

THE RIGHT TO EDUCATION: THE VISION OF THE ECtHR

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The right of education, although a socio-cultural right, is one of the most important human rights; after all, its enjoyment enhances other human rights such as, for example, freedom of speech, freedom of worship, right of information, open government and transparency, ... In that sense the right to education is not only a socio-cultural right but has in particular also an instrumental character¹ and empowers other liberal (and classical) human rights. The present contribution focusses specifically on the case law of the European Court of Human Rights concerning the right to education as guaranteed by European Convention on Human Rights

Keywords: educational law, right to education, European Convention on Human Rights

A. LEGAL BASIS: INTERNATIONAL LAW

1. Several international² and regional³ treaties on human rights contain one or more provisions with education as an object. A thorough investigation of all of those international provisions is beyond this paper's scope; here, the overview and analysis is limited to the right to education, and to the extent that this right is relevant in a European context.
2. In terms of Art. 2 of the First Protocol ECHR, "*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*".⁴
3. All human rights treaties have, amongst other, for objective to create a common understanding about human rights and to formulate common standards of goals⁵; state-parties ratifying these international human rights instrument are bound to the agreements put forward in these covenants. Specifically, the State has i) to protect

1 A. MORGAN, *The protection of the Right to Education in the International, European and Inter-American Human Rights System*, 4 and 8; concerning the difficulty of State obligations with regard to socio-cultural human rights, see in particular D. BALANESCU, *Safeguarding Education Beyond Borders*, 5 on the issue of the political and social dimension of the right to education and State obligations; S. KALANTRY, J. GETGEN and S. KOH, *Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators*, 293-299; D. WILSON, *The Quality Imperative*, 4-6.

2 See Art. 26 Universal Declaration on Human Rights; Art. 13 International Covenant on Economic, Social and Cultural Rights; Art. 28 Convention on the Rights of the Child; UNESCO Convention against Discrimination in Education; Art. 10 Convention on the Elimination of All Forms of Discrimination Against Women; Art. 24 Convention on the Rights of Persons with Disabilities. Also G. VAN BUEREN, *The International Law on the Rights of the Child*, 233.

3 E.g. Art. 2 First Protocol European Convention on Human Rights; Art. 14 Charter of Fundamental Rights of the European Union.

4 On the drafting of Art. 2 First Protocol: J. FAWCETT, *The Application of the European Convention on Human Rights*, 411-416.

5 P. KUNDU, "The Right to Education: Some Theoretical Issues", *Contemporary Issues and Ideas in Social Sciences* 2005/1, 3.

the right to education and has to refrain from actions which violate this right, ii) has to ensure that third parties do not infringe this right of others and iii) has to provide facilities required so that citizens can enjoy this right.

B. BRIEF COMPARISON

4. It should be noted that the right to education, such as that honoured in the ICESCR-Treaty and the Convention on the Rights of the Child, is formulated in a positive sense, while in the First Protocol to the ECHR the determination has been made in a negative sense.⁶ However, the right to education plays such an important role in the education of youngsters, that a restrictive interpretation of the ECHR-guarantee would not be consistent with the aim of the provision; the right however is not absolute and may be subject to limitations, in so far as these restrictions do not curtail the right such that it is deprived of its effectiveness. Within the ECHR, States have a negative obligation not to interfere with the right to education.

Art. 2 of the First Protocol protects the right to education and the freedom of education⁷, as well as the right to be respected in the teaching of the parents' philosophical, ideological or religious beliefs and the consequent right to free choice regarding the school setting and ideological and religious education.⁸ The freedom to enjoy education in accordance with one's own conviction has the following characteristics: it is an absolute freedom allowed to the extent that it is beyond any influence or pressure from the outside and it is a permanent freedom as far as it is not allowed to interrupt the freedom of choice. Moreover, this choice can be changed at any time at the person's discretion and should not be justified vis-à-vis the government. Those different aspects can also be found in the ICESCR-Treaty and the Convention on the Rights of the Child.

Other than Art. 13 of the ICESCR-Treaty, the direct applicability of Art. 2 of the First Protocol is widely accepted.

5. Free access to education is not required or prescribed by the First Protocol to the ECHR, while the comparable provisions of the ICESCR-Treaty and the Convention on the Rights of the Child in this respect are rather declarations of intent. All cited laws, however, contain an explicit provision on compulsory education, with the exception of the European Convention on Human Rights.

C. THE RIGHT TO EDUCATION

§1 Preliminary remarks and observations

6. In interpreting and applying Art. 2, primarily by the national authorities and courts⁹, one must regard the fact that its context is a treaty for the effective protection of individual human rights, and that the Convention must be read as a whole and be interpreted in such a way as to promote internal consistency and harmony between its various provisions.¹⁰ The two sentences of Art. 2 must therefore be read not only in the light of

6 In the Campbell and Cosans case the Government of the U.K. tried to invoke the reserve it has made that the right of choice of parents for education corresponding to their religious and ideological beliefs could be accepted only to the extent that it is compatible with effective education and exercise and no unreasonable costs are incurred. The European Court rejected the argument of the government under Art. 64 of the ECHR. See: L. CLEMENTS, *European Human Rights. Taking A Case Under The Convention*, 210.

7 Commission, n° 11.533/85, 6 March 1987, Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo vs Sweden: "This provision guarantees the right to start and run a private school, such a right being, however, subject to regulation by the State in order to ensure in particular the quality of education". Cf. J. VELU and R. ERGEC, *La Convention européenne des droits de l'homme*, n° 778.

8 Further about this: L. WILDHABER, "Right to Education and Parental Rights", in R.S. MACDONALD, F. MATSCHER and H. PETZOLD (eds.), *The European System for the Protection of Human Rights*, 551.

9 Explicitly ECtHR, Leyla Şahin vs Turkey, 10 November 2005, §99; ECtHR, Köse and others vs Turkey, 24 January 2006.

10 ECtHR, Catan and others vs Molodova and Russia, 19 October 2012, §136.

each other but also, in particular, in terms of Articles 8, 9 and 10 of the Convention which proclaim the right of everyone, including parents and children, “to respect for his private and family life”, to “freedom of thought, conscience and religion” and to the “freedom [...] to receive and impart information and ideas”.¹¹ Art. 2 therefore restricts State interference in education.

The Convention should, as far as possible, be interpreted in harmony with other relevant rules and principles of international law of which it forms a part.¹² Finally, the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.

7. The introductory phrase of Art. 2 contains a guarantee of education for the legal subject, particularly, the right of access to existing educational institutions, the right to education in the national language, as well as the right to official recognition of studies. According to the second sentence of the Article, the State, in the exercise of any functions in relation to education and teaching, shall respect the right of parents to ensure that such education and teaching is in conformity with their own religious and philosophical convictions.

8. Although the right to education qualifies as one of the most important in a modern society, and aims to facilitate political integration and the realization of socio-economic rights¹³, it must be clear that the right to education is not absolute but may be subject to limitations¹⁴; provided that there is no injury to the substance of the right, these limitations are permitted, as education by its very nature calls for State regulation. In order to ensure that the restrictions do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the restrictions must be foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to Articles 8 to 11 of the Convention, it is not bound by an exhaustive list of “legitimate aims” under Art. 2. A limitation assumes a reasonable relationship of proportionality between the means employed and the aim sought.¹⁵

9. Lastly, as has been settled in many other cases also regarding the right to education, the Convention (and the Protocols) is “a living instrument which must be interpreted in the light of present-day conditions”.¹⁶

§2 Definition of the term "education"

10. In the Belgian Linguistic Case, the Commission has opted for a broad interpretation of the term education: nursery, primary, secondary and higher education all fall under the concept¹⁷

11 E.g. ECtHR, Kjeldsen, Busk Madsen and Pedersen, 7 December 1976, §52; ECtHR, Leyla Şahin vs Turkey, 10 November 2005, §156. See also L. CLEMENTS, *European Human Rights. Taking a Case under the Convention*, 207.

12 ECtHR, Cyprus vs Turkey, 10 May 2001, §273-274; ECtHR, Catan and others vs Molodova and Russia, 19 October 2012, §136.

13 K. BEITER, *The Protection of the Right to Education by International Law*, 29-30; B. RAINEY, E. WICKS and C. OVEY, *Jacobs, White and Ovey: The European Convention on Human Rights*, 521.

14 E.g. ECtHR, Belgian Linguistic Case, 23 July 1968, §65; ECtHR, Leyla Şahin vs Turkey, 10 November 2005, §154.

15 ECtHR, Leyla Şahin vs Turkey, 10 November 2005, §154; ECtHR, Ali vs the U.K., 11 January 2011, §53; ECtHR, Catan and others vs Moldova and Russia, 19 October 2012, §140; ECtHR, Tarantino and others vs Italy, 2 April 2013, §45.

16 ECtHR, Leyla Şahin vs Turkey, 10 November 2005, §136.

17 In general “(...) the right to education, 'for the purpose of considering the present case', 'includes entry to nursery, primary, secondary and higher education'” (ECtHR, Belgian Linguistic Case, 23 July 1968, §1). For nursery education: ECtHR, Scozzari and Giunta vs Italy, 13 July 2000, §242. For secondary education in particular: ECtHR, Cyprus vs Turkey, 10 May 2001, specifically §273-280. Specific for higher education, see ECtHR, Tarantino and others vs Italy, 2 April 2013, §43, as far as the complainer fulfils the university's entrance requirements (cf. ECtHR, Lukach vs Russia, 16 November 1999 regarding a disabled person; ECtHR, Tarantino and others vs Italy, 2 April 2013 with regard to the necessity to pass entrance examinations). Further K.A. PÛRAITÉ, “Accessibility of Higher Education: The Right to Higher Education in Comparative Approach”, *Baltic Journal of Law & Politics* 2011/1, 27-51; A. JAKUBOWSKI, “The right to education (Art. 2 of Protocol No. 1 to the Convention) and numerus clausus in higher”,

and applies with respect to both State and private institutions.¹⁸

In a small number of subsequent decisions, harshly criticized¹⁹, the Commission²⁰ returned to its previous jurisprudence and stated that the right to education applies "*mainly to primary education (...) and not necessarily higher specialized studies*".

§3 Scope *ratione personae*

11. It is generally determined that, corresponding Art. 2, no one should be denied the right to education. This provision can thus be invoked by any legal subject who is within the jurisdiction of the Contracting States. Minors and adults, nationals as well as foreigners²¹, stateless persons as well as illegal residing persons²², are therefore bearers of this fundamental right.²³ Rephrased, the right to education applies regardless of the age of the beneficiary, his nationality, etc..

This does not mean, however, that foreigners or foreign students, for example, could rely on this right to ignore an order to leave the territory with the justification that their right to education will otherwise be violated.²⁴ Nor can a stranger enforce access to a State under Art. 2 of the First Protocol in order to pursue an education.

The right to education can be raised by both parents (in respect of their children) as well as by the children themselves.²⁵ In a case where the position of the two rightful claimants come into conflict²⁶, the child's right has to be weighed against that of its parents, taking into consideration that the second sentence (the right of parents) is subordinate to the first sentence (the right of children to education).²⁷ Parents are primarily responsible for the education and teaching of their children and they may therefore require the State to respect their

Studies in Public Law 2014/1, 107 stresses that this right for higher education at all levels, *i.e.* bachelor, master and doctoral studies.

18 ECtHR, Kjeldsen, Busk Madsen and Pedersen, 7 December 1976, §50; ECtHR, Folgerø and others vs Sweden, 29 June 2007, §84; ECtHR, Hasan and Eylem Zengin, 9 October 2007, §48.

19 L. WILDHABER (*Right to Education and Parental Right*, 531) considers that the wording, the purpose and a correct interpretation of Art. 2 indicates that "education" refers to all levels of education; G. COHEN-JONATHAN (*La Convention européenne des droits de l'homme*, 492) considers that Art. 2 applies to all levels of education. According to P. KUNDU (*The Right to Education: Some Theoretical Issues* 2 and 8-12) the right to education in developing countries is derivable from economic efficiency considerations.

20 *E.g.* Commission, n° 5962/72, 13 March 1975, X vs the U.K.; same opinion also adopted in ECtHR, Georgiou vs Greece, 13 January 2000 as follows: "*Art. 2 is concerned primarily with elementary education and not necessarily advanced studies*".

21 Commission, n° 25.297/94, 16 January 1996, Powell and others vs the U.K..

22 *E.g.* R. HODGKIN and P. NEWELL, *Implementation Handbook for the Convention on the Rights of the Child*, 23; E. KOMADA, "Turned away: The Detrimental Effect of Italy's Public Security Law on Undocumented Children's Right to education", *Boston University International Law Journal* 2011, 462.

23 Commission report of 24 June 1965, Belgian Linguistic Case, §388; also P.M. DUPUY and L. BOISSON DE CHARZOUNES, "Protocole N° 1-Art. 2", in L.E. PETTITI, E. DECAUX and P.M. IMBERT (eds.), *La Convention européenne des droits de l'homme. Commentaire Article par Article*, 1003; G. COHEN-JONATHAN, *La Convention européenne des droits de l'homme*, 58.

24 Commission, n° 7671/76, 19 May 1977, X vs the U.K. which states that the ECtHR does not guarantee a foreign person to reside in a country and in the protected right to education cannot be read any right of residence.

25 *E.g.* Commission, n° 9303/81, 13 October 1986, Brant and others vs the U.K.; Commission, n° 10491/83, 3 December 1986, Angelini vs Sweden. The fact that a child is placed by a local authority in a foster home, doesn't deprive the natural mother to demand for her child the education that is in accordance with her wishes and personal beliefs, Commission, n° 10.554/83, 15 May 1985, Aminoff vs Sweden.

26 For example, in the case where the parents want the child leaves school and goes to work while the child wishes to remain in school (Commission, n° 17.817/90, 8 September 1993, Bernard and others vs Luxembourg).

27 "*As is shown by its very structure, Art. 2 constitutes a whole that is dominated by its first sentence. (...) The right set out in the second sentence of Art. 2 is an adjunct of this fundamental right to education*" (ECtHR, Kjeldsen, Busk Madsen and Pedersen, 7 December 1976, §52); cf. ECtHR, Bulski vs Poland, 30 November 2004. L. WILDHABER, *Right to Education and Parental Rights*, 546 states that Art. 2 does not really deal with the problem of conflicts between the right of parents and the rights of the children, a

religious and philosophical convictions. The rights of the parents are not to be seen as absolute rights, but rather as a legitimate protection against any totalitarian tendencies of education organized by the State.²⁸

12. The question also arises whether, in addition to natural persons, legal persons may rely on the protection of Art. 2 of the First Protocol; in several cases, the Commission considered this to be impossible.²⁹ The legal doctrine, however, does not understand why parents might not have a collectivity, an association, a private school or a church body take their interests to heart³⁰ and, moreover, that the legislator did not choose “individual” as the legal concept but “person” - therefore, a legal person.³¹

D. ART. 2: NO PERSON SHALL BE DENIED THE RIGHT TO EDUCATION

§1 The right of the State to regulate education

13. Although the right to education provides every citizen with the possibility of using the existing educational structures, it does not prevent the government from regulating the educational system and from providing education. After all, “*the right to education guaranteed by the first sentence of Art. 2 by its very nature calls for regulation by the State*”.³² It should be noted, therefore, that the right to education is an enforceable, subjective and individual right that, however, may be limited; the right can, indeed, only be exercised after the fulfilment of the legal conditions imposed.

14. The competent authority may attach conditions to the access to certain fields of study³³ (such as the possession of a particular diploma or degree³⁴ or the successful passing of an entrance exam³⁵), impose requirements concerning the ability of prospective candidate-students in higher education³⁶, establish a registration or enrolment fee or forbid the transition from one educational institution to another during the school year, etc.

Nor is the government bound to admit less gifted or disabled children into mainstream education, if it establishes or subsidizes institutions providing special education for these pupils³⁷, or if the education provided in these institutions is more suitable for disabled children.³⁸ Art. 2 cannot favourably be invoked by the parents to enrol their handicapped child in a private specialized educational institution at the expense of the government³⁹ if disabled students can be inscribed in mainstream education with appropriate support and facilities.

fortiori doesn't regulates this conflict.

28 L. WILDHABER, *Right to Education and Parental Rights*, 547.

29 Commission, n° 3798/68, 17 December 1968, Church of Scientology of California vs the U.K. (the government had withdrawn the recognition of a school as an educational institute); Commission, n° 11.533/85, 6 March 1987, Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo vs Sweden: “(...) *the foundation being a legal and not a natural person, was not entitled to rely on Art. 2 (...)*”.

30 L. WILDHABER, *Right to Education and Parental Rights*, 549.

31 Therefore also a legal person, cf. J. VELU and R. ERGEC, *La Convention européenne des droits de l'homme*, n° 82 and n° 778.

32 Thus ECtHR, Belgian Linguistic Case, 23 July 1968, §5; ECtHR, Campbell and Cosans vs the U.K., 25 February 1982, §41.

33 E.g. a minimum age to attend Koran study education in Turkey, cf. ECtHR, Ciftci vs Turkey, 17 June 2004.

34 Commission, n° 8844/80, 9 December 1980, X vs the U.K., *D&R*, 23, 228.

35 ECtHR, Mürsel Eren vs Turkey, 7 february 2006, §44. See also the problem of a *numerus clausus* in higher education (ECtHR, Tarantino and others vs Italy, 2 April 2013, §47).

36 ECtHR, Lukach vs Russia, 16 November 1999.

37 Commission, n° 14.135/88, 2 October 1989, PD & LD vs the U.K.; CH. KNIGHT, *Human Rights in the Education Sphere*, n° 7.

38 Commission, n° 25.214/94, 4 July 1995, Klerks vs The Netherlands (complaint against registration disabled children into mainstream education type). In this respect also the UN Convention on the Rights of Persons with Disabilities cannot longer be passed.

39 Commission, n° 14.668/89, 4 December 1989, Simpson vs U.K. and n° 13.887/88, 5 February 1990, Graeme vs the U.K.

Where it can be assumed that the school authorities may impose admission requirements or may refuse to admit students, either due to middle school performance, the lack of necessary skills or aptitude for a particular training or because they have exceeded a predetermined age limit for certain studies⁴⁰, a broad consensus exists that the regulatory power does not give the government the right, through the imposition of access conditions, to deny primary education to individuals. In addition to access, the government can also impose legal conditions for the continuation of already initiated studies; thus, a student may be denied a “repeat year” for the simple reason that he has not attended more required classes.⁴¹

15. When “regulating in the field of education”, the government may also establish the educational curriculum⁴², without, however, the meaning or the content of the right to education being eroded and other provisions of the ECHR being ignored. There must be a balance between safeguarding the general interest of the community, on the one hand, and the fundamental right of a person, on the other hand.⁴³

It may be emphasized that the applicable regulations in time and space, the function of the needs of society and the resources available to the government may vary.

§2 Margin of appreciation

16. The margin of appreciation of a State in the domain of the right to education increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large.⁴⁴ At the university level, which currently remains optional for many people fees in general are commonplace and can be considered fully justified. The opposite goes for primary schooling providing basic literacy and numeracy, as well as integration into and providing first experiences of society, and which is compulsory in most countries. Secondary education falls between those two extremes, although secondary education plays an ever-increasing role in personal development and social and professional integration in a modern society.

The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the grounds of ethnic origins as compatible with the Convention⁴⁵ and specific safeguards to ensure non-discrimination of racial or ethnic minorities are necessary.⁴⁶

40 Commission, n° 5492/72, 16 July 1973, X vs Austria.

41 Commission, n° 8844/80, 9 December 1980, X vs the U.K.

42 In the Valsamis-case the Court states that it has not to interfere with the choices made by the Greek government in establishing the school program, but that it is concerned regarding the fact that a pupil could be required to participate in a school parade on a holiday outside the school at the risk to be excluded for one day at school (ECtHR, Valsamis vs Greece, 18 December 1996, §31).

43 ECtHR, Belgian Linguistic Case, 23 July 1968, §5; ECtHR, Campbell and Cosans vs the U.K., 25 February 1982, §41.

44 Settled case-law: ECtHR, Ponomaryov and Ponomaryov vs Bulgaria, 28 November 2011, §56; ECtHR, Catan and others vs Moldova and Russia, 19 October 2012, §140. B. PRANEVIČIENĖ and A. PŪRAITĖ, *Right to Education in International Legal Documents*, 146 speak in general of “a very broad margin of appreciation of the right to education provided in a particular state”.

45 Regarding to education: ECtHR, Timishev vs Russia, 13 December 2005, §56; ECtHR, Oršuš and others vs Croatia, 16 March 2010, §149

46 E.g. ECtHR, Oršuš and others vs Croatia, 16 March 2010, §182; ECtHR, Sampani and others vs Greece, 11 December 2012, §103.

17. As for the setting and planning of the curriculum, this mainly involves questions of expediency on which it is not for the Court to rule⁴⁷ and whose solutions may legitimately vary according to the country and the area.⁴⁸

By introducing compulsory ethics classes⁴⁹ or a prohibition on the wearing of religious symbols⁵⁰, the State does not exceed this margin of appreciation conferred by Art. 2 of the First Protocol. Parents cannot oppose the integration of compulsory religious or philosophical subjects in the curriculum; such a possibility would risk making all institutionalized teaching unworkable.

§3 The right to education

18. The negative formulation of the right to education caused some confusion as to the exact scope of the right when the First Protocol of the ECHR came into force. The question arose whether this provision should be construed merely as a bulwark against a government that wants to stint the “right to education” or whether it relates to a socio-economic right to education. Another important point of discussion was whether the States had the obligation to furnish or subsidize some form of education, and whether this obligation might depend on the individual’s desire. The Court gave an answer in the Belgian Linguistic Case: “*The negative formulation indicates (...), that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level*”⁵¹, nor that the government had to meet the needs of everyone within the existing education provision.⁵² Nevertheless, the Court further noted that: “*However it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Art. 2 of the Protocol*”.⁵³

Further, Art. 2 cannot be seen as an obstacle to establishing State educational institutions or to its subsidizing private institutions.⁵⁴

§4 The right of access to existing educational facilities

a) access to educational institutions

19. *The right of access.* According to the Court, there exists a right of access to, or a right to use the existing, educational infrastructure and courses of study. Naturally, States guarantee not only the right to access but

47 Settled case-law: ECtHR, D.H. and Others vs Czech Republic, 13 November 2007, §205; ECtHR, Hasan and Eylem Zengin vs Turkey, 9 October 2007, §51; ECtHR, Appel-Irggang vs Germany, 6 October 2009; ECtHR, Tarantino and others vs Italy, 2 April 2013 with regard to (entrance) examinations and other tests.

48 Explicitly in this sense ECtHR, Kjeldsen, Busk Madsen and Pedersen, 7 December 1976, §53; ECtHR, Efstratiou vs Greece, 18 December 1996, §29.

49 ECtHR, Costello-Roberts vs U.K., 25 March 1993, §27.

50 E.g. ECtHR, Leyla Şahin vs Turkey, 10 November 2005; On the margin of appreciation in religious and philosophical matters in education: A. FØLLESDAL, B. PETERS and G. ULFSTEIN, *Constituting Europe. The European court of Human rights in a National, European and Global Context*, 99-101; A. NIEUWENHUIS, “State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey”, *European Constitutional Law Review* 2005, 495-510.

51 ECtHR, Belgian Linguistic Case, 23 July 1968, §3; Commission, n° 7010/75, 29 September 1975, X vs Belgium (concerning the organization of a continuing education course); Commission, n° 11.655/85, 10 October 1985, Glazewska vs Sweden (on the refusal of the government to set up “adapted” higher education for holders of a foreign diploma).

52 Commission, n° 7527/76, 5 July 1977, X, Y and Z vs the U.K. (no requirement for a local government to provide local educational institutions structure of a certain philosophy, ideology or pedagogical method).

53 Cf. ECtHR, Belgian Linguistic Case, 23 July 1968, *Publ.Court*, Serie A, Vol. 6, §3.

54 J. VELU and R. ERGEC, *La Convention européenne des droits de l’homme*, n° 737 ; J.E.S. FAWCETT, *The Application of the European Convention on Human Rights*, 415.

access to educational institutions on the basis of equal opportunity⁵⁵; therefore, special attention must be given to special groups of children, such as children of minority groups, children with disabilities and specific learning needs, ...

20. Several Court judgements concern access to higher education. Turkish university education requires a multiple-choice examination organized by the Higher Education Council's Student Selection and Placement Centre (ÖSYM). After three failed attempts between 1994 and 1996, Mr. Mürsel Elen attended private courses to prepare for the 1997 examinations, which he passed with one of the highest results among the candidates. Nevertheless, his exam results were annulled on the advice of the academic council, given his poor results in previous years and the inexplicability of his excellent achievement. The judgement stipulates that given the absence of any proof of fraud and of any explicit accusation levelled against the student to that effect, the conclusion reached by the academic council lacked a legal and rational basis resulting in arbitrariness.⁵⁶ By annulling the applicant's exam results on the basis of the academic council's advice, the refusal to enrol the applicant denied his right to education.

A second topic concerns restrictive entrance examinations and tests to obtain a *numerus clausus* for (whether specific or not) university programmes. Firstly, in the Court's view, such entrance exams are foreseeable. Secondly, the question remains of whether the reasons for their introduction are legitimate. In the Tarantino-case the Government argued that the criteria for introducing a numerous clausus were a) the capacity and resource potential of universities and b) society's need for members of a particular (medical) profession. As to the first criterion, the Court judged that Art. 2 contains no specific obligations concerning the extent of the means of instruction and the manner of their organization or subsidization⁵⁷; the right to education applies only as far as it is available and within relevant limits. With regard to the second criterion, the Court accepts that there ought to be a balance between the provision of educational training and the pursuit of avoiding excessive public expenditure and unemployment in that sector.⁵⁸ Lastly, students who did not pass the *numerus clausus* were not denied the right to apply for any other course.⁵⁹ Therefore, the *numerus clausus* in this case was not disproportionate and, in applying those measures, the Italian State did not exceed its margin of appreciation⁶⁰, so that Art. 2 of the First Protocol was not violated.

21. *(II)legally residing persons.* Specific attention should be paid to the legal residency of pupils and students: can the issue of regularity of residency of an individual in a country justify differential treatment in access to education? This legal question was raised in Ponomaryov and Ponomaryov versus Bulgaria; after their mother remarried a Bulgarian national, she and both her sons of Russian nationality were entitled to reside in Bulgaria. During their minority, they attended secondary school and when they reached a majority, they applied for a residence permit of their own. Until this permit was obtained, both youngsters had to pay a school fee to be able to attend classes and obtain a diploma. The applicants alleged they were discriminated against since certain limited categories of aliens with permanent residence permits⁶¹ did not have to pay such a fee. The Court observes that "*a State may have legitimate reasons for curtailing the use of resource-hungry-public services*

55 G. VAN BUEREN, *The International Law on the Rights of the Child*, 245-246. Specific on the access in higher education: A. PÜRAITÉ, *Accessibility of Higher Education: The Right to Higher Education in Comparative Approach*, 27-51.

56 ECtHR, Mürsel Eren vs Turkey, 7 february 2006, §46.

57 ECtHR, Tarantino and others vs Italy, 2 April 2013, §51; compare Commission, n° 8844/80, 9 December 1980, Patel vs the U.K.

58 Cf. ECtHR, Tarantino and others vs Italy, 2 April 2013, §56.

59 Compare ECtHR, Lukach vs Russia, 16 November 1999.

60 ECtHR, Tarantino and others vs Italy, 2 April 2013, §58. Further B. SAUL, D. KINLEY and J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases, and Materials*, 1105.

61 For instance, the preferential treatment of nationals of E.U. member States is based on an objective and reasonable justification, because the E.U. forms a special legal order and establishes its own citizenship, cf. ECtHR, Ponomaryov and Ponomaryov vs Bulgaria, 28 November 2011, §54.

such as [...], by short-term and illegal immigrants, who, as a rule, do not contribute to their funding". The Court continues that education is a complex activity to organize and expensive to run; in deciding how to regulate access to education, in particular whether or not to charge fees for it and to whom, a State must strike a balance between the educational needs of those under its jurisdiction and its limited capacity to accommodate them. However, education is a right expressly enshrined in Art. 2 of the First Protocol and enjoys direct protection. Taking into account the fact that both youngsters were not in the position of individuals arriving unlawfully in Bulgaria, and the legal stay on their mother's permit while minors over many years, the Bulgarian authorities had no substantive objection to their remaining in the country nor did it have any serious intention of deporting them. Moreover, at the age of majority, they had taken steps to regularize their situation; they had never tried to abuse the Bulgarian educational system. The authorities took none of these matters into account and in these specific circumstances, the required school fees for secondary education were not justified.⁶²

In *Timishev vs Russia*, an ethnic Chechen citizen received compensation for the property he had lost in Grozny and, in exchange, the applicant had to surrender his migrant card and his children were not enrolled any longer at school. Although Mr. Timishev tried to return in 1999, his entry was refused at the administrative border. The Court stresses that Art. 2 prohibits the denial of the right to education and has no stated exceptions. In a democratic society, the right to education plays such a fundamental role that a restrictive interpretation of the first sentence of the provision would not be consistent with the aim or purpose of that provision.⁶³

b) at a given time

22. The phrase "*at a given time*" does not imply that Art. 2 constrains the government to establish or to subsidize specific educational facilities at the simple request of users; for example, actively building school premises and making instruction available for everybody⁶⁴, the creation of a particular kind of educational establishment⁶⁵, special education forms or new study facilities⁶⁶, the possibility of minority-speaking classes⁶⁷, an obligation to set up ad hoc (educational) courses for detainee(s)⁶⁸, etc.

In one case, the European Commission examined to what extent Art. 2 entails an obligation for a (local) government to provide school transport for pupils or to intervene in its cost. While the student was able to obtain registration in a nearer educational institution the Commission⁶⁹ submitted that the aforementioned provision did not impose a positive obligation on a State and thus cannot be invoked with a view to the introduction of Government-organized free transportation.

§5 The right to education and compulsory schooling

23. Several times, the question has been raised whether the right to education and the freedom to follow education also implied that the parents could explicitly renounce receiving education for their children and could

⁶² ECtHR, *Ponomaryov and Ponomaryov vs Bulgaria*, 21 June 2011, §60-62.

⁶³ ECtHR, *Timishev vs Russia*, 13 December 2005, §64; cf. ECtHR, *Leyla Şahin vs Turkey*, 10 November 2005, §137.

⁶⁴ M. NOWAK, *The Right to Education*, 254.

⁶⁵ In this sense, *inter alia*, ECtHR, *Simpson vs the U.K.*, 24 February 1998.

⁶⁶ "*Persons subject to the jurisdiction of a Contracting State cannot draw from Art. 2 of the Protocol the right to obtain from the public authorities the creation of a particular kind of educational establishment*", ECtHR, *Belgian Linguistic Case*, 23 July 1968, §9).

⁶⁷ E.g. ECtHR, *Skender vs the Former Yugoslav Republic of Macedonia*, 22 November 2001.

⁶⁸ On this topic specifically, *infra* n° 36.

⁶⁹ Commission report of 28 February 1996, *Cohen vs the U.K.*

therefore ignore, for example, a national law imposing “compulsory education”. In that regard, the Commission⁷⁰ considered that “(...) *it is clear that Art. 2 implies a right for the State to establish compulsory schooling (...) and that verification and enforcement of educational standards is an integral part of that right*”.

National law of a Contracting State obliging compulsory schooling is not considered inconsistent with Art. 2 of the First Protocol, provided that there is at least sufficient space left to the parents to educate their children. The “right to learn” can therefore entail “compulsory schooling”.⁷¹

§6 *The right to education in a national or minority language*

a) in general

24. Art. 2 is silent on the question of whether language education should be provided so that a genuine right to education can be realized. However, the Strasbourg case law shows that “(...) *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*”.⁷² In other words, a person has the right to demand education in the national language or in one of the national languages.

The principle of non-discrimination in Art. 14 ECHR does not alter that situation. Even reading Art. 14 ECHR together with Art. 2 of the First Protocol does not give the child or the parents the right to education in a language of their choice. The object of both provisions taken together is limited, and can only be understood in the sense that each State will guarantee the right to education for all legal subjects without distinction as to language. Another interpretation of the two Articles taken together would lead to absurd situations in which any person would be offered the opportunity anywhere on the State-territory to claim every possible form of education in any language. The right to education comprises in itself, therefore, no language requirement, and also the right of the parents does not imply that the States in the field of education and teaching must respect the language preference of the parents.⁷³ Whether the government has an obligation to provide special facilities in the existing educational institutions available for the benefit of non-native foreigners whose knowledge of the language of instruction is lacking, is a legitimate question to ask. After all, for such students, the right to education remains indefinitely illusive without such provision. With regard to at least primary education, a specific regime should be developed for foreign, non-native entrants.

b) minority languages

25. In the first interstate case before the Court after the reforms⁷⁴, amongst other human rights aspects, the situation in secondary schools of Greek pupils living in northern Cyprus was at stake. These children were denied secondary-educational facilities and their parents were, as a consequence, denied the right to ensure their children’s education in conformity with their religious and philosophical convictions. In northern Cyprus secondary education is open to all children in Turkish- or English-language schools and - in the strict sense - there is no denial of the right to education. Nevertheless, in the Court’s opinion the continuation of secondary education for Greek-speaking pupils is unrealistic; where they have received primary education in a Greek-

⁷⁰ Commission, n° 10.233/83, 6 March 1984, X vs the U.K.

⁷¹ Cf. L. WILDHABER, *Right to Education and Parental Rights*, 532.

⁷² ECtHR, Belgian Linguistic Case, 23 July 1968, §3; ECtHR, Catan and others vs Moldova and Russia, 19 October 2012, §137.

⁷³ ECtHR, Belgian Linguistic Case, 23 July 1968, §§6 and 7. Some criticism concerning that vision, see L. WILDHABER, *Right to Education and Parental Rights*, 541.

⁷⁴ ECtHR, Cyprus vs Turkey, 10 May 2001; C. TOPRAKSEVEN, “The Analysis of Cyprus v. Turkey: Just Satisfaction Judgment and its implications”, *The Journal of Turkish Weekly*, 22 May 2014, 3p.; Ch.E. LANDAU, “Reflections on the Right to Education”, in *Promoting Justice, Human Rights and Conflict Resolution Through International Law. Liber Amicorum Lucius Calfish*, 288-289.

language schools, these facilities do not exist for secondary education and the failure of the authorities to provide the same secondary-educational facilities must be considered as a denial of the substance of the right.⁷⁵

26. A similar case is found in *Catan vs Moldova and Russia*, in which the Court ruled that the forced closure of Latin-script schools and the harassment measures constituted interferences with the students' rights of access to educational institutions and to be educated in their national - Latin - language. As in the Cyprus case, the alternative for the parents was schooling in another language (and alphabet) instead of their mother tongue or long journeys for the children who faced substandard facilities, harassment and intimidation.⁷⁶

§7 Disciplinary sanctions versus the right to education

a) disciplinary measures

27. A few cases concerned the legal question of compliance on disciplinary matters and sanctions at school, and the right to education.

In a first case, at several occasions Ms Dogru refused to take off her headscarf⁷⁷ despite the repeated requests, as this was incompatible with physical education classes. The school's discipline committee decided to expel the pupil for breaching a) the duty of assiduity by failing to participate in physical education and sport classes, b) the school's internal rules, c) a memorandum on pupils' safety during school activities. Before the ECtHR, she complained that the disciplinary matters violated her right to education because after her exclusion, she had had to take correspondence courses and she had not sought to circumvent the obligation to attend classes regularly. The ruling recalls that the right to education does not exclude disciplinary measures, such as temporary or definitive suspension in order to ensure compliance with the applicable internal rules.⁷⁸

After a fire was discovered in a waste paper basket in a classroom, three pupils were advised not to return to school until the police investigation was completed. No limit was placed on the exclusion, although it was required by the applicable internal rules (max. 45 days), and during this period the applicant was offered revision-based, self-assessed work in different subjects. Following closure of the case by the prosecutor, the pupils re-entered the school after 48 days of exclusion. The Court accepts the foreseeability, reasonableness and, notwithstanding some procedural irregularities, fairness of the disciplinary measure; the exclusion was not arbitrary, school authorities tried to minimize the effects of the exclusion (by providing adequate alternative education, although this did not cover the full national curriculum) and the exclusion was temporary; the student was only removed from the roll call due to the intransigence of his family and himself.⁷⁹

28. Likewise, in higher education, Art. 2 does not preclude disciplinary action. The Commission⁸⁰ considers, for example, that a student at the university can be dismissed by disciplinary action if it is certain that he has

⁷⁵ ECtHR, *Cyprus vs Turkey*, 10 May 2001, §278.

⁷⁶ ECtHR, *Catan and others vs Moldova and Russia*, 19 October 2012, §143.

⁷⁷ In a series of cases the Court rules concerning a similar problem, but only under the angle of Art. 9 Convention: *inter alia*, ECtHR, *Aktas vs France (headscarf)*, ECtHR *J. Singh vs France*, ECtHR (regarding a "keski", *i.e.* under turban generally worn by children), all decisions of 17 July 2009.

⁷⁸ ECtHR, *Dogru vs France*, 4 December 2008, §83; a comment on this ruling in H. HASHMI, "Too Much to Bare? A Comparative Analysis of the Headscarf in France, Turkey and the United States", *University of Maryland Law Journal of Race, Religion, Gender and Class* 2010/2, especially 423; G. VAN BUEREN, *The International Law on the Rights of the Child*, 249-253. Compare "[...] disciplinary sanctions are an integral part of the process whereby the school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils"; see also ECtHR, *Campbell and Cosans vs the U.K.*, 25 February 1982, §33; Commission, n° 14.524/89, 6 January 1993, *Kemal Yanasik vs Turkey* (disciplinary penalties at a military school); Commission, n° 24.515/94, 17 January 1996, *Sulak vs Turkey* (suspension of a university student).

⁷⁹ ECtHR, *Ali vs the U.K.*, 11 January 2011, §64: no violation of Art. 2 First Protocol.

⁸⁰ Commission, n° 24.515/94, 17 January 1996, *Sulak vs Turkey*.

repeatedly violated the rules and even if that measure implies the student cannot acquire enrolment at another university.

In a second university case, several students were suspended for one or two terms on the grounds that they appeared to be lodging individual petitions requesting Kurdish-language classes as an optional module, which constituted an offence in Turkey. The Court examined the case under Art. 2, read in the light of Art. 10 ECHR. Firstly, are the sanctions foreseeable and do they pursue a legitimate aim; furthermore, is there a reasonable relationship of proportionality between the means employed and the aims sought to be achieved? It cannot be ignored that the university authorities acted on a legal basis, with regulations serving a legitimate aim in the Convention's terms. However, the applicants merely submitted petitions containing their views on the need to introduce specific language classes as an optional module and were not focused on breaching the peace or order in the university. The Court reiterated the settled case law regarding Art. 10 - freedom of expression - as one of the essential foundations of a democratic society and one of the basic conditions for each individual's self-fulfilment. Secondly, although the right to education does not exclude disciplinary measures, disciplinary regulations must not injure the substance of the right "*nor conflict with other rights enshrined in the Convention or its Protocols*".⁸¹ Therefore, the suspension imposed was not reasonable and proportionate.

29. It is obvious that the current (disciplinary) regulations should not prevent a pupil or student, on dismissal, from applying in a different setting for another place or subscription.⁸²

b) corporal punishment

30. The reason for a ECtHR- judgement in this area was/is the use of corporal punishment ("corporal chastisement") in numerous British schools. The basic judgement, notably the Campbell and Cosans case, is actually a diptych. On the one hand, the Campbell mother had demanded from the school authorities the guarantee that her son, Gordon, would never be subjected to corporal punishment (ultimately, the boy would never be punished, as he left the relevant school at the age of 10). On the other hand, Jeffrey Cosans had taken a shortcut from school to home that led across a cemetery; according to the school regulations, this incident could be met with corporal punishment. On the advice of his mother, her son refused to undergo that punishment, whereupon he was suspended. Access to the school would only be granted again if his mother allowed that Jeffrey should undergo corporal punishment as long as he went to school at the institution concerned.

The complaint, based on Art. 3 of the ECHR, was rejected. The plaintiff also claimed that the suspension of her son resulted in a denial of his right to education. The Court reiterated its fixed case law, under which "*the right to education guaranteed by the first sentence of Art. 2 by its very nature calls for regulation by the State, but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols*". It concerns the right of the child and not the right of a parent; the pupil could return to school on the condition that his parents renounced their convictions. That conviction is specifically protected by the second sentence of Art. 2, and especially "*convictions which the United Kingdom is obliged to respect (...)*". The Court therefore decided that "*a condition of access to an educational establishment that conflicts in this way with another right enshrined in Protocol No. 1 cannot be described as reasonable (...)*".⁸³

31. The Campbell and Cosans ruling cannot be interpreted in the sense that the decision involves an absolute prohibition of taking disciplinary measures vis-à-vis pupils who misbehave in school or commit a disciplinary offence. It cannot be disputed that a school board may impose a disciplinary punishment and thus safeguard the rights of fellow pupils, but this must be done in accordance with the provisions of the Convention and the

⁸¹ ECtHR, Irfan Temel and others vs Turkey, 3 March 2009, §45.

⁸² Commission, n° 14.524/89, 6 January 1993, Kemal Yanasik vs Turkey.

⁸³ ECHR, Campbell and Cosans vs the U.K., 25 February 1982, §41. See also Commission, n° 7907/77, 12 July 1978, X vs the U.K.

additional protocols so that the right to education is not ignored.⁸⁴ This is especially the case because any disciplinary action is the result of and due to the behaviour of the pupil himself who prevents his own exercising of the right to education; the fact that a disciplinarily sanctioned underage pupil no longer meets the requirements of compulsory schooling is not contrary to Art. 2 of the First Protocol.

§8 *The right to a form of official recognition for completed studies*

32. After the European Court, in its judgement concerning the Belgian Linguistic Case, had initially put forward the principal accessibility of education for everyone, it considered further: “*For the ‘right to education’ to be effective, it is further necessary that, inter alia, the individual who is beneficiary should have the possibility of drawing profit from the education received (...)*”.⁸⁵ In second instance, the States have the obligation to ensure some form of official recognition for finished studies and this is exactly so that the right to education would have a useful effect on the part of the holders of that right.

Citizens qualified abroad in a discipline, and would subsequently wish to settle in their country of origin, can thus turn to the latter government in order to obtain any official (academic or professional) recognition of their foreign qualifications. This recognition, however, is not automatic; the competent authorities may use accreditation and may re-examine the recognition, linking the recognition to certain conditions such as the homologation (by the equivalence) of the studies, the successful participation in an additional examination or attendance of additional training.⁸⁶ The autonomy of the competent approval authority may not lead to an absolute prohibition of recognition nor impose conditions that erode completely the protection provided by Art. 2.

§9 *The right to education and detained persons*

33. The European Court had to consider three cases concerning the right to education of prisoners.

In the first case, a pupil had to abandon his last year of high school after his imprisonment; the detainee’s father requested that the warden of the prison allow his son to complete his school year or to allow him to attend classes to learn a trade or profession. This request was refused because it was not possible to arrange high-school courses at that time in prison. First of all, the Court considered that the applicant was only prevented from continuing in full-time education during his lawful detention and that such a restriction could not be construed as a deprivation of the right to education⁸⁷; the fact that the prison facilities did not have the resources to arrange the requested courses did not cause them to fall outside the legal framework regulating the provision of courses for detainees. Moreover, he attended several sporting, artistic, and literary competitions, as well as a number of training and educational programmes in prison and it appears that as soon as the prison authorities provided courses or training programmes fitting the applicant’s requests and educational profile, he was allowed to enrol and to attend them. Considering all this, the Romanian prison authorities had not failed to comply with the obligations enshrined in Art. 2.

In the second case, a 26 year-old man was detained on remand on suspicion of the unlawful possession of firearms. Never having finished secondary education, during his imprisonment he requested permission to

⁸⁴ Commission, n°14.524/89, 6 January 1993, Kemal Yanasik vs Turkey.

⁸⁵ Settled case-law: ECtHR, Belgian Linguistic Case, 23 July 1968, §4; ECtHR, Folgerø and others vs Sweden, 29 June 2007, §84; ECtHR, Sampani and others vs Greece, 11 December 2012, §75; ECtHR, Oršuš and others vs Croatia, 16 March 2010, §146; ECtHR, Catan and others vs Moldova and Russia, 19 October 2012, §137; ECtHR, Lavida and others vs Greece, 30 May 2013, §61.

⁸⁶ Commission, n° 7864/77, 9 October 1978, X vs Belgium; Commission, n° 11.655/85, 10 October 1985, Glazewska vs Sweden.

⁸⁷ ECtHR, Epistatu vs Romania, 24 September 2013, §62 with references to Commission, n° 23.938/94, 23 October 1995, Sorabjee vs U.K.

enrol in the school operating in prison; according to a letter written by the Minister of Education, individuals deprived of their liberty were entitled to continue their education in prison but the letter made no specific reference to remand prisoners. In another letter, the refusal of enrolment was motivated by the fact that since the applicant already had prior convictions, the inclusion of recidivists in the prison's educational and work programmes for non-recidivists would lead to a breach of the requirement that different categories of inmates are to be kept apart and are to participate separately in correctional programmes. The ECtHR recalled that Art. 2 does not oblige a State to organize educational facilities for prisoners where such facilities are not already in place. However, in the present case, educational facilities were available but the applicant was refused access to them, so it must be examined whether this refusal was arbitrary and unreasonable. The Court doubted whether the restrictions were sufficiently foreseeable; furthermore, a lack of clarity was showed by the different reasons motivating the several refusals relying on three different (legal) grounds to justify the exclusion from the Prison School. Since the refusal to enrol the applicant in the Prison School "*was not sufficiently foreseeable, nor that it pursued a legitimate aim and was proportionate to that aim*"⁸⁸, there'd been a violation of Art. 2.

A third detainee alleged that he was not entitled to prepare for and take the final examination for his university law degree. Reiterating the principles of the Belgian Linguistic Case, the Court noted that the Convention provision comprises no specific obligations concerning the extent of the means and the manner in which the subsidization of education is organized. Furthermore, the Court considered that the applicant was only prevented from taking exams during a short period corresponding to his lawful detention (14 months), and was not otherwise deprived of access to an educational institution or of his right to an effective education.⁸⁹

§10 The right to education and (the wearing of) religious and philosophical symbols at school

34. Several complaints to the Court concerned the issue of the wearing of headscarves and other religious symbols at school. Although this legal question is usually addressed and assessed within the scope of Art. 9 ECHR⁹⁰, the prohibition of such wear in the present contribution is only analysed in the context of Art. 2.

A landmark ruling is the Leyla Şahin case⁹¹ in which a fifth-year medical student, who had already studied for four years at Bursa University while wearing a headscarf, was refused the right to wear a headscarf at Istanbul University. The legal basis was a circular written by the University's Vice-Chancellor, in accordance with which the applicant was denied access to a written examination on oncology and public health, was refused to enrol in the course and admission to a neurology lecture - all because the student wore a headscarf. The prohibition against wearing a headscarf at Istanbul University was foreseeable⁹² and pursued a legitimate aim of

88 ECtHR, Velyo Velev vs Bulgaria, 13 June 2014, §42.

89 The Court therefore decided the application manifestly ill-founded, ECtHR, Georgiou vs Greece, 13 January 2000;

90 E.g. ECtHR, Dahlab vs Switzerland, 15 February 2001 (teacher prohibited to wear a headscarf in the performance of her teaching duties; ECtHR, Leyla Şahin vs Turkey, 10 November 2005 (female university student. About religious symbols in ECtHR case law in general, see E. HOWARD, *Law and the Wearing of Religious Symbols. European bans on the wearing of religious symbols in education*, Oxon, Routledge, 2012, especially 58-66; G. VAN DER SCHYFF and A. OVERBEEKE, "Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans", *European Constitutional Law Review* 2011, 424-452; B. DAVIS, "Lifting the Veil: France's New Crusade", *Boston College International and Comparative Law Review* 2011, 117-144; A. HAGBERG, "The European Convention on Human Rights and the Hijab", *Human Rights II, Regional Legal Systems*, 1128-1926; S. PEI, "Unveiling Inequality: Burqa Bans and Non-discrimination Jurisprudence at the European Court of Human Rights", *Yale Law Journal* 2013, 1019-1102.

91 A comment on this ruling in H. HASHMI, Too Much to Bare? A Comparative Analysis of the Headscarf in France, Turkey and the United States, l.c., 429 a.f.; further

92 "*It would be unrealistic to imagine that the applicant, a medical student, was unaware of the regulations restricting the places where religious dress could be worn or had not been sufficiently informed about the reasons for their introduction*", cf. ECtHR, Leyla Şahin vs Turkey, 10 November 2005, §160.

protecting the rights and freedom of others and of maintaining public order, as well as to preserve the secular character of the educational institution. The Court also accepted a reasonable relationship of proportionality between the means used and the aim pursued.⁹³ The restrictions on wearing a headscarf did not, therefore, conflict with Art. 2, or with other rights enshrined in the Convention.

Several cases concerned the wearing of religious symbols in France.⁹⁴ In *Kervanci vs France*⁹⁵, the facts are similar to those of *Dogru*; the Court reiterated that certain restrictions are not incompatible with Art. 2 of the First Protocol and the refusal to obey them can be penalized with temporary or permanent exclusion. Exclusion for wearing a headscarf in neutral State schools does not infringe Art. 2 of the First Protocol.

35. Of a different order is the *Lautsi* case; the legal problem concerned the presence of religious symbols in the classroom, in particular, crucifixes. A request to remove these religious signs was rejected. The Strasbourg institutions took two decisions.

In the first decision, the Court derived from the basic principles an obligation on the State to refrain from imposing beliefs, even indirectly, in places where persons were dependent on it or in places where they were particularly vulnerable, emphasizing that the schooling of children was a particularly sensitive area in that respect. The Court “*could not see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of “democratic society” within the Convention meaning of that term*”, and further “*that the compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe. It is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State’s duty to respect neutrality in the exercise of public authority, particularly in the field of education*”.⁹⁶ Therefore, violation of the right to education *ex Art. 2*. This ruling led to overwhelming criticism in numerous countries and religious and legal organizations⁹⁷; there was talk of a religious negation and a will to eradicate Christian history and culture in Europe, of praetorian legal activism and the will to impose a postmodern liberal ideology and an illegitimate judicial legislation⁹⁸, among other objections.

The Grand Chamber overruled the heavily criticized Chamber decision. Having recalled most of the basic principles, the Court emphasized that the second sentence of Art. 2 not only concerns the content of the curricula, but also the question of religious symbols in the classrooms of State schools; the respect referred to in the previous provision is binding for the Contracting States “*in the exercise of all the functions [...] in relation to education and teaching*”⁹⁹ and includes the organization of the school environment. The Court agreed that

93 ECtHR, *Leyla Şahin vs Turkey*, 10 November 2005, §157-159.

94 Only two complaints were lodged under Art. 2, second sentence First Protocol (ECtHR, *Dogru vs France*, 4 December 2008 analysed *supra*, n° 27 “disciplinary sanctions”). The other cases were introduced mainly under the angle of Art. 9 Convention (*e.g.* amongst others ECtHR, *Aktas vs France* and ECtHR, *R. Singh vs France*, all decisions of 17 July 2009).

95 ECtHR, *Kervanci vs France*, 4 December 2008, §§80-84.

96 See ECtHR, *Lautsi and others vs Italy*, 3 November 2009, §§ 57 and 58.

97 Among others, see G. PUPPINK, “The Case of *Lautsi v. Italy*: A Synthesis”, *Brigham Young University Law Review* 2012, 873-930; D. CAPODIFERRO CUBERO, “The Position of Children’s Freedom of Thought and Religion in the Rulings of the European Court of Human Rights on the Case *Lautsi v. Italy*”, *The Age of Human Rights Journal* 2013/1, 67-93; J. TEMPERMAN (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, Martinus Nijhoff Publishers, Leiden, 2012.

98 See, *inter alia*, L. ZUCCA, “*Lautsi*: A Commentary on a Decision by the ECtHR Grand Chamber”, *International Journal of Constitutional Law* 2013/1, 220.

99 ECtHR, *Lautsi and others vs Italy*, 18 March 2011, §63.

a crucifix is above all a religious symbol, but found that there was no evidence that this sign on a classroom wall may have had an influence on pupils. However, a crucifix on a classroom wall is a passive symbol and is not to be associated with compulsory teaching about or a proselytizing tendency in Christianity. Lastly, the parents retained their right to enlighten and advise their children, to exercise in this regard their natural functions as educators, and to guide children on a path compatible with their own philosophical convictions.¹⁰⁰ As far as the parents as applicants are concerned, the second sentence of Art. 2 had not been violated; as for the children, the Court understood why pupils who are in favour of secularism may see in the presence of crucifixes in the classrooms of the attended State school an infringement of the rights they derive from those provisions. However, the Court considered that there had been no violation of Art. 2 of the First Protocol.¹⁰¹

§11 *The right to education and education at home/home schooling*

36. The doctrine is not unanimous on the competence of state to restrict home schooling. According to WILDHABER¹⁰², the government should be able to exercise control over the education provided and by the education at schools promote the integration of a young person; DUPUY and BOISSON DE CHARZOUNES¹⁰³, however, believe that if parents can opt for private school education this also implies the possibility of homeschooling. Both theorems partially pass on with that proviso that the government at all times must be able to exercise control on the quality of the home schooling.

37. The Konrad family belongs to a Christian community strongly attached to the Bible; the family members reject the attendance of private and State schools for religious reasons, since their beliefs do not accord with sex education, the discussion of mystical creatures at school and physical and psychological violence among pupils at school. The children are educated at home in accordance with the syllabus and materials of the (unrecognized as private education) “Philadelphia School”; their parents applied for exemption from compulsory primary school attendance and for permission for home education, but the exemption was refused by the authorities. The parents lodged a complaint that related mainly to the second sentence of Art. 2.¹⁰⁴ The Court recalled the former Commission’s jurisdiction that Art. 2 implies the possibility for the State to establish compulsory education, either in State schools or through private tuition of a satisfactory standard¹⁰⁵ and noted that the German authorities and courts had carefully reasoned through their decisions and mainly stressed the fact that not only the acquisition of knowledge but also integration into and first experiences of society are important goals in primary-school education. The presumption that those objectives could not be achieved to the same extent by home education was not erroneous and fell within the State’s margin of appreciation. The Court also stressed the importance of the general interest of society and the integration of minorities into society, and that therefore the aforementioned German aims were in accordance with the Court’s case law on pluralism. As the parents were able to educate their children at home after school and at weekends, the parents’ right to education in conformity with their religious convictions was not restricted in a disproportionate manner.

100 Compare ECtHR, Kjeldsen, Busk Madsen and Pedersen vs Denmark, 7 December 1976, §54; ECtHR, Valsamis vs Greece, 18 December 1996, §31.

101 ECtHR, Lautsi and others vs Italy, 3 November 2009, §§77 and 78.

102 L. WILDHABER, *Right to Education and Parental Rights*, 159.

103 P.M. DUPUY and L. BOISSON DE CHARZOUNES, *Protocole N° 1 - Art. 2*, 1008.

104 ECtHR, Konrad vs Germany, 11 September 2006. Read also F. REIMER, “School Attendance as a Civic Duty v. Home Education as a Human Right”, *International Electronic Journal of Elementary Education* 2010/1, 15p.; A. MARTIN, “Homeschooling in Germany and the United States”, *Arizona Journal of International and Comparative Law* 2010/1, 225-282 P. ROTHERMEL (ed.), *International Perspectives on Home Education. Do we still need Schools*, Hampshire/New York, Palgrave MacMillan, 2015.

105 Commission n° 10.233/83, 6 March 1984, Family H vs the U.K.

E. SOME CONCLUDING REMARKS

38. Finally, note that Art. 2 of the First Protocol is not “notstandsfest”; in other words, it is a relative right. In an emergency, one can consequently deviate from this Article.

39. The States have a negative obligation not to interfere with the right to education. However, every State has the right to regulate its educational system, in so far as those regulations do not deprive the right to education of its effectiveness. If States introduce restrictions, these must have been foreseeable to those concerned, *i.e.*, parents for pupils in primary and secondary education, and students in higher education, and must be prescribed by law. Besides which, such restrictions must pursue a legitimate aim.

Between the legitimate aim sought by the State and the means employed there must exist a reasonable relationship of proportionality. The Court takes into account the duration of an exclusion of a pupil, the existence and extent of procedural safeguards for the parents and the students, the involvement of parents in the education and decisions concerning the education of their children and the opportunity of procuring alternative education, among other factors.

The European Convention on Human Rights and its Additional Protocols are undeniably to be taken as a whole, also both sentences of Art. 2 of the First Protocol. In particular, this involves “to respect private and family life”, “freedom of thought, conscience and religion”, “freedom [...] to receive and impart information and ideas” and “respect for the ideological and philosophical convictions of the parents.

More specifically, there is the obligation of States not to discriminate certain categories of pupils; although different reasons can underlie instances of discrimination. In the Court’s case law, non-discrimination encompasses positive recognition and facilitation of a different lifestyle and regulations that are not discriminatory, as well as negative obligations that require States to refrain from discrimination although they possess a margin of appreciation for partially different treatment. Ensuring access to at least basic education on an equal basis for children belonging to a minority group is an obligation for every State within the Council of Europe. In the case of minorities, the objective and reasonable justification must be interpreted as strictly as possible.

Finally, judicial protection is essential with regard to the right to education; in the case of a breach of the right to education, parents or students must have the opportunity to lodge a complaint before courts or administrative tribunals. The courts or tribunals must then examine the complaint on the basis of both international (e.g., the ECHR) and national (e.g., constitutional) provisions regarding the right to education.

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