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Fundamental Human Rights and Online Education

Colette Cuijpers

Summary

Online tools offer manifold opportunities to introduce innovation within traditional education as well as helping solve the problem of how to continue to provide education during a global pandemic. With respect to the right to education, the shift from offline to online modes of education may even stem from positive obligations deriving from the right to education. However, the transition from offline to online education also raises a number of challenges. High-quality online education depends on certain technical preconditions, including the proper infrastructure and minimum software and hardware requirements. What are the consequences to the right to equality and non-discrimination if educational access becomes dependent on both the existence and quality of digital infrastructures and the economic circumstances of students? Another challenge pertains to privacy, insofar as online education heavily depends on video technology deployed within the privacy of students' homes. Particularly with respect to online examinations, forms of video surveillance are mandated by universities, both to prevent fraud and to ensure the validity and value of a diploma. Although in their endeavor to prevent fraud, universities may well have valid reasons for resorting to online proctoring (surveillance software), it is important that this must not disproportionately impinge upon students' fundamental human rights. The rights and obligations of both students and universities are affected by online education, thus creating a need to establish a proper balance between the—often competing—interests. This may require governments and universities to invest in positive initiatives aimed toward accommodating the right to equality and nondiscrimination as well as the right to privacy, in response to the fact that online educational tools may impact upon the private lives of students and, in turn, produce situations of exclusion.

The Impact of the Pandemic on Education

Ever since the start of the COVID-19 pandemic, there have been a plethora of measures introduced across the globe to prevent the spread of this contagious disease. Travel restrictions, curfews and complete lockdowns are the most common measures taken by governments.² These measures have a huge impact upon everyday life, including within the field of education. Although exceptions were initially made for younger children, at least in countries like the Netherlands, to keep primary and secondary schools open, universities were one of the first institutions to experience lockdowns.³ In March 2020, the vast majority of universities in Europe migrated from on-campus teaching to remote teaching. Although most universities had already embraced some of the initiatives associated with digitally enhanced learning and teaching—such as tools like Zoom as well as systems to electronically provide educational materials and training for lecturers in online learning and teaching—the capacity and familiarity needed to adjust to the situation created by the pandemic was lacking (European University Association, 2020, p. 1). Moreover, similar issues on students' end also prevented a smooth transition to online education, insofar as this requires at the bare minimum some kind of underlying digital infrastructure.⁴ Several international organizations have already reported on the long-term impact that COVID-19 will have on our future society, with many children having fallen behind and many more continuing to experience a lack of proper education. Unesco, UNICEF, The United Nations Development Program and the World Economic Forum have all raised major concerns in this regard.⁵ Notwithstanding the long-term implications of COVID-19 on education and children's development, the sudden change to online education also raises serious immediate concerns. For example, the impact of the measures taken to bridge the gap between physical and distance education can have a directly deleterious impact upon the fundamental human rights of students. The focus in this chapter is on fundamental human rights as embedded in the European Convention on Human Rights (ECHR), which was the first instrument to crystallize and give binding effect to the rights set out in the Universal Declaration of Human Rights (1948). Despite dating back to 1950, the Convention nevertheless remains a vitally important instrument for human rights protection, insofar as it is able to keep pace with an ever-changing society. The European Court of Human

Rights (ECHR) interprets the Convention dynamically in light of present-day conditions. The Court has clarified and extended the rights set out in the Convention in case law, dealing with situations that were unforeseeable and unimaginable when the Convention was adopted, thus creating a 'living instrument' that adapts to society (European Court of Human Rights, 2021a). In this respect, the ECHR can offer protection against the impact of COVID-19 measures in education that negatively impact upon students' rights. The ECHR thus provides a crucial framework through which to implement new forms of education, fostering the right to education while simultaneously preserving other relevant human rights, such as the right to privacy and the right to non-discrimination.

The Right to Education

The right to education is embedded in Article 2 of Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms. The article states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. (Council of Europe, 1952)

The provision appears to be a negative obligation: a prohibition to interfere with one's right to receive education. However, the ECHR also acknowledges positive obligations under this right, which is to say that Member States must take measures to ensure that they uphold this right. The right to education is interpreted in a broad manner, for the simple reason that a restrictive interpretation is not in line with the aim of the provision (European Court of Human Rights, 2021b). In the Belgian Linguistic case, the ECHR explained that the right to education included a right of access to educational institutions existing at a given time (European Court of Human Rights, 1968). In the case of *Memlika v. Greece*, the ECHR also ruled that:

Where there is a need for the authorities to take the appropriate measures to avoid any risk of contamination, in order to protect the health of children and teachers, the authorities have an obligation to act diligently and expeditiously in order to reconcile the protection of the interests of the community and the interests of individuals subjected to such measures.⁶

On the basis of these cases, one could put forth the argument that because access to educational institutions must be ensured, providing education online is obligatory during periods where physical presence at schools is impossible due to severe health concerns.

⁶ European Court of Human Rights (2021b) under reference to the European Court of Human Rights (2015).

² Even though the EU tried to coordinate the measures in response to COVID-19, it mainly was a national matter. See: <https://www.ecdc.europa.eu/en/covid-19/external-resources> and Alemanno (2020).

³ See for a chronological overview of parliamentary papers and documents about COVID-19 and education in the Netherlands: <https://www.onderwijsconsument.nl/chronologisch-overzicht-kamerstukken-coronavirus-en-onderwijs/>.

⁴ According to Angiolini et al. (2020), the pandemic revealed this as a critical weakness of online education, namely "the lack of an adequate digital infrastructure to support the provision of education online, not only during an emergency, but, more generally, in a way that makes the most out of EdTech tools." (p. 68).

⁵ See for UNESCO: <https://en.unesco.org/news/one-year-covid-prioritizing-education-recovery-avoid-generational-catastrophe>. See for UNICEF: <https://data.unicef.org/resources/one-year-of-covid-19-and-school-closures/>. See for United Nations Development Program (UNDP) 2020 "COVID-19: Human development on course to decline this year for the first time since 1990." https://www.undp.org/content/undp/en/home/newscentre/news/2020/COVID19_Human_development_on_course_to_decline_for_the_first_time_since_1990.html. See for the World Economic Forum: Li and Lalani (2020).

Consequently, the measure taken to shut down schools needs to be reconciled with the interests of those that are subjected to these measures. This can be explained in terms of providing the means to protect students' right to education, which can be done in the form of online education.

However, as explicitly acknowledged by the ECHR, the right to education is closely associated with other fundamental human rights, in particular, the right to privacy, the right to freedom of thought, conscience, and religion, the right to freedom of speech and the prohibition of discrimination (European Court of Human Rights, 2021b). Hence, even though providing online education may be interpreted as a positive obligation under the right to education, the impact of online education must also be critically assessed in light of other fundamental human rights.

Given that digital tools and platforms offer the possibility to provide education at a distance, they can thus be said to increase access to education. However, the availability of a well-functioning underlying infrastructure allied with certain software and hardware requirements may actually impede equal access to this kind of education. This tension is underscored by Lorente et al., who conclude:

(...) the technological divide between developed and developing nations exacerbates the enormous inequality in educational opportunities between them. 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 needs. (Lorente et al., 2020, p. 12).

UNICEF (2020) points to other challenges besides the lack of access to remote learning modalities, namely the fact that skill gaps among teachers or a lack of parental support can also undermine children's ability to benefit from remote education. This, in turn, can (re)produce discriminatory situations if the requisite environment for online education is lacking in specific regions or among specific groups within a population.

Equality and the Right to Non-Discrimination

Even though, at least in principle, technology can facilitate greater access to education, and, in turn, enhance the right to education, it also raises questions concerning the quality of education that is being provided as well as the impact that online education may have on other fundamental human rights. The question of whether online education can meet the quality standards of traditional physical forms of education is a topic of considerable debate.⁷ Some research indicates that pre-existing online education tools are unable to

⁷ Perspectives differ on the quality of online education. See, for example, Friedrich (2020) and Frutos-Perez (2020).

“meet the educational requirements due to the lack of real-time, two-way, face-to-face communication.” (Yue et al., 2021, p. 47). Despite heterogeneous opinions on the quality of online education, it is evident that technological requirements are a determining factor in successful online education. Both access to and the quality of online learning environments are dependent on several aspects: the underlying infrastructure; the minimum software and hardware requirements; and other factors such as connection speed. This obliges universities to enhance their knowledge of such minimum technical requirements, while, simultaneously, dealing with the budgetary constraints that play a role in establishing a successful online learning environment. As will be explained further in the next section, while opting for cheaper technological solutions may be justified from an economic perspective, it may come at a profound price, such as less security or reduced privacy.

The online learning environment that universities establish also has consequences from students' perspectives. To be able to participate in the first place, students must adhere to certain technical standards put forward by the university. This raises the question of whether online education does indeed foster access to education in situations in which both the availability and quality of underlying digital infrastructures within a certain geographical area and the personal economic circumstances of students are decisive for participation. This is where the right to equal treatment and non-discrimination may come into play. Article 14 of the ECHR states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁸

From this provision, it can be derived that only discrimination in terms of the enjoyment of the “rights and freedoms set forth in the Convention” is prohibited. However, Article 1 of Protocol No. 12 extends the scope of protection against discrimination to include “any right set forth by law” and, even further yet still, includes any other act or omission by a public authority.⁹ This does not mean that a violation of the right to non-discrimination depends on the existence of a violation of another right. That is to say, even if the right to education as such is not violated by providing education online, it may nevertheless result in a violation of Article 14 if online education leads to unequal access to education. This is especially the case given that Article 14 not only covers direct forms of discrimination, but also indirect forms. Direct discrimination pertains to the fact that persons in a similar situation must be treated in an equal manner. Conversely, indirect discrimination

⁸ This right is completed by Article 1 of Protocol No. 12 to the Convention which prohibits discrimination more generally, in the enjoyment of any right set forth by law (European Court of Human Rights, 2020). The information in this section is based upon the European Court of Human Rights (2021c).

⁹ The scope extends even further, but this is beyond the scope of this chapter. For the exact scope, see the European Convention on Human Rights (2021c, p. 10).

can be explained as “disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, has a particular discriminatory effect on a particular group.” (European Convention on Human Rights, 2021c, p. 11). This not only applies to measures taken by government, as the ECHR has also acknowledged the “horizontal effect” of Article 14, which means that it can also apply in purely private situations, for example, in a scenario where a private university takes measures that impact upon equal treatment and non-discrimination. Notwithstanding the negative obligation to not discriminate, the ECHR has also established positive obligations under Article 14, which states that Contracting States are obliged to take the necessary measures to prevent or punish discrimination between private parties or to adopt measures to correct “factual inequalities”.¹⁰

Therefore, in situations in which measures to move education entirely online disproportionately affect a certain region or members of a specific group, then appropriate safeguards may have to be put in place to correct this factual inequality. As a point of comparison, it is instructive to mention several of the positive obligations considered by the ECHR to make reasonable accommodations for persons with disabilities, to be understood as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case.” (European Court of Human Rights, 2021b, p. 13). Even though the term ‘reasonable’ does indicate that budgetary issues may play a role in these matters, the court ruled in the case *Enver Şahin v. Turkey* that insufficient funds to complete all the required adaptations to provide access did not constitute a reason for not having at least started undergoing the development work (European Court of Human Rights, 2021b, p. 14). Moreover, in relation to school fees, the ECHR has also indicated that any restrictions on access to education should not have the effect of creating a discriminatory system (European Court of Human Rights, 2021b, p. 9).

From the above, it can thus be concluded that universities need to consider the implications for equality and non-discrimination when deciding on the technical characteristics of the online learning environment and the costs that this may entail for students. While the interest of providing high-quality online education may be a justifiable reason to opt for certain technologies, the negative impact that this may have on (certain groups of) students may need to be corrected by other measures, such as providing either free licenses for students to use certain software or subsidies for students to acquire the requisite hardware to participate in the online learning environment. In this regard, the impact that certain software or hardware may have on the private lives of students must also be considered.

¹⁰ Leaving room for forms of what is also known as “positive discrimination”.

The Right to Have One’s Private Life Respected

To mimic a traditional learning environment, two-way interaction and a sense of presence are essential. Video is thus a practical necessity for online learning environments, which, in turn, requires students to have a functioning camera. This camera is situated inside the house of students, and can severely impact upon their private sphere. The home is a place where people can be themselves without the interference of others, which is disturbed by a streaming or recording camera. Elements within the home can reveal all kinds of information about the student living there, such as their economic status (type of furniture and equipment in the house), health status (medicines on the table) and religious beliefs (a cross on the wall, for example). Alongside the lecturers and other students within the online learning environment, the providers of the technology can also have access to the videos and other personal information about the students that is being processed when they register for and use the online education environment. This raises many questions from the perspective of the EU General Data Protection Regulation (GDPR).¹¹ The GDPR is an extensive legal framework with comprehensive obligations regarding the processing of personal data. An easy first step to take when assessing the legitimacy of the use of technology in education is the privacy test as embedded in Article 8 of the ECHR:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The privacy test in Article 8 consists of several questions. First, is one’s private life being interfered with? Second, is this interference justified? This question is assessed based on three steps: Is the interference foreseen by law? Is the interference serving one of the interests mentioned in section 2 of Article 8 ECHR? Is the interference necessary in a democratic society? This final step is judged based on the principles of proportionality and subsidiarity. Proportionality pertains to the question of whether the infringing measure can achieve its intended purpose. If the intended purpose can be achieved by a measure that is less invasive to someone’s privacy, then the principle of subsidiarity has been breached.

The privacy test can be illustrated in relation to the proctoring software that is being used

¹¹ For example, Angiolini et al (2020) indicate that there are four main issues with online education and the GDPR: 1) allocation of roles and responsibilities of the actors involved; 2) transparency of the processing and possibility to effectively exercise data subjects’ rights; 3) extra-EU data transfers after Schrems II; 4) challenges of e-proctoring systems.

by universities to check the identity of students taking part in an exam as well as to prevent fraud.¹² This software is detested by many students, insofar as it surveils them at home while they are taking an exam, which they deem to be a violation of their privacy.¹³ Surveillance during exams is foreseen by law, as it is a public task of universities to provide education, to administer examinations and to issue diplomas, while, simultaneously, guaranteeing both the quality of that education and of the diplomas being issued. The situation generated by COVID-19 created the need to resort to online proctoring software.¹⁴ Universities have a legal duty to provide education, assessments, and diplomas. This is important, both for the economic well-being of a country and in the interest of the right to education. The first questions of the privacy test can thus be answered in the affirmative, which leaves the question of whether proctoring is necessary in a democratic society. As indicated above, this must be assessed based on the principles of proportionality and subsidiarity. The functionality of online proctoring systems—such as monitoring the desk and the screen, disabling certain functionalities, detecting second screens—can achieve the purposes of identifying the student and preventing fraud. The key remaining question is whether these aims can be achieved in another way that is less privacy-invasive than proctoring. To answer this question, careful consideration must be given to the types of assessment that justify online proctoring as well as the functionality of such a system. For many exams, alternative options are available, such as papers, oral exams, and take-home exams. A further interest to take into consideration is whether the alternative examinations will not disproportionately impact upon the workload of teachers. Online proctoring only seems necessary for large-scale exams of great importance, consisting of multiple-choice questions and closed questions that assess one's level of remembering and understanding.¹⁵ Proctoring must also be limited in terms of functionality and duration, only resorting to what is absolutely necessary to achieve the purpose of checking the identity of the student and preventing fraud.¹⁶

Conclusion

During a pandemic, moving education to online environments may be required on the basis of the positive obligations stemming from the fundamental human right to education. Such environments can foster access to education, but they can also negatively impinge upon other fundamental human rights.

From the perspective of the right to education and the right to equality and non-discrimination, governments and universities must invest in digital infrastructures that support online education. Moreover, to prevent certain groups of students from being deprived by online education, as a result of social, technical, or economic disadvantages, measures like subsidies for hardware and free software licenses for students should be considered. When creating an online learning environment, choices over which hardware and software to use should not solely be based upon technical requirements and costs. This is because the providers of software, hardware and platforms are not neutral actors within the online learning environment. Rather, they are commercial parties with possible ulterior motives, especially in relation to the huge amounts of data that are being processed in online learning environments.¹⁷ Therefore, fundamental human rights must serve as a guiding mechanism when designing online learning environments. High-quality education—including safeguarding the validity and value of diplomas by taking measures to prevent fraud—must be ensured in such environments, while, simultaneously, also preserving students' fundamental human rights. Therefore, universities must invest in embedding privacy and data protection principles within the design and deployment of remote teaching policies and online learning environments. Moreover, as Angiolini et al also indicate, funding programs should be initiated, and investments should be made into oversight mechanisms (2020, p. 71).

¹² Based on Cuijpers (2020), who provides a more comprehensive analysis of proctoring in light of Article 8 ECHR.

¹³ See, for example, Kelly (2020).

¹⁴ In the Netherlands, based on the Act for higher education and scientific research (Wet op het hoger onderwijs en wetenschappelijk onderzoek -WHW), universities are obliged to create rules and regulations regarding examinations, in which the University of Amsterdam has indicated surveillance during exams to be obligatory.

¹⁵ See in this regard also Surf (2020).

¹⁶ A Dutch court came to a similar conclusion based on an analysis of the compliance of proctoring with the GDPR Rechtbank Amsterdam (2020) and Gerechtshof Amsterdam (2021).

¹⁷ See, for example, Goodyear (2019-2020) and St. John (2020).

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Student Perspective: What Did you Think of Online Testing?

Rick:

'Proctoring can stay as far as I'm concerned. I quite liked it. It's just hard to find the right focus in your own environment. If it's noisy at home, that can be distracting, though. But you are spared the nervous conversations in the hall before the exam. The privacy argument, that you are being watched all the time, I actually find that quite hypocritical. On social networking sites and the internet, you are constantly monitored but nobody thinks that's a problem.'

Jamie:

'I had a lot of trouble with online proctoring. Many things went wrong. My exam was declared invalid because I hadn't performed the actions correctly. The aftermath of rectifying this, and the loads of paperwork involved, was very annoying and time-consuming. That gave a lot of stress. I do understand that proctoring is necessary, and I'm not particularly against it, but then everything must go off without a hitch. The organization and the administration were not up to standard.'

Anne:

'I don't think Proctorio is ideal, but I do understand why Proctorio was used. You can be certain that the exam is fair and valid. Sometimes Proctorio stopped working briefly and then it was tempting to take a quick look at your book. I also took a few exams using TestVision. That was OK, too. TestVision works with time slots, so you cannot go back to an earlier page. I think that, whenever the exams are taking place in person again, Proctorio should continue to be an option for students who are abroad on exchange and want to finish a course.'

Milan:

'All my exams were conducted via proctoring. I was not too happy about that. It went OK with some exams, especially with multiple-choice questions. What was especially tricky was all the conditions you had to meet. A mistake was easily made, and it could have considerable consequences. In my opinion, the burden of responsibility is too much on the student. I had made a small mistake myself and it felt unjust that I was treated so harshly. Especially because I knew that I had not cheated.'

'I do understand that a tool like proctoring is indispensable, but the situation has to be taken into account. Students are already under a lot of stress because of the exam, and then there are all these checks. It's so easy to make a mistake.'