

THE RIGHT TO EDUCATION OR THE RIGHT TO HEALTH - GOOD GOVERNANCE CAN CHOOSE BETWEEN THEM?

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Abstract

Any human society will seek to educate its next generations, passing on to them its most precious values, thus it will ensure that this supreme values will be forwarded in the future. But anyway it will put at least the same price on the health of its members. Moreover, in any contemporary society in which democratic values, such as freedom and dignity of the human being, but also fundamental rights and freedoms are declared and guaranteed by the fundamental, constitutional law, the education and health of its members must be central elements of any government. Good governance must be individual-centered, it must aim every member of society concerned.

But when a society struggles to pass by a deep crisis, there is a risk of conserving its resources to use them only for what it needs to get out of that crisis. In our opinion, there is even more risk of doing so when that crisis is a public health crisis, such as the one from nowadays.

In such situations, we ask ourselves if at least the values mentioned above are protected, but also if and which of them should be guaranteed to the human being, perhaps more than ever in such periods. Indeed, any government will have to appreciate and decide, fully assuming the decision taken, how it will still be able to ensure good governance in such unfavourable conditions, ensuring and guaranteeing not only the right to health but also the right to education, among other fundamental rights and freedoms.

In this paper, we will search for answers to the above, as we will try to find out if there is a legitimate and moral possibility to give priority to one of the two rights, if we could use the principle of proportionality to answer this dilemma, but also if good governance, in special situations, can be realised by prioritizing one of these rights. In this paper, we will search for answers to the above, we will try to find out if there is a legitimate and moral possibility to give priority to one of the two rights, but also if we could use the principle of proportionality to answer this dilemma, and if good governance, in special situations, can be realised by prioritizing one of these rights.

Keywords: *fundamental right, health, education, proportionality, good governance.*

1. Introduction

Good governance, although not a modern concept has become a fashionable concept in recent years, being „a major ingredient in analyses of what's missing in countries struggling for economic and political development”¹.

Besides, the Commission on Global Governance in its report from 1995 has defined the governance as „the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest”².

This is just one of the many definitions given to this concept, reinforced by the opinion that, in fact, „while good governance has gained prominence in the

literature, there is little agreement on the essence of the concept”³.

So whenever we discuss about good governance, whenever governments discuss about this concept, we should be able to identify measures decided by governments in the interest of all of us.

In our opinion, the effectiveness of veritable good governance should be all the more visible in times of crisis, as is the Covid-19 pandemic, a crisis we are still going through. The competence and ability of the political leaders to ensure a government that responds to the needs caused by such a crisis, will be able to be identified in the measures they take precisely to ensure not only a government, but good governance. Such good governance would also be able to provide a framework and climate as close as possible to the one familiar until then, to exercise of fundamental rights, such as the right to education and the right to health.

In a time of crisis, especially in a time of public health crisis, the exercise of fundamental rights and freedoms may be affected or even restricted by measures taken by the authorities to protect the population, within the limits set by constitutional

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¹ M. S. Grindle, *Good Governance: The Inflation of an Idea*, in CID Working Paper Series 2010.202, Harvard University, Cambridge, MA, October 2010, p.1.

² Commission on Global Governance, *Our global neighborhood*, The Report of the Commission on Global Governance, 1995, available at: <https://www.gdrc.org/u-gov/global-neighborhood/>, accessed on: 22.03.2021.

³ T. A. Börzel, Y. Pamuk, A. Stahn, *Good governance in the European Union*, in Berlin Working Paper on European Integration No. 7, 2008, p. 5.

regulations such as those relating to the nature of exception of the restriction of the exercise of some fundamental rights or freedom. In a time of crisis, especially in a time of public health crisis, the exercise of fundamental rights and freedoms may be affected or even restricted by measures taken by the public authorities to protect the population⁴, within the limits set by constitutional regulations such as those relating to the exceptional character of the restriction on the exercise of certain rights or freedoms, provided by art. 53 of the Romanian Constitution.

In a time of profound public health crisis, such as the one generated by the current pandemic, there is no doubt that any government in a constitutional democracy will focus on taking those measures that will at least preserve the health of the population. This crisis, as well as the fundamental right to health, will be the ones that will be prioritized to the detriment of other aspects of our lives and other rights. When measures taken to protect the population and its health are concentrated in a short period of time, the impact on other rights and their exercise is not major. However, as the crisis continues, the impairment of other rights and of the exercise of these rights, such as the right to education, becomes more and more serious.

In this context, in this article, we will emphasize relevant aspects, in our opinion, of the concept of good governance, as well as of the right to education and the right to health, as they emerge from the literature, legislation, jurisprudence. Taking into account our own pedagogical experience from last year since the onset of this public health crisis, we will try to identify the causes that determine the governments to choose between exercising two fundamental rights, through the measures taken, possible solutions to avoid such a decision.

2. Good governance

The concept of good governance is tempting and tender at the same time.

„Good governance is a good idea”⁵ because it provides a minimum framework with principles that should be followed by governments so that the governed ones can have an effective governance that meets their needs in a constitutional, legal, and practical framework where public institutions are „[f]air, judicious, transparent, accountable, participatory, responsive, well-managed, and efficient”⁶.

Although it is a concept with multiple dimensions⁷, reiterated and developed by the World Bank, through its 1992 report⁸, good governance is not a new concept⁹, as we already have mentioned, but once reiterated in the twentieth century XX, has become a necessity in any state governed by democratic principles or which tends to become so.

On the other hand, good governance is a concept that has not only been imposed in the public system, and which we will take into consideration in this article, but also the private one¹⁰. In fact, the development of this concept in the private environment is not accidental as long „[t]he initial debate over good governance was concerned less with improving the political leadership of democracy and integrating economic and social goals....than with reversing decades of state-dominated economic and social development”¹¹.

Good governance is a good concept for states founded and developed on democratic principles, as well as for those who strive to be like those because it is also a complex concept that considers „multiparty elections, a judiciary and a parliament, which have been emphasised as the primary symbols of Western-style democracy”¹², but also „formidable: universal protection of human rights; non-discriminatory laws; efficient, impartial and rapid judicial processes;

⁴ See the two presidential decrees regarding the establishment of the state of emergency on the Romanian territory, namely Decree no. 196 of 16.03.2020, published in the Official Gazette of Romania, Part I, no. 212 of 16.03.2020, and Decree no. 240 of 14.04.2020, published in the Official Gazette of Romania, Part I, no. 311 of 14.04.2020, as well as the last of the government decisions regarding the establishment, respectively the extension of the alert state on the Romanian territory, namely: Government Decision no. 293 of 10.03.2021 on the extension of the alert status on the Romanian territory starting with March 14, 2021, as well as the establishment of the measures applied during it to prevent and combat the effects of the COVID-19 pandemic, published in the Official Gazette of Romania, Part I, no. 245 of 11.03.

⁵ M. S. Grindle, *op. cit.*, p.1.

⁶ *Ibidem*.

⁷ For more definitions of good governance from different perspectives of different international institutions, see, for example:

Th. G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, in *Third World Quarterly*, Vol. 21, No. 5 (Oct., 2000), pp. 796 – 798.

⁸ See, World Bank, *Governance and Development*, 1992, p. 1, but also the introductory remarks regarding the concept of governance, but also the one of good governance, available at: <http://documents1.worldbank.org/curated/en/604951468739447676/pdf/multi-page.pdf>.

⁹ For example, some authors have mentioned that „the concept of ‘governance’ has a long and distinguished pedigree. From the Greek city-state to the modern nation-state, governance—or the art of governing—has been a constant preoccupation for rulers and political philosophers”; and added that „in the 1990s, aid donors and a range of international institutions, including the multilateral development banks, the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development (OECD), and the United Nations Development Program (UNDP), formally adopted ‘governance’ agendas”. See V. Collingwood, editor, based on research by E. Drake, A. Malik, Y. Xu, I. Kotsioni, R. El-Habashy, and V. Misra, *Good Governance and the World Bank*, Nuffield College, University of Oxford, 2001, p. 4. Also see, for the meaning of governance: Y. Keping, *Governance and Good Governance: A New Framework for Political Analysis*, in *Fudan J. Hum. Soc. Sci.* (2018) 11:1–8, pp. 1-2. Also see: M. S. Grindle, *op. cit.*, p.3.

¹⁰ Regarding the good governance and even the codes of good governance – „a set of ‘best practice’ recommendations regarding the behavior and structure of the board of directors of a firm”, see, for example, R. V. Aguilera and A. Cuervo-Cazurra, *Codes of Good Governance Worldwide: What is the Trigger?*, in *Organization Studies* 25(3) SAGE Publications, London, Thousand Oaks, CA & New Delhi, 2004, pp. 415 – 417.

¹¹ Th. G. Weiss, *op. cit.*, p. 805.

¹² *Idem*, p. 801.

transparent public agencies; accountability for decisions by public officials; devolution of resources and decision making to local levels from the capital; and meaningful participation by citizens in debating public policies and choices¹³. So, taking into account these elements, we also can appreciate that a short definition of good governance can sound like this: „[a] mode or model of governance that leads to social and economic results sought by citizens¹⁴.”

Being an attractive concept, „a seductive idea¹⁵, perhaps not so much for states as for international organizations and citizens, it is a concept that enjoys „popularity among researchers and practitioners¹⁶.” Therefore, „the conceptual and operational battles about governance and good governance are a few decades old, but the journey to explore global governance has just begun¹⁷.”

Even if it is such a broad concept, we appreciate the importance and necessity to identify its defining elements, elements necessary to be found in the content, substance of the concept of good governance in any historical context - influenced or not by a fundamental crisis - provided that state it remains a democratic one. Thus, elements of good governance, which must be respected by any democratic state, are: „[e]ffectiveness, efficiency, transparency, accountability, predictability, sound financial management, fighting corruption, the respect for human rights, democracy and the rule of law¹⁸.” On the other hand, „[t]he state and its administrative capacities play a crucial role in the good governance debate¹⁹, so „improving governance, therefore, means building and strengthening state institutions and capacities²⁰, which is, in our opinion, a natural phenomenon that such a state should go through to ensure good true governance.

Based on the reports of various international organizations or their structures, as The United Nations

Development Program (UNDP), the juridical doctrine has highlighted the identification of principles of good governance, such as those identified by UNDP in „Governance and Sustainable Human Development, 1997²¹: legitimacy and voice – by participation and consensus orientation, direction – by strategic vision, performance – by responsiveness and effectiveness and efficiency, accountability and transparency, and fairness – by equity and rule of law²². The same authors have mentioned that these five principles represent „a set of principles that, with slight variations, appear in much of the literature²³ and also that „there is strong evidence that these UNDP – based principles have a claim to universal recognition²⁴.”

Certainly, the identification and definition of these principles of good governance is a „difficult and controversial²⁵ process. Thus, for example, the Council of Europe, by Centre of Expertise for Good Governance, identifies 12 such principles, namely: „Participation, Representation, Fair Conduct of Elections; Responsiveness; Efficiency and Effectiveness; Openness and Transparency; Rule of Law; Ethical Conduct; Competence and Capacity; Innovation and Openness to Change; Sustainability and Long-term Orientation; Sound Financial Management; Human Rights, Cultural Diversity and Social Cohesion; Accountability²⁶ – principles designed to ensure „the responsible conduct of public affairs and management of public resources²⁷, meaning good governance²⁸.”

On the other hand, „the concept of governance may be applied to any form of collective action²⁹ which means, as these authors point out, that when it is about governance and, implicitly, good governance, that it must “govern” the actions of international organizations and other supranational structures, of public authorities from national, regional and local level, but also of private organizations. Moreover, in

¹³ Ibidem.

¹⁴ T. Plumptre & J. Graham, *Governance and Good Governance: International and Aboriginal Perspectives*, Institute On Governance, 1999, p. 8.

¹⁵ M. S. Grindle, *op. cit.*, p. 1.

¹⁶ Idem, p. 6.

¹⁷ Th. G. Weiss, *op. cit.*, p. 806.

¹⁸ T. A. Börzel, Y. Pamuk, A. Stahn, *op. cit.*, pp. 6-7. In this article, the authors summarize a number of opinions regarding the concept of good governance, expressed by different authors from various point of view.

¹⁹ John Pierre, *Introduction: Understanding Governance*, in: *Pierre, John: Debating Governance: Authority, Steering, and Democracy*, Oxford, 1999, 1-12; Rudolf Dolzer, *Good Governance: Neues transnationales Leitbild der Staatlichkeit?*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64: 3, 2004, 535-546; Emma C Murphy, *Good Governance: Ein universal anwendbares Konzept?* in: *Internationale Politik* 57: 8, 2002, 1-, quoted by T. A. Börzel, Y. Pamuk, A. Stahn, *op. cit.*, p. 8.

²⁰ T. A. Börzel, Y. Pamuk, A. Stahn, *op. cit.*, p. 8.

²¹ J. Graham, B. Amos and T. Plumptre, *Principles for Good Governance in the 21st Century*, Policy Brief No.15, Institute On Governance, Ottawa, Canada, 2003, p. 3.

²² Ibidem, also for more details regarding this topic.

²³ Ibidem.

²⁴ Ibidem.

²⁵ Ibidem.

²⁶ Council of Europe, 12 Principles of Good Governance, available at: <https://www.coe.int/en/web/good-governance/12-principles>.

²⁷ Ibidem.

²⁸ Ibidem. On the other hand, we can observe that different kinds of sets of principles regarding good governance are identified by many and various organisations to respond to their specific needs. Thus, The British and Irish Ombudsman Association (BIOA) identified 6 such principles: independence, openness and transparency, accountability, integrity, clarity of purpose. See, British and Irish Ombudsman Association, *Guide to principles of good governance*, 2009, available at: <https://www.ombudsmanassociation.org/sites/default/files/2020-12/BIOAGovernanceGuideOct09.pdf>.

²⁹ J. Graham, B. Amos and T. Plumptre, *op. cit.*, p. 2.

our opinion, good governance does not imply involvement only at one level or another of those mentioned before. On the contrary, we appreciate that the collaboration, especially in times of profound crises, such as the current public health crisis, between national authorities at different levels, for example, will be able to ensure veritable good governance or, at least, to create the premises in this sense³⁰.

It is also necessary to emphasize that the actors on the political scene have different views on what is supposed to be good governance. Thus, „for those on the political right, good governance has meant order, rule of law, and the institutional conditions for free markets to flourish”³¹, instead „for those on the political left, good governance incorporates notions of equity and fairness, protection for the poor, for minorities, and for women, and a positive role for the state”³². Moreover, some of them confuse good governance with the possession and exercising of power only under the conditions and limits agreed by them, moving away from the will of the majority who elected them. Actually, „governance is about governing, and governing is predominately about making decisions”³³, but good governance does not involve making decisions only unilaterally, even dictatorially, ignoring, sometimes even completely, the connection with the governed people.

Perhaps this is also the reason why the constitutions do not provide much about governance. In the constitutions of the Member States of the European Union, the reference to governance and good governance, in particular, does not usually exist. By art. 10, the Constitution of Poland³⁴ settles about „the system of government of the Republic of Poland” that „[s]hall be based on the separation of and balance between the legislative, executive and judicial powers”. The art. 17 of the Constitution of Portugal³⁵ stipulates

about governance saying that the existence of „the set of rules” that are „[g]overning rights, freedoms and guarantees shall apply to those set out in Title II and to fundamental rights of a similar nature”. The Constitution of Slovakia³⁶ stipulates, in its preamble, that one of the purposes of Slovak people recognized at constitutional level is „seeking the application of the democratic form of government”, and the Instrument of Government³⁷ of Sweden³⁸, as the effective constitution is officially called, identifies in its first articles, especially in art. 1 - art. 10, “basic principles of governance”³⁹ and which correspond to any rule of law.

However, we could appreciate that the recognition, through the constitutional provisions, of the fact that a state has the specific features of a rule of law, implies, implicitly, the recognition, but also the assumption, of the achievement of good governance. In this sense are, for example, the provisions of art. 2 of the Constitution of Poland according to which „the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice”, or those of art. 2 of the Constitution of Slovenia⁴⁰ according to which „Slovenia is a state governed by the rule of law and a social state”⁴¹, of those of Constitution of Romania⁴² which, by art. 1 para. (3), state, among other provisions, that „Romania is a democratic and social state, governed by the rule of law...”.

There are also constitutions, such as that of Nicaragua⁴³, which, although it provides, by art. 6, that this state „[i]s organized as a democratic and social state based on the rule of law”, by art. 98 para. (2), speaking about the national economy, mentions that „the State must play the role of facilitator in the production sector which creates the conditions which allow the private sector and the workers to pursue their economic, productive and labor activities in a

³⁰ J. Gaskell and G. Stoker, *Centralized or Decentralized - Which Governance Systems are Having a “Good” Pandemic?*, in *Democratic Theory*, Volume 7, Issue 2, Winter 2020, p. 34, available at: <https://www.berghahnjournals.com/view/journals/democratic-theory/7/2/dt070205.xml>.

³¹ M. S. Grindle, *op. cit.*, p. 3.

³² *Ibidem*.

³³ B. G. Peters and Jon Pierre, *Comparative Governance*, 2016, Cambridge: Cambridge University Press, apud. J. Gaskell and G. Stoker, *op. cit.*, p. 34.

³⁴ This Constitution is available at: https://www.constituteproject.org/constitution/Poland_2009?lang=en, accessed on: 22.03.2021.

³⁵ This Constitution is available at: https://www.constituteproject.org/constitution/Portugal_2005?lang=en, accessed on: 22.03.2021.

³⁶ This Constitution is available at: https://www.constituteproject.org/constitution/Slovakia_2017?lang=en, accessed on: 22.03.2021.

³⁷ For details, see: Ș. Deaconu, coordinator, I. Muraru, E. S. Tănăsescu, S. G. Barbu, *Codex constituțional. Constituțiile statelor membre ale Uniunii Europene*, vol. II, Monitorul Oficial Publishing House, Bucharest, p. 653.

³⁸ This Constitution is available at: https://www.constituteproject.org/constitution/Sweden_2012?lang=en, accessed on: 22.03.2021.

³⁹ *Ibidem*.

⁴⁰ This Constitution is available at: https://www.constituteproject.org/constitution/Slovenia_2016?lang=en, accessed on: 22.03.2021.

⁴¹ Dispoziții în acest sens se regăsesc și în alte constituții, precum preambulul Constituției Lituaniei unde se prevede că unul dintre obiectivele acesteia este „striving for an open, just, and harmonious civil society and State under the rule of law” (This Constitution is available at: https://www.constituteproject.org/constitution/Lithuania_2019?lang=en, accessed on: 22.03.2021), sau în art. 1.1 din Constituția Spaniei care prevede că „Spain is hereby established as a social and democratic State, subject to the rule of law” (This Constitution is available at: https://www.constituteproject.org/constitution/Spain_2011?lang=en, accessed on: 22.03.2021), or in art. B para. (1) of Hungarian Constitution according to „Hungary shall be an independent, democratic rule-of-law State” (This Constitution is available at: https://www.constituteproject.org/constitution/Hungary_2016?lang=en, accessed on: 22.03.2021), or in the preamble to the Constitution of Honduras, which states that its purpose is inclusive „to strengthen and perpetuate a rule of law which ensures a politically, economically and socially just society ... within a context of justice, liberty, security, stability, pluralism, peace, representative democracy and the common good” (This Constitution is available at: https://www.constituteproject.org/constitution/Honduras_2013?lang=en, accessed on: 22.03.2021).

⁴² This Constitution is available at: https://www.constituteproject.org/constitution/Romania_2003?lang=en, accessed on: 22.03.2021.

⁴³ This Constitution is available at: https://www.constituteproject.org/constitution/Nicaragua_2014?lang=en, accessed on: 22.03.2021.

framework of democratic governance and full legal certainty...". Also, the same constitution, by art. 131 para. (4), provides good governance among the principles according to which it must be „the centralized, decentralized or deconcentrated Public Administration to serve the general interest with objectivity”.

Starting from the provision of this constitution, we will be able to emphasize that good governance must be a principle, but also a goal for any government in a state governed by the rule of law. On the other hand, democracy also involves the exercise of power, inclusively by public administration, but not only centralized, but also decentralized in order to be closer to the needs of those governed, to understand and satisfy them. The better you understand the needs of the people as a government, the more you will be able to find and implement the best solutions to satisfy them, through the decisions you make because „multi-level governance benefits from both centralized and decentralized capacity, mutual learning and integration, and celebrating and exploiting differences”⁴⁴.

„Equating good governance arrangements to good COVID-19 response outcomes is not straightforward”⁴⁵. However, we wonder whether good governance necessary to enable the exercise of two fundamental rights - the right to education and the right to health, can not be better achieved through real, effective collaboration between central and local authorities.

In this regard, we also agree that can be „[h]ighlighted how four positive qualities of multi-level governance can contribute, when combined, to greater chances of positive practical outcomes in times of crisis:

- a strong central capacity - in terms of the ability to implement rapid, decisive action;
- decentralised capacity – to mobilise different resources to tackle the outbreak;
- mutual learning and integration;
- celebrating differences - by providing local governance centre with the freedom and resources to undertake what they feel is needed for their

communities”⁴⁶.

3. The right to education

For any human being, education is a fundamental right recognized by international, regional or national regulations⁴⁷. Obviously, in a state governed by the rule of law, education and the right to education are essential even for the existence of the state, education being interconnected with democracy⁴⁸ because „to render democratic governments safe, the people's "minds must be improved to a certain degree”⁴⁹.

Through education we can transmit knowledge, we explain it, but also we can contribute essentially to the training of the youngest of, as the ECHR pointed out mentioning „that the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development”⁵⁰.

We are living in a world full of challenges that forces us to adapt continuously, permanently, and the Covid-19 pandemic has shown us that such challenges, of different natures and intensities, can occur at any time. Rather, we believe that the current pandemic reminded us that "history repeats itself," but also that we should not forget its lessons as soon as the event occurred. Maybe now at least we will work harder to prepare for almost any future event, little or not at all predictable in terms of size, duration and consequences.

In our current existence, as we have already mentioned, education is an essential element, and its providing by the main actors, including the public authorities of the states, is a permanent challenge whose intensity has increased during this pandemic period. Thus, in a world already aware that „was already facing formidable challenges in fulfilling the promise of education as a basic human right”⁵¹, we faced a new challenge - the COVID-19 pandemic that „has caused the largest disruption of education in history, having already had a near universal impact on learners and

⁴⁴ J. Gaskell and G. Stoker, *op. cit.*, p. 34.

⁴⁵ *Ibidem*.

⁴⁶ See J. Gaskell and G. Stoker, *Centralised or multi-level: which governance systems are having a 'good' pandemic?* in *British and Irish Politics and Policy*, 2020, pp. 2-3, available at: <https://blogs.lse.ac.uk/politicsandpolicy/governance-systems-covid19/>, accessed on: 22.03.2021.

⁴⁷ See, for example, art 26 of Universal Declaration of Human Rights, at the international level, art. 13 of Charter of Fundamental Rights of the European Union, at the regional level, or art. 32 of Romanian Constitution.

⁴⁸ E. Berger, *The education right to under the South African Constitution* in *Columbia Law Review* 103 (2003), p. 614, available at: <https://digitalcommons.unl.edu/lawfacpub/26>, accessed on: 22.03.2021.

⁴⁹ Thomas Jefferson, *Notes on the State of Virginia* 148 (William Peden ed., Univ. of N.C. Press 1955) (1787), quoted by Eric Berger, *op. cit.*, p. 614.

⁵⁰ *CASE OF CAMPBELL AND COSANS v. THE UNITED KINGDOM*, paragraph 33, Court Judgment, 25.02.1982, (application no 7511/76 and 7743/76), ECLI:CE:ECHR:1982:0225JUD000751176,

⁵¹ United Nations, *Policy Brief: Education during Covid-19 and beyond*, 2020, p. 5, available at: https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/08/sg_policy_brief_covid-19_and_education_august_2020.pdf, accessed on: 22.03.2021. Besides, in this document is pointed out that „despite the near universal enrolment at early grades in most countries, an extraordinary number of children – more than 250 million – were out of school and nearly 800 million adults were illiterate”, according to different data from websites as: <http://uis.unesco.org/en/topic/out-school-children-and-youth>, or <http://uis.unesco.org/en/topic/literacy>. The same document revealed many other practical problems regarding education and the implementation of the right of education existing even before the Covid-19 pandemic.

teachers around the world, from pre-primary to secondary schools, technical and vocational education and training (TVET) institutions, universities, adult learning, and skills development establishments⁵².

To protect our health and not only, we had to adapt by resorting to a solution used occasionally and only for certain types of education such as distance or part-time higher education. Thus, „the virtual world has come to the rescue⁵³ and „many of schools and universities closed turned to technology to try to continue the teaching and learning process⁵⁴.

Thus, we tried to continue to educate, respectively to learn, as the case, from a distance, through various learning platforms in the online environment. But, it is very difficult, complicated and demanding to involve the student in the activities carried out through online platforms, as we could do in face-to-face learning. Certainly, educating and learning through online tools is a constant challenge, especially when this process takes place in the area of legal sciences, with first-year students who at that moment meet for the first time, most often, with legal notions and terms. The inventiveness and adaptability of the teacher will be decisive in making such abstract notions as understandable as possible. These issues are mentioned only to highlight some of the challenges that have arisen in learning law through online platforms, but to these are added challenges that affect the entire education system, such as:

- „the lack of Internet or almost non-existent Internet connectivity in educational centers across the board in the poorest geographical areas⁵⁵
- the lack of equipment with a laptop or computer to be able to actively participate in teaching activities; most of the time a phone, although it is a useful, device, is not enough - assertion valid for the pupil, student, but also for the teacher;
- the lack of specific skills of teachers or the existence of such skills, but only at an acceptable level;
- the increased temptation to look for the answers to the teacher's requests during the teaching activities in the virtual environment, without checking their correctness⁵⁶.

Social and economic disparities have negatively influenced the way this education has been done through the means offered by the internet. Thus, „in high-income countries, the closure of educational centers to this unknown level has been alleviated by providing the necessary coverage from homes⁵⁷, affirmation that we appreciate to be largely true even when we refer to middle and high income families.

„The right to education, also in distance modalities, is once again a threatened and non-realized right for children in the most impoverished societies, and for those belonging to the most disadvantaged and vulnerable groups, ranging from women to students with special educational needs⁵⁸. All the more so as the exercise of the right to education will suffer when the central public authorities of a state fail or have difficulty in adopting measures to manage the crisis situation for a considerable period of time. Or when they grope by adopting and, especially, amending normative acts without predictability, without the participation and consultation, perhaps only superficial sometimes, of the representatives of all participants in the educational process, wanted an absolute centralization of the decision, the risk that the measures taken further affect the right to education is even greater.

It must not be forgotten that „the right to education it is a precondition for the exercise and understanding of other rights civil and political rights⁵⁹, „freedom of information and the right to vote depend on a minimum level of education⁶⁰. More than that „through education individuals can be taught values such as tolerance and respect for human rights⁶¹. Thus, we have the same opinion according to which „education is not merely an end in itself, but also a means to address many other social problems⁶², and when we are „[d]efining educational adequacy⁶³ it is necessary for the „[g]overnment to provide its citizens with better schools⁶⁴.

The configuration of a general framework, of some general principles, at national level in which education can be continued in such a crisis situation is welcome, but the role of a central decision-making public authority in the field of education must not be

⁵² Ibidem.

⁵³ S. Jain, M. Lall and A. Singh, *Teachers' Voices on the Impact of COVID-19 on School Education: Are Ed- Tech Companies Really the Panacea?*, in *Contemporary Education Dialogue* 18(1), 2021, p. 60, available at:

<https://journals.sagepub.com/doi/full/10.1177/0973184920976433>, accessed on: 22.03.2021.

⁵⁴ Ibidem.

⁵⁵ L. M. Lázaro Lorente, A. Ancheta Arrabal and C. Pulido-Montes, *The Right to Education and ICT during COVID-19: An International Perspective*, in *Sustainability* 2020, 12, 9091, p. 12, available at: <https://www.mdpi.com/2071-1050/12/21/9091>, accessed on: 22.03.2021.

⁵⁶ Regarding these challenges as well as others, see, for example, A. Maguire and D. McNamara, *Human rights and the post-pandemic return to classroom education in Australia*, in *Alternative Law Journal*, 2020, vol. 45(3), p. 206, available at: <https://journals.sagepub.com/doi/full/10.1177/1037969X20954292>, accessed on: 22.03.2021

⁵⁷ Idem, p. 11.

⁵⁸ Idem, p. 12.

⁵⁹ P. du Plessis, L. Conley and C. Loock, *The right to education: are we facing the challenges?*, in *Educational Research and Review*, vol. 2 (8), p. 198, 2007, available online at <http://www.academicjournals.org/ERR>, accessed on: 22.03.2021.

⁶⁰ Ibidem.

⁶¹ P. du Plessis, L. Conley and C. Loock, *op. cit.*, p. 199.

⁶² E. Berger, *op. cit.*, p. 661.

⁶³ Ibidem.

⁶⁴ Ibidem.

absolutized. Just as it has to take into account the implications of the principle of university autonomy, so it should take into account the actual needs and possibilities of schools from different counties and allow the adaptation of the way of achieving education according to them. As we mentioned above, it is important to have a central public authority with a real capacity to identify measures, to make prompt decisions, but it is equally important to use the best resources, taking into account the regional and / or local specifics, in order to identify the best appropriate form of education that works as optimally as possible and for as long as possible.

In the end „education is a socio-cultural practice, where young people are given access to formal knowledge codes in mediated relationships with others”⁶⁵. On the other hand, schools are institutions „within which vastly different experiences may be provided”⁶⁶ which, because of the „[l]ink with nation-building and social cohesion”⁶⁷ or „[l]abour markets to provide, or close off, access to jobs”⁶⁸, „[t]end to reproduce the patterns of inequality and privilege of their broader societies, rather than change them”⁶⁹.

But education must presuppose equality, at least in the opportunities offered to any child to access it and to reap its benefits. Thus, „the deployment of online distance learning (together with radio and television), should only be seen as a temporary solution aimed at addressing a crisis, and the digitalization of education should never replace onsite schooling with teachers”⁷⁰. This way we have certainly discovered new and „[u]nlimited drive, and untapped resources”⁷¹, that will be needed for „[t]he restoration, not only of education’s essential services, but of its fundamental aspirations”⁷². But, even in our opinion, if „[d]istance education become the new paradigm for education after the end of the pandemic, it would affect the heart and purpose of the right to education. Onsite and face-to-face education enables teachers not only to provide content, but to ensure it is understood and well received. Besides, education goes much beyond a single objective of transmitting didactic knowledge, and aims at developing socio-emotional skills, critical spirit and creativity, citizenship and mutual understanding

between groups that need to interact and mix in order to live in and build a peaceful society, and at connecting children to nature and to their environment. Education is a social act of a community of learners that require real human interactions.”⁷³

And we also considered that „it is the responsibility of governments and the international community to stay true to principles and conduct reforms”⁷⁴ to configure solutions tailored to the specific needs of each community for possible other future crisis situations in order to allow, as optimally as possible and non-discriminatory, the full exercise of the right to education.

4. The right to health vs. right to education?

Any „state constitution is a charter document expressing citizens’ values, priorities, and aspirations”⁷⁵, and one of these is our health, and this is why, indeed, „the centrality of health as an important aspect of the human condition is universally recognized”⁷⁶.

The Universal Declaration of Human Rights, by art. 25, provides that „everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. The Charter of Fundamental Rights of the European Union, by art. 35, states that „everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices”, and also that „a high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.” Even at national level, by constitutional provisions, it is usually

⁶⁵ P. Christie, *Opening the Doors of Learning: Changing Schools in post-Apartheid South Africa*. Heinemann, Johannesburg, 2008, quoted by P. Christie, *The complexity of human rights in global times: The case of the right to education in South Africa*, in *International Journal of Educational Development* no. 30, 2010, p. 8, available at: <https://www.sciencedirect.com/science/article/abs/pii/S0738059309000935>, accessed on: 22.03.2021.

⁶⁶ P. Christie, *op. cit.*, p. 8.

⁶⁷ *Ibidem*.

⁶⁸ *Ibidem*.

⁶⁹ *Ibidem*.

⁷⁰ Human Rights Council, Forty-fourth Session, Right to education: impact of the COVID-19 crisis on the right to education; concerns, challenges and opportunities, Report of the Special Rapporteur on the right to education, A/HRC/44/39, 2020, point 47, p. 12, available at: <https://undocs.org/A/HRC/44/39>, accessed on: 22.03.2021.

⁷¹ United Nations, *op. cit.*, p. 26.

⁷² *Ibidem*.

⁷³ Human Rights Council, *op. cit.*, point. 47, p. 12.

⁷⁴ *Ibidem*.

⁷⁵ See E. Weeks Leonard, *State Constitutionalism and the Right to Health Care*, in *Journal of Constitutional Law* [Vol. 12:5], 2010, p. 1401, available at: <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1135&context=jcl>, accessed on: 22.03.2021.

⁷⁶ S. D. Jamar, *The International Human Right to Health*, in *Southern University Law Review*, Vol. 22, 1994, p. 3, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093085, accessed on: 22.03.2021.

regulated that „everyone has the right to the protection of health”⁷⁷.

The right to health, enshrined, usually, in fundamental normative acts, such as the right to health care, is "a complex, ambivalent right, with two components, one substantial and the other procedural"⁷⁸. If every human being should enjoy the right to health, the international community, but especially the states, through specific mechanisms, are obliged to configure the legal framework and not only of the health system to ensure the protection of the health of each of us. In other orders, we can affirm that „the right to health is therefore better thought of as ‘[w]hat we as a society do collectively to ensure the conditions in which people can be healthy’”⁷⁹.

Therefore, it is the obligation of each state to respect, and as regards the right to health and its protection, especially in public health emergencies, fundamental principles, such as:

- „equality and non-discrimination whereby governments must refrain from acting in a manner that either directly or indirectly discriminates against individuals or groups, including avoiding unintended consequences of policies and programmes and protecting against third party discrimination;

- communities must have access to accountability mechanisms and remedies in situations where their rights have been, or are at risk of being, breached.”⁸⁰

We can identify some neighboring rights – as the right to food, the right to a decent standard of living, and the right to work, and some other rights – as the right against torture, the right to life, and the rights of prisoners, the enforcement or nonenforcement of which contribute to or detract from the state of human health”⁸¹. But, we also can mention some „certain rights which are stand-alone rights are also part of the right to health and have particularized meaning in defining the right to health”⁸², and one of them is the right to education⁸³. Indeed, in this situation it is mainly

about the right to health education and its protection, but even for this it is necessary to ensure a minimum of general education, which is why, in our opinion, it is more than obvious that these two fundamental rights of any human being - the right to education and the right to health - are interconditioned. Even that sometimes „without the right to health other rights have less meaning and importance”⁸⁴, this does not mean that in cases of crisis, such as a pandemic, any other fundamental rights, such as the right to education, must be restricted or even abolished. We consider such a assertion to be valid especially when, acting responsibly, predictably and in a timely manner, public authorities can set up an optimal framework in which the two rights are exercised simultaneously, with minimum conditions and restrictions.

We support the above mentioned because, even we agree that „[g]ood health does not depend only on health care. It also depends on nutrition, lifestyle, education, women’s empowerment, and the extent of inequality and unfreedom in a society”⁸⁵.

In crisis situations, such as the Covid-19 pandemic, it is natural for state authorities to take measures to protect every citizen, to configure the framework in which they can protect their health and, if necessary, to appeal, of the means, procedures, legal institutions to protect their health. However, these measures must be taken so as not to affect the substance of other rights, such as the right to education.

Thus, it is necessary that our governments to design an ethical framework, which is also a legal one, to represent „a constellation of values and considerations that ought to be considered by decision-makers in this context”⁸⁶. Such values⁸⁷ can be:

- substantive values: individual liberty, protection of the public from harm, proportionality, privacy, duty to provide care, reciprocity, equity, trust, solidarity, stewardship;

- procedural values: reasonable, open and transparent, inclusive, responsive, accountable.

⁷⁷ In this regard, see, for example, art. 28 of Estonian Constitution (This Constitution is available at: https://www.constituteproject.org/constitution/Estonia_2015?lang=en, accessed on: 22.03.2021), or art. 55 of Albanian Constitution (This Constitution is available at: https://www.constituteproject.org/constitution/Albania_2016?lang=en, accessed on: 22.03.2021), or art. 12 point 5) of Constitution of Oman (This Constitution is available at: https://www.constituteproject.org/constitution/Oman_2011?lang=en, accessed on: 22.03.2021), or art. 34 of Romanian Constitution.

⁷⁸ Decision 1252/2010 of Romanian Constitutional Court regarding the exception of unconstitutionality of the provisions of art. 208 para. (3) first sentence, art. 211 para. (1) and art. 213 para. (4) of Law no. 95/2006 on health care reform, published in Official Gazette of Romania, Part I, no. 759 from 19.11.2010.

⁷⁹ T. Evans, *A human right to health?*, in *Third World Quarterly*, Vol 23, No 2, p. 198, 2002, where is quoting International Federations of Red Cross and Red Crescent Societies and Francois-Xavier Bagnoud Centre for Health and Human Rights, 1999: 29, available at: https://www.jstor.org/stable/3993496?seq=2#metadata_info_tab_contents, accessed on: 22.03.2021.

⁸⁰ UNAIDS, *Rights in the time of COVID-19. Lessons from HIV for an effective, community-led response*, Geneva, 2020, p. 5, available at: <https://www.unaids.org/en/resources/documents/2020/human-rights-and-covid-19>, accessed on: 22.03.2021.

⁸¹ See Steven D. Jamar, *op. cit.*, p.5.

⁸² Ibidem.

⁸³ Ibidem.

⁸⁴ See Steven D. Jamar, *op. cit.*, p.34.

⁸⁵ A. Sen, *Why and how is health a human right?*, in *The Lancet* 372, no. 9655, 2008, p. 2010, available at: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(08\)61784-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(08)61784-5/fulltext), accessed on: 22.03.2021.

⁸⁶ M. Smith and R. Upshur, *Pandemic Disease, Public Health, and Ethics*, in A. C. Mastroianni, J. P. Kahn, and N. E. Kass, *The Oxford Handbook of Public Health Ethics*, 2019, p. 8, available at: <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190245191.001.0001/oxfordhb-9780190245191-e-69?print=pdf>, accessed on: 22.03.2021.

⁸⁷ University of Toronto Joint Centre for Bioethics Pandemic Influenza Working Group, 2005, quoted by M. Smith and R. Upshur, *op. cit.*, p. 9 -13.

We consider that it is appropriate to emphasize that when we are speaking about individual liberty and proportionality, as substantive values, „[i]n a public health crisis, restrictions to individual liberty”⁸⁸ may be decided by the governments only if it „[i]s necessary to protect the public from serious harm”⁸⁹. Such „restrictions to individual liberty should be proportional, necessary, and relevant, employ the least restrictive means, and be applied equitably”⁹⁰. So, these „restrictions to individual liberty and measures taken to protect the public from harm should not exceed what is necessary to address the actual level of risk to or critical needs of the community”⁹¹.

5. Conclusions

Good governance will focus on the needs of those governed, building on state, regional and local possibilities, but will also require the obligation of governments to identify and develop other mechanisms, procedures, institutions through which to strengthen and develop good governance.

Five principles are considered critical to guiding the reforms of global governance and global rules⁹²: common but differentiate responsibilities and respective capacities, subsidiarity, inclusiveness, transparency and accountability, coherence, responsible sovereignty.

Adapting⁹³ these principles and their essence, we consider that in a crisis situation as Covid-19 pandemic, when there are discussions about the priority of these two fundamental rights - the right to education or the right to health, our governments must act taking into consideration the following:

- the diversity of national circumstances and policy approaches that requires common but differentiate responsibilities and respective capacities at national and local level;
- in respect of subsidiarity and proportionality, some problems can be handled well and efficiently at the local or regional levels reducing the number of issues that need to be tackled at national level;
- the institutions that participate in a real good governance, need to be representative of, and accountable to, the entire community, while decision-

making procedures need to be democratic, inclusive and transparent;

- enhanced coherence is also needed between the local or regional and national spheres of policymaking, an improved coordination among various stakeholders and enhanced information sharing is also needed.

Human health is „a claim, interest, need, or demand which is cognizable under law and which proceeds from moral precepts necessary for respect for human dignity”⁹⁴, but also the right to education has its role in defining the human dignity. There are two rights that, in our opinion, must be able to be exercised simultaneously, especially since „in the case of a right to health, there is increasing evidence that globalisation itself will lead to greater levels of disease”⁹⁵ that can be preventable and avoidable or at least manageable, as the movement of people, goods and ideas continues to increase on a global scale⁹⁶.

On the other hand, „while we might think COVID-19 will pass and this will all be over soon, other disasters might warrant more online delivery, such as earthquakes or floods”⁹⁷. „Our ability to learn from this pandemic will determine not only our success in responding to future pandemics but also other global challenges”⁹⁸, so it is necessary „to build protection systems and resilience”⁹⁹.

Governments need to discover mechanisms and procedures to ensure the realization of education in such situations of severe crisis, when education in classical way is difficult or impossible to carry out. And for those possible situations in which it is necessary for the educational process to take place in the online environment, the governments are obliged to ensure, in advance, that any participant in this process has the necessary technical equipment, but also has assimilated essential knowledge, methods and techniques to use this kind of teaching or learning, as the case.

As we can still observe, „it is essential that in today’s digital world, teachers can switch from face-to-face teaching to online when required and that they can support all of their students no matter from which section of society”¹⁰⁰.

Even in our opinion, in any situation „teachers should have autonomy and liberty in deciding when and

⁸⁸ University of Toronto Joint Centre for Bioethics Pandemic Influenza Working Group, 2005, quoted by M. Smith and R. Upshur, *op. cit.*, p. 11.

⁸⁹ *Ibidem*.

⁹⁰ *Ibidem*.

⁹¹ *Ibidem*.

⁹² United Nations, *Global governance and global rules for development in the post-2015 era, 2014*, p. vii, available at: <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/2014-cdp-policy.pdf>, accessed on: 22.03.2021

⁹³ For details referring to these principles, see United Nations, *op. cit.*, p. vii.

⁹⁴ Goler Teal Butcher, an oft-repeated statement to the author in their conversations, quoted by Steven D. Jamar, *op. cit.*, p.8.

⁹⁵ T. Evans, *op. cit.*, p.208.

⁹⁶ See, T. Evans, *op. cit.*, p.208.

⁹⁷ S. Jain, M. Lall and A. Singh, *op. cit.*, p. 84.

⁹⁸ United Nations, *Covid-19 and human rights. We are all in this together. Human rights are critical – for the response and the recovery*, 2020, p. 20, available at: https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf, accessed on: 22.03.2021.

⁹⁹ *Ibidem*.

¹⁰⁰ S. Jain, M. Lall and A. Singh, *op. cit.*, p. 84.

where to integrate technology to support their teaching practices”¹⁰¹. And this is another reason why the governments must create clear, predictable, simple procedures that allow for the decentralization of educational processes, but also of some decisions in this area, in order to adapt them to the specific needs and possibilities of the each local community.

Consequently, veritable good governance will find optimal solutions so that in crisis situations, such

as a pandemic, the governments do not have to choose between the right to health and the right to education, to the detriment of the latter.

On the other hand, good governance must not be perceived as a chameleon-like concept that is determined or at least influenced exclusively by the discretionary power of national governments.

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¹⁰¹ Ibidem.

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