) to allow them to attend to school is a discriminatory or a justified restriction is another matter. As well as whether they can be expected or obliged to prove their immunity at their own costs or any compensation can be claimed based on the principle “education should be free of charge” (see the cost of education).

Nevertheless, this predicament shall be solved with the spread of vaccines and the creation of a certificate verified across the EU proving being vaccinated or received a negative test. Bilateral treaties regarding the mutual acceptance of national “immunity cards” already came into force.

4.3. Free choice of education

Free choice of education is the complementary - status negativus - aspect of the abovementioned right to learning and compulsory schooling. The freedom of choice in selecting a school plays a critical role in every child and parent’s life and will have a significant impact on the child’s later career. Ideally, the parents can decide which school they want their child to attend based on various factors

³³ ECtHR, *Wunderlich v. Germany*, Appl. no. 18925/15, Judgement of 10 January 2019. ECtHR, *Konrad v. Germany* Appl. no.35504/03 Judgement of 11 September 2006. All ECtHR decisions are available at: <http://hudoc.echr.coe.int/>

³⁴ World Declaration on Education for All, page 6.

³⁵ One year into COVID-19 education disruption: Where do we stand? UNESCO Report

³⁶ COVID-19: Towards a Digital Fragmentation of the Right to Education?

such as location, the child's abilities, whether the school is public, public-dependent or private school, the teaching methodology applied, and the school's religious orientation.

The free choice of education is in accord with the parents' right to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions, as they should have the option to enrol their child to schools maintained by a religious body/organisation. Freedom of choice of school is not an unlimited fundamental right. On the one hand, it is limited by the child's right to opinion. According to Article 12 of The United Nations Convention on the Rights of the Child, "*the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*".

With regard to the choice of education, the child who is capable of forming his or her own views needs to be heard before choosing a school for them. Although the treaty stipulates the obligation of hearing the child, it does not prescribe the obligation to make the final decision in accord with the child's opinion, as the parents have the right to decide against their child's wishes. What parents, as well as the authorities' decision needs to be based on is ultimately the child's best interest, a principle which does not only entitle the parents (to deviate from the child's wishes) but which also poses limitations in exercising their rights.

States do have the right to prescribe mandatory education, but it is counteracted by the principle of free choice of school. Thus the individuals need to be presented with real choices regarding how they would like to fulfil their state-prescribed educational obligations, from which's limitation the states need to refrain.

Naturally, other rights and freedoms may also limit the freedom of school choice. In the case *Blyudik v. Russia*, the ECHR held that the authority's decision, which placed the applicant's daughter in a closed educational facility 2,500 km from her home was unlawful in the absence of grounds under domestic law for such placement and violated the applicant's right to respect for their family life enshrined in the Article 8 of the Convention.³⁷

Covid has made a less serious or different impact on status negativus than it did on status positivus. To reiterate, the former one means that one can exercise its right or freedom without having to wait for permission from the state. In this respect, Covid measures pose very mild restrictions for relationships both within and between member states. RTE may only be restricted by such a measure when it deprives either the child or the parent of exercising their freedom of choice. Closing the country borders and preventing the child from commuting to school (if the child attends school in a neighbouring country) may rid the child of its right to learning, however, there has been no data to indicate that freedom of choice has been violated as a result of any Covid measure.

4.4. Freedom of teaching

Freedom of teaching can be aligned with the 'status positivus' element of compulsory schooling, which represents the main core obligations on the side of the state. On the contrary, freedom of teaching as a status negativus item, gives voice to certain privileges enjoyed by various participants. That is, freedom of education is not only a right enjoyed by parents and their children, but also ensures a series of entitlements for the school management and the individual teachers as well. An entity (whether public, private or religious) operating the school can set its own policies, including the study

³⁷ ECtHR, *Blyudik v. Russia*, Appl. no. 46401/08, Judgement of 25 September 2019, available at: <https://hudoc.echr.coe.int/>

material and the teaching methods, as long as they are in accord with the standards set by the state. Individual teachers also have the right to choose what materials they would like to use in their class. Ideally, teachers are also free to consult with the students and decide together which topics to cover, in order to facilitate motivation, ensure a better learning experience and, ultimately, achieve better results. This freedom however is not without limitations as the state can set minimum standards, and also maintains the right to prescribe the curriculum, and within it, prescribe mandatory and optional topics, in order to set a nation-wide minimum standard that applies to all schools, regardless of the school being public or not.

COVID impacts the freedom of option in terms of school subjects inasmuch as online education relies on learning materials highly different from the materials previously used in classroom teaching. The question remains whether teachers enjoy a freedom in selecting learning material for online teaching; such freedom is determined by national legislation, the national curriculum, or the given school's internal rules and regulations. It is argued in this paper that restrictions related to the freedom of choice cannot be so severe that they violate the principle of availability and the violation of availability entails disproportional restrictions. In this paper we argue that it is the state's responsibility to determine the requirements which will guarantee the prevention of disproportional restriction.

The other essential issue to be addressed is data protection. Freedom of teaching and mandatory digital education has several data protection aspects to consider such as materials and video proving students' completion of their assignments, or the uploading, sharing and storing of different documents. On the basis of GDPR, most school activities (i.e. displaying pupils' and students' names and other identification data, the content of written and oral tests, pupils' and students' involvement in class, their exam results, photos, videos and, in fact, any sort of operation carried out on these data should be regarded as data processing. As for teachers, their activities during the online class including its voice and image should also be regarded as personal data.

If a pupil or student needs to provide a video recording as evidence of the completion of an assignment, it shall be required so that no other person is featured in the video, and the video should reveal as little as possible of the submitter's private space and home environment. Another key principle is that streamed classes and presentations should not be recorded and stored (as they are not recorded or stored in traditional, classroom teaching settings either) considering that they may be misused to allow different abusive practises either against the teacher, or against the pupil/student.

Article 13 of the GDPR requires that information or communication must be provided relating to the processing of personal data, and those affected should be entitled to exercising their rights established under Article 15-22. In terms of mandatory education, there are also rules to adhere to: if teachers are allowed to use their own device, they must not use any software which violates any law (i.e. copyright); they must use antivirus or malware detectors, and should update their devices on a regular basis. It is the education institutions' responsibility to guarantee that such rules are observed by all their teaching staff and the relevant regulatory measures need to be put in place.

When it comes to tests and examinations, the principle of limited storage should also prevail. As part of this, teachers may only be allowed to keep assessment data as stipulated by the rules of the given institution, relevant to midterm and endterm tests, thesis, etc.

Data protection can be interpreted as a factor in children's right to privacy or as a liability to be taken on by the state or the institution. This paper attempts to highlight that neither the teacher's nor the school's freedom of teaching may reach the extent where the child's right to privacy is violated in terms of data protection. We argue that from this perspective the 4A criteria is not sufficient here, the main point is that RTE as a fundamental right should not disproportionately restrict the child's right to privacy.

4.5 The cost of education

The most unequivocal requirement deriving from the international sources in relation to compulsory education is to ensure its availability free of charge, i. e., without any fees imposed on children, parents, or guardians by states (centrally or locally) or schools.

The cost of education involves not only direct fees for school attendance, but also indirect charges, e. g. indispensable textbooks, uniforms, "voluntary" financial support, or levies demanded by a school.³⁸ These costs may constitute a violation as well as any direct charge or may be permissible on a case-by-case decision.

According to the ECtHR, a state's margin of appreciation regarding the cost of education increases with the level of education. However, as a limitation by a state, it has to be inversely proportional to all the individual and common benefits from the targeted education, e.g. the importance of that education for the society (*Ponomaryovi v. Bulgaria*).³⁹

Therefore tuition fees do not violate equal opportunities and equal treatment in higher education, even if the ability to pay them depends on the family's financial and social situation. To fully realize the citizens' RTE and right to culture, states might provide a certain form or amount of financial support to students in need.⁴⁰ However, it is perfectly within the state's margin of appreciation.

Maintaining educational infrastructure is therefore a major element of RTE. The major question, however, is what a state or an institution should be obliged to do to simultaneously comply with the principle of safeguarding one's right to health? Protecting human lives during the pandemic increases expenditure. If the authorities choose to switch to online teaching, they need to tackle the issue of digital infrastructure. Whose obligation is it to provide technical devices and internet access to pupils/students and teachers? As it was highlighted above, non-discrimination is an issue here, considering that RTE may be violated if the child has no access to an appropriate device. In the longer term, modern technology could play an important role in increasing the availability and accessibility of education at a reasonable price. In this regard, the 'World Declaration on Education for All' highlights the following:

"All available instruments and channels of information, communications, and social action (in addition to the traditional means, libraries, television, radio and other media) could be used to help inform and educate people" since "[...] new technologies (educational radio and television, computers, and various audio-visual instructional devices) become less expensive and more adaptable to a range of environments."

Given that, the strategy of the EU and the Member States should be focusing on finding the best and most secure way of platformization, while increasing the digital skills and number of devices that

³⁸ CESCR, General Comment No. 11 paragraphs 6 and 7.

³⁹ ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgement of 21 June 2011, available at: <https://hudoc.echr.coe.int/>

⁴⁰ The support can be either an actual amount of funding, whether in cash or in kind, or a partial or complete non-payment, remission or repayment. This includes but is not limited to access to dormitory or other housing attendance, student grants, student loans or scholarships.

students have worldwide. Easing the prevailing of online learning with common methods would make education in general more adaptable. However, to meet all the 4A requirements, this paper argues that elementary education shall not be realized entirely online.

4.6. Neutrality of public education

In contrast to the obligation of providing material support for students of elementary school age, the neutrality of public education portrays a ‘laissez aller’ policy of the state towards educational institutions. Church and State, separation and secularism has always been a hot topic over the course of history. As of the modern era, the subject generated a conflict of interests within the internal affairs and regulation of states: on the one hand, they have to reach an extent of compliance with principles of various international and regional human right conventions and, on the other hand, they also have to display their commitment to national values, interests and traditions prevalent in this field.

The notion of the neutrality of public education originates from the concept of secularism, and the idea of religiously neutral states. On this ground, public schools cannot be identified with any religion or belief. The main task of public schools is to transmit knowledge objectively, critically bearing in mind and respecting the belief of children and parents, while providing them the choice between various ideological, religious and moral views. Based on the above, the main obligation of the state is to establish public schools and grant secular public education.

In recent years, the ongoing debate concerning the place and status of religion in the public sphere has infiltrated the European Court of Human Rights as well, which resulted in decisions affecting contrastive specifics of the right to education.

In *Lautsi and Others v. Italy* the applicant found herself up against the strong and long-standing tradition of Christianity in Italy, when she questioned the presence of crucifixes in her classrooms and, requesting them to be removed. When she was refused by the Italian court, she turned to the ECtHR. The first decision was delivered by the Chamber on the 3rd of November 2009, which stated that Article 2 of Protocol No. 1 (right to education), Article 9 (freedom of thought, conscience, and religion) and Article 14 (prohibition of discrimination) were infringed and thus the crucifixes had to go.⁴¹ They added that „*the crucifix may be easily interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion*”. However, this controversial decision stirred up many Member States, and the Government of Italy turned to the Grand Chamber. In its judgement of 18th March 2011 the previous ruling was reversed and the Court found that „*there is no evidence [...] that the display of a religious symbol on classroom walls might have an influence on pupils*”, and thus the above cited laws were not violated.

A similar case, *Dahlab v. Switzerland*, dealt with the subject of religious clothing.⁴² It involved a primary school teacher who turned to the Court after she was prohibited from wearing a headscarf while teaching. Though the Court declared her application inadmissible, they made some core assessments related to the topic, stating that the hijab was a powerful symbol, and, accordingly, the teacher as a representative of the State was in a quasi-dominant position, delivering a subconscious message to pupils who – between the age of four and eight – were easily influenced. This way, the measures taken by the government intended to safeguard the principle of neutrality of primary education.

⁴¹ ECtHR, *Lautsi and Others v. Italy* Appl. no. 30814/06, Judgement of 3 November 2009, available at <https://hudoc.echr.coe.int/>

⁴² ECtHR, *Dahlab v. Switzerland*, Appl. no. 42393/98, Judgement of 15 February 2001, available at <https://hudoc.echr.coe.int/>

Another, similarly illustrative case, *Folgerø and Others v. Norway*, focused on parents' philosophical and religious convictions.⁴³ The applicants claimed that there had been a violation of Article 2 of Protocol No. 1 second sentence through the refusal to grant these parents full exemption from the compulsory teaching of the „religion” subject. The Court ruled in their favour stating that „*the system of partial exemption was capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life and that the potential for conflict was likely to deter them from making such requests.*”

The state has the obligation to develop a curriculum which is devoid of any ideology. In the case of *Mansur Yalçın v. Turkey* the applicants argued that the Alevi faith was not adequately represented in the curriculum. According to the ECHR, “*where a Contracting State includes religious instruction in the curriculum for study, it is then necessary, in so far as possible, to avoid a situation where pupils face a conflict between the religious instruction given by the school and the religious or philosophical convictions of their parents.*” Thus, the Court held unanimously that there has been a violation of Article 2 of Protocol No. 1.

Neutrality in education is one of the most sensitive issues in RTE, it has been mentioned in this paper in an attempt to depict a full picture with relevance to COVID. Theoretically, even the mandatory use of masks can be questioned if a student is obliged to wear a burka in times of classroom teaching.

4.7. Establishing and maintaining public educational institutions

The principle of “right to education”, in the strict sense of the word, embodies the so called status positivus⁴⁴, reflecting the proactive participation on the side of the state. On the one hand, the state has to uphold the appropriate institutional system and, on the other hand, adequate financial support has to be introduced in order to practise the right in its entirety.⁴⁵

It follows from the above that the state is obliged to ensure the legal and functional conditions of establishing and maintaining educational institutions without any kind of discrimination. This can be best interpreted on the level of compulsory and free primary education. Most national constitutions and international treaties on human rights encompass this requirement with the core concept that states are responsible for operating free primary schools.⁴⁶ The legal aspects and options of establishing these educational institutions involves national legislation. For example in Hungary, not only state but also regional and ethnic authorities as well as ecclesiastic institutions are entitled to establish public educational institutions.⁴⁷

The authorities also need to be respectful towards local minorities, and eliminating their free choice of school can also result in violation of the right to education. In the case of *Catan and Others v. Moldova and Russia*,⁴⁸ the ECtHR held that the Russian Federation violated the applicants' right to education by closing their previous local schools that used the Latin alphabet and forced parents to choose between schools using Cyrillic script or schools that were located farther away, had worse equipment and on the way to which their children were harassed.

⁴³ ECtHR, *Folgerø and Others v. Norway*, Appl. no. 15472/02, Judgement of 29 June 2007, available at <https://hudoc.echr.coe.int/>

⁴⁴ According to the *Statuslehre* of Georg Jellinek, human rights can be divided into four categories based on the relation between the individual and the state: status positivus, status negativus, status activus, status passivus. In this case, status positivus represents the rights which need governmental support to be fulfilled and enjoyed.

⁴⁵ This part is corresponding to “Availability” of the 4A's framework we mentioned before.

⁴⁶ CRC, Paragraph 1(a) of Article 28; ICESCR Paragraph 2(a) of Article 13

⁴⁷ Act 190 of 2011 on Public Education, Section 3, Para. 2.

⁴⁸ ECtHR, *Catan and Others v. Moldova and Russia*, Appl. no. 43370/04, 8252/05 and 18454/06, Judgement of 19 October 2012, available at <https://hudoc.echr.coe.int/>

Once such institutions are established, their maintenance also needs to be guaranteed. There are several factors which need to be taken into consideration in order to ensure the functionality of educational bodies. According to the General Comment No. 13, schools „*require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.*”⁴⁹ These requirements can be achieved at a national level, with adequate subsidies from the state calling forth resources and tools ranging from securing compulsory and quality education, through training teachers and ensuring their professional development, up to providing infrastructural and transportation facilities.

The above analyzed obligation of the state regarding maintaining educational institutions was expanded, new aspects have arisen, which can be an element for discussion. State provided classroom education requires appropriate conditions of hygiene in order to ensure safe schooling, without endangering human health. Just think about sanitizing classrooms, providing masks for children and teachers alike. The question is, in order to enforce Availability of the „4A” elements, can the above mentioned obligation be interpreted as a strict kind of „status positivus”, hence should the state meet the amended hygiene requirements? As a substitute, would it be sufficient for children to wear their own masks and only undergo a body temperature check at entry by the school management? All this does not only affect children but proposes another side of obligation regarding public schools: securing safe, non-hazardous work-environment for teachers. This provision prevails increasingly during the epidemiological situation, for these reasons, the aforementioned obligation of the state should be interpreted broadly, and thus, should be enforced.

4.8. Freedom of establishing and operating a school

The freedom of establishing a school is closely connected to the freedom of teaching, and is a necessary prerequisite to free choice of school. As we mentioned before, the state is obliged to provide education, however they also need to ensure the plurality of education. The state needs to make it possible for certain entities – such as churches or corporations – to set up schools, so that the individuals can have a choice between public and non-public schools, whichever suits them the best. This freedom of school-founding can be limited, as states do have the right to prescribe which entities, on which conditions, can establish and operate schools, and which basic requirements they need to meet.

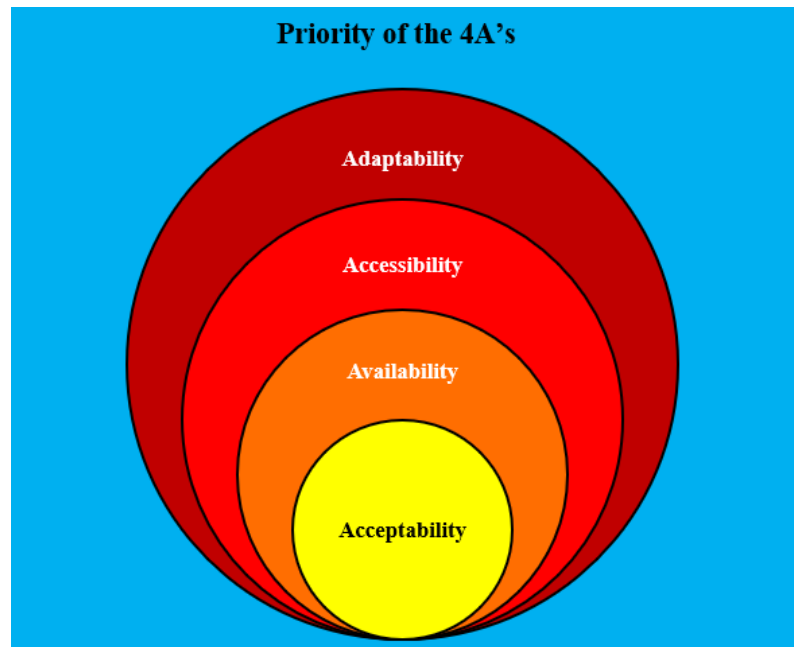
One of the Covid-issues is, whether the institution can decide which form to opt for: classroom or online teaching. This paper argues that the right to health cannot be violated at the expense of online education except when it serves to safeguard the child’s best interest. In conclusion, neither the state nor the institution may allow a scenario where children and/or parents are deprived of their freedom of choice.

⁴⁹ CESCR General Comment No. 13, paragraph 6(a).

5. Correlation between Covid and the 4A principle

Before drawing the final conclusion, this paper will attempt to shed some light on some correlations between the 4A requirements and some of the relevant legislations adopted by international organisations, the EU, and by member states, individually.

5.1. Internal coherence of 4A

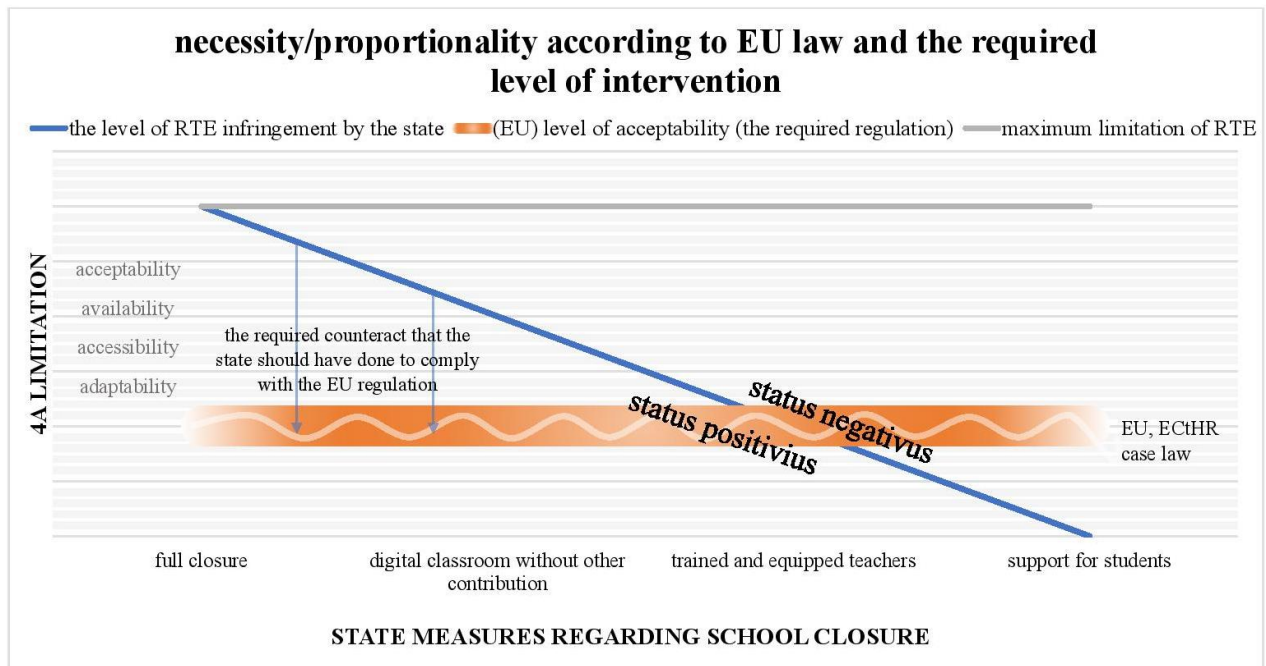


(Figure 4)

As it has been demonstrated above, some of the partial components making up RTE may be described by applying the 4A criteria. These criteria are interdependent, as Figure 4 shows above. The introduction of a lockdown, for instance, prevents children from having access to a school providing classroom education: therefore the principle of Accessibility is violated. The principle of Adaptability is also infringed, as the government fails to fulfil its obligation to provide these children with adaptable education. In case of such a scenario, the two upper circles in Figure 4 are violated. Further on, if the state rules to suspend classroom education and neither the state nor the school introduces online education, then the internal core, the principle of Acceptability is infringed, and via this violation, so are the other three principles. Accordingly, the internal coherence between the elements can be best described via the above shell structure.

5.2. Correlation between the 4A test, the necessity and proportionality test and legislation

4A is closely linked to legislation, and this correlation can be shown by applying the necessity and proportionality test. This paper argues that the more member states do to enhance online education, the less the child's RTE will be infringed (see Figure 5 below).



(Figure 5)

Figure 5 shows that if the measures undertaken by the state (as indicated on the horizontal axis) do not sufficiently ensure the 4A requirements (as we can see on the vertical axis), RTE will be violated. Therefore, the decreasing straight line, indicated by blue, shows the level of RTE infringement committed by the state. In other words, the less effort the state makes in the direction of platformization, the larger the number of extra measures needed to be adopted to ensure the child's RTE under the EU Charter.

This paper also argues that the EU should introduce a regulation on RTE that determines the minimum requirements and the elements or the method of evaluation of a case by case decision. The lane marked in orange shows the possible scope of acceptability according to the Charter's provisions of necessity and proportionality, taken into consideration the prior case law of ECtHR and CJEU. Measures falling in the range above the straight line are either unnecessary or disproportionate. The lane demonstrates the state's elbow room to act (margin of appreciation), while the arrows show the required counter-measures to meet the minimum level that we propose to the EU to introduce in the future.

This confined area above the blue line can be described as the area of status negativus, where other fundamental rights and the freedoms of learning and teaching should prevail, while the area below the blue line denotes status positivus: the space where the state has an obligation to act to avoid unaccepted levels of infringement.

6. Conclusions

This paper set out to propose two hypotheses. First, international, EU-level and national measures adopted during COVID-19 inevitably redefine fundamental rights. Second, these measures that have been adopted by states to safeguard citizens' right to life, physical integrity, and health, however, need to meet two, seemingly contradictory, conditions: 1) the measures should ensure that citizens' right to education (RTE) is not violated unnecessarily and disproportionately in defence of right to

life, while they should also guarantee that citizens' right to life is not violated in an attempt to defend RTE.

The paper attempted to define the partial components of RTE and it went on to provide some examples as to what restrictions COVID may impose on these partial rights. It was highlighted that each of these restrictions may impact at least one of the 4A criteria. We argued that the 4A criteria has a strong correlation with COVID: we claim that any scenario where Availability, Adaptability, Accessibility is violated will inevitably trigger the restriction of Acceptability. The paper goes on to argue that this latter criterion, in effect, lends itself to the test of necessity and proportionality, that is, the level of Acceptability practically coincides with the level of necessity and proportionality. A zero-measure on the horizontal axis (not introducing online education), will result in a larger degree of restriction on the vertical axis (4A effect), which in turn will require more severe counter-measures to satisfy the requirement of Acceptability.

In our paper, we draw the conclusion that in an EU context it should be the European Commission's task to define the minimum requirements for RTE in relation to the partial components of the right detailed above. This paper further argues that the current international regime of RTE, i.e. the declarations that attempt to safeguard this right, are not satisfactory as they do not provide appropriate guarantees to protect this right in a pandemic situation.

This paper therefore proposes that the European Commission shall prepare a Green Book which summarises the preferences (offer recommendations for a list of actions) which member states should consider to ensure that the Acceptability criterion is met and the principles of fundamental rights are also upheld. In Figure 5, this Green Book could define where exactly the orange lane should be located.

In an international context, the role of the UN should also be highlighted. EU legislation needs to be in harmony with the UN's international legal instruments on fundamental rights as well as with the recommendations of international institutions adopted to contain the COVID pandemic.

As our final conclusion we fully agree with and support the ground statement of the 2020 Report of the Special Rapporteur on the right to education. That is, in order to preserve the global fundamental principle - the best interest of the child - states must ensure the uttermost continuity of education guided by strictly proportionate and necessary measures based on the 4A's.

The principle of the best interest of the child can only be adhered to if the United Nations and the European Commission undertake to determine the minimum conditions for Acceptability. If they fail to do so, in similar emergency situations, the means to safeguard children's rights will necessarily become erratic and unpredictable, hence, the fundamental principle of "best interest of the child" will become compromised.