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The right to education as a fundamental right in democracy

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Abstract

To know whether the right to knowledge is achieved through constitutional law on education and how it can be found to be enshrined both in the domestic law of the States and in European Union law. The theme is of greater relevance to fundamental rights in the today's political agenda. The purpose of this analysis is to demonstrate that the role of universities is crucial, and that the EU actively promotes education. These are the ways to promote development. In the Portuguese national dimension, the right to education is presented in the Constitution. In international European law is also enshrined. In any case there is a positive dimension in this right that involves the intervention of States. Through a methodology with literature revision of national legal texts and EU law it is possible to analyze the progress achieved historically towards the integration objectives in the Member States' recommendation to make education systems more adequate and inclusive.

Keywords: Right; education; European; union.

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1. Introduction

Whereas the right to knowledge takes place through the constitutional right to education, it is possible to find him enshrined both in terms of the domestic law of States in terms of European Union (EU) law. The theme chosen today is of greater relevance as fundamental rights are increasingly on the political agenda. The aim of demonstrating that the role of Universities is crucial as the main players in the Bologna Process launched at European level in 1990, which is promoted by the EU through education, research and innovation. These are the ways to promote development on the basis of growth, employment and social cohesion. Europe's university education systems can give a fundamental contribution to address important issues related to growth and this economic vector comes even enshrined in the framework of the global strategy Europe 2020 programme.

In the Portuguese national dimension, the right to education is presented in addition to a freedom, in article 43, and also as a cultural right, inserted in the economic, social and cultural rights of the Constitution of the Portuguese Republic of 1976, in article 73. In European international law, although absent from the text of the 1950 European Convention on Human Rights, the right to education appears in an additional protocol of the same document and has been enshrined in the Charter of Fundamental Rights of the European Union since the 2000 version and now in version of 2007 in its article 14. In any case there is a positive dimension in this law that involves, necessarily, the intervention by the Member State for implementation of the same. This right is constitutional in the national dimension because a fundamental right that is enshrined in the Constitution as a manifestation of the original constituent power originating status; and constitutional in the European perspective in the sense of founder, structural, element of the construction of the chosen integration model. Education, and especially university education, can condition the performance of economic vectors by observing that investment in education, while public spending, started again to grow in 2016, after consecutive years of contraction, by about two-thirds of Member states.

Given the assumptions and objectives outlined above, and given the embryonic nature of this study, designed a methodology that focuses on review of the literature on the various topics discussed, with particular focus on the issue of education and Constitutional law. Deductively, it will thus be possible to infer the contribution of the Portuguese Constitutional text to the realization of education. The state of the art, theoretical and academic, will be assisted and consolidated through systematic and methodologically selected normative and jurisprudential interpretation of national legal texts and European Union law. Significant progress has been made in the history of the EU's integration objectives, it is underlined today by the need for Member States to make their education systems more adequate and inclusive, in particular as regards the integration of refugees and migrants.

2. The question of the right to education

The right to education is enshrined in fundamental rights, from the passage to the constitutional stage of the State (Silva & Alves, 2016), and also in human rights, as a fundamental element in the functioning of democratic bases. Moreover, education today represents an economic and development value (Comissao Europeia, 2016a), with knowledge at the heart of the European Union's efforts to achieve smart, sustainable and inclusive growth (Comissao Europeia, 2011).

The constitutional objectives of education are congruent with a democratic and social rule of law, to form citizens who are free, civically active, supportive and responsible (Canotilho & Moreira, 2007). Likewise, modern and effective higher education systems will be the foundation of an open, confident and sustainable society, and of a creative, innovative, entrepreneurial and knowledge-based economy. The joint efforts of the Member States' authorities, higher education institutions, stakeholders and the European Union will be crucial to the achievement of Europe's most successful objectives (Comissao Europeia, 2011).

Even more, education plays a fundamental role in the learning and exercise of human rights (Conselho da Europa, 2010), never definitively guaranteed, but in a permanent and urgent construction.

In this context, universities are key players for the future of Europe (Parlamento Europeu, 2016) and for the successful transition to a knowledge-based economy and society. However, this crucial sector of the economy and society still needs to be restructured and modernized, a prerequisite for Europe to win the global competition in education, research and innovation (Comissao Europeia, 2006).

3. The Right to Education in the Portuguese Constitution

In the Portuguese constitutional law, with the end of the absolute State in 1820 (Silva & Alves, 2016), all constitutions enshrine the right to education as a fundamental right: the Constitution of 1822, in articles 237 to 239; Constitutional Charter of 1826, in article 145, paragraphs 30 and 32; Constitution of 1838, in articles 28 and 29; 1911 Constitution of 1911, in article 3, paragraphs 10 and 11; and Constitution of 1933, in articles 42 and 43 (Miranda, 1992).

Today, in the actual Constitution of the Portuguese Republic (CRP) of 2nd april 1976 (you can read it at <http://www.dre.pt>), the right to education is contemplated as a freedom, contemplated in article 43 saying that "1. Freedom to learn and to teach is guaranteed. 2. The State cannot program the education according to any philosophical, aesthetic, political guidelines, ideological or religious. 3. Public education will not be confessional. (...)" But, since it is the particular expression of culture it is also a cultural right inserted in the economic, social and cultural rights, in chapter III of title III of part I, articles 73 to 77. On a positive side, as typical social right of warranty, it involves, necessarily, the intervention by the State or States to enforce it as a right of access to school, the right to obtain education, which represents an obligation for the State to create and maintain schools (Canotilho & Moreira, 2007), but not only, being possible also to find in him a negative slope of freedom (Leitao, 2014).

4. The Right to Education in the European Union

In the texts of international law, although absent from the initial text of the European Convention on Human Rights or European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 in the framework of the Europe Council's main task of protection of human rights, as the right to education only appears in an additional protocol to the same document, article 2. The Convention entered into force on 3 September 1953 and Portugal ratified it by Law n.º 65 / 78 of October 13 in the *Diário da Republica* n.º 236, I Series, pp. 2119 to 2145 (texts on the portuguese internet address of the Directorate-General for Justice Policy, Office for International <http://www.gddc.pt/direitos-humanos/textos-internacionais-dh/tidhregionais/conv-tratados-04-11-950-ets-5.html>).

Already in the previous Universal Declaration of Human Rights of 1948, resulted in article 26. On December 10, 1948, the United Nations General Assembly approved in Paris, with 48 countries, Resolution 217A (III) with the text of 30 articles. Nowadays signed by more than 180 countries, Portugal acceded on December 14, 1955 and published it in the *Diário da Republica*, I Series A, n.º 57/78 of March 9 (text at http://direitoshumanos.gddc.pt/3_1/IIIPAG3_1_3.html).

In the European Union, education as a policy appears in article 165 of the Treaty on the Functioning of the European Union (Porto & Anastácio, 2012). The right to education today arises in the Charter of Fundamental Rights of the European Union since the 2000 version and now in version of 2007 in its article 14. It was at the European Council in Nice, France, from 7 to 9 December 2000 that the text of the European Charter of Fundamental Rights was solemnly proclaimed without being legally binding. It was published in 2000/C 364/01 in the Official Journal of the European Communities (OJEC) C 364, 18.12.2000, pp. 1 to 22. With the entry into force of the Treaty of Lisbon, the ECFR is contained in the attached Declaration. Last publication 2016/C 202/01, Official Journal of the European Union (OJEU) C 202 of 07.06.2016 (at <http://eur-lex.europa.eu/collection/eu-law/treaties.html>).

Without a definition of what the legal text means by education, as happens on Portuguese fundamental law, is sure that inclusiveness is a fundamental concept in this theme, (Silveira & Canotilho,

2013), attentive to globalization, incentives to free movement as facet of construction of the internal market and more recent concerns with the need for Member States to make their educational systems more suitable, in particular as regards the integration of refugees and migrants. This is the question of accessibility, appropriate, therefore, to migrant and displaced populations, refugees and ethnic minorities (Silveira & Canotilho, 2013). Here is also relevant the linguistic question. It is worth mentioning that the appreciation of this aspect works as a feature that identifies the European Union universe of international organisations and can be found in the treaties, in the texts of secondary legislation, in community case law and the doctrine, as can be seen by the instruments used and referenced in this study. And the EU's own motto (at http://europa.eu/about-eu/basic-information/symbols/motto/index_pt.htm) – “United in diversity” – expresses these ideals (Swiebel, 2008). Even the European Union's goal mapped out in 1995 by the European Union, to put citizens to master three foreign languages, it wasn't all achieved, although certainly there are big differences in reality from country to country (Comissao Europeia, 1995). And there are also present here an idea of citizenship in respect for fundamental rights that should not be confused (Silveira, Canotilho & Froufe, 2016), and that today, in view of the aspects mentioned, goes beyond national citizenship and right of European citizenship, since the mobility is not limited to economic indicators and each human being circulating creates bonds and that human mobility implies the exercise of fundamental rights where their right to education is inscribed.

The theme of respect for the right to education is of the greatest relevance on the political agenda, and as recently as 25 October 2016, the European Parliament requested the European Commission to present a proposal, by September 2017, on the development of a Pact of Union for democracy, the rule of law and fundamental rights (at http://www.europarl.europa.eu/pdfs/news/expert/infopress/20161020IPR47863/20161020IPR47863_pt.pdf). But still, in the context of secondary legislation, that is, legislative or guiding documents resulting from the more general objectives guiding written in treaties, the concern with education is present. Today, the main objective for the education results of the strategy Europe 2020 (at http://ec.europa.eu/europe2020/targets/eu-targets/index_pt.htm), as part of wider EU strategy for growth and jobs. From a global European perspective, reflected in quantifiable national targets (at http://ec.europa.eu/europe2020/pdf/themes/2016/early_leavers_education_training_201605.pdf) to guide employment-led investment as benchmarks for assessing progress made (Comissao Europeia, 2010). And where they fall, then general initiatives that allow, for example, to guide the teaching of all Member States to a level of high standard (Comissao Europeia, 2016a).

5. The Role of Universities and the Right to Education

Education, and especially university education, can condition the performance of economic vectors by observing that investment in education, as public expenditure, began to grow again in 2016, after consecutive years of contraction (Comissao Europeia, 2016b), by about two-thirds of Member states. And the European Union trusts that the education and training systems of the Member States make good results, as they have all undergone significant reforms and peer reviews over the years and are effective in providing young people the skills they need to Develop their lives as citizens and develop their professional careers, with significant progress in improving education in general (Comissao Europeia, 2016a). Therein lies the role of universities in ensuring and realizing the right to education. A European objective for all Member States is to endeavour to improve the quality of education. Even countries with good results should not sleep in the shade of their laurels. Ensuring high-quality education is a never-ending task: it requires constant attention, improvement and adaptations.

The University is a sublime creation of the medieval spirit and many universities created in the middle ages remain to the present day. Throughout antiquity, access to culture had been exclusive to a

small number of privileged. The Church, to proclaim the equality of all men before God, allowed, in ecclesiastical schools since the beginning of the middle ages, the free education of all who wished to devote himself to ecclesiastical career. In the high middle ages, the study of Arts and letters is aimed pretty determined to serve the Church, through a better preparation for the exercise of ecclesiastical functions and as social sense. The community that the medieval University serves is the Christian community (Cruz, 2008). The elementary and secondary education was spread everywhere where there was a cathedral, a monastery or a simple parish church. Higher education already was focused on half a dozen places, throughout Europe (Cruz, 2008).

In the early centuries of the Christian era there were higher schools which continued their action, but the University only emerged in the 12th century and the word began by designating the "community" of masters and pupils who gathered for the transmission of knowledge (Serrao, 1983). Still, the first is the University of Bologna, founded in Italy in 1088 with the law school. Then the University of Paris in 1150. In 1181, that of Montpellier. The University of Salamanca emerged in 1218. The first universities were formed spontaneously, through a characteristic process of growth and corporatization of a school or existing local schools - *ex-consuetudine*. At other times, the process of formation of new universities resulted *ex secessione*, constituting a break-up of another already existing university. Others still appear *ex-privilege*, arise as a result of the decision of a sovereign but lack papal confirmation.

Today, as yesterday, the University is an evolutionary concept that, from a first cycle with a more "by the book" teaching but a second and third cycles in which teaching must be fundamentally from the research, involves the education of people. However, education, both in childhood (Comissao Europeia, 2016a) and in university education, should always prepare for life in development, contributing to the economic aspect, which can only achieve with a good performance (Comissao Europeia, 2016b).

In the present days, we find in the aspect of the right to education regarding the freedom to learn and teach a relationship the creation of private schools and cooperatives (as Universidade Portucalense Infante D. Henrique it is, at www.upt.pt). There is no single model of excellence and Europe needs a great diversity of higher education institutions (Comissao Europeia, 2011), as recognized by the EU itself (Comissao Europeia, 2006). But efforts are continuing towards modernize universities against global concerns (Comissao Europeia, 2006). The aim is not to standardize educational systems (Porto & Anastácio, 2012), but rather to articulate mobility and the recognition of the degrees awarded.

Being academic freedom part of that right (Canotilho & Moreira, 2007), it is in this context that difference can be achieved when, in delivering the subjects included in the curriculum of the respective educational establishment, the free presentation of ideas by the teacher highlights fundamental freedoms and emphasizes the Values of equality. As acknowledged by the European Commission, the role of teachers is crucial in the innovation dimension (Comissao Europeia, 2016b) and makes the difference. This point continues to require improvements and adaptations to converge with employment concerns and economic development (Comissao Europeia, 2016a).

We must emphasise the need to direct more efforts to make more inclusive education systems in the current global context. Education is a powerful force for integration of population with migration background and the EU attaches great importance to this item (Comissao Europeia, 2016b) taking into account the increase in the number of refugees and migrants who arrive.

6. Conclusion

Significant progress has already been achieved historically towards the EU's integration objectives but, nevertheless, the need for Member States to make their education systems more adequate and inclusive, particularly with regard to the integration of refugees and migrants, is now underlined. Remains the recommendation of fitness education systems permanent realities brought about by globalization. The consecration in fundamental texts, internal, international and European nature is

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essential but only subsidiary as a stone path plotting on initial implementation by each State in its legislative and regulatory and translation, in detail, for each actor involved, as is the case of educators.

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