

EUROPEAN PERSPECTIVES OF EDUCATION RIGHTS FROM THE ECtHR

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1. The right to education in the ECHR – structure, meaning, scope, and interpretation

Article 2 of Protocol No. 1 of the European Convention on Human Rights (literally the Convention for the Protection of Human Rights and Fundamental Freedoms – hereinafter the Convention) defines the right to education as follows:

“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.”

The inclusion of a right to education among the Convention rights in 1952 was accepted by controversies although the originally proposed formula (‘Every person has a right to education’) was rejected to avoid imposing positive obligations on the State. Even nowadays to this Article there are unusually high number of reservations and declarations.¹

The first sentence of the Article guarantees the right of the individuals to education. The second sentence provides the right of the parents to have their children educated in conformity with their religious convictions. The second sentence is considered by the Court as an adjunct of the fundamental right to education. “The education

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¹ JACOBS, White & Ovey: *The European Convention of Human Rights*. Oxford, Oxford University Press, 2014. (6th edition). 520.

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 to the transmission of knowledge and to intellectual development.”² The Convention does not require to establish any special educational system but merely of guaranteeing in principle access to the means of education existing at a given time.

In spite of its importance, the right to education is not an absolute right, but may be subject to limitations. These are permitted by implication since the right of access “by its very nature calls for regulation by the State”³.

The objective of the second sentence is the safeguarding of pluralism in education, an essential element in the preservation of the democratic society. It does not guarantee an absolute right to have children educated in accordance with their parents’ religious or philosophical convictions.⁴

2. Principles

When interpreting the above provision of the Convention, the European Court of Human Rights (hereinafter the Court) developed several general principle.

First, the Court underlines the necessity of an *effective right of access to educational institutions*. Although that Article cannot be interpreted as imposing a duty on the Contracting States to set up or subsidise particular educational establishments or institutions of higher education, any State doing so will be under an obligation to afford an effective right of access to them⁵. Put differently, access to educational institutions is an inherent part of the *right to education*⁶.

The right of access is provided obviously only to existing educational institutions. It includes also the right to obtain official recognition of the studies completed. The beneficiary of education should be able to draw profit from the education received, has the right to obtain official recognition of the completed studies. Education in the majority of cases is not an end in itself.⁷

Secondly, the Convention does not put a positive obligation on the States but demands the *duty of regulation*. The first sentence has a negative formulation not obliging the States to establish or subsidize education of any particular type.⁸ However, the second sentence implies some positive obligations on the part of the State.

² *Campbell and Cosans v. UK*, 1982, 25 February 1982, § 33, Series A no. 48.

³ *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* [=Belgian linguistic case (No. 2)] (merits), 23 July 1968, § 2, Series A no. 6, 154?.; *Leyla Şahin v. Turkey*, no. 44774/98, § 5, 29 June 2004.

⁴ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 50, Series A no. 23.

⁵ *Belgian linguistic case*, § 3-4; *Leyla Şahin v. Turkey*, no. 44774/98, § 137, 29 June 2004.

⁶ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 50, Series A no. 23.; *Ponomaryovi v. Bulgaria*, no. 5335/05, § 49, ECHR 2011.

⁷ *Belgian linguistic case*, § 4.

⁸ *Valsamis v. Greece*, no. 21787/93, 18 December 1996.

Thirdly, *the right to education is enjoyed at all school levels*. The case-law mainly refers to primary or elementary schooling but the Court extended the rights also to secondary⁹ and higher education¹⁰ stating that it would be hard to imagine that institutions of higher education do not come within the scope of the first sentence of Article 2 of Protocol No 1.

In the Court's view, the State's margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned. Thus, at the university level, which remains optional for many people, higher fees for aliens seem to be commonplace and can be considered fully justified.¹¹ The opposite goes for primary schooling, which provides basic literacy and numeracy – as well as integration into society – and is compulsory in most countries.¹²

The fourth principle guarantees the *right to education in the national language*. Since the Belgian linguistic case the right to be educated in the national language forms part of the general right to education. “The right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be.”¹³

3. Restrictions

The text does not contain expressed list of restrictions or exhaustive list of legitimate aims.

States enjoy a certain margin of appreciation in this sphere but the Court must satisfy itself that the restrictions are foreseeable for those concerned and pursue a legitimate aim. Furthermore, a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.¹⁴

Admission and selection criteria are compatible with the Convention and may be imposed but the criteria must be foreseeable for those concerned.

School fees may have legitimate reasons but not unreservedly, and must not create a discriminatory system. In the *Ponomaryovi* case the applicants of Russian origin had enrolled in and attended secondary schools run by the Bulgarian State, They were later required, by reason of their nationality and of their immigration status to pay school fees in order to pursue their secondary education. The applicants were

⁹ *Cyprus v. Turkey* [GC], no. 25781/94, § 278, ECHR 2001-IV.

¹⁰ *Leyla Şahin v. Turkey*, no. 44774/98, § 137, 29 June 2004.

¹¹ *Ponomaryovi v. Bulgaria*, no. 5335/05, § 56, ECHR 2011.

¹² *Ponomaryovi v. Bulgaria*, no. 5335/05, § 49, ECHR 2011.

¹³ *Belgian linguistic case*, § 3. In the cases *Cyprus v. Turkey* [GC] and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts) the Court reiterated the right to receive education in the national language.

¹⁴ *Leyla Şahin v. Turkey*, no. 44774/98, § 154, 29 June 2004.

thus clearly treated less favourably than others in a relevantly similar situation, on account of their personal characteristic.¹⁵

4. Discrimination

The eventual different treatment in the implementation of Article 2 of Protocol 1 should not lead to the violation of the prohibition of discrimination, enshrined in Article 14:

“The enjoyment of the rights and freedoms set forth in [the] 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.”

The applied test is again legitimate aim plus proportionality. The case-law of the Court mainly focused in this respect on three main areas.

First, on the discrimination based on nationality, in the above mentioned *Ponomyarovi v. Bulgaria* case requiring free access to education as “effective access”.

Secondly, the Court faced the problem of the educational discrimination based on ethnic origin. Especially, numerous cases related to discrimination against the Roma community.¹⁶

In the case *Horváth and Kiss v Hungary* (2013) the applicants, Roma children with mild mental disabilities were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a consequence, they received an education that did not offer the necessary guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special schools. The education in the view of the Court should help them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Thus, the State is obliged to implement positive measures against segregation.¹⁷

Thirdly, and recently the specific concern of the Court regarded the discrimination of persons with disabilities. The development of the Court’s case-law in this regard is worth for a closer look.

5. Substantive equality of persons with pupils with disabilities

The former European Commission of Human Rights (Commission - functioning until 1998) interpreted the scope of the States’ obligation to provide specific arrangements

¹⁵ *Ponomyarovi v. Bulgaria*, no. 5335/05, § 49-50, ECHR 2011.

¹⁶ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV; *Oršuš and Others v. Croatia* [GC], no. 15766/03, ECHR 2010.

¹⁷ *Horváth and Kiss v Hungary*, no. 11146/11, § 127, 29 January 2013.

and solutions for disabled persons quite narrowly. A wide measure of discretion had to be left to the appropriate authorities as to how to make the best use possible of the resources available to them in the interests of disabled children.

In the restrictive practice of the Commission, the second sentence of Article 2 of Protocol No. 1 did not require that a child suffering from a severe mental handicap should be admitted to an ordinary private school rather than placed in a special school for disabled children.¹⁸ Similarly, it did not require the placing of a child with serious hearing impairment in a regular school.¹⁹ The use of public funds and resources also led to the conclusion that the failure to install an elevator at a primary school for the benefit of a pupil suffering from muscular dystrophy did not entail a violation.²⁰ The Court was following similar interpretation. The refusal of a single school to admit a disabled child could not be regarded as a breach of the Convention.²¹ In the case of *Şanlısoy v. Turkey*²², the applicant had complained of a discriminatory breach of his right to education on account of his autism. After examining the facts of the case and the minor's situation, the Court found that there had not been a systemic denial of the applicant's right to education on account of his autism or a failure by the State to fulfil its obligations under Article 2 of Protocol No. 1 taken together with Article 14 of the Convention. It thus dismissed the application. Applications aimed at the accommodation in special schools as well. In *Simpson v. UK* the local education authority vulnerable groups. This was due to the adoption of two related concepts that of the considered adequate the education of the child in a local large comprehensive school, while the parent wished the dyslexic child to attend a special school. The Commission concluded that it was not its task to assess the standard of the special facilities provided.²³

However, the Court gradually developed a more favourable approach in favour of the inclusive education and the reasonable accommodation. Inclusive education brings all children in the same classrooms, in the same schools. It opens real learning opportunities for groups who have traditionally been excluded like children with disabilities, or speakers of minority languages. A reasonable accommodation is an adjustment made to accommodate or make fair the system for individuals of a proven need. The term was introduced by the Convention on the Rights of Persons with Disabilities (CRPD - adopted by the United Nations on 13 December 2006, and entered into force on 3 May 2008) The refusal to make accommodation results in discrimination. The CRPD defines a "reasonable accommodation" as

“[...] necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a

¹⁸ *Graeme v. the United Kingdom* (Commission decision), no. 13887/88, 5 February 1990.

¹⁹ *Klerks v. the Netherlands* (Commission decision), no. 25212/94, 14 July 1995.

²⁰ *McIntyre v. the United Kingdom* (Commission decision), no.29046/95, 21 October 1998.

²¹ *Kalkanli v. Turkey* (dec.), no. 2600/04, 13 January 2009.

²² *Şanlısoy v. Turkey* (dec.), no. 77023/12, § 60, 8 November 2016.

²³ *Simpson v. the United Kingdom* (Commission decision), no. 14688/89, 4 December 1989.

particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

In the *Çam v. Turkey* case the Music Academy refused to enrol a blind person even though she had passed the examination. The Academy had not even considered special accommodations in order to meet her special needs. The Court considered that discrimination on grounds of disability also covers refusal to make reasonable accommodation. The Court underlined that it must have regard to the changing conditions of international and European law and respond, for example, to any emerging consensus as to the standards to be achieved. The Court noted the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education, which are enshrined in many international texts. It further emphasised that those international instruments have recognised inclusive education as the most appropriate means of guaranteeing the fundamental principles.²⁴

The Court observed that the refusal to enrol the applicant in the Music Academy was based solely on the fact that she was blind and that the domestic authorities had at no stage considered the possibility that reasonable accommodation might have enabled her to be educated in that establishment. The Court considered that the applicant was denied, without any objective and reasonable justification, an opportunity to study in the Music Academy, solely on account of her visual disability. It therefore concluded that there has been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.

The Court was aware that every child has his or her specific educational needs, and this applies particularly to children with disabilities. In the educational sphere, the Court acknowledges that reasonable accommodation may take a variety of forms, whether physical or nonphysical, educational or organisational, in terms of the architectural accessibility of school buildings, teacher training, curricular adaptation or appropriate facilities. Finally, the Court emphasises that it is not its task to define the resources to be implemented in order to meet the educational needs of children with disabilities. The national authorities, by reason of their direct and continuous contact with the vital forces of their countries, are in principle better placed than an international court to evaluate local needs and conditions in this respect.

In the case of *Enver Şahin v. Turkey* while he was a first-year mechanics student in a technical faculty of a University, the applicant was seriously injured in an accident which left the lower limbs of his legs paralysed. He asked the faculty to adapt the university premises in order to enable him to resume his studies. The judgment reiterated that education is geared to promoting equal opportunities for all, including persons with disabilities. Inclusive education indubitably forms part of the States’ international responsibility in this sphere.²⁵

²⁴ *Çam v. Turkey*, no. 51500/08, 23 February 2016 (§ 64).

²⁵ *Enver Şahin v. Turkey*, no. 23065/12, § 55, 30 January 2018.

The judgment also addressed the other concept, that of the respect for the “reasonable accommodation – necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case” – which persons with disabilities are entitled to expect in order to secure their “enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” (Article 2 CRPD). The Court concluded that the national authorities, including, in particular, the academic and judicial authorities, reacted with the requisite diligence to ensure that the applicant could continue to exercise his right to education on an equal footing with other students and, consequently, to strike a fair balance between the competing interests at stake, and that this resulted in the violation of the Convention.²⁶

After these developments in the related jurisprudence of the Court, the practice still leaves open certain questions for the standards of reasonable accommodations. Two cases on inclusive education after cautious balancing rejected the applicants claims for violation by decisions at Committee level.

Thus, there had not been a systemic denial of the applicant’s right to education in *Dupin v. France*²⁷ when an autistic child who had been denied admission to a mainstream school was directed to a specialised institution. In my view the Court did not deteriorate from its previous case-law, took into due consideration the situation of the child (the applicant’s son), the assessment of the domestic authorities, courts, and experts that found more appropriate in this autistic child’s case to enrol him into a special medico-educational institute.

In the case of *Stoian v. Romania*²⁸ the Court took into consideration that the applicant was never completely deprived of education, and she continued her studies despite the lack of personal assistance, and she advanced through the school curriculum. When evaluating whether the state authorities complied with their duty to provide reasonable accommodation the Court took into consideration that the authorities made efforts to find and retain a suitable personal assistant for him. The authorities - in compliance with the international standards in the field which recommend inclusive education for children with disabilities - recommended that the child attend mainstream schools throughout his education. When the parents alerted them to the lack of accessibility and of reasonable accommodation in school, the domestic courts ordered the local authorities to take concrete measures in the first applicant’s favour. The courts also gave interim orders compelling the authorities to make immediate accommodation for the first applicant in school. Thus, the Court rightly observed that the domestic courts reacted quickly and adequately to changes in the first applicant’s situation and renewed their instructions to the administrative authorities whenever they found that the measures taken by those authorities were insufficient. The Court took note of the difficulties encountered by the State in finding a suitable personal assistant for the first applicant and could not ignore the fact that some of these difficulties were created

²⁶ *Enver Şahin v. Turkey*, no. 23065/12, § 68, 30 January 2018.

²⁷ *Dupin v. France* (decision), no. 2282/17, 18 December 2018.

²⁸ *Stoian v. Romania*, no. 289/14, 25 June 2019. Note that I was one of the three judges in the Committee.

by the parents themselves. In the understanding of the Court the authorities did not turn a blind eye to the first applicant's needs, but allocated resources to the schools attended by him in order to help accommodate his special requirements. Therefore, the Court, in accordance with its case-law, concluded that the domestic authorities complied with their obligation to provide reasonable accommodation "not imposing a disproportionate or undue burden" and, within their margin of appreciation, to allocate resources in order to meet the educational needs of children with disabilities, and there was no violation of Article 8 of the Convention or of Article 2 of Protocol No. 1 to the Convention taken alone or together with 14 of the Convention.'

Recently, the Court in the *G.L. v. Italy* Chamber judgment, concluded that the inability for an autistic child to receive the specialised learning support to which she was entitled by law, during her first two years of primary school, had entailed a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1.²⁹ The national authorities had not determined the child's real needs or the possible solutions to allow her to attend primary school in conditions that were equivalent as far as possible to those enjoyed by other pupils, without imposing a disproportionate or undue burden on the administration. However, in this case based on very similar facts that in *Stoian*, the Court raised the threshold. The case concerned a girl with non-verbal autism who had a special assistant during the kindergarten but this was discontinued when she started elementary school. The girl according the Italian laws had a right to special assistance, therefore the parents initiated court proceedings. Their claim was rejected by the domestic administrative courts, mainly based on the argument that the local authorities had taken the necessary steps but it had been a reduction of resources allocated to the region. The justification by the lack of resources caused by budgetary restrictions was not accepted by the Strasbourg Court. The Court went even further: it underlined that limitations caused by budgetary restrictions should impact the educational offer for both non-disabled and disabled pupils in an equivalent way. The concurring opinion of judge Wojtyczek rightly pointed out that the Court is not consistent in its interpretation of the duty of reasonable accommodation. Anyway, *G.L. v. Italy* elevated the standard of assessment higher than its previous case-law.

²⁹ *G.L. v. Italy*, no. 59751/15, 10 September 2020.