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DUPIN V. FRANCE: THE ECTHR GOING OLD SCHOOL IN ITS APPRAISAL OF INCLUSIVE EDUCATION?

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By Johan Lievens (VU Amsterdam) and Marie Spinoy (Leuven Centre for Public Law, KULeuven)

In *Dupin v. France* the European Court of Human Rights saw itself confronted with one of the key conflicts in education law: when parents and state officials disagree on which educational trajectory is best for a child with a disability, who gets the final say? This case concerned a mother fighting the decision of the French authorities to refuse her child, who has Autism Spectrum Disorder, access to a general school (through a form of inclusive education). Instead, the child was referred to an 'Institut medico-éducatif', an institution established to provide care and a specialized type of education to children with an intellectual impairment. Seemingly going back on its prior case law, the Court did not consider the right to education of the child to be violated.

The Court ruling

The Court first ruled on the alleged violation of the right to education (Article 2 First Protocol ECHR). It referred to prior case law which indicates that education for children with a disability concerns a complex service to organise in a world of finite resources. It reiterated that the member states are in principle better placed to decide on what accommodations are reasonable in each individual case. However, they should carefully consider the impact of their choices on vulnerable groups, such as children with autism. Next, it confirms the importance of inclusive education. So far, so unremarkable. In the next step however, the Court considered that the right to education for children with a disability is adequately guaranteed by French law. This is surprising, given the refusal of inclusive education by the French authorities, contrary to the mother's wishes. The Court noted that the French legislation allows children with autism to go to general schools. It contained a right of enrolment for every child with a disability, resulting in an individually tailored school program consisting of supportive measures to meet the needs of the child. Priority is thereby given to inclusive trajectories within general schools. The Court further stated that the right to education is also ensured by the education provided in specialized institutions. In line with the French authorities, the Court considered that the special education needs of the student could not easily be met in the ordinary school system. Therefore, the Court did not find any violation of article 2 of the First Protocol. It did not consider the alleged breach of article 14 ECHR since the internal remedies had not been exhausted on that point. As we will discuss in the next paragraphs, the case raises several questions.

Inclusive education as the rule?

In an at first sight remarkable judgment, the Court seems to turn away from its previous jurisprudence. Basing itself on the Convention on the Rights of Persons with Disabilities (CRPD) as indicating international consensus, the Court in its earlier

jurisprudence recognized inclusive education as the most appropriate instrument to guarantee the principles of the CRPD, aiming to promote equal chances for all, especially for persons with a disability (*Çam*, §64; *Enver Sahin*, §62). Therefore, a very strong priority for inclusive education as the way to realise equal access to education was laid down in those cases. Although the Court in *Dupin* still praises the priority given by the French legal system to inclusive education, no such reference to the CRPD or to a more general principle of inclusive education is made. In fact, even in the section of the judgment where relevant national and international law is listed, the CRPD is notable by its absence.

While other recent cases seemed to indicate an embracing of the CRPD model (unlike the very first cases on the right to education for persons with disabilities), the Court here seems to take a step back. It is almost as if the Court considers inclusive education as a favour accorded by the State, rather than as the priority scenario to which children with a disability are entitled. One could explain this through the fact that the Court does not read Article 2 of the First Protocol in combination with Article 14 ECHR as it did in those other cases. However, this does not stop the Court from pronouncing that there is no systematic denial of the child's right to education because of his disability. Similarly, it (at least theoretically) considers the reasonable accommodations put in place for the child. This seems to indicate Article 14-considerations were taken into the deliberation process.

Moreover, the decision contains terminology that seems difficult to reconcile with the social model of disability (as put forward by the CRPD) and the model of inclusive education this dictates. Firstly, the Court is consistently talking about *autistic children* ("*enfants autistes*"), thereby giving way to the outdated medical model of disability in which a person is subsumed under the master label of their impairment. Recent doctrine and international instruments (most notably the CRPD) favour the social model approach, in which focus is laid on the social and environmental barriers that exclude people from participating in society instead of on the medical label of their individual impairment. This model thus requires that society is adapted to the needs of people with a disability and that those barriers are removed.

Secondly, the Court seems to talk of integrated education, not inclusive education. Inclusion implies that an education system is adapted and/or designed in such a way that it can provide good education for as many children with different educational needs. This includes differentiated curricula, teaching methods and individual support where necessary. Integration on the other hand describes the situation where students can enrol in a school and take classes as long as they can meet the requirements of the system. Unlike what happens in inclusive education, the system is not adjusted to their needs and the right of enrolment is limited to the extent that a student can adapt to the system. The Court at several points seems to talk about integration, not about inclusion (e.g. *Dupin*, §27 and §30). The same can be said of the description by French authorities of the requirements to be allowed into the general schooling system :

"Considering that the student admitted in a school for inclusion ('une CLIS') has to be capable of, on the one hand, taking up the minimal constraints and requirements of behaviour implied by school life, and on the other hand, of having acquired or being on the way to acquiring a capacity of communicating compatible with school assignments and situations of daily life and collective education." (own translation) (*Dupin*, §11)

The concept of inclusion (both on a societal and on an educational level) is more demanding of the education system than that of integration. The latter puts the burden of adaptation on the shoulders of the child, the way the French authorities seem to do: "we welcome you to give it a try, but if you are not able to function the same way as other students, you don't belong here."

Although its reasoning is remarkable in that aspect, the conclusion of the Court does not automatically seem unjustified. Firstly, the child had been in a general school and had seemingly not thriven there. Only after a 'mismatch' between the child and general schooling had become clear – as shown for instance by the fact that during the short period he had spent in a general school, he had had only little contact with other kids, and did not speak, write or read (*Dupin*, § 30) – recourse was made to special education. The question remains whether the French authorities did not focus too much on the 'fitness' of the child (cf. the idea of integration) instead of on the (lack of) flexibility by the school (cf. the idea of inclusion). Furthermore, one could argue that the reasoning of the Court could have a contrary effect, as a school not willing to take on the engagement of facilitating a child with a disability is somehow 'rewarded' if they manage to sabotage the 'proper' functioning of the child. Secondly, the parents of the child were divided on the matter too, the father – with whom the child was residing although the custody was being shared – being in full support of special schooling.

It would have been more compatible with prior ECHR jurisprudence and with the members states' international obligations under the CRPD had the Court reaffirmed the priority of inclusive education. In the circumstances at hand, however, divergence from that priority track might not have been illegitimate *per se* as the needs of the child would result in a serious burden for general schools.

Reliance on national authorities: more or less?

To some extent the Court did refer to its prior cases on inclusive education. It reiterated that:

> "where the educational needs of children with a disability are concerned, it is not up to the Court to define the resources to be implemented since 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." (*Dupin*, para 26).

It thus considered the French authorities as better placed to evaluate the implementation of such specific measures. It stated these same principles in *Çam* and *Enver Sahin*. However, in those cases the Court came to a stricter scrutiny of how the state acted. It thereby did not only refer to the position of national authorities as better placed to evaluate the situation, but added that national authorities should carefully consider the impact of their choices on vulnerable groups, such as children with a disability. In this case, the Court seems to emphasize the national autonomy over the required care and does not probe too searchingly. Thus, the acceptance of an overly wide margin of appreciation gives States space to divert from the priority to be given to inclusive education.

To justify this, The Court also cites the case of *Sanlisoy v. Turkey*, in which a Turkish child with autism was refused access to *one* specific school where an individualized development program in line with his diagnose could be offered. Although the Court *does* refer back to its earlier case law here, it only does so in a limited way, ignoring the differences between the *Sanlisoy* case and *Dupin*. A first difference between both judgments is how the resort to the judgment of the national authorities in *Sanlisoy v. Turkey* only followed a clear and principled multiparagraph argument in favour of inclusive education. Secondly, *Sanlisoy v. Turkey* was ruled inadmissible because the Court saw itself confronted with diverging versions of factual elements, notably related to the [number of] demands made by the parents involved to enrol their child with a disability in private schools (*Sanlisoy*, para 64). Contrary to that case, no discussion on the facts, as simple as whether the parents had or hadn't tried to enrol in more than one school existed in *Dupin.* Lastly, desiring access to a

specific school with special facilities the parents in the *Sanlisoy* case brought up the unfitness of the general school of their child (*Sanlisoy*, para 53), while the main question in the *Dupin* case was the exact opposite: whether or not the child could stay in a general school.

At odds with other Council of Europe Organs?

Another fact that could strike one as odd is the dysphonia found when this case is considered at a Council of Europe-level. In two earlier cases against France, the European Committee of Social Rights found that France did not fulfil its obligations concerning the right to education (and non-discrimination) of children with autism. It considered that there were serious flaws in the French system of providing education to children with autism, both in inclusive education and in in specialised institutions. Amongst other things, it stated that a disproportionate amount of children with autism was refused access to the general schooling system. It also pointed out as problematic that the education provided in many Instituts Médico-Educatifs is minimal and/or subsidiary to other care provided there. In comparison, the Court seems to accept quite easily that the right to education is adequately ensured for children with autism. In a third party intervention to a pending case on inclusive education (*Stoian v. Romania*), the Human Rights Commissioner also filed a report on inclusive education which is far more demanding in its definition of inclusive education. While the Court is not bound by these other organs, the Court normally does follow the European consensus on evolving matters, to which the Committee of Social Rights' position can be an indication. In any case, it is striking that these decisions are so far apart.

Is the Court really going old school?

One can wonder about the predictive value of this case for future case law on inclusive education. Where both *Çam* and *Enver Sahin* were decided in a Chamber judgment, this case was decided by three judges. Moreover, it does not seem to consider the full range of relevant legal arguments since the discrimination claim was not investigated by lack of exhaustion of domestic remedies. In both *Çam* and *Enver Sahin* Article 14 was explicitly considered. The right to reasonable accommodation, closely linked to ensuring the right to inclusive education is indeed part of the non-discrimination obligation of Article 14 ECHR. One is left to wonder what the still pending case of *Stoian v. Romania* will teach us. That case once again concerns the right to inclusive education of children with disabilities and one of the alleged violations relates to Article 2, First Protocol ECHR in combination with Article 14 ECHR.

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