

The Protection of the Right to Education within the Framework of the European Convention

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Framework

The right to education is here considered in the light of the European Convention for the protection of human rights and fundamental freedoms under the framework of the Council of Europe. The European Convention was originally opened for signature on the 4th November 1950 and entered into force on the 3rd September 1953. Currently there are 46 countries that are signatures to the Convention. Although the original rights recognized by the Convention were such rights as are traditionally thought of being civil and political rights, yet with the introduction of Protocols other rights have also been recognized.

Any Member Country upon becoming a signatory automatically assumes the responsibility of abiding with the rights mentioned in the Convention and the relative Protocols and of ensuring protection for such rights to persons found within its territory. The Convention establishes a system of protection giving the individual a right to directly petition a judicial organ established by the Convention. Before petitioning the Court the individual alleging a violation of one of the rights protected under the Convention or in its Protocols must first take his/her complaint before the domestic courts – the State being bound to ensure the provision of an effective remedy. It is only after all domestic remedies have been exhausted that an individual's complaint may be presented to the Court established under the Convention.

At present the only body forming part of the enforcement mechanism is the Court, however this 'new' procedure has come into being with Protocol 11 which came into force on the 1st November 1998. One main difference between the procedural aspects as in force prior to the amendments introduced by Protocol No. 11 was the division of responsibilities between the European Commission and the European Court. Prior to 1998 an application was first considered by the European Commission. The Commission was responsible to examine whether the application was admissible or not in the light of various criteria. If it

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considered the application inadmissible, then the application would not have been considered at all by the Court. However, in the case where the Commission considered the application admissible, then the Commission would deliver an opinion on whether the complaint did constitute a violation of the rights enshrined in the Convention or not. After the delivery of this opinion, and if the parties did not reach a friendly settlement, then the application would be sent to the European Court for its considerations and judgments.

However, with the introduction of the amendments of Protocol No.11, the European Commission no longer exists and an application is immediately considered by the European Court, or one of its chambers or committees.

Recognition of the Right to Education

This right is given recognition in the *First Protocol to the European Convention* under Article 2 in the following terms:

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.

As stated the right binds the State not to deny a person of the possibility of obtaining an education. Furthermore the State is not only bound to consider the right of parents to choose to educate their children according to their own religious and philosophical convictions, but is actually bound to respect such right of parents. In this manner, the State does not only have responsibilities for providing an opportunity of education but such education is to be respectful of the person's religious and philosophical convictions.

Unlike other rights the recognition of this right is not stated in a two paragraph article, such as for example the right to freedom of expression. It is a particularity of some of the rights as recognized under the Convention to be stated in two tiers; first the recognition of such right, followed by the limitations that may be imposed on the exercise of that right. For example the right to freedom of expression is expressed in the following terms:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 2 of the First Protocol does not state exceptions or permitted limitations and in this manner resembles the structure of other articles such as Articles 2 and 3 of the Convention, which together are held to enshrine the most fundamental values of the democratic societies making up the Council of Europe. "In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision"¹. The right to education is also a right recognized in other international instruments such as the Universal Declaration of Human Rights (Article 26), the International Covenant on Economic, Social and Cultural Rights (Article 13), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e) (v)), and the Convention on the Rights of the Child (Article 28).

Although Article 2 of the First Protocol does not state recognized limitations to the exercise of such right, yet an analysis of the case law indicates that it is not all encompassing. A definition of the protection offered by Article 2 of the First Protocol to the Convention is best obtained from a consideration of the judgments delivered by the Court.

Scope and Purpose of the Right to Education

The Court has defined the process of education by stating that "the education of children is the whole process whereby, in any society, adults endeavor 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."² As indicated below this vision of the right to education has left few areas related to education which fall out of the ambit of Article 2 of the First Protocol to the Convention.

¹ Leyla Sahin v. Turkey (Application Number 44774/98) 29 June 2004.

² Campbell and Cosans v. The United Kingdom (Application no. 7511/76; 7743/76) 25 February 1982.

In examining the application of this article to any given complaint, the Court while considering the article as a whole has distinguished the article between its first and second sentence yet at the same time has repeatedly stated that the article is to be considered as one. In the case of *Kjeldsen, Busk Madsen & Pedersen v. Denmark*³ the Court interpreted the right to education in the following terms: “As is shown by its very structure, Article 2 (P1-2) constitutes a whole that is dominated by its first sentence. By binding themselves not to ‘deny the right to education’, the Contracting States guarantee to anyone within their jurisdiction ‘a right of access to educational institutions existing at a given time’ and ‘the possibility of drawing’, by ‘official recognition of the studies which he has completed’, ‘profit from the education received.’ ”

Extent of the Right to Education

a. Applicability to all or some levels of education

The first sentence of the right as stated may be taken to refer only to the education of minors, that is, to primary and secondary education, and not to higher education. The first judgments on the right to education in fact interpreted this right as so limited by repeatedly stating that: “[T]he right to education envisaged in Article 2 is concerned primarily with elementary education and not necessarily advanced studies such as technology.”⁴

However this interpretation has evolved to encompass within the scope of the right of education also tertiary or higher education. In this sphere the Commission has considered a number of issues related to university education which include an examination of certain restrictions on access to institutions of higher education⁵ and an examination of suspension or expulsion from educational institutions⁶. At the same time the Court has stated in the case of *Leyla Sahin v. Turkey*⁷ that “While the first sentence of Article 2 essentially establishes access

³ *Kjeldsen, Busk Madsen & Pedersen v. Denmark* (Application no. 5095/71; 5920/72; 5926/72) 7 December 1976.

⁴ *X. v. the United Kingdom*, no. 5962/72, Commission decision of 13 March 1975, DR 2, p. 50; and *Kramelius v. Sweden*, no. 21062/92, Commission decision of 17 January 1996.

⁵ *X. v. the United Kingdom*, no. 8844/80, Commission decision of 9 December 1980.

⁶ *Yanasik v. Turkey*, no. 14524/89, Commission decision of 6 January 1993; *Sulak v. Turkey*, no. 24515/94, Commission decision of 17 January 1996.

⁷ See footnote 1.

to primary and secondary education, there is no watertight division separating higher education from other forms of education.”

The case of *Leyla Sahin v. Turkey* is an interesting case to consider when examining the scope of the right to education. One of the complaints brought by Leyla Sahin before the Court was that the lack of access to her university on the basis that she was wearing a headscarf was in violation of her right to education as protected by Article 2 of the First Protocol to the Convention. In seeking to establish the limits of the sphere of the right to education the Court in these proceedings also considered the work of the Council of Europe in the field of education and sought to define the extent of this right in the light of developments explaining that: “The Court does not lose sight of the fact that the development of the right to education, whose content varies from one time or place to another, according to economic and social circumstances, mainly depends on the needs and resources of the community. However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, the Convention is a living instrument which must be interpreted in the light of present-day conditions...”

While the Court has in these proceedings established that institutions of higher education fall within the scope of the first sentence of Article 2 of the First Protocol to the Convention, yet it seems that this first sentence does not make it obligatory on the State to provide such institutions of higher education, however if so established, then the State is bound with the responsibilities that this Article imposes upon it in providing education. In this light the Court stated that: “Although that Article does not impose a duty on the Contracting States to set up institutions of higher education, any State so doing will be under an obligation to afford an effective right of access to them. In a democratic society, the right to education, which is indispensable to the furtherance of human rights, plays such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision.”

b. Is it a right limited to access to education?

Having established that the right to education refers to all levels of education it is furthermore important to consider whether the right to education is only a right to access to such educational institutions. In practice, were the scope of this right be limited to a right to access

to any such academic institution, the individual would have only a limited right to education without any protection in practice once such access is granted. For that right to be effective, access to the academic institution must be accompanied with the possibility for the individual who is the beneficiary to have the opportunity “of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed.”

c. Method of Education

It is the second sentence of the stipulation of the right to education that has given rise to most of the complaints examined by the Court in the light of this Article. In applying this right to the circumstances that have been brought before it, the Court has had to clearly define the extent of a number of terms used in this second sentence, such as “functions which it assumes in relation to education and to teaching” and “religious and philosophical convictions.”

d. “State’s Functions”

In considering the extent of the State’s functions the Court has had to consider whether for example the teaching of sex education⁸ or the participation of students in activities related to the celebration of a National day⁹ or the exercise of disciplinary measures¹⁰ fall within the responsibility of the State under this Article. When any such functions are held to fall within the ambit of this Article, then that State is bound to ensure that such practices and measures are respectful of the parents’ religious and philosophical convictions and of those of the student.

In considering the second sentence of the right to education it is important that one does not forget that under the Convention an individual enjoys freedom of conscience and religion and that parents are entitled to offer their children an upbringing in line with their convictions. In this light, the State in offering academic institutions cannot ignore these rights and is consequently directly by way of Article 2 of the First Protocol and also indirectly in education matters

⁸ Kjeldsen, Busk Madsen & Pederson v. Denmark, (Application no. 5095/71; 5920/72; 5926/72) 7 December 1976.

⁹ Efstratiou v. Greece, (Application no. 24095/1994) 18 December 1996.

¹⁰ Campbell and Cosans v. United Kingdom, (Application no. 7511/76; 7743/76) 25 February 1982.

as an effect of Article 9¹¹ of the Convention bound to ensure that such academic institutions are not managed in such a way that conflicts with the religious or philosophical convictions of the person receiving that education.

The extent of the applicability of this second sentence and its interpretation is best seen through a consideration of a number of judgments delivered by the Court. The case of *Campbell and Cosans v. United Kingdom*¹² considered whether the term “functions” in relation to education and teaching encompasses also disciplinary measures that are adopted by the schools in disciplining students. In these proceedings, the parents complained of the use of corporal punishment as a disciplinary measure used in State schools in Scotland attended by their children alleging that their rights under the second sentence of this Article (P1-2) were violated. The Government here submitted that measures of discipline do not fall within the ambit of the functions mentioned in the second sentence of Article 2 (P1-2) arguing that this is only a matter of internal administration and is only ancillary to such functions. However the Court rejected this argument concluding that the obligations imposed by this Article are “binding upon the Contracting States in the exercise of ‘each and every’ function that they undertake in the sphere of education and teaching, so that the fact that a given function may be considered to be ancillary is of no moment in this context.”

Consequently, the Court in adopting a less restrictive interpretation of such terms has brought about a situation whereby the obligations of the State do not stop at making educational institutions available but a State is also responsible for issues that fall within the administration of such institutions. However, this is not to say that every day issues that arise within the administration of a school are the direct responsibility of the State, as the Court clearly distinguished this in saying that:

It may be true that the day-to-day maintenance of discipline in the schools in question is left to the individual teacher; when he administers corporal punishment he is exercising not a power delegated to him by the State but a power vested in him by the common law by virtue of his status as a teacher, and the law in this respect can be changed

¹¹ Freedom of thought, conscience and religion: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”

¹² *Campbell and Cosans v. United Kingdom* (Application no. 7511/76; 7743/76) 25 February 1982.

only by Act of Parliament (...). Nevertheless, in regard to education in Scotland, the State has assumed responsibility for formulating general policy (...) and the schools attended by the applicants' children were State schools. Discipline is an integral, even indispensable, part of any educational system, with the result that the functions assumed by the State in Scotland must be taken to extend to question of discipline in general, even if not to its everyday maintenance. Indeed, this is confirmed by the fact that central and local authorities participated in the preparation of the Code of Practice and that the Government themselves are committed to a policy aimed at abolishing corporal punishment (...).

Another interesting issue that has been considered by the Court in relation to the right to education is one which deals with access to education in a particular language, often in a language that is spoken by the minority. Reference may here be made to two particular cases which are the Belgian Linguistics Judgment¹³ and that given in the case of *Cyprus v. Turkey*¹⁴. In the Belgian Linguistics case the Court established the principle that this Article does not specify the language in which education must be conducted for the right to education to be respected. Therefore leading one to think that making instruction available in the language spoken by the majority would be sufficient for the State to abide by its obligations under this Article. However, as was the case with higher education already considered above, once the State has begun to provide education in such a language than it has obtained such obligation so as to ensure the continuance of such education in that language of instruction.

In the *Cyprus v. Turkey* (as already mentioned) the Court stated:

However, in the Court's opinion, the option available to Greek-Cypriot parents to continue their children's education in the north is unrealistic in view of the fact that the children in question have already received their primary education in a Greek-Cypriot school there. The authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language. Having assumed responsibility for the provision of Greek language primary schooling, the failure of the "TRNC" authorities to make continuing provision for it at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue.

¹³ Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) 23 July 1968.

¹⁴ *Cyprus v. Turkey* (Application no. 25781/94) 10 May 2001.

Decisions relating to the cancellation or annulment of exam results have also been found to fall within the ambit of the right to education as protected in the Convention. Such a complaint was considered in the case of *Mursel Eren v. Turkey*¹⁵. While this judgment is pending a decision from the Grand Chamber, the judgment delivered by the Second Section Chamber has established that while it is within the discretion of the education committee to ensure that exams are not taken in an improper manner, yet such a decision is subject to a review vis-à-vis the right to education especially when such a decision is found not to have any legal basis. The Court expressed itself as follows:

The Court emphasizes at this juncture that annulling the exam results of a candidate who is found to have cheated during the exam, is not an action left to the discretion of the ÖSYM, but is one of that organization's duties (...). In this regard, it is noteworthy that neither the academic council nor any of the administrative courts found any proof of impropriety on the part of the applicant in the present case.

...

In the absence of any proof of the applicant having cheated—or even any explicit accusation leveled against him to that effect—, and bearing in mind his undisputed submission that he had prepared for the 1997 examinations by attending a private course, the Court finds untenable the conclusion reached by the academic council that his good results could not be explained. It concludes, therefore, that the decision to annul the applicant's exam results, which was subsequently upheld by the domestic courts, lacked a legal and rational basis, resulting in arbitrariness.

d. “Religious and Philosophical Convictions”

Another issue that needs to be considered under the right to education is the obligation of the State to respect the right of the parents to educate their children according to their religious or philosophical convictions. While the stipulation is rather clear it is the definition or rather the issues that are covered by the terms “*religious or philosophical convictions*” that have given rise to some ambiguity.

In the case of *Eriksson v. Sweden*¹⁶ the mother complained that her child had been taken into care and was placed in a foster home whose household did not practice the dictates of the Pentecostal movement to which her mother had converted. She alleged that the placement of

¹⁵ (Application no. 60856/00) 7 February 2006 under appeal to the Grand Chamber.

¹⁶ *Eriksson v. Sweden* (Application No. 11373/1985) 23 May 1989.

her daughter within a foster home which did not profess the dictates of the Pentecostal movement prohibited her from educating her daughter according to her religious convictions. In seeking to reach a decision the Court concluded that the applicant's allegation was unsubstantiated however this only after taking into consideration the fact that the applicant had changed her religion after the child was taken into care and that the applicant had not presented her claim before the domestic authorities prior to bringing her complaint before the Court. The judgment delivered in the *Olsson v. Sweden*¹⁷ also related to the education of children taken into care in line with the parents' religious and philosophical convictions. Although in both cases the Court did not find a violation of Article 2 of the First Protocol, yet an important principle was established in that the right of parents to educate their children in their own religious or philosophical convictions remains valid even after the children have been taken into care. At the same time these two proceedings seem to require a religious or philosophical conviction held prior to the taking of the children into care and a conviction that may be objectively established.

Furthermore for a school practice or legislation to be found in violation of the right to education the Court also needs to find that such practice or legislation offends the religious or philosophical conviction of the parents.¹⁸

The participation of school children in parades commemorating a national historical event has also been considered by the Court. In the case of *Efstratiou v. Greece*¹⁹ the applicants alleged a violation of the second sentence of Article 2 of the First Protocol on the basis that the applicants' child was suspended from school after refusing to participate in the school parade. The applicants being persons professing the beliefs of Jehovah Witnesses argued that the participation of their child in the school parade runs counter to their pacifist beliefs. In interpreting the term "*convictions*" the Court stated:

The term "belief" ("conviction") appears in Article 9 (art. 9) in the context of the right to freedom of thought, conscience and religion. The concept of "religious and philosophical convictions" appears in Article 2 of Protocol No. 1 (P1-2). When applying that provision

¹⁷ *Olsson v. Sweden* (Application no. 10465/83) 24 March 1988.

¹⁸ *Kjeldsen, Busk Madsen & Pederson v. Denmark*, (Application no. 5095/71; 5920/72; 5926/72) 7 December 1976.

¹⁹ *Efstratiou v. Greece* (Application no. 24095/ 1994) 18 December 1996.

(P1-2), the Court has held that in its ordinary meaning “convictions”, taken on its own, is not synonymous with the words “opinions” and “ideas”. It denotes “views that attain a certain level of cogency, seriousness, cohesion and importance” (...) Mr. and Mrs. Efstratiou were accordingly entitled to rely on the right to respect for their religious convictions within the meaning of this provision (P1-2). It remains to be ascertained whether the State failed to discharge its obligations to respect those convictions in the applicants’ case.

However the Court did not stop at establishing that such views were in fact part of the religious convictions of the applicants, but having established this further considered whether in this regard the State had failed to abide with its obligations. While reiterating that the State is bound to respect the parents convictions in the entire State education programme it further stated that this applies not only to the content of education and the manner of its provision but also to the performance of all the “functions” assumed by the State. After considering the importance and the manner in which the school parade was inserted in the school curriculum, the Court while expressing itself to be “surprised that pupils can be required on pain of suspension from school—even if only for two days—to parade outside the school precincts on a holiday. Nevertheless, it can discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants’ pacifist convictions to an extent prohibited by the second sentence of Article 2 of Protocol No. 1 (P1-2).”

Caselaw has established that the right to education does not only put a negative undertaking on the State to ensure that everyone enjoys a right to education however a positive obligation on the part of the State has also been developed. Consequently the State is forbidden from pursuing “an aim of indoctrination that might be regarded as not respecting parents’ religious and philosophical convictions.” However the Court will also evaluate the situation so as to verify whether such school activity really deprives the parents from educating the child in their religious or philosophical convictions.

It is evident from the considerations made above that the right to education is in close affinity with other rights protected under the Convention such as the right of freedom of conscience, thought and religion. Furthermore, it is at times a fundamental manner in which persons coming from a minority may seek to strengthen respect and recognition of their language and religious or philosophical convictions.

In conclusion while the Court has on occasions recognized in its judgments the importance of education in developing a democratic society, this principle has been developed more thoroughly by the Council of Europe often through the Committee of Ministers. One of the recommendations²⁰ that relates to Access to Higher Education has stated in its preamble that: "... higher education has a key role to play in the promotion of human rights and fundamental freedoms and the strengthening of pluralistic democracy and tolerance [and] (...) widening opportunities for members of all groups in society to participate in higher education can contribute to securing democracy and building confidence in situations of social tension..."

It is therefore likely that developments in the sphere of the right to education, even if not only through the Court, will seek to enforce the integration of minorities through the exercise of their right to education, thereby insisting on access to an education that is inclusive rather than exclusive.

²⁰ Committee of Ministers of the Council of Europe, Recommendation No. R (98) 3 on Access to Higher Education. 17 March 1998.