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HUMAN RIGHTS

Beyond Systemic Discrimination

Educational Rights, Skills Acquisition and the Case of Roma

by
Päivi Gynther

MARTINUS NIJHOFF
PUBLISHERS

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Martti Koskenniemi
General Editor

Vae qui condunt leges iniquas et scribentes iniustitiam scripserunt

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FOREWORD

The distance between the declaration of a human rights policy and the emergence of desirable effects of that policy can sometimes be long, even dauntingly so. It is one thing for a government or an international organisation to adopt a policy on a rights-related theme—say on the "right to education"—and another to have it turn into institutional arrangements and distribution of resources that correspond to the expectations of the initiators of the policy, or to those of the public at large. Of course, the government of modern societies is no easy matter. And the expectations of the interest groups may often be unrealistic or based on false premises. But even when they are not so, the broad contours of political programmes rarely turn into easily definable institutional policies, and even less often into measurable consequences in the lives of human beings. This applies above all to wide-ranging socio-economic or cultural policies, including educational policies. Here controversy even among experts remains ripe: how to measure the attainment of educational objectives? Even to simply aggregate the "results" begs the question about what "results" mean and which items should be included in the calculation. But to add the supplementary criterion (and it is hard to see how it could not be added) about the distribution of those results between different groups—that is, to include issues of equality, solidarity, and, for example, inter-generational justice in the calculation—makes the whole enterprise seem simply hopeless.

We live in a period of calculation and means-ends rationality. Everybody's (including public officials') eyes are focused on the Pareto optimum. In such a situation, rights-policies inevitably enter institutional decision-making late in the day, when the broad contours of what ought to be done has been already decided, and the question remains only of trying to avoid that no group gets unreasonably hit by the chosen avenue. This creates a structural bias that may often be hard to overcome. Formal inclusion may be accompanied by unreformed practices and expectations that lead into de facto exclusion. Yet how widely public funds should be allocated for correcting such problems remains—as it must—a matter of intricate political bargaining. In such situations, reference to formal rights, treaty provisions or policies decided at international organisations may often contribute little, if anything to the debates. More important is an enlightened awareness in the relevant institutions of the complexity and ultimately contestable nature of any chosen arrangement.

It is the great merit of Päivi Gynther's study of the application of educational rights that it shuns from any unproblematic solutions; that it accepts the complexity of educational policies—including any rights-policy—from the perspective of the actors involved, including the assumed beneficiaries. The

study is a careful and many-sided examination of the benefits and "dark sides" of the implementation of what are often understood as internationally guaranteed educational rights using the example of one disadvantaged group, the Roma. The study proceeds from the sober understanding that even where educational rights are uncontroversial, their implementation "on the ground" always requires a careful assessment in view of the circumstances of the groups affected by proposed changes. Such deformalisation of rights in the institutions where rights are to be applied is paradoxical, however. For "rights" were introduced in liberal societies only after the realisation that administrative discretion, "balancing of the stakes" and economic optimization were leading into a bureaucratic de-politization of important decision-making powers. Educational priorities were being set by officials, and in view of preferences set in administrative instead of political processes. To move to think about education in terms of "human rights" was intended to counteract the dilution of political priorities within administrative discretion. So it is certainly not enough to point to "complexity", or to hope to resuscitate legislative determinacy by introducing yet another category of rights to curtail administrative decision-making (for in due course, those "rights", too, would have to be set against countervailing rights, and available resources). More important—and this is Gynther's interesting and path-breaking suggestion—is to seek to do develop an appropriate administrative "mindset", check-lists or thumb-rules for the assessment of types of (educational) policies in regard to their potential effects on disadvantaged groups. The analysis of the framework of the "four Rs" (rights, recognition, resources and representation) is an innovative and realistic—but also theoretically sophisticated—effort to break from the impasse that opposes of absolutely determinate (and thus impossible) educational rights to all-pervading (and thus illegitimate) administrative discretion. This analysis is significant from the perspective of its immediate subject-matter—the educational situation of the Roma. But, I suggest, it is even more significant as an example of what a progressive, but still institutionally realistic policy of rights might today look like.

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ABBREVIATIONS

CCPR	Covenant on Civil and Political Rights
CDE	Convention against Discrimination in Education
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CESCR	Covenant on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CRC	Convention on the Rights of the Child
EC	European Community
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ECRI	European Commission against Racism and Intolerance
ECRML	European Charter for Regional or Minority Languages
ESC	European Social Charter
ETS	European Treaty Series
FCNM	Framework Convention for the Protection of National Minorities
HRC	Human Rights Committee of the United Nations
ICED	International Council for Educational Development
ILO	International Labour Organization
NVQ	National Vocational Qualifications
ODL	Open and Distance Learning
OSCE	Organisation for Security and Co-operation in Europe
TEC	Treaty establishing the European Community
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
* * *	Typographical character used to divide sections

PART ONE

GENERATING THE FRAME

CHAPTER ONE

INTRODUCTION

1.1. *Challenging Outdated Parameters*

More than half a century ago, the Universal Declaration of Human Rights proclaimed that everyone has the right to education. This proclamation has later been reaffirmed, in one form or another, by a number of binding international instruments. Likewise, the right to education is guaranteed by several constitutions in different parts of the globe. The proper scope of such a right has, however, become increasingly complicated in the so-called era of the information society that in contrast to the production of material commodities is, as Daniel Bell (1973) puts it, characterised by knowledge production.[1]

For one thing, the need for education definitely no longer ends when childhood ends. Expressions such as 'lifelong learning' and a 'learning society' are commonly used in the rhetoric of education policy but scarcely placed under legal analysis. For another thing, most Western states have in recent decades been forced to question their national myths about their ethnic or cultural homogeneity. Simultaneously, the myth about the national education system as the guarantor of basic educational rights to every member of the society has been called into question. It is obvious that as the pluralistic character of society is overtly recognised, even the parameters of educational rights must be modified: 'one size only' education standards must be revisited from the viewpoint of the diverging needs in contemporary societies.

In the so-called Western world, the level of educational achievement required for an individual to become a functioning member of society has continuously increased. Respectively, anybody who lacks skills in literacy and numeracy runs the risk of becoming increasingly vulnerable. The same applies to anybody who lacks skills in an officially recognised language of the country, due to the fact that diverse public services, including vocational education, are in many cases available only in such a language.[2]

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[1] For divergent views about whether the right to education qualifies as a customary norm of international law, see Beiter 2006, pp. 44–46. According to Beiter, there are two aspects of education that can with confidence be considered as part of customary law, namely the right to free and compulsory primary education and the right not to be discriminated in the enjoyment of educational rights.

[2] 'Officially recognised language' here refers to any language or languages taught in schools in the category of domestic language, and used in official communications and services. The concept is not necessarily interchangeable with 'official language', which in the strict sense refers only to a language/languages that is/are given a unique legal status in the state territory.

This study focuses on the problems of individuals with basic skill deficiencies as an issue connected to the universal right to education. It develops an analytical framework for exploring when the national educational legislation should be considered as discriminatory unless or until proven otherwise. In exploring this question, the focus will be laid on what international standards say about publicly-funded educational arrangements for individuals above compulsory school age that are oriented toward a generally recognised qualification.[3]

This research is situated at a junction where strands from discrimination law and educational rights interweave. Legally-oriented research on the right to education has no strong tradition so far, at least not in those languages from which this study derives its data. The shortage of juridical research on youth and adult education is especially striking if we consider the number of people that fail to complete their primary education because of such reasons as, for instance, forced migration, trafficking, lack of sufficient language skills, or lack of residence permit. Legal scholarship on discrimination has mainly focused on labour market and gender. Discrimination in education has, by contrast, been studied relatively little. In this field, the research must be started from the ground up.

One issue that emerges immediately in this field is the opposition between individual and collective rights.[4] The emphasis in what follows will be on individual rights. This is justified by two reasons. First, when talking about the very core of the right to education, it is individuals that are entitled to rights. Second, as groups simply do not exist apart from individuals, they should not be considered socially prior to individuals without a good reason. The concept of group rights will be analysed only as a right to sector-specific representation in the clearly demarcated research area. Yet, in the field of education, maybe more than in any other sector of society, it becomes obvious how fuzzy the boundaries between individual and collective rights are.

1.2. *Qualifications as a Means for Quality Assurance in Education*

With regard to formal education as a process, the distribution of opportunities (how to enter the education system in a given society), the content of education, and the curriculum have been much discussed. Attention has been drawn to factors affecting the input-side and the transformation process of the system. In recent years, however, the outcomes of the process have been increasingly in focus, as part of the breakthrough of performance measure-

[3] Universal compulsory school age does not exist, but varies from country to country. On average, the compulsory school age stretches from 6 to 15 or 16 years. However, there are even countries that have not legislated the compulsory school-age at all. See, for example, the list of legal age-limits in Flekkoy & Kaufman 1997, p. 141.

[4] See, for instance, Lerner 1991, Galenkamp 1998, Donders 2002.

ment systems in educational services as a means of quality assurance. As will be discussed below, the present study focuses on the output-side of the process, i.e. on formal qualifications and credentials, and suggests that even in its initial stages, education should be provided that is accredited as part of the qualifications framework.[5]

The choice to focus on the outcomes of the education process derives basically from the fact that international human rights norms not only recognise everybody's right to education but they recognise everybody's right to *quality* education. According to the UNESCO Convention against Discrimination in Education, "the subjection of any person or group to education of an inferior standard is considered as discriminatory."[6] Several other international instruments declare that achieving education for all involves high standards of teaching and learning, and that the separation of the issues of access, equality and quality is impossible.[7] With respect to world-famous precedents, the decision of the US Supreme Court in *Brown* v. *Board of Education of Topeka* (1954) stands as a judicial pronouncement that equality of educational opportunity must include an evaluation of the quality of educational services provided.[8] Both international human rights law and case law on educational rights thus acknowledge that standards of education shall be offered and verified, and individuals shall be able to evaluate the quality of education that they receive.[9]

The key point is thus that everybody has the right, not only to education, but to quality education. Disputes start as soon as one tries to define quality: what is it and how shall it be measured? Several UN bodies have struggled to develop indicators to provide information on the quality of education. Statements of the treaty bodies monitoring the right to education have often preceded these efforts. With regard to the measurement of economic, social and cultural rights, a round of international indicator discussions has recently been initiated. The indicators developed so far have mostly been found difficult to use in the work of monitoring bodies, and even if suitable indicators have been identified the problem remains which ones should be selected.[10]

The chosen focus does not reject access to education as a crucial point for educational equality, but suggest that parallel attention should be given to skills standardisation as an educational outcome, in the same manner as the equality

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[5] Credentials here denote a document certifying that one has fulfilled the requirements of and may practice in a field.

[6] The UNESCO Convention against Discrimination in Education, Article 1(1). For more detailed discussion of this provision, see Chapter 2.3.1, below.

[7] See, for instance, Jomtien Declaration, World Education Forum 2000, p. 16.

[8] *Brown* v. *Board of Education*, 347 US 483 (1954).

[9] See how the Committee on the Rights of the Child underlines the individual and subjective right to a specific quality of education in its General Comment No. 1, 2001.

[10] For an introduction on how the use of indicators has been developed in assessing compliance by state parties with the right to education as a universal right, see Beiter 2006, pp. 625–629.

discourse has broadened from equality of opportunity to equality of outcome. Philomena Essed and David Theo Goldberg (2002) point out the importance of discussing this shift in education context in their article on the cloning of cultures and systemic reproduction of sameness. According to them, "[t]hose who do not fit the productivity profile along lines of gender, race, first-third world situatedness, or educated-illiterate are likely to be marginalized". Even if profiled standards of merit and ability may have positive implications as means of educational quality assurance, they also need to be questioned as any other normative preferences for sameness. The reproduction of one's own kind by means of education may imply the de-humanising of others, which may give impetus for their systemic discrimination.

Not nearly everybody agrees either that professional education provides a route for entrance into meaningful occupations in our society. John Holt (1964) and Ivan Illich (1996/1971) are famous advocates of 'free schools' or 'de-schooling'. According to these scholars, the real challenge is to make education less structured by status systems, closer to everyday concerns, and less regimented by bureaucratic requirements and compulsion. Michel Foucault (1977) can be mentioned as a further well-known proponent of anti-school theories who argues that education has rather a repressive than liberating effect and that it amounts to nothing but exertion and restriction. Moreover, Randall Collins (1979) with his preference for 'credential radicalism' is a proponent of the abolishment of credentials. The apt criticism of this school of thought brings to light the fact that the right to education is a multi-faceted debate.

As Collins points out, credentialling may assist in the kind of job segregation in which the menial tasks are shunted off onto a separate hierarchy of 'second-class people' with no career possibilities. It may discriminate against members of particular groups insofar as these groups have limited access to educational credentials and hence are kept in a position of powerlessness. The process of credentialling may legitimise inequality by making it appear natural and immutable, while it in fact just declares 'our' social and cultural norms as the standard and 'them' as implicitly devalued, thus securing 'our superiority'.[11] Moreover, it may be that increasing credentialling creates higher levels of competition and stiffer sanctions for 'low' performance. Thus, the educational institutions may rather try to seek ways to rid themselves of low performers than to promote equality in education.

This study, however, seizes on the constructive opportunities that skills standardisation and respective credentialling can offer as regards the promotion of quality education for all. The underlying logic here is that although credentials as such do not guarantee anybody a respectable wage, they never-

[11] On increasing polarisation of the workforce into a core of highly-skilled, well paid workers and a periphery of low-skill, low-pay workers, see, for instance, Green 1997.

theless are a necessary prerequisite for many, if not most, jobs. Comparing students with the agreed-upon standard, instead of comparing them with one another, could be a way to eliminate biased credentialling for the benefit of 'average' students. Quality and standards are not synonymous, but the information generated by standards is a basis of accountability in the sense that it provides for judgements to be made on the quality of education being offered. Teaching methods, teaching materials and curriculum content may vary, but if the end result is competence in the subject matter that has been studied, then the education has been of sufficient quality.

The essential argument proposed here is that everybody should have a right to education that progresses towards clearly stated and generally recognised aims. By safeguarding the access of educationally disadvantaged individuals to an education that has clearly defined standards and that leads to generally recognised credentials, we might be able to diminish the separation of the educational world into two spheres: on the one side state-mandated diploma-targeted education in which the conduct is highly regulated, and on the other side non-certified education leading to dead-ends.

This standpoint is important in particular as national vocational qualifications (NVQs) are a form of credentialling that in past few decades have been built up all over the industrialised world. NVQs can be defined as authoritatively accredited qualifications to prove that a candidate has the ability and skill needed for a particular area of work. Definitions vary slightly from country to country, but as a rule they enable the official recognition of skills that qualify for employment in occupations requiring less than a baccalaureate or advanced degree.[12]

There are many who have not agreed with the benefits of skills standardisation, neither in the name of rivalry and antagonism, nor in the name of increased equality at the individual level. The reform is part of larger questions such as the role of the nation state as a fulfiller of the requirements of the economy under conditions of global competition, the power of capital to dominate all spheres of society, and the manifestation of what kind of knowledge is valued as a common good. Rapid technological advance and the competitive needs of corporations within globalised markets are the main impetuses for the rise of the system. It is thus no wonder that the main criticism has been targeted towards an explicit linkage of business interests with educational practices and goals. If we interpret globalisation as an idea that the world is becoming more uniform and standardised, through technological, commercial and cultural synchronisation, then undoubtedly, standardisation of marketable skills is part of this process.

[12] As a point of entry, country reports containing information about the NVQs in 30 European countries can be downloaded from <www.refernet.org.uk/35.htm>.

Certainly, it is reasonable to ask whether the rhetoric of standards, assessments, and accountability in fact aims to restrict us to thinking that conceptualises education in terms of just producing economically productive individuals, at the cost of political, ethical, aesthetic, or in fact any other type of knowledge.[13] Indeed, shortcomings of the NVQ framework have been polemicised from indigenous, labour, gender, black and out-of-school youth perspectives.[14] It has been questioned whether the system will succeed in opening up access to NVQs for previously excluded groups, or whether it in contrast merely widens the gap between the quality of education for poor and marginalised minority students and that of the more privileged students.

Research also shows that out-put related education along with output-related funding easily leads to the 'creaming off' of the best candidates.[15] This type of funding shifts provision away from the most disadvantaged groups of the society. Notable among the 'losers' are poorly educated and those with special needs. This study builds on these questions and explores whether the NVQ framework could actually serve human rights purposes by promoting meaningful realisation of the right to quality education for all. In any case, NVQ standards are here to stay so we might as well have a look at how to challenge and ultimately steer them towards human rights accountability.

In conclusion, let us make an important choice in how to conceptualise the amount, level or extent of education that should be provided for everybody. A widely held opinion among human rights scholars is that any positive right should be given a sufficiently precise meaning to make it possible to evaluate when the right is fulfilled and when not. However, to talk about a 'minimum right' or about a 'minimum amount' of education is risky, because in *realpolitik* the recommended minimum easily becomes the absolute maximum. Attempts to define the right to basic literacy or language training services merely in terms of hours is also risky, due to the fact that those who are worst off suffer most from such a mechanical measurement.

To deal with this problem, the present study introduces the concept of *"an identifiable quantum of quality education"* as a measure of the extent to which everybody's right to education should be honoured. By the use of this concept, emphasis is placed on the two points that have been discussed above. First, 'identifiable' suggests that everybody should have a right to education that progresses towards clearly stated and generally recognised aims. This might sound axiomatic when higher levels of education are under consideration, but in adult literacy, numeracy and language training programmes the setting

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[13] For critical standpoints on this issue, see, for instance, Usher & Edwards 1994, Hyland 1995, Green 1997, Bourdieu 1998.

[14] Ka'ai 1992, Parker, 1992, Burton *et al.* 1992, Samson & Vally 1996, Kgobe 1997, Felstead 1998.

[15] On negative counter-effects of output related funding see, for instance, Green 1997, p. 86, Felstead 1998.

of measurable goals may be more haphazard. Second, 'quantum' suggests that courses in basic skills should be integrated into the overall framework of national qualifications, in order to spell out what the expected learning outcomes of pre-vocational education for individuals above compulsory school-age are. The notion of 'quality' reappears throughout the study as a reminder that educational rights are in no case merely a matter of quantity.

1.3. *Specification of the Research Area and the Research Problem*

1.3.1. *Missing Rungs in the Knowledge Ladder*

A description of the pros and cons of an output-oriented approach was carried out above in order to offer a greater understanding of changes that are taking place in the research area of the present study. As regards research on educational levels, the focus of attention of researchers, by and large, has by tradition been either on initial education or on universities. Less attention has been paid to addressing the problem of social marginalisation through neglect of the right to basic and vocational education above compulsory school age. In this respect, the present study breaks new ground insofar that the research interest is focused precisely there.

In the language of metaphors, the question is whether the lowest rungs in the ladder of knowledge are missing for those individuals who are unable to fit into the mainstream system. 'The lowest rungs' here include skills acquisition in the areas of literacy, language, vocational and cultural skills, as will be described in detail in Chapter 3. In general terms, the question is whether this ladder is unbroken from the very basic education until the first level of generally recognised vocational qualifications. The research area in the entirety of the Finnish education system as an example is sketched out in Figure 1. Discrimination may well be embedded in the unquestioned laws and regulations of the research area. The soundness of the legal framework will be assessed by asking what international human rights law and minority rights law have to say on the issue of whether there are rungs of the knowledge ladder missing from literacy and language proficiency up to generally qualified vocational training for those individuals that do not fit into the national education system based on conventional age cohorts.

1.3.2. *Roma in Focus*

Another important dimension of the research concerns the identification of possible victims of discrimination. In this respect, this monograph focuses on how educational legislation may relate to the marginalisation of Roma, many of whom across Europe reportedly suffer educational disadvantage. There are numerous studies and official reports demonstrating the educational

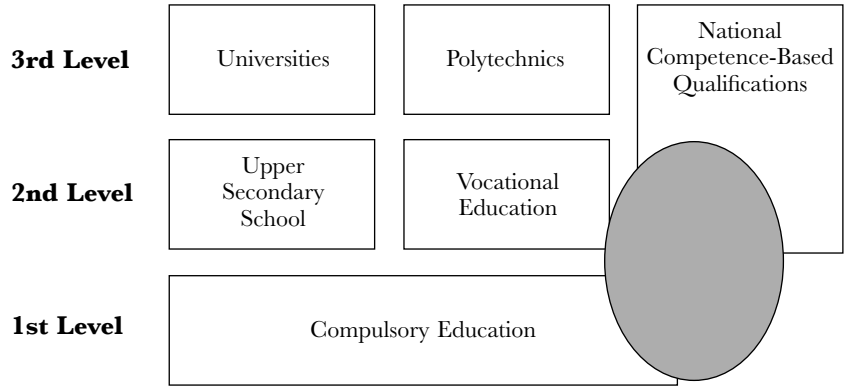

Figure 1. Research area in the context of the general educational system of Finland

deprivation of Roma.[16] At the same time, the word Roma is a rather wide notion used in various ways.[17] One fundamental distinction can be made between the definite expression 'the Roma' that refers to a group as a unit, and the expression 'Roma' without the article that refers to the individual members of the group.[18] The focus of the present study being on skills deficiency of individuals, the lack of a definite article 'the' before 'Roma' throughout the text is deliberate and is in order to avoid essentialising the concept of Roma.[19]

The Roma approach will be highlighted in Part III of the study. However, it may already at his stage be useful to identify the relevant rights and the instruments providing them. As the starting point, each and every one should have a right to adequate education in accordance with the claim that universal human rights belong to every human being. Roma as anyone are considered to be protected by instruments that seek to regulate topics such as elimination of discrimination in education, or discrimination against 'racial' or ethnic groups, even if the notion of 'race' and 'ethnicity' as such are normatively ambiguous.

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[16] For references, see below, Chapter 7.1.

[17] See e.g. Liégeois & Nicolae 1995, Okely 1997, Ladányi & Szelényi 2001, George & Acton 2001. For diverse figures concerning the number of Roma in Europe, see Liégois 1987, p. 35; Liégois 1994, pp. 29–36; Liégois & Gheorghe 1995, p. 7; Mirga & Gheorghe 1997, p. 5.

[18] Bertram 1997, pp. 2 and 11.

[19] Note, however, that when, for instance, case law is cited, the vocabulary adopted by the court at issue is used. Note also that some legal definitions in the UK encompass Gypsy Travellers as an ethnic minority, whilst some other laws distinguish Travellers because of their mobility, and still some others by reason of both ethnicity and mobility. For instance, the 1996 Education Act, obliging local education authorities to educate all children, applies equally to 'Gypsy Travellers', 'Irish and Scottish Travellers', 'Fairground Travellers', 'Circus Travellers', 'New Travellers' (i.e. persons that have taken up nomadic lives in the present generation), and 'Roma' (referring primarily to refugees from Eastern European countries). *See also* Gheorghe & Acton 2001, p. 68.

Similarly, instruments that consider education in limited contexts, such as those that seek to protect women, children, migrant workers and their families are applicable to Roma, and shall therefore be examined. The study also includes instruments that consider special aspects of education, such as professional student guidance and teacher training of good quality, from the very basics up to vocational skills. Moreover, both universal instruments regulating the treatment of stateless and refugee individuals and European regional instruments concerning asylum seekers and refugees are highly relevant to many Roma today.

From the fact that the focus here is on whether education law is biased against individuals deficient in basic skills, it follows that the recognition of Roma as a minority *per se*, entitled to protection of its group-specific characteristics, falls to a large extent outside the scope of the present study. In contrast, what will be examined here is which Roma individuals are covered by international provisions that protect the separate existence of minorities with epithets such as 'national', 'ethnic' or 'linguistic'.

The question of special minority rights and their coverage is particularly interesting in Europe, where a number of instruments have emerged recently addressing educational issues. It is reasonable to examine these standards expressly from the viewpoint of individual rights because of the very reason that in international law, members of groups accepted as 'minorities' have more guaranteed rights, including educational rights, than 'immigrants', 'migrants', 'guest workers' or 'refugees'. Thus, minority status affords a range of substantive rights as well as sources of institutional support. On the other hand, minority rights instruments do not necessarily cover all Roma communities with distinguishable characteristics and a collective will to survive, as the vagueness of minority definitions in international instruments enables both their exclusion and their inclusion.[20]

Particularly those instruments that protect or promote the linguistic rights of Roma in the educational sphere are worthy of note, as Roma in the public discourse often are treated as a single language group. The fact is, however, that European Roma speak the Romani language in different regional variants and these varieties are to a large extent mutually non-intelligible.[21] Thus, it is not necessarily correct to talk about them as a single linguistic minority. What is vital from the viewpoint of educational disadvantage is that individuals using the most marginalised dialects should not suffer from the standardisation process.

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[20] For descriptions of the concept of a minority in international law, see Capotorti 1991, p. 5; Thornberry 1991, p. 164; Gayim 2001 and references made therein.

[21] According to Gheorghe & Acton (2001, p. 97) the Romani language today is spoken by around 2.5 million of the putative 8–10 million European Roma, and there are between 50–100 mutually incomprehensible dialects. On the variations of Romani languages, see, for example, Liégois 1994, pp. 43–59.

Finally, an interesting question is to what degree international instruments distinguish between European Roma and non-European Roma, and how such a distinction goes together with individual educational rights that shall belong to all by virtue of their universality. If one is to ascribe educational rights to an individual on the basis of a specific group membership, one will have difficulty in identifying who does and does not belong to that group and face the ethical problems of doing this.

The fact that Roma fall into several legal categories calls for an analysis of a large number of international instruments. However, it is to be noted that many instruments containing important provisions on education still remain outside the scope of the study. For instance, UN instruments on indigenous peoples are excluded from the analysis, in spite of their comprehensive provisions on education rights, due to the fact that Roma do not enjoy the status of indigenous peoples in any European state.[22] Also, the study does not explore legal standards that are set for the protection of exceptional students with physical, mental, or emotional impairments, which in all its complexity is a research topic of its own.

In sum, the research question will be compressed into the following single sentence:

> What support does international human rights law provide for arguments that domestic education law discriminates against Roma in access to vocational qualifications?

Thematic operationalisation of the research question will take place after a short presentation of sources and methodology.

1.4. *Sources and Methods*

1.4.1. *Sources*

Public International Law

The study in hand uses predominantly sources of international law. By this is meant, broadly speaking, those sources defined in Article 38(1) of the Statute of the Court of International Justice (1945). Largely following the definition given in that Article, the present study will, for the purpose of delineating what international law stipulates on the subject matter, draw upon the following:

[22] For a definition of indigenous communities, peoples, and nations that is widely accepted with the UN, see Martínez Cobo 1986. For a discussion on the status of Roma as a people, nation or minority, see Bertram 1997, Aukerman 2000.

a) International treaties, whether general or particular, establishing rules expressly recognised by member states of international regimes. In somewhat generalising terms, the text of a treaty constitutes evidence of the consent of contracting state parties to rules of international human rights law more incontrovertibly that other source of international law.[23] Thus, treaties are taken up as primary sources due to the fact that a state is generally considered to be bound by treaties that it chooses to ratify.[24] Bearing in mind the large amount of norms at the international level that are potentially applicable, only the most well known bodies and agencies and only instruments making mention of educational rights will be reviewed. At the same time, it is noteworthy that this study contains even conventions that are unratified by many Western states. Whenever there is conceivable non-recognition of international human rights law, it is reasonable to ask why these standards are overlooked and what may be the effect of the neglect on recurring marginalisation of certain parts of the population.

b) Customary international law. In the context of the present study, this source refers first and foremost to the Universal Declaration of Human Rights (hereafter UDHR), which strictly speaking is a non-binding instrument but which can be considered as reflecting or even representing binding customary international law. As to countries that have endorsed the UDHR and ratified legally binding treaties based on it, there may be no point in discussing whether the Declaration as such binds them or not. Instead, an attempt will be made to analyse whether certain parts of the UDHR should in the name of indivisibility, interconnectedness and interdependency of human rights be taken more seriously than until now by any domestic legislature that is committed to respect, protect and fulfill them.

c) Acts and declarations of a non-binding nature adopted by inter-governmental organisations are used to throw extra light on the interpretation of sources mentioned above, especially when binding treaties are silent on the issue under consideration. The complementary role given to non-binding instruments is first and foremost research economic and it is not meant to declare that other instruments would have no role in bringing to reality the human right to education. Rather, the present author agrees with the arguments made by Riedel (1991) for the co-variant interaction between norms of

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[23] Such as *jus cogens*, general or special custom, general principles, judicial decisions, the teachings of publicists, UN General Assembly resolutions etc.

[24] The extent to which international law enters into domestic legal systems may sound a simple question, but answering it is not always that simple. Finland's ratification of the Convention against Discrimination in Education in 1971 is illustrative of how the reasoning behind a seemingly simple procedure may evoke many questions. Lauri Hannikainen has conducted careful research into this peculiar ratification process, and concluded that the legal reasoning behind it is unsatisfactory in several respects. *See* Hannikainen 1993, pp. 43–49.

different legal concreteness. There are several bodies, both governmental and non-governmental, both at national and at international level, whose activities in drawing attention to the shortcomings of legislation from the human rights point of view are in no way meant to be played down by the fact that their reports are not used as primary sources for the present study. On some important points, illustrative references may also be made as to how single states have observed certain sources of this category in their domestic law.

d) Judicial decisions and teachings of the 'most highly qualified' publicists of the various nations, as a subsidiary means for the determination of rules of law. The notion of 'judicial decisions' as a source to discern the law is in this study comprised widely as containing even decisions made by treaty monitoring bodies of advisory or quasi-judicial status. Thus, in addition to the judgments of the European Court of Human Rights, even decisions made by monitoring bodies of the UN treaties will be used as sources. Among diverse interpretative documents, attention will be paid to the general comments and general recommendations given by the human rights treaty bodies with the purpose of assisting the state parties in fulfilling their obligations. Textbooks and periodical literature that have been used as sources are mentioned in the list of references.

European Law

European Law in this study covers standards both from the Council of Europe and from the European Union. Regarding the Council of Europe, by and large the same applies as was said above about sources of international law in general. As the focus of this study is on human rights and minority rights, a major emphasis is placed on the instruments of the Council of Europe and on the decisions of the European Court of Human Rights. With regard to legislation of the European Union, the study in hand makes use of mainly three sources: primary legislation, secondary legislation, and case law of the European Court of Justice (ECJ). Primary legislation in the context of this study means in particular the Treaty establishing the European Community (TEC).[25] Secondary legislation comprises—in addition to case law—regula-

[25] If not otherwise stated, the abbreviation TEC will throughout this study refer to the current consolidated version of the Treaty establishing the European Community, taking into account the amendments made by the Treaty of Nice (2002). The seminal Treaty for the TEC was the Treaty of Rome, signed in 1957. Later, it was succeeded by a number of amending Treaties, three of which, the Single European Act of 1986, the Maastricht Treaty of 1993 and the Treaty of Amsterdam of 1999, notably expanded its scope. The Treaty of Nice did not bring amendments to the Amsterdam Treaty as far as provisions discussed in this study are concerned. The Treaty of Nice is thus a series of amendments to the existing Treaties and not a Treaty in its own right. A characteristic for the TEC is that its provisions are subject to the jurisdiction of the European Court of Justice, unlike the intergovernmental parts of the Treaty on European Union (TEU).

tions, directives, decisions, recommendations and opinions.[26] Case law of the ECJ is considered as binding for the member states.[27]

At the regional level, pronouncements by the European Ombudsman have not been considered a relevant source for the present study. This is due to the fact that the mandate of the European Ombudsman is delimited to apply to Community institutions and bodies, whereas education is traditionally considered as an area that falls under national competence, with Community law having only a complementary role. However, as will be discussed later, this distinction has in recent years become increasingly blurred, particularly as far as the borderline between vocational education and higher education is concerned.[28]

1.4.2. *Methodology*

When reading the following description on how the methodology will be elaborated, it is warranted to keep in mind that this study attempts to account for a phenomenon that cannot automatically be taken as given. In spite of focusing on fairly traditional sources of law, the study strives not to reduce the analysis to a mere discussion of relations between norms and questions of legal validity. Instead, an effort will be made to illustrate how a narrow, incoherent way of identifying diverse human rights norms may lead to biased educational legislation. By contrast, understanding of interaction of various norms in combination with each other is necessary so as to contribute to an increasingly sound legal framework.

Modern social theorists have pointed out the importance of analysing discursive power mechanisms and unequal divisions of access to discourse situations, including the conditions of law creation.[29] For a study focusing on the soundness of education law, a useful yield seems to be available in the theoretical work of John Rawls. In his well-known *Theory of Justice* (1971, revised 1999) he proposes what he calls the 'difference principle', which requires redistribution of societal goods to the least advantaged whenever this can be done without violating the principle of liberty. Rawls's theory as such is notoriously controversial in many respects. Particularly, communitarians and some feminist scholars have criticised the Rawlsian approach for

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[26] In a nutshell: regulations are binding and directly applicable in all the member states; directives are binding as to result to be achieved, but shall leave to national authorities the choice of form and method; decisions are binding on those to whom they are addressed; recommendations and opinions shall have no binding force. See TEC Article 249.

[27] The question posed by legal scholars of whether and when international law is really binding falls beyond the problem formulation of the present study.

[28] See below, Chapter 3.4.2.

[29] For example, Foucault 1973, Bourdieu & Passeron 1977.

failing to hear minority voices because of his overemphasis of the rational choice theory. Another wave of criticism against Rawls focuses on his high level of abstraction that is professed to erase any real sociopolitical context.[30] Yet the ideas presented in *A Theory of Justice* can still be assessed in a positive manner.

In legal sciences the methodological efforts of Rawls have been usefully elaborated by Tove Stang Dahl, a Norwegian pioneer of feminist legal theory who dedicated much of her work to describing women's subordination by means of law. Stang Dahl (1987) suggests that testimonies of single individuals and groups could be used to show how the law ignores them. She introduces for analytical purposes a method of three steps, according to which we should first examine the existing law from the viewpoint of disadvantaged groups, second, use the findings of other social sciences to argue for more inclusive legislation, and third, use testimonies of single individuals and groups on how the existing law leaves them unprotected or unnoticed. The aim of her method was to enable the use of different sources of knowledge in the analysis of law as a social construct.

The main ambition of this study is to examine the outer limits that binding international law sets for a sound legal framework on good quality post-compulsory basic and vocational education. In countries that are parties to international legal instruments on education and training, the soundness of the domestic legal framework can, at least partly, be taken to include including a commitment to ensure the implementation of these instruments. In other words, state parties to binding international human rights standards should actually follow the requirements contained in the instruments they have adopted. In any other case the commitments risk becoming meaningless.[31]

This study brings together international standards on the research area in order to establish the kind of expectations they create for the contracting states. It is to be noted that the standards to be examined may themselves

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[30] See, *e.g.* Young 1990, pp. 104–105. Most recently, Nussbaum (2006) questions Rawls's theory from the viewpoint of disability studies, global justice and animal ethics, and shows how a contract for mutual advantage among approximate equals, as suggested by Rawls, cannot address questions of social justice posed by unequal parties. This study has no ambition to contribute to theoretical discourses on moral or political philosophy as such, however, for a philosophically oriented reader, it can be interesting to note that the monograph in hand has reflected upon ideas developed in *A Theory of Justice* roughly in the following manner (page numbers in parentheses refer to Rawls 1999). Chapter 3 relates to how the concept of 'self-respect' implies a confidence in one's ability (pp. 386–391). Chapter 4 strives to deconstruct assumptions about who all those persons are behind the 'veil of ignorance' whose interests should be taken into account (pp. 118–123). Chapter 5 can be read in the light of the 'maximin rule', which instructs us to rank alternatives by their worst possible outcomes (132–136), and Chapter 6 relates in general terms to the questions of 'relevant social positions' and reciprocity embodied in the term 'original position' (pp. 81–86, 102–168, 475). The stance of the present study towards the theory of Rawls will be discussed in the concluding Chapter 8.4.2.

[31] On the feminist pragmatist approach to human rights, see Peach 2001.

be far from perfect or rational or out of balance with each other. In what follows, the methodological choices will be described step by step.

Step 1. Search for an Actor Perspective

The preliminary stage of this study attempted to use validation of individual experiences for identifying the exclusion of different categories of individuals in education law. Information was collected from the field by two case surveys, one focusing on the educational opportunities of adult Roma of Finnish nationality and the other one on the educational needs of immigrant youth.[32] These surveys influenced the analytical construction of the present study, so far that the 4R Scheme, to be introduced in the next chapter was developed after interviews and later, the hermeneutic knowledge gained in the interviews helped in the operationalisation of the four Rs.

It is in this manner that the study in hand takes as its starting point empirically determined needs. On the other side, these preliminary studies showed the importance of trying to resist stereotypical generalisations by occasional survey results, as there is no 'one truth' of disadvantage experience, but many, and also as understandings of educationally marginalised individuals of their experiences are themselves affected by legal categorisation. The most excluded individuals are also the ones most difficult to reach. However, the foremost insight of these inquiries was that discriminatory aspects of law are rarely perceived at the individual level.

Step 2. Presumption of Compliance with International Law

The most basic presumption against which the forthcoming analysis shall be reflected is that the domestic law of education should not be in conflict with international human rights law to which the state is a party. With this presumption of compliance in mind, the first methodological step is to review international instruments relating to the right to education and corresponding positive state guarantees. Provisions referring to educational rights are to be found in more than a dozen legally-binding international standards. The number increases manifold if legally non-binding documents are also taken into consideration.

In order to cope with the large amounts of information, a choice made is *not* to go into an extensive enumeration of legally non-binding instruments. Instead, a cross-section inventory of the major legally-binding provisions that highlight the subject matter will be carried out. The rationale behind this choice is that the more unambiguously different components of the right to

[32] Gynther 2000a, 2000b.

education can be linked to specific phrasings in the legally binding conventions, the more powerful will be the analysis concerning the soundness of the legal framework at domestic level. Here, the ambition is to show that it is possible to find legislative gaps that should be bridged and biases that should be righted even by focusing mainly on hard-law, whereas arguments for strengthening soft-law can be left aside as an additional strategy.

This methodological choice does not strive to impugn the relevance of soft-law as such. It merely suggests that the gathering and evaluation of fragmented hard-law rules can well be a tenable way to reveal more than pointillistic aspects of norm regulation. Each chapter in Part II contains a summarising pair of tables with a total of 26 instruments that include provisions relating to the right to education and rights in education. The analysis of the international regimes is mostly based on these instruments, which will be discussed in respective chapters by and large in chronological order.

Step 3. Judicial Decisions and Authoritative Interpretations by the Monitoring Bodies

The amount of relevant case law in the area at issue is quite restricted, both at the universal and regional European level. The tradition of using courtrooms for dispute resolution in educational matters seems to be weaker than in many other sectors of society. One explanation for this might be in the dispute over the justiciability of economic, social, and cultural rights on the whole. A widespread view has been that power within the educational system should remain localised in the hands of educational authorities, whereas courts should intervene as little as possible in disputes over which they are regarded as having no competence. The standpoint adopted in the present study is that the courts may not need to be first into the fray, but they may serve as last resort when governments persistently fail to comply with their human rights obligations.

In any event, the present study looks initially to the existing body of international case law from two angles. First, as a reservoir where the principles of interpretation on human rights texts of high abstraction are developed, and second, as a subject of inventory itself. That is to say, what the courts 'have in stock' can also be questioned from the viewpoint of what is not there. Examples showing how precedents on the right to education are distributed among different interest holders can at least evoke questions concerning by whom and for whom the contours and the substance of the educational law are shaped.

The same goes for the decisions and other resolutions of the treaty bodies that are there to monitor the domestic accomplishment of provisions on educational rights and non-discrimination. Just as with the case law survey, the analysis of these documents has two ambitions: the first is to highlight their content as authoritative interpretations of the instruments in question,

whereas the second is investigative in the sense that it will ask whether some essential aspects of the right to education have remained unnoticed.

Step 4. The Viewpoint of Educational Disadvantage

The set of international legal standards discussed under the two steps above will then be estimated through the lens of the disadvantage doctrine. As will be described in Part III, Roma in the main as a category of educational concern are the *sine qua non* of this analytical step. In exploring the existing rules, the task is to identify not only the borders of valid law, but also the areas of weak legal support.

Moreover, attention will be drawn to some sub-areas of education where 'legal' issues have not been addressed. The underlying logic is that omissions of the legislature call for good reason as much as does intervention, for they effectively legitimise the status quo. Non-regulated areas can thus come to be seen as areas in which the law implicitly legitimises the inequality of certain groups.[33] Similarly, it is also the case that legislation that creates different educational spheres without a legitimate reason may indicate discrimination by the system. The purpose is to expand the lens of legal relevance to encompass the eventually missing perspective of the indivisibility, interconnectedness and interdependency of human rights and minority rights.

1.4.3. *Defence of the Methodology Chosen*

One fundamental question must be clarified that tackles the notion of 'standpoint epistemology', which is often mentioned as one of the central characteristics for legal pragmatism in general and for feminist pragmatism in particular. How can a person that is not a Roma evaluate the education law from something called their viewpoint? The foremost option in this issue is to be aware of the risks for maternalistic benevolence that any 'majority researcher' may accidentally succumb to. At the same time, it is realistic to question the view of some standpoint writers that members of minority groups might, because of the shared experience, have the capacity to carry out more advanced research on minority related issues than members of majority groups. Our ability to understand others does not automatically follow lines based on ethnicity or other '-isms'.

Moreover, as was outlined above, the present study has striven to draw from talks with educationally disadvantaged individuals with minority background when conceptualising the working definitions to be used. Nevertheless, this

[33] See how the European Court of Human Rights accepted in the Case of *X and Y* v. *the Netherlands* the applicant's argument that the lacuna in domestic law amounted to a violation of her rights.

study is not on minorities or ethnicity issues as such, but an attempt to develop a tool by which the legal system of the 'mainstream' dominant culture can be analysed. Therefore, the need to be alive to the risks of ethnocentrism is not as high as in studies where minority cultures are in focus, and the principal methodological challenge is to locate the investigation in relation to the legal system.

As another fundamental methodological choice, the present study is a synchronic analysis concerned with contemporary universal and European law, and not beyond. Instead of describing changes in the course of history, the analysis attempts to create a holistic picture of the currently existing situation. This delimitation does not suggest that history—including the drafting history of the instruments under consideration—is meaningless. Quite the contrary: studies concerned with change and backgrounds are as essential as attempts to understand complex phenomena at a single point in time. Nonetheless, taking into account all the components that will be included in the analytical scheme of the study in hand, an attempt to cover both synchronic and diachronic approaches, would bring in too many variables to cope with. Hence, the focus is laid on contemporary legislation instead of methodically considering historical antecedents.

As far as epistemological positioning overall is concerned, the present study does not follow the demarcation between the various turfs of international human rights law, European Community law, education law, etc. On the contrary, it is a cross-section of existing law from the global to the regional level in a demarcated sub-sector of education. The cross-section over several international regimes is justified by the fact that decision-makers on different levels of the domestic education system should take all these jurisdictions into account when developing laws and policies.

CHAPTER TWO

ANALYTICAL STARTING POINTS

2.1. *Elaborating the Analytical Framework: The '4R Scheme'*

This study seeks guidelines from international human rights law, minority rights law and anti-discrimination law on the question of when the domestic legal framework on education is sound and non-discriminatory. Obviously, the soundness of international law cannot be taken as given either. It may well be that international instruments themselves are more or less opposed to each other, that they offer no agreed-upon conception of key distinctions to guide the state parties, or that they, in spite of seemingly determinate rules, contain claw-back clauses that allow the contracting states to opt out endlessly. It may also be that those instruments, while seeking a remedy to some problems, maintain their own blindspots and structural biases.[1]

The starting point for the study in hand is, however, that the contracting parties assume the international regimes to which they commit themselves are sound. The analytical challenge, then, is to formulate and validate a framework by which the (possible) conflict or incompatibility of domestic education law with international law can be made visible. In what follows, four interconnected aspects are suggested, disregard of which cumulatively create and maintain exclusion of individuals of disadvantaged groups from educational qualifications with proper functional value for them and their communities.

The four aspects chosen for analysis are: rights, recognition, resources and representation. The aim is to understand what role international law plays in the comprehension of each of these aspects: 1) how and where rights are defined; 2) how essentialism and otherism are created and maintained; 3) how resources needed for the fulfilment of rights are described; and 4) how decision-making authority in the area of the present study is determined.[2] The operationalisation of each of the four 'Rs' and their embodiment in international human rights regimes will be described in Part II, from Chapters 3 to 6 consecutively. Figure 2 illustrates the interrelatedness of the four aspects under consideration in schematic form.

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[1] A classic among critical views of international law is the monograph by Koskenniemi (1989/2005). Also, as Kennedy (2005) illustrates, international human rights law may well have bad consequences in spite of good intentions.

[2] For an earlier presentation of this analytical framework, see Gynther 2003.

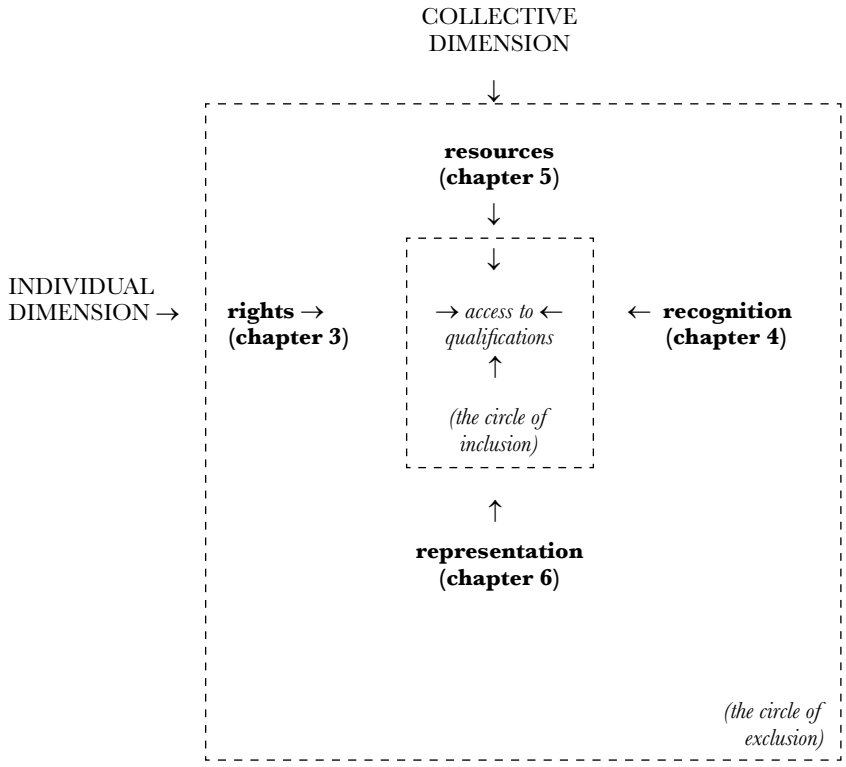

Figure 2. A '4R Scheme' of systemic discrimination in access to vocational qualifications

The dashed lines in Figure 2 illustrate that the (non-)existence of discrimination by law may be described as being defined by several concentric circles: at the centre are the persons whose rights, resources, recognition and representation are all well safeguarded, and whose access to high quality credentials is thus most effectively buffered by law. Surrounding these persons are the ones who are partly visible and partly invisible; while in the margins, in the outmost circle, are the invisibles, the ones whose right to quality education is most severely violated. Different aspects may have different importance and thus, a metric measurement is not possible, but we can draft a rough sketch on the included and the excluded by using this scheme. The point with the metaphor of concentric circles is that no one aspect necessarily establishes discriminatory law on its own, but considered together the four different aspects illustrate that discrimination is more likely than not to take place.

A major challenge for this study is to try to make the cumulative effect of the four 'Rs' demonstrable. Thus, the common endeavour of the four chapters in Part II is to manifest the outer limits in the international human rights framework for the claims that a state fails to provide for a non-discriminatory education system.

The concept of 'systemic discrimination' may, for the purposes of this

study, and by reference to the UDHR, the two European anti-discrimination directives of 2000, and the Constitution of Finland,[3] be defined as follows:

> failure of the legislature to appropriately guarantee that the law of education safeguards everybody's right to an identifiable quantum of quality education in accordance with their ability and special needs and as a vital prerequisite for an emancipated and collectively responsible life.

The working definition will be broken up into four pieces, each to be discussed in the respective chapters on rights, recognition, resources and representation of Part II. The reference to 'the law of education' is meant to recap that what is under consideration is law as a system and not beyond.

2.2. *Characterisation of Systemic Discrimination*

2.2.1. *The Major Rationale for a Separate Concept: To Render Possible Bias Resulting from Indeterminacy in Education Law Visible*

By and large, systemic discrimination refers to a somehow patterned form of discrimination instead of merely considering it as an individual pathology. One of the main objectives of such a conceptualisation is to ensure that the realities of discrimination are not marginalised individual acts of no general political significance.

In this respect, the notion of systemic discrimination attempts at a holistic observation of societal problems, in a similar manner as does the canon of the indivisibility of human rights. As pointed out by a human rights theorist, single human rights can function as an effective means for combating ongoing and endurable forms of discrimination only as parts of a system.[4] In the same way, different elements of systemic discrimination inevitably are interdependent to some degree since if they were not, they could simply not maintain the system of subjugation.

Actually, several scholars have adopted the concept of systemic discrimination into their vocabulary.[5] In many writings it more or less overlaps with notions such as 'static', 'structural', 'institutional', 'institutionalised',

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[3] Section 16 of the Constitution of Finland (731/1999), which has served as one of the sources of inspiration here, reads in part: "(1) Everyone has the right to basic education free of charge.... (2) The public authorities shall, as provided in more detail by an Act, guarantee for everyone equal opportunity to receive other educational services in accordance with their ability and special needs, as well as the opportunity to develop themselves without being prevented by economic hardship..."

[4] See Scott 1989, 1999.

[5] The notion of systemic discrimination was launched in legal scholarship as early as the 1960s. See, for example, Mayhew 1968, p. 313. Regarding more recent *in passim* use of the concept, see, e.g., Browne 1999, p. 412. For miscellaneous definitions of systemic discrimination, see, e.g., Cunnigham 2000, p. 48; Williams 2000, p. 64 *et seq.*; Joseph *et al.* 2000, p. 563 *et seq.*; Beck *et al.* 2001, p. 4.

'inter-sectional' or even 'indirect' discrimination.[6] Systemic discrimination also has been used to mean any kind of application of beliefs, values, presumptions and processes by the institutions of society that treat a particular group as inferior. In such an extended meaning, systemic discrimination may well cover even the phenomena of stereotyping and prejudice as underlying factors.

The definition used in the present study diverges from the rest insofar that out of the complexity of broad social, legal, cultural, or economic circumstances that may have exclusionary effect, it is merely the presence or absence of black-and-white legally binding norms that it seeks to identify.[7] We could assume that discriminatory normative instruments are in practice quite rare in contemporary societies respecting the rule of law. Nevertheless, when the concept of non-discrimination is enlarged to encompass the positive state obligations actively to ensure the enjoyment of human rights, there arises a greater actual need for discussion on where the borderlines of these obligations should be drawn and by whom.

Scrutiny of law can offer just a partial analysis of the phenomenon of discrimination that takes place in human societies. Legal provision, nevertheless, contributes a foundation for non-discriminatory education policies, which can be seen as a basic justification for the present study. As should be obvious, this delimitation does not claim that a legal approach could solve all the problems connected to educational discrimination. Instead, such an approach strives only to give to a complex phenomenon a single substantive contribution that can be tested by methods that were described above in Chapter 1.4.

2.2.2. *An Additional Rationale: To Reach Beyond False Dichotomies*

In attempts towards conceptual typologies, systemic discrimination should not be defined as a separate category along with the categories of direct and indirect discrimination. This kind of conceptualisation is misleading insofar as legal standards that typically exemplify systemic discrimination can function directly as well as indirectly. Certainly, systemic discrimination can include direct discrimination, such as the apartheid legislation of South Africa illustrated, but on other occasions, provisions of law may include subtle, unconscious forms of indirect discrimination which disadvantage subjugated

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[6] For a review of these concepts in legal and social sciences, *see* Gynther 2006, pp. 33–43.

[7] As alternatives to 'systemic discrimination', even notions of 'legal discrimination', 'institutionalised discrimination' or 'formal discrimination' might serve as usable concepts when focusing on discrimination that is upheld by law. However, 'legal discrimination' is basically an absurd pair of contradictory concepts, and moreover, it might also be confused with 'positive discrimination.' The notions of 'institutionalised discrimination' and 'formal discrimination' might for their part include even procedures that are not upheld by law, but by the internal regulations of private organisations. Thus, the term 'systemic' was chosen for this study in spite of its delimited conceptualisation.

groups in cumulative ways. Thus, in reality, all three concepts form mixtures and extend essentially beyond each other. Various combinations can co-exist in a given societal setting, but systemic discrimination shall be opposed neither to direct nor indirect forms of discrimination.

It is also important to note that intent or lack of intent is not to be considered as a feature that would specifically distinguish the concept of systemic discrimination from those of direct or indirect discrimination. A trend in the development of anti-discrimination legislation and case law has been the movement from a requirement of intention to ground a complaint to the recognition as actionable discrimination that may be unintentional as well. At the start, liability for discrimination was circumscribed very narrowly, requiring a form of intention that was tantamount to malice. The theoretical advocacy in the discrimination law context has nevertheless little by little swung from a focus on the moral blameworthiness of the defendant to an attempt to focus solely on the effects of discrimination on its victims.[8] Systemic forms of discrimination may well establish themselves even in well-intentioned rules. Thus, the difference between systemic and other forms of discrimination is not a difference in intent.[9]

Burden of proof is another feature that may misleadingly be seen as distinguishing systemic from other forms of discrimination. Once again, when looking at the development of case law, a progress can easily be perceived from the most basic level of human rights protection dealing with the isolated incident of discrimination, where the complete onus for redress was on the victim, to the creation of specialised bodies that respond to individual complaints. The onus of ameliorating the situation may lie on these investigation bodies irrespective of what type of discrimination is at issue.[10] The difference is that in direct discrimination it is the cause of a given decision or practice which is subject to scrutiny; and in indirect discrimination it is the effect upon certain (particular) group members which is of primary concern, whereas in systemic discrimination, as defined in this study, the focus is on standing regulation that in the present or future may have discriminatory effects on an indefinite number of individuals.

Where remains then the need to separate the notion of systemic from those of direct and indirect discrimination? Eventually, different strategies to confront all these types will little by little merge into a more unified general disadvantage theory. However, thus far there still are some reasons to make

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[8] McColgan 2000a.

[9] *Cf.* Williams (2000, p. 64) according to whom the concept of systemic discrimination comprises those sources of group-patterned disadvantage and inequality that are *neither* a consequence of the voluntary choices of individual members of the disadvantaged group *nor* a product of particular social agents' bias against that group.

[10] The notion of 'investigation bodies' refers here to equal treatment commissions, ombudsman systems, formal enquiry arrangements by which whole organisations or administrative bodies can be looked at, and the like.

distinctions between these concepts. One of the most important grounds is that remedial orders can seldom be the same in each of the three types. As to reparation of direct discrimination, individual compensation for lost opportunities or injuries is a rule, whereas indirect discrimination is usually compensated by remedial orders for action to be taken within a period of time. Both these forms of remedies are reactionary for 'somebody.' In contrast, the transformative potential of work against discriminatory legislation is essentially in its proactive character, i.e. its aim to eliminate unfair distinctions between any individuals or groups. For this very reason, it locates the main problem in the design of the legal order rather than in *ex post facto* remedies.

Another important reason for separate treatment of systemic discrimination is that it brings the situation of the most vulnerable parts of the population into view. In the individualistic approach, those who are worst discriminated against by the system are likely to bring the fewest charges simply because of the cumulative concentration effects of exclusion or subordination. The challenge, then, is to create a legal framework that manages to make the invisibles visible and the unheard heard.

2.3. *The Concept of Systemic Discrimination in Selected Human Rights Regimes*

2.3.1. *United Nations Instruments and Interpretative Texts*

What follows is a general overview of references to discrimination embedded in the law itself made in international human rights instruments and their authoritative interpretations.[11] Further provisions and case laws that are substantively relevant for the present study, though making no explicit reference to systemic discrimination, will be analysed in their due contexts in Part II of the study.

a. *CCPR Article 26 and the Case Law of the HRC*

A most important reference as regards systemic discrimination is to be found in the text of Article 26 of the Covenant on Civil and Political Rights (hereafter CCPR), according to which all persons are entitled to equal protection of the law. This entitlement demands that the legislature not only refrains from any discrimination when enacting laws, but also that it prohibits discrimination by enacting special laws and affords effective protection against discrimination. Thus, failure of the legislature to be sufficiently articulate in matters concerning equal protection of the law, anti-discrimination law and remedial legislation may altogether or separately end up in systemic

[11] For what is meant by authoritative interpretations, see Chapter 1.4.2, above.

discrimination of those individuals or groups that are left as outlaws due to insufficient national legislation.

As far as the case law of the Human Rights Committee (hereafter HRC) is concerned, the concept of systemic discrimination as such seems to be quite untapped. An exception is *Ms. G.* v. *Canada*, which considered alleged discrimination relating to the country of origin of the author's academic credentials. In that case the author repeatedly applied the concept of 'systemic discrimination'. The HRC, however, considered the communication inadmissible and took no explicit stand on the concept under consideration.[12]

Nonetheless, there are several interesting cases where the HRC has ruled on issues that incontrovertibly relate to the possibility of educational legislation being a system that may reinforce discrimination. In *Hartikainen* v. *Finland* (1978) the author claimed that the education law of Finland is in violation of Article 18(4) of the CCPR in as much as it stipulated obligatory attendance in Finnish schools by children whose parents do not profess any religion, in classes of the history of religion and ethics. The author contended that there was no prospect of remedying this situation under the existing law. Moreover, he argued that it would be of no avail to institute court proceedings, as the subject matter of the complaint was a law that created the situation of which he and a number of other persons were victims. The case was thus taken directly to the HRC, which decided that the communication was admissible but as its final conclusion considered that the Finnish legislation was not incompatible with Article 18(4) of the CCPR.

At the turn of the 1980s–1990s, several cases were raised against Sweden where the authors claimed to be victims of discrimination by the public authorities due to the fact that the state did not provide the same level of subsidy for public and private educational establishments. In *Blom* v. *Sweden* (1988), the HRC rejected the author's arguments by reasoning that a state party cannot be deemed to act in a discriminatory fashion if it does not provide the same level of subsidy for the two types of establishments, when the private system is not subject to state supervision.[13] A few years later, the HRC dealt jointly with the cases *Lindgren et al.* and *Lundquist et al.* v. *Sweden* (1990). In its conclusion, the HRC rejected the arguments of the authors, according to which the denial of a public subsidy for textbooks and school meals of students attending certain private schools was incompatible with Article 26 of the CCPR.[14]

In all these cases against Sweden, the reasoning of the HRC was based on the premise that attendance at a private school was a voluntary choice and that therefore differences in the legal and/or financial situation of such schools does not constitute discrimination prohibited by the CCPR. A common

[12] *Ms. G.* v. *Canada*, paras. 2.2, 2.3, 3.2, 4.2.
[13] *Blom* v. *Sweden*, para. 10.3.
[14] *Lindgren et al. and Lundquist et al.* v. *Sweden*, para. 10.4.

denominator for these cases was that the HRC repeatedly concluded that mere formal accessibility to 'comprehensive' public sector schooling would free the state party from any obligation to provide for contributions intended to cover the costs for private schools. What the HRC did not take into account was the question of whether the public sector school system was capable of and willing to provide for substantive equality in education.

In *Waldman* v. *Canada* (1996), the issue was whether public funding for denominational schools of one religion, but not for denominational schools of another religion, and a consequent unequal burden to meet the full cost of education constituted a violation of the author's rights under the Covenant. At this time, the HRC drew attention to the fact that it was not possible for all religious denominations to have their religious schools incorporated within the public school system. When publicly funded religious schools were available to members of certain denominations only, private schools of other religions should not be considered as freely chosen additional options, but rather as choices that were private by necessity. Differences in treatment between religious schools that are publicly funded as a distinct part of the public education system, and schools of religions that are private by necessity cannot *per se* be considered reasonable and objective.

The HRC concluded that if a state party chooses to provide public funding to religious schools, it should make this funding available without discrimination.[15] The *Waldman* case contains several interesting arguments seen from the viewpoint of the present study. Most interestingly, it brought into the forefront a dilemma entrenched in the Canadian Constitution, since one provision of the Constitution guarantees a privileged position to one religious denomination as compared with other religious denominations, and yet simultaneously another constitutional provision prohibits religious discrimination.[16] The case also indicates, for instance, that the system of public education is not merely a matter of policy decisions for the government to take, but also a construction where the principle of non-discrimination shall rule.[17] It also points out that the preferential treatment of selected schools is justified only on the basis of a comparatively disadvantaged position of the communities they aim to serve.[18] The arguments developed in this case will be discussed in later parts of the present study.

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[15] *Waldman* v. *Canada*, paras. 10.5 and 10.6.

[16] More precisely, religious discrimination is prohibited in the Canadian Charter of Rights and Freedoms, which is part of the Constitution of Canada.

[17] The HRC observed the question of whether the domestic law as such violated the prohibition against discrimination already in 1987 in the cases of *Zwaan-de Vries* and *Broeks*, but at that time it did not develop any substantive arguments around this issue. *Zwaan-de Vries* v. *the Netherlands*, Communication No. 182/1984, paras. 12.3 and 12.4; *Broeks* v. *the Netherlands*, Communication No. 172/1984, paras. 12.3 and 12.4.

[18] *Waldman* v. *Canada*, para. 10.4.

Most interesting in the HRC case law is *Diergaardt* v. *Namibia*, where the authors claimed, among other things, that the lack of language legislation had had the consequence that they had been denied the use of their mother tongue, *inter alia*, in education. The HRC confirmed that the exclusive use of the English language for official purposes constituted discrimination on the basis of language under Article 26 of the CCPR. The majority of the HRC considered that the Namibian government had not been able to demonstrate that the preference of English as the only language of official communication was a reasonable and non-arbitrary language distinction, in spite of the fact that English according to the Namibian Constitution was the only official language of the state.[19] This decision demonstrates that the HRC considers itself competent to set limits for the state sovereignty *vis-à-vis* its official language policy in order to give substance for the provisions prohibiting linguistic discrimination in international human rights law.

The cases above illustrate that the problematic of systemic discrimination is to be found in the HRC case law even if not absorbed into the argot of the Committee as such.

b. *Special Anti-Discrimination Instruments of the United Nations*

Given the particular focus on the right to education, a most interesting text for the study in hand is the UNESCO Convention against Discrimination in Education (hereafter CDE) of 1960. This convention recalls that the UDHR of 1948 asserts the principle of non-discrimination and proclaims the right of every person to education. The text of the CDE does not expressly use the attribute 'systemic' but the terminology is broad enough to comprise it. This becomes apparent from Article 1(1), where the term 'discrimination' is defined in such a way as to include any distinction, exclusion, limitation or preference "which [...] has the *purpose or effect* of nullifying or impairing equality of treatment in education and in particular:

> (a) Of depriving any person or group of persons of access to education of any type or at any level;
>
> (b) Of limiting any person or group of persons to education of an inferior standard;
>
> (c) [...] of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
>
> (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.[20]

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[19] *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al.* v. *Namibia*. According to a significant dissenting minority, Namibia as a sovereign state may choose its own official language that may be treated differently from non-official languages. The dissenters argued that, on the contrary, the use of one of the non-official languages for official purposes would discriminate against the other minority languages.

[20] Emphasis added here.

Moreover, the contracting parties undertake in Article 3(a) expressly *to abrogate any statutory provisions* which involve discrimination in education. This paragraph, along with the paragraphs on categorical distinctions that shall not be deemed to constitute discrimination, will be discussed in Chapter 5. For now, it is sufficient to note that as the CDE lacks a monitoring body similar to other main human rights treaties of the UN, no general comments or other extensive interpretations to its stipulations are available.[21]

Among other important anti-discrimination instruments in the UN treaty series, the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter CERD) of 1965 explicitly makes mention of both the law as a system and education. In Article 2 (1)(c) it prescribes, that:

> [e]ach State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

Besides, Article 5 of the CERD commits all state parties:

> to undertake to prohibit and to eliminate racial discrimination *in all its forms* and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (e)(v) The right to education and training.[22]

Similarly to the CERD, the Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW) of 1979 stipulates in Articles 2 (a) and (f) that all state parties shall undertake:

> to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle; . . . and . . . [t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Moreover, Article 10, the education provision of the CEDAW refers—in line with the CDE—to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

Some soft-law documents related to the CEDAW use even the concept of systemic discrimination. The Platform for Action of the Fourth World Conference on Women, adopted in Beijing in September 1995, twice makes express use of this concept. Thus, the actors involved commit themselves, in paragraph 178(f) to implement and monitor positive public- and private-sector

[21] Emphasis added here. For the peculiar monitoring mechanisms for the CDE, see Gynther 2006, p. 50.

[22] Emphasis added here.

employment, equity and positive action programmes *to address systemic discrimination* against women in the labour force, in particular women with disabilities and women belonging to other disadvantaged groups, with respect to hiring, retention and promotion, and vocational training of women in all sectors.

Furthermore, paragraph 222 of the Platform of Action stipulates that "if the goal of full realisation of human rights for all is to be achieved, international human rights instruments must be applied in such a way as to take more clearly into consideration the systematic and systemic nature of discrimination against women that gender analysis has clearly indicated.[23] Contrary to the instruments mentioned above, the Platform of Action is a legally non-binding commitment of the member nations to seek to achieve the goals and objectives of the Beijing declaration. Thus, it has no direct effect on a country's law.

Additional examples of legally binding provisions of relevance for a study on systemic discrimination can be found in standards adopted by the International Labour Organisation (hereafter ILO). For instance, the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation of 1960 prescribes that each member state undertakes to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. It obliges, in Article 3 (b) and (c), the member states:

> to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy; . . . and . . . [t]o repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy.

The provisions above were cited word for word to underline how clearly they extend beyond an individualistic approach and how indisputably they address systemic forms of discrimination. They all point at generic sources of discrimination and call for legal reforms whenever such sources are discovered.

2.3.2. *The European Convention on Human Rights and its Case Law*

a. *Articles 1 and 14 of the ECHR*

State parties to the European Convention on Human Rights (ECHR) are, according to Article 1, obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Consequently, if a state fails to take the necessary legislative and other mea-sures so as to ensure the rights and freedoms mentioned in Section I of the Convention, it may violate an obligation under Article 1. The same line of reasoning works here as

[23] Emphasis added here.

above in the case of CCPR Article 26. Even if there has been no concrete violation of one of the rights and freedoms, the non-existence of domestic law can also lead to a breach of the Convention.[24] Thus, Article 1 implicitly forbids systemic discrimination that may take place by means of insufficient legislation.

Anti-discrimination provisions in the regime of the ECHR have traditionally been considered relatively weak. A regularly repeated remark is that the prominent norm, Article 14, has mainly an accessory nature, meaning that it cannot be relied upon independently and does not apply to claims of discrimination in areas not covered by the substantive provisions of the Convention. It might seem to be common sense to think that the absence of a general anti-discrimination article eliminates systemic discrimination reflections from the ECHR process. Indeed, the lack of an independent prohibition of discrimination in the ECHR was the principal reason for drawing up the separate protocol, Protocol No. 12, which in Article 1 stipulates:

> The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[25]

The success of Protocol No. 12 as a strategic tool in anti-discrimination work remains to be seen, as it entered into force only recently on 1 April 2005. However, a first round perception is that the Protocol stays in line with the ECHR control system, which is based on the guarantee of individual rights. Indeed, the Explanatory report to the Protocol expressly rejects claims over the state failure to promote equality.[26] Nonetheless, the Court has already made reference to the 'principle of equality of treatment' in its earlier case law,[27] and as other Strasbourg cases cited below illustrate, we do not need to go outside the scope of the Convention itself when addressing systemic discrimination, specifically when Article 14 is combined with claims based on Article 1, which obliges the contracting states to ensure the rights mentioned in the Convention to everyone within their jurisdiction.

Moreover, the Protocol should not limit or derogate from the human rights treaty provisions which ban systemic discrimination, such as the provisions of CERD and CEDAW presented earlier in this chapter. Also worth noticing in Protocol No. 12 of the ECHR is that the second paragraph of Article 1 prohibits discrimination "by any public authority". On the basis of this accentuation, more pressure can be put on public authorities to get rid

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[24] See van Dijk & van Hoof 1998, p. 695.
[25] Protocol No. 12 to the ECHR.
[26] Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS no. 177), para. 16.
[27] See, for example, the *Belgian Linguistics* case, para. 10.

of lacunae in domestic laws or administrative regulations that give rise to educational inequalities.

Defects that are built into the system and thus become ongoing are at least as severe violations against equality as discrimination in sporadic individualistic cases. As far as conceptual choices are concerned, at least from the date that Protocol No. 12 entered into force it has been justified to talk expressly about a right to non-discrimination, instead of a mere principle of non-discrimination, which is a more vague notion. What is most important, however, is the base that is already established by the ECHR case law, since even Protocol No. 12 will presumably build strongly on it. What follows is a sample of that base.

b. *Case Law of the ECHR*

The notion of 'systemic' had not been in use in the Strasbourg case law until very recently.[28] Yet the phenomenon at issue can actually be identified in several decisions of the Court. A set of high-water marks will be described here briefly in chronological order. The relevance of enlisted cases for the present study will for some parts be discussed in more detail in the latter chapters.

Belgian Linguistics v. Belgium

The *Belgian Linguistics* case (1968) is interesting due to the fact that here the Court made a distinction between acts of 'active' discrimination, deriving from the deliberate will of governments, and acts of 'static' discrimination, which have their origin in factors of an economic, social or political nature or in historical circumstances.[29] Some members of the European Commission of Human Rights considered that the ECHR and the Protocol 1 thereof do not oblige states to establish or subsidise any education at all; from this they inferred that the Belgian State, "in encouraging education in Dutch" and "discouraging education in French" grants 'a privilege' to the Flemish-speaking inhabitants without inflicting 'hardships' on French-speaking inhabitants. Consequently, they did "hesitate to consider the system as such" as discriminatory.[30] Nevertheless, the Court used the notions of 'static' and 'system' simply in passing without any further explanations. Thus, the problem of systemic discrimination was touched upon but by-passed.

This case became famous particularly as it implied that the ECHR is capable of covering both direct and indirect discrimination. In its decision, the Court suggested that justification of a measure would be required where the 'aims and effects' were discriminatory and there was no reasonable relationship of

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[28] See the case of *Browiovski* v. *Poland*, below.

[29] This case is by its official title *"Case relating to certain aspects of the laws on the use of languages in education in Belgium"*.

[30] Ibid., paras. 4, 6, 10.

proportionality between the means employed and the aim sought to be realised. The *Belgian Linguistics* case also interestingly mentions the right to education among rights and freedoms that by their very nature call for regulation. The Court observed that such regulation "may vary in time and place according to the needs and resources of the community and of the individuals," but added that "such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention".

Kjeldsen, Busk Madsen and Pedersen v. Denmark

An early case of the ECHR that dealt with the right to education along with a claim that a state should accommodate the official education system for difference was *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark* (1976).[31] In this case, some parents of primary school age pupils objected to integrated, and hence compulsory, sex education as introduced to state schools by an amended State School Act. The applicants maintained that the sex education given in public schools violated their religious or ideological convictions and constituted a violation of Article 14 together with Article 2 of Protocol No. 1 (the right to education). As regards the alleged violation of Article 14 of the Convention, the Court found that there was a difference in kind between religious instruction and sex education, and that the parents were thus not discriminated against on the ground of their religious conviction even if the law did not allow them to have their children exempted from the sex education given in state schools.

Concerning the alleged violation of Article 2 of Protocol No. 1, the Court held that sex education was given neutrally and objectively to all pupils in the state schools and that the parents who so wished were allowed to educate their children at home or to send them to private schools. Therefore, the Court reached the conclusion that the disputed legislation in itself did not offend the applicants' religious and philosophical convictions protected by the second sentence of Article 2 of Protocol No. 1. The parents' claim for a positive state duty to accommodate for differences was thus rejected.

The applicants also complained about some directives issued by the Danish authorities regarding the manner in which sex education should be carried out. The Court noted briefly that it will have regard to the delegated legislation that remains in use throughout the country and contributes to an elucidation of the spirit of the legislation in dispute, but otherwise rejected this part of the complaint due to the failure to exhaust domestic remedies.[32] An interesting point is that the Court here takes the task of judging the rationale of the domestic legal norms of a lower norm-hierarchical order.

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[31] *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark*, (1976).
[32] Ibid., paras. 32 and 48.

15 Foreign Students v. the United Kingdom

The case *15 Foreign Students* v. *the United Kingdom* (1976) contains a paraphrase worthy of note when education law as a non-discriminatory system is in focus. The Commission found that Article 2 of Protocol No. 1 did not grant a right for an alien to stay in a given country. An alien's 'right to education' was considered to be independent of her/his potential right to stay in the country. Thus, the refusal of permission to remain in the country was not regarded as an interference with the right to education, but only as a control of immigration. Interestingly, the Commission did also mention that Article 2 might be at issue in a case where expulsion would result in the applicant being denied any elementary education in his/her country of destination. A *contrario*, this statement can be seen as putting a strain on the education systems of the member states of the ECHR to guarantee elementary education for aliens under their jurisdiction. Otherwise, the reference to the denial of elementary education as a ground for non-expulsion would make no sense.

Thlimmenos v. Greece

In the landmark case of *Thlimmenos* v. *Greece* (2000) the applicant invoked Article 14 of the Convention taken in conjunction with Article 9. The alleged violation concerned the applicant's initial conviction for insubordination and the authorities' resultant refusal to certify him as a chartered accountant, which taken together constituted interference with his right to manifest his religious beliefs. This case is of relevance even when discussing violations against a right to education as far as the state duty to accommodate for differences is being considered.

In contrast, for example, to *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark*, the Court concluded now that Article 14 is violated not only when persons in analogous situations are treated differently but also when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. The wording of the judgment according to which the difference shall be significant seems to leave leeway for the state concerned, yet this case signals a progressive interpretation of the non-discrimination clause of the ECHR. The ruling of the Thlimmenos case is significant for members of any minority groups on whom the mainstream legislation has a disparate effect.

Cyprus v. Turkey

A case that can shed some light on the conception, or rather on the omitted conception, of systemic discrimination in ECHR case law is *Cyprus* v. *Turkey* (2001). In that case the Court held that there had, among several other violations, been a violation of Article 2 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them. In addition, the Court found a violation of

Article 3 in that some of the claimants had been subjected to discrimination amounting to degrading treatment. Again, as in the previous cases, the Court decided that it was not necessary to examine separately whether there had been a breach of Article 14. Nonetheless, this case illustrates well that the exclusion of certain categories of people from appropriate secondary education leading to a production of an educationally disadvantaged population could be addressed by the ECHR.

Violations were also alleged of Article 2 of Protocol No. 1 in relation to the treatment of Turkish-Cypriot Gypsies living in northern Cyprus. Accordingly, it was claimed that there existed an administrative practice of discriminatory and degrading treatment against the Gypsy community. The claim of discrimination by way of an administrative practice was conceptualised with rather clear reference to the ill intentions of the relevant state. The Court held, however, that the situation of the Turkish Cypriots was not within the scope of the case as declared admissible, and thus declined jurisdiction to examine these aspects of the complaints.[33]

Broniowski v. Poland

The case of *Broniowski* v. *Poland* (2004) concerned the alleged failure to satisfy the applicant's entitlement to compensation for property that had belonged to his grandmother in pre-Second World War Poland. This case is significant for the present study in so far that here the Court identified what it called a 'systemic problem'—a problem that affected thousands of individuals and called upon the state to resort to "appropriate legal measures and administrative practices" with a view to solving the problem. Importantly, the general approach was taken up not only in the reasoning, but also in the operative part of the Court decision. This might be the very first time when the Court expressly took a step away from its traditional individualistic approach. Yet, it is noteworthy that the applicant in this case does not rely on Article 14. Neither does the Court talk about systemic discrimination but only identifies a defect, problem or situation that it considers to be systemic in the sense that it might give rise to numerous subsequent well-founded applications.

D.H. and Others v. Czech Republic

Last, *D.H. and Others* v. *Czech Republic* (2006) is a most interesting case from the viewpoint of systemic discrimination. In this case, a dozen Roma families challenged racial segregation in Czech schools, claiming that there exists a pattern of racial discrimination in the school system of the north-eastern district of Ostrava. According to the lawsuit, there is a disproportionately high placement of Romani children in schools for the mentally retarded. A local counsel collected statistical evidence to prove the existence of discrimination.

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[33] *Cyprus* v. *Turkey*, paras. 349–350.

Accordingly, Roma children in the Ostrava district would outnumber non-Roma in special schools by a proportion of more than twenty-seven to one. At the domestic level, the Czech Constitutional Court had acknowledged the persuasiveness of the applicants' arguments, but still rejected the complaints, holding that it was not competent to consider evidence demonstrating a pattern and/or practice of racial discrimination.

Having unsuccessfully exhausted all domestic remedies the applicants brought the case to the Strasbourg Court claiming, *inter alia*, that they have suffered degrading treatment and that they have been denied their right to education. The Court agreed to hear the case in May 17, 2005, five years after the application was filed. In February 7, 2006 the Court found that the applicants had not sustained their claims. According to the judgement, the Czech system of special schools was not introduced solely to cater for Roma children. The Court held by six votes to one that the applicants had not proven violation of Article 14 of the ECHR, taken together with Article 2 of Protocol No. 1.[34]

During the course of the years that *D.H. and Others* has been pending, several similar lawsuits have come to the Strasbourg Court from Roma communities of the Central and Eastern European Countries. The European Roma Rights Centre (ERRC) announced in May 2003 the filing of an action before the European Court of Human Rights against Croatia, based upon segregated Roma-only classrooms in regular schools. The full-scale application would, according to the ERRC, be filed if it becomes clear that the applicants have been denied an effective and comprehensive remedy in Croatia. Another similar lawsuit was brought before the Sofia District Court, also in May 2003. The lawsuit alleges violations of Bulgarian and international law arising from the racial segregation of and discrimination against Roma students forced to attend poor-quality, all-Roma schools in Roma settlements in Sofia.[35] The fact that the Strasbourg Court did not find the applicants in *D.H. and Others* victims of racial discrimination in education will very likely effect future judgements, one way or another.

* * *

Summing up, in those cases cited above where a violation of the substantive provision was found, the Court did not proceed to examine whether the treatment complained of was also discriminatory. It also remains an open question why the concept of 'static' discrimination that was introduced in the *Belgian Linguistics* case has not been elaborated in the subsequent decisions of the Strasbourg organs. The argumentation developed thereafter until the

[34] On May 4, 2006 the applicants still asked the Court's highest body, the Grand Chamber, to review the case because of its potential to establish precedent.

[35] Reports on these cases can be found by using the search engine of the European Roma Rights Centre, <www.errc.org/>.

case of *Thlimmenos* seems to be in this aspect regressive rather than progressive. On the contrary, in recent years the Court has showed some readiness to develop concepts related to systemic discrimination through case law. The cases of *Cyprus* v. *Turkey* and *Broniowski* v. *Poland* are pioneering attempts on this dimension.

2.3.3. *European Community Law*

The principle of equality has been developed in several directives of the European Community (hereafter EC) and in the case law of the European Court of Justice (hereafter ECJ). Especially the gender aspect of discrimination in relation to labour and social security has been well recognised since the Treaty of Rome (1957).[36] The vast and complex case law that emerged on these areas are research topics of their own and will not be studied here. Instead, the foremost non-discrimination provisions of EC law will be reviewed briefly from the viewpoint of the research statement as specified earlier.

The Treaty establishing the European Community (TEC)

Until 1999, the only binding TEC provisions expressly addressing questions of discrimination focused on outlawing discrimination on grounds of nationality—which has generally been interpreted as limited to discrimination between nationals of EU member states—and mandating equal pay for men and women who perform equal work.[37] Other, declarative norms addressing discrimination have lacked legal force.

It was first the Treaty of Amsterdam of 1999 that categorically proclaimed the challenge to tackle discrimination at the European level. At this time, a new article, Article 13, was added to the TEC that authorised the Council to take 'appropriate action' to combat discrimination based on, *inter alia*, racial or ethnic origin. This provision neither prohibits racial discrimination nor obliges member states to enact legislation containing such a prohibition. Rather, it simply allows the Council to undertake whatever action it may deem 'appropriate'. The concept of discrimination is not defined in this Treaty provision.

As will be described later, the European Union has, under the TEC, competence to complement certain parts of the education systems of member States. As the role of especially vocational education and training has been

[36] See especially Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (hereafter Gender Directive).

[37] See Articles 6 and 119 of the Maastricht Treaty, and Articles 12 and 141 of the Amsterdam Treaty.

growing along with the European integration process, it is relevant to ask what the relation will be between anti-discrimination provisions and education in the coming times at the European level.[38]

The Non-Discrimination Directives of 2000

As a result of Article 13, which was added to the TEC by the Treaty of Amsterdam, two new Directives were adopted in the year 2000. The 'Racial Equality Directive' requires member states to implement the principle of equal treatment of people, irrespective of racial or ethnic origin.[39] It requires member states to make unlawful discrimination on grounds of racial or ethnic origin in employment and training and to provide protection against discrimination in non-employment areas including education. The 'Employment Directive' establishes a general framework for equal treatment in employment and occupation, which covers race and ethnicity as well as religion or belief, disability, age or sexual orientation in areas of employment and training.[40] This directive applies to all persons, as regards both the public and private sectors, in relation, *inter alia*, to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience. Both Directives set down broad objectives that will require action by all member states to ensure that discrimination is prohibited and that victims are entitled to a minimum level of redress.

As regards different forms of discrimination, both of the directives ban "any direct or indirect discrimination" and both of them define these two concepts in similar wordings. Systemic discrimination being specifically in focus, some provisions of the directives point out clearly, that they do not strive to cover solely individualistic forms of discrimination. Most importantly, member states are urged to take the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished, and that any other provisions contrary to the principle of equal treatment are declared null and void or are amended.

The Charter of Fundamental Rights of the European Union

One more effort towards a more coherent EU anti-discrimination doctrine is the Charter of Fundamental Rights of the European Union (hereafter CFREU). The CFREU was signed and proclaimed jointly by the European Commission, the Council and the Parliament in December 2000. As of now, it is only a political document, although it later may still be incorporated into

[38] On EU right to education, see, for instance, Gori 2001.

[39] Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin (hereafter Racial Equality Directive).

[40] Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (hereafter 'Employment Directive').

the basic legal texts of the European Communities. Among several other fundamental rights, the CFREU recognises everybody's right to education as well as the right to access to vocational and continuing training. Article 21, the non-discrimination clause of the CFREU, is all-encompassing, stating that 'any discrimination' based on 'any ground' shall be prohibited. This broad formulation logically should include even the prohibition of systemic discrimination, otherwise the notion of 'any' is exaggerated. Although the aim of this clause sounds well-meant, its superficial form can be criticised concerning the ability of the Charter to prohibit, as prohibition assumes the existence of penal sanctions, which again do not necessarily come under the Community's competence. How this potential contradiction will affect anti-discrimination work in different member states of the EU remains to be seen.

* * *

In sum, the development of EC anti-discrimination doctrine has recently been relatively dynamic, even if systemic discrimination is not expressly endorsed as an issue of concern. Insofar as both non-discrimination directives of 2000 expressly target, *inter alia*, "access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience", attention should be paid even to the elimination of potential systemic discrimination in these areas.

2.3.4. *On the Topic of Systemic Discrimination in Some Domestic Legal Orders*

This study is a pioneer in applying the attribute 'systemic' to education law as a system of rules that itself may have discriminatory effect or purpose. However, case law of some domestic courts has acknowledged a phenomenon called systemic discrimination ever since the early 1980s. For instance, the Supreme Court of Canada employed in its 1987 decision over the *Action Travail des Femmes* case the concept of systemic discrimination and adopted for it the following definition: "Systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination."[41] The later legislative changes in Canada have reportedly led to stagnation of cases on systemic discrimination. In any case, Canadian jurisdiction of 1980s and 1990s illustrates that the notion of systemic discrimination has been a useful concept in courts.[42]

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[41] *Action Travail des Femmes* v. *Canadian National Railway Company* (1987). For representative Canadian cases and their interpretation, *see*, Mahoney 1994, pp. 437–461, Hosain *et al.* 2000, pp. 461–46, Gynther 2003, pp. 45–54, Gynther 2006, pp. 62–65 with references.

[42] Beck *et al.* 2002. On the factors behind the watering-down of the Canadian systemic discrimination legislation, see Agocs 2002, p. 65 *et seq.*

Systemic discrimination 'Canadian style' is not identical with how the concept is used in this study. One of the main differences is that the Canadian doctrine defines 'system' much more widely, inclusive of several societal phenomena that expressly are marked off from the present analysis of law as a system. Another distinction is that the Canadian doctrine also seems to use it simply as a synonym for 'indirect discrimination.' A third noticeable dissimilarity is that in Canadian doctrine the claimants shall be identified by membership of a distinguishable group that can be legally identified. What must be proven is, first, the existence of a rule, standard, practice or policy of discriminatory nature; and, second, its disproportionately negative effect on a designated group because of a special characteristic related to the group. Those falling between the cracks have thus no chance to push any law-reforms through this way.

A significant case to be mentioned is the South-African case *Grootboom*.[43] Not even this case serves as a 'pure' example of systemic discrimination as defined for the purposes of the present study, as it deals with single administrative decisions (or their absence) rather than with nation-wide regulations. Regardless of this, this case is worth mentioning as a groundbreaking court decision on the realisation of economic, social and cultural rights.

The case dealt with the constitutional right of the claimants to have access to adequate housing. In its decision, the Constitutional Court of South Africa pronounced that the state policies under consideration fell short of the minimum constitutional requirements. The Court also interestingly spelled out the key elements that define the extent of the State's obligations. Accordingly, the following three key elements shall be taken under examination: 1) reasonable legislative and other measures; 2) progressive realisation; and 3) resource availability. Moreover, the Court made several observations in determining whether the measures adopted by the appellants meet the test of reasonableness. The *Grootboom* case offers an interesting reflection point when we discuss the borderlines of state responsibility in guaranteeing an identifiable quantum of quality education for all.

With this discussion on the comprehension of discriminatory legislation in international and domestic legal contexts, we now turn from framing the research to validating its analytical frame.

[43] *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2001.

PART TWO

VALIDATING THE FRAME

CHAPTER THREE

RIGHTS

3.1. *A Broad Conception of the Right to Education*

"Everybody's right to an identifiable quantum of quality education" is the first excerpt to be picked out of the working definition of systemic discrimination.[1] Pursuant to it, discrimination is systemic if the legislative framework on the subjective right to education is distorted.

To start with, an argument is needed for an expanded outlook on the right to education for those in substantively the most disadvantaged position. It has been maintained that the core content of the right to education shall be universal in order not to undermine the concept of the universality of human rights. This view becomes evident, for example, from an analysis done by Kate Halvorsen (1990) of the process of formulating the right to education as it is stipulated in the UDHR and the International Covenant of Economic, Social and Cultural Rights (hereafter CESCR). She reports as the general opinion of the drafters that these instruments should not set forth directives regarding the system or the content of education, in accordance with the general opinion that the provisions at issue should be universal so that all countries would be able to accept them. Consequently, the guidelines for the content of education were very general, highlighting solely the spirit of monitoring and managing education.[2]

In the course of the 1970s, the question of the core content was closely connected with 'minimum essential learning needs', a concept introduced by the International Council for Educational Development (ICED). It was argued that the right to education must be translated into terms of some 'minimum package' of attitudes, skills and knowledge that every young person in a given society requires for an effective and satisfying adulthood. The ICED first tried to derive its concept from an analogy with 'minimum nutritional needs', but before long the idea of a 'minimum' was rejected. Instead, the less restrictive term 'basic learning needs' came to be preferred internationally.[3]

More recently, Fons Coomans (1998) has elaborated the term 'core content' of the right to education as defined in the CESCR. According to him, the nature of a right must be understood as meaning its core or essence, i.e. that essential element without which a right loses its substantive significance

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[1] The working definition of systemic discrimination was settled at the end of Chapter 2.1.
[2] *See also* Coomans 1998, para. 10.
[3] See World Education Report 2000, p. 46.

as a human right. Coomans proposes three elements of the core content of the right to education as a human right: 1) individual right of access to the existing public educational institutions on a non-discriminatory basis; 2) the right to enjoy basic (primary) education in one form or another; and 3) free choice of education without interference by the state or a third person. An approach presented by Manfred Nowak (2001) is similar but somewhat wider; in addition to the three elements mentioned by Coomans he brings up even the freedom to establish and direct educational institutions.

The interpretation advocated in this study strives to provide a justification for a somewhat different core of the right to education. There is no doubt that the core shall consist of a 'minimum aggregate' which should be provided for all. There are some aspects, however, that should be discussed more thoroughly. One is the requirement that the core content of the right to education should be convergent worldwide. Yet, the phrase 'meeting basic learning needs' may well mean different things in different circumstances. As Nelly Stromquist (1990) puts it, in societies with the traditional patterns of living, the inability to read and write may not be as big handicap for sustaining human life as in the Western world. Van Dijk and van Hoof also speak in favour of contextualisation by noting that the scope of the right to education may vary from one country to another and is subject to developments.[4]

The same axiom is recognised in Article 1 of the Jomtien World Declaration on Education for All, according to which "[t]he scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time". The point at issue is that, in increasingly technological knowledge societies, the weaknesses of the education system still leave many individuals illiterate or semi-literate, although the ability to write and read in such a society can be considered a fundamental need. Inasmuch as insufficient education is threatening to become a major handicap, broadening the 'core content' of the right to education may well be necessitated, in line with the broadened concept of basic needs. This is a kind of relativist argument that puts emphasis on the notion of the progressive realisation of rights to be discussed in Chapter 5.

Another aspect that needs some ventilation is whether individuals above compulsory school age shall be regarded as belonging to the core or to the periphery of educational rights-holders. Several commentators seem to take for granted that only education at the primary level shall be counted as an element of the core content of the right to education. Yet, at least one other alternative interpretation is in line with international human rights instruments, as will be reasoned below. It holds true that primary education without charge is an important component of basic education. Nevertheless, when studying systemic discrimination in particular, the focus shall be put expressly on the

[4] Van Dijk and van Hoof 1998, p. 644.

margins of any categorisations, inclusive of the margins between primary education and other categories of basic education.

All in all, the right to education remains relatively superficial and the road to workable and concrete tools to operate with is long. The present research puts forward a certain re-conceptualisation, without which identification of systemic discrimination is unfeasible. Consequently, it is suggested here that the right to education should cover the chain from the highly fundamental skills of literacy, numeracy and language to the skills necessary for the professional identity of an individual. Thus, access to vocational qualification, as understood here, includes the right to learn the minimum skills needed to make the step onto the bottom rung of the ladder as well as the right to obtain schooling for vocational skills that will enhance long-term earning capacity. To safeguard the equality of outcomes, all rungs of the ladder of knowledge shall consist of education that progresses resolutely towards clearly stated and generally recognised targets.[5]

Aligned with this reasoning, the right to education is below conceptualised by dividing it into four key components: 1) the right to basic skills, 2) the right to language skills, 3) the right to vocational skills and 4) the right to cultural skills. In what follows, the focus will thus be put on international human rights standards that provide for formal instruction of these four elements to individuals above compulsory school age. As was already suggested in the introductory chapter, it is only by means of a holistic approach that the right to education gains substantive significance. The four components shall thus not be seen as compartmentalised targets with no impact on each other.

3.2. *The Right to Basic Skills*

3.2.1. *The Rise and Fall of the Concept of Fundamental Education*

The right to basic education is concisely expressed in Article 26(1) of the UDHR: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages." Questions concerning the implementation of this provision are to a considerable extent bound up with questions of interpretation. The subject matter to be discussed next is: how well does the bottom line safeguard the acquisition of basic learning skills of those individuals that for one reason or another missed their chances at the primary level?

Several scholars have commented on the drafting process of the educational article of the UDHR and especially upon the discussions concerning

[5] See above, Chapter 1.2.

the concept of fundamental education.[6] It has been reported that the Commission on Human Rights set up to draw up the UDHR amended the draft educational article several times. A most sensitive question was whether the right to education was exclusively for children or whether it was for adults also. Those members that insisted on the use of the term 'fundamental' instead of the term 'primary' argued that such a conceptual choice would expressly encourage adult education.

According to one observer, fundamental education meant "the equal right of all to a minimum standard of education as a means to world co-operation".[7] The point made by the representatives that favoured 'fundamental' to replace 'elementary' was that the word 'fundamental' contained a much broader concept of adult education.[8] Thus, what was adopted by the General Assembly in the final version was a compromise term, in order to recognise the right to education even for illiterate adults and others who had not had the opportunity when they were young to receive a full elementary education.

Do the subsequent international instruments then adhere to the above described attempt to convey the conception of basic education as a right of everyone, or can we discern affirmation of other principles not specifically mentioned in the UDHR? The CDE recalls the right of every person to education in its preamble, but not in the body text. The issue of fundamental education above compulsory school age is included in Article 4(c), according to which the states undertake to formulate, develop and apply a national policy which will tend:

> [...] to encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity.

It is noteworthy that this article contains a clause that allows the usage of "methods appropriate to the circumstances and to national usage" although the convention itself does not permit reservations.

Article 13 of the CESCR, a comprehensive educational provision, starts by reiterating the UDHR. Accordingly, the state parties "recognize the right of everyone to education". This provision introduces the concept of primary education that shall be available free to all, and that since then has habitually been considered as a children's right. The two other stages mentioned, i.e.,

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[6] See, e.g., Volio 1979; World Education Report 2000, pp. 93–107.

[7] Commission on Human Rights, E/CN.4/AC.2/SR.8. Another definition from the 1940s incorporates into the content of fundamental education a broad range of skills from literacy and numeracy to vocational skills, domestic skills, spiritual and moral development etc., as manifested by the 'pressing needs and problems of the community'. See Fundamental Education, A Description and Programme, pp. 11–12, Paris, UNESCO 1949. Quoted in World Education Report 2000, p. 27.

[8] Un Doc. E/CN.4/SR.68.

secondary and higher education, are also regarded as applicable to everyone but to be more qualified by the availability of resources.[9] The concern of the present study in relation to basic skills is recognised in sub-article 13(2)(d) as follows:

> Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

Merely by virtue of Article 13(2)(d) CESCR it is not possible to define to what extent individuals who have not received or completed the whole period of their primary education have a right to have their basic knowledge gap reduced. According to the Committee on Economic Social and Cultural Rights (hereafter the CESCR Committee) enjoyment of the right to fundamental education is not limited by age but is a right of all age groups. The Committee also consolidates the concepts of fundamental education and basic education in international human rights discourse by stating that they, in general terms, correspond to each other.[10]

One more relevant binding instrument in this context is the Convention on the Rights of the Child (hereafter CRC), which covers only children as holders of educational rights. The demarcation of rights-holders by age appears reasonable with regard to the acquisition of primary and secondary education, as the CRC is applicable only to individuals below 18 years of age. In contrast, however, it can quite reasonably be asked why higher education is recognised, but illiterates above compulsory school age are left without recognition. Article 28(3) CRC clearly stipulates that:

> States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world…In this regard, particular account shall be taken of the needs of developing countries.

Yet, no matter how valuable the reference to international co-operation in this subject matter may be, this provision gives little attention to the educationally disadvantaged above primary school age that reside in the so called developed countries. These 'in-betweens' will be put under examination in Chapter 4.

In contrast to the scarcity of legally binding universal codifications on the right to basic education of those aged 15+, the UN soft-law is at this point embracing rather than exceptional. A repeated statement is that governments all over the world shall commit themselves to ensuring opportunities for all to acquire and maintain literacy skills.[11] Numerous declarations and

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[9] The question of progressive realisation will be discussed separately in Chapter 5.

[10] CESCR General Comment No. 13, paras. 22, 23 and 24.

[11] Declaration on Eradication of Illiteracy in the United Nations Development Decade (1964); Final Report of the World Conference on Adult Education (Tokyo 1972); UNESCO Recommendation on the Development of Adult Education (1976).

recommendations have expressly affirmed that every person—child, youth, and adult—shall be able to benefit from educational opportunities to meet their basic learning needs.[12] They have confirmed that literacy is a fundamental right, that the provision of learning opportunities for all—including the unreached and the excluded—is the most urgent concern, and that the basic learning needs of all can and must be met urgently. In addition, they have pointed out that the right to education as a human right naturally provides that the right to free elementary education covers not only children but also adults where necessary.[13]

Struggles over the definition of the key concepts occur repeatedly. It has been reported, for example, from the Education for All Conference in Jomtien in 1990, that the definition of the concept 'basic education' was far from unanimous. Countries from the South wanted the concept also to include non-formal education and adult education, whereas several donors, led by the World Bank, wanted to limit the concept to primary schooling. In this situation, countries from the South managed to have 'basic education' defined in broader terms than 'primary education.'[14]

As regards basic education above compulsory school age in the legal instruments of the Council of Europe, the story can be made short. In the ECHR the right to education is distinguished by its negative formulation. The wording used in Protocol Nr. 1, Article 2 is: "No person shall be denied the right to education." The essential in the present context is that this wording is not limited to primary education only, as the provision concerned clearly does not talk about 'no child.' Another question is to what degree a generally worded provision shall be interpreted as including protection of adult basic education for the reason that it has not been mentioned in specific terms. The position taken in this study is that Article 2 does not exclude everybody's right to basic education even if this is not directly expressed.[15]

The Revised European Social Charter (hereafter ESC) recognises some parts of adult education indirectly in its Article 10, which obliges the contracting

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[12] Jomtien World Declaration on Education for All and Framework for Action to Meet the Basic Learning Needs (1990). 'Basic learning needs' are described as comprising both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.

[13] Hamburg Declaration on Adult Learning (1997); Dakar Framework for Action (2000).

[14] See, e.g., discussion in NORRAG News, Number 19, June 1996.

[15] For the view that Article 2 of Protocol No. 1 of the ECHR is applicable to all levels of education, *see also* Wildhaber 1993, p. 531, inclusive of references mentioned in footnotes 2 and 5. *Cf.* how the European Court of Human Rights in *Kosiek* v. *Federal Republic of Germany* invoked the fact that certain universal instruments protected a specific right as a reason for refusing to read generally worded protections in the ECHR to include protections that had not been mentioned in specific terms. See also how Craig Scott (1999) criticises the result of this case as being the opposite of what an approach of global interdependence would suggest.

parties "to provide or promote, as necessary, the technical and vocational training of all persons". The ESC also mentions distinctly the education of young persons and persons who live or risk living in a situation of social exclusion or poverty, but in the language of protection instead of that of rights.[16]

The European Community has by tradition, since the 1950s, incorporated the concept of education within frameworks for vocational training.[17] It was first the Treaty of Maastricht[18] that brought compulsory education into the Community framework, and even then still limited it to the 'European dimension'. Before that, compulsory education could be influenced only indirectly by linking it to vocational training, or to some other areas such as gender equality issues, or to the special case of migrant workers and their families.[19] The Treaties of Amsterdam and Nice[20] brought no change in this issue and the key concern of the European Community seems thus to remain vocational training. The Charter of Fundamental Rights of the European Union (CFREU) of 2000 stipulates in very general terms that "Everyone has the right to education." Undoubtedly, such a stipulation leaves considerable space for interpretation.[21]

As most recent developments in EC law, it is noteworthy that the new Directives on asylum seekers and refugees both cover the right to education. The Asylum Seekers Directive lays down the right to education of minor children of asylum seekers and of asylum seekers who are minors under similar conditions to nationals of the host member state for so long as an expulsion measure against them or their parents is not actually enforced. The Refugees Directive obliges member states to grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same condition as nationals. Adult refugees shall be granted access to the general

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[16] ESC (revised) 1996, Articles 17 and 30. It is interesting to note how vaguely the right to education still is recognised in the Revised Charter, taking into account the fact that the absence of the general right to education in the original Charter has been mentioned as one of the reasons for the necessity of revision. See, for example, Harris 2001, p. 18.

[17] TEC has made reference to vocational training ever since the 1957 Treaty of Rome. See below, Chapter 3.4.1.

[18] For the informal names of different versions of the TEC, see footnote 25 in Chapter 1.4.1 above.

[19] Note, however, that, for example, McMahon (1995) argues that the initial impression that education is not an area where the Community would have striven to construct a legal framework is false. He reports attempts that have been taken to draft a European Charter of Education, providing a framework for educational thought in the Community. The overall goal would, according to him, be the gradual harmonisation of the educational policies of the Member States. As concerns the right to vocational training of migrant workers and for the educational and training rights of their family members, see Regulation no 1612/68, to be discussed below, in Chapter 3.4.1.

[20] See footnote 25 in Chapter 1.

[21] Note the existence of some sporadic policy documents by the European Parliament, such as "Eradication of illiteracy in the EC", Resolution A3–0400/92 of April 1993. *See also* the European Commission's Communication 'Making Lifelong Learning a Reality for All' [COM (2001) 678 final 21 November 2001].

education system under the same conditions as third country nationals legally resident. These provisions clearly acknowledge the right to education, even if the term 'under similar conditions' does not put particular pressure on the state to accommodate difference.[22]

Overall, the provisions discussed above suggest that international human rights law does acknowledge the right to basic education above compulsory school age. As will be argued more closely later, the fact that this right is directly and entirely linked to state obligations only as regards compulsory education does not as such diminish the fundamental nature of everybody's right to receive quality basic education. In other words, the fact that other forms of basic education are qualified by the availability of resources and are subject to 'progressive realisation' does not nullify the existence of these rights. What is essential at this stage is the conclusion that legally-binding international human rights instruments do recognise the right of everyone individual to get her/his basic learning needs satisfied.

3.2.2. *Quality Basic Education for All: An Illusion?*

The argument for a broad conception of the right to education even involves a quality aspect. This aspect calls upon especially those countries that already declare themselves as having an all-extensive right to education to direct all the more attention to the progress of guaranteeing its quality. The CDE stipulates quite clearly about the importance assigned to the quality issue. In Article 1(2), the term 'education' as such is said to refer, among other things, to the standard and quality of education. Article 2 permits the establishment or maintenance of separate educational systems or institutions of certain type merely on condition that they provide education of the same quality as other schools. Moreover, Article 4(b) obliges the state parties to ensure that the standards of education are equivalent in all public education institutions

[22] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Article 10; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Article 27. The right to education in the situation of mass influx is a specific question of its own that cannot be tackled in the present study. For references to relevant international standards, see Beiter 2006, pp. 124–127. It is noteworthy, however, that the right to education is also mentioned in Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof. Persons under temporary protection, the duration of which, according to the Directive, is normally one year and a maximum of three years, are in Article 12 granted the right to education for persons under 18 years on roughly the same terms as for nationals, whereas Article 14 leaves any aspects of the right to education of individuals above the age of 18 to the discretion of the member states.

of the same level, and that the conditions relating to the quality of education provided are equivalent.[23]

With regard to judicial statements, it has ever since *Brown* v. *Board of Education* been widely accepted that equality of educational opportunity shall include an evaluation of the quality of educational services provided.[24] Nevertheless, a problematic issue is determining what kind of education could be designated as having sufficient quality—especially in cases where there are no appropriate comparators. On the basis of what was said above, a total denial of educational opportunity is a violation of the human right to education. A much more complicated issue is the provision of each human being with an opportunity to acquire quality basic education in accordance with her/his individuals needs.

It is this requirement of qualitative components that makes it so difficult to develop good indicators on the right to education. Yet, along with the increasing requirements for greater accountability that the educational sector encounters, we can hardly avoid a fundamental question of what it means in legal terms that everybody receives quality education. As Foster & Pinheiro (1987) accurately note: "legal mechanisms protecting equal access to educational services are meaningless without further controls over the quality of educational services provided." More recently, the CESCR Committee has highlighted quality as one of the characteristics of acceptable education, along with its relevance and cultural appropriateness.[25]

How, then, can quality be defined in terms of basic education above compulsory school age? A fact already referred to is that the relevant concepts in this context, such as literacy and basic learning needs, are culturally bound and socially derived. The term 'literacy', for example, refers traditionally to reading and writing skills, but it is sometimes used also with reference to various other kinds of basic knowledge and skills, such as 'scientific literacy', 'computer literacy', and 'political literacy'.[26] Defining literacy in a way that fits all cultures may be relevant for comparative international surveys, but the view adopted in the present study is that attention shall be paid to an individual's ability to function in a given society. Hence, the more 'developed' countries cannot neglect the educational needs of some segments of the population by claiming that a certain world-wide minimum level of basic skills is already achieved.

It can be deduced from what has been said above that the main objective of the right to quality basic education shall be to impart functional literacy in a given (usually national) context. This demand follows a classic UNESCO definition, according to which functionally literate person is one

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[23] These provisions will be discussed in more detail in Chapter 5.
[24] See Chapter 1, footnote 8.
[25] CESCR General Comment No. 13, para. 6(c) (c).
[26] Fiske *et al.* 1997, p. 18.

who is capable of taking part "in all life's activities, where literacy is needed for everyday activities in a society, and the one who uses his/her reading, writing and calculating skills for personal development and for the development of the society".[27] Although a definition like this can be accused of being too neutral to be useful, we can from it derive a model of the right to an education according to which the focus shall be shifted from mere access to the achievement of a minimum level of proficiency in basic skills and thus, ultimately, to output.

As was already conveyed in Part I, the focus of this study is not so much on the access to education, but rather on the 'output-equality' of education, which refers to the formally certified competence of students from different backgrounds to apply for available employment positions or further education once they leave the education system. What is argued here is that such an output-oriented approach is applicable even when assessing the quality of the very lowest levels of 15+ education. In England, for example, where the government has identified literacy, numeracy, information technology, possession of a modern foreign language, problem-solving and personal and social skills as essential aspects of competence, these are now to be incorporated into all post-16 qualifications.[28]

The valuable point with this kind of skills identification is that society thereby recognises its responsibility to provide all with an option for sufficient skills to be able to participate adequately in employment and/or further learning opportunities. The importance of introducing into formal certification procedures an attestation of basic skills or 'key competencies' is recognised even in Article 4 of the Jomtien Declaration, according to which:

> the focus of basic education must…be on *actual learning acquisition and outcome*, rather than exclusively upon enrolment, continued participation in organized programmes and completion of certification requirements.

The same matter is reiterated in the Dakar Framework for Action, which commits the International Community by the year 2015 to improve "every aspect of the quality of education, and ensuring their excellence so that *recognized and measurable learning outcomes* are achieved by all, especially in literacy, numeracy and essential life skills".[29]

An increasingly pluralist and multicultural society creates challenges for the education system, which then has to accommodate the wide range of demands made of it. In this process, it is important to draw attention to the fact acknowledged in the above-mentioned international standards that an individual's interest in educational services is a human right that extends beyond questions of access to include the quality of services received. It is

[27] UNESCO 1978, p. 18.
[28] Broadfoot 1996, p. 51.
[29] Emphasis added.

not sufficient that a government expresses a broad commitment to educate all of its citizens. The government shall also be able to demonstrate a stable commitment to fulfilling the basic educational rights of all members of society, and one essential element of this commitment is the recognition of a legal right to quality basic education above compulsory school age.

3.3. *The Right to Language Skills*

3.3.1. *The Complex Nature of Language Rights*

Academic debate concerning linguistic rights has, for obvious reasons, been closely linked with minority rights issues. The right of minorities to maintain their collective identity takes place largely through the medium of their mother tongue, which again is essentially exercised through education. However, observation of linguistic rights as purely individual rights is not a novel idea, either—particularly not in Northern America. As early as two and half decades ago Mala Tabory (1980) triggered a "language rights as human rights" debate, pondering among other questions whether language rights are part of the broader category of cultural rights. A decade later, Dale Gibson (1991) contributed to the discourse by examining whether Canadian constitutional provisions can give recognition to individual language claims. He discussed in particular provisions that recognise freedom of expression and freedom of association, those that guarantee the right to an interpreter in legal proceedings in addition to equality rights as legitimate grounds for language claims.

In Europe, Tove Skutnabb-Kangas has consistently made appeals for language rights as human rights from a linguistic point of view ever since the 1980s.[30] More recent works have been analyses of existing legal documents on the theme of language rights both in universal and European human rights regimes.[31] As regards prevailing views, Sue Wright (2001) argues that "few in Europe, outside the far-right fascist fringe in Western Europe or the new nationalist enclaves in the post-communist world, would quarrel with the weak interpretation of linguistic rights". Moreover, Wright suggests that the right to use regional or minority languages in the private sphere is not an aspect that demands the particular attention of human rights researchers in contemporary Europe. Instead, many fundamental problems remain to be solved concerning linguistic rights in the public sphere.

Two core areas distinguished from a multitude of potential concerns will be examined here. First, language rights are here conclusively examined as individual human rights. Thus, at arm's length are kept any attempts to

[30] Skutnabb-Kangas 1988, 1989, 1990, 2000.
[31] E.g. de Varennes 1997, 2000; Kontra *et al.* 1999; Dunbar 2001.

ground this set of the rights in the abstraction of language itself, which often happens when the proponents of linguistic diversity strive to define what language rights basically are about. As Robert Dunbar notes, an approach that does not ground linguistic right in the person "contemplates an interest to be protected, which is separate to and possibly in some circumstances at odds with even the interests of speakers of minority languages themselves".[32]

What follows in the present chapter makes no attempt to cover comprehensively controversial key questions such as what language rights ultimately are. It is sufficient to emphasise that individuals, rather than languages, are here regarded as the bearers of rights. For the sake of clarity, the concept 'right to language skills' will be used henceforth to indicate an individual right that can be measured and monitored within the framework of a qualification system.

Second, we shall approach the right to language skills more widely than just as a derivative of minority rights. So far, theorists of language rights have mostly dealt with the interest in using a particular language, namely, one's mother tongue. The approach adopted here is, however, that it is not only a matter of opportunity for minority members to learn their mother tongue fully and properly. It is as much a matter of their right to learn the official language(s) of the society where they live. This approach absolutely does not suggest that education should be conducted solely in the language of the majority. Instead, what it does suggest is that in a study focusing on systemic discrimination it is indispensable to explore the two dimensions of the right to language skills: the right to the minority mother tongue together with its less-often recognised reciprocal, the right to majority language skills.

3.3.2 *Are Language Rights Truly Individual Human Rights?*

As a matter of everyday discussion, it is unproblematic to declare that everybody has a right to language skills. Any human being needs language skills as a basic means of coping in life. As Leslie Green notes, in this general sense: "language is the conceptual substructure of all rights and indeed of all other moral concepts".[33] When international or national courts are faced with having to make a decision on whether language rights constitute fundamental rights in the prevailing legal order, the matter becomes less self-evident. Much of the literature on language rights discusses what having the right 'to speak' or 'to use' the language means. The placement of the language issue in the realm of education rights impels us, instead, to ask what having the right 'to learn' the language means. In other words, language rights may well be autonomous claims in and of themselves, but this study looks at them expressly as a subset of educational rights.

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[32] Dunbar 2001, p. 94.
[33] Green 1987, p. 650.

a. *United Nations Standards*

As a general rule, it is individuals that are the beneficiaries of rights in the standard setting of the United Nations human rights framework. On the one hand, excluding some provisions on indigenous and tribal peoples, this holds true even regarding standards on the right to education.[34] On the other hand, a right to language skills is rarely, if ever, mentioned in the context of clauses stipulating on the right to education.

What can then be said about an individual's right to an education in one's own language? Kate Halvorsen reports in her above-mentioned analysis on how the right to education was formulated in the UDHR that several arguments were at that time made against a clause guaranteeing such an option. First, attention was called to the fact that rights of minorities were already covered elsewhere and that therefore language matters needed not be dealt with in the UDHR. In other words, the right to language skills as an individual right was left unquestioned, because language rights were considered solely as derivatives of minority rights. Second, it was argued that to grant minorities education in their own languages would imperil the work for national unification in heterogeneous societies.[35] For these reasons, little guidance can be found in the UDHR to the question under consideration.

The CDE, on the contrary, contains some explicit references to language. In accordance with Article 2, the establishment or maintenance of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians shall be permissible, *inter alia*, for linguistic reasons. The conditions laid down are that participation in such systems or attendance at such institutions shall be optional and that the education provided shall conform to existing national standards. Additionally, Article 5 stipulates, among other issues, that it is essential to recognise *the right of members of national minorities* to carry on their own educational activities, including the use or the teaching of their own language.[36] Even if the convention at this point does not expressly set up any individual right to language skills as such, the provision at issue does implicitly refer to such a right.

The question of language is mostly omitted in other universal standards that include general articles on education. The educational articles of neither the CESCR nor the CRC refer to language. It is noteworthy that, in the CESCR, the goal of education to promote understanding, tolerance and friendship among racial, ethnic, and religious groups is explicitly stated, whereas the same benevolent goals are not mentioned *vis-à-vis* linguistic groups.[37] Article 29

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[34] Indigenous peoples' rights fall outside the scope of current study for reasons explained above in Chapter 1.3.2. See, however, how Articles 26 and 27 of the ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (1989) stipulate on the opportunity of the *peoples* to acquire education.

[35] Halvorsen 1990, p. 355.

[36] Emphasis added.

[37] See Article 13 of the CESCR; Article 28 of the CRC.

of the CRC, on the other hand, recognises that the education of the child shall be directed towards the development of respect for the child's language, among other things. Moreover, Article 30 of the CRC acknowledges that the right of a child belonging to a linguistic minority to use his or her own language in community with other members of his or her group shall not be denied.

A binding UN instrument that contains provisions concerning both educational rights and language rights is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereafter UN Migrant Workers Convention) of 2003. In line with other UN treaties, it recognises the rights of individuals, not of groups, thus, no migrant community can claim to have rights or privileges on the basis of this instrument. States of employment[38] are requested to endeavour to facilitate for the children of migrant workers the teaching of their mother tongue, but the decisions are at the discretion of the government. Moreover, it is to be noted that this document has a narrow scope of application as the definition of migrant workers is quite restricted. By and large, the education clauses of UN binding instruments not only focus solely upon individual rights, but also shy away from any overt mention of language.

When we turn to look at the legally non-binding instruments, the emphasis gradually changes. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) recognises initially individual rights, by stating that *persons* concerned in the declaration have the right to use their own language, in private and in public; that states shall create favourable conditions to enable *persons* to develop their language; and that *persons* should have adequate opportunities to learn their mother tongue. Nevertheless, it also demands states to protect the *linguistic identity of minorities*, thus acknowledging even a collective element of language rights.[39]

b. *European Standards*

At the European level, the interconnectedness of language and education is explicitly acknowledged in several standards and legal cases. The educational provision of the ECHR does not specify the language in which education must be conducted in order for the right to education to be considered respected. Neither does it *per se* mention language along with the demand for respect of the parents' religious and philosophical convictions.[40] Nonetheless, the relation between the right to language and the right to education was thoroughly discussed in the *Belgian Linguistics* case. The Court then found

[38] The term "State of employment" means the state in which the migrant worker is engaged in a remunerated activity.

[39] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Articles 1(1), 2(1), 4(2) and 4(3). Emphasis added.

[40] ECHR, Protocol No. 1, Article 2.

that the ECHR provision on the right to education does contain an implicit language component, although the provision guaranteeing that nobody's right to education "shall be denied" was interpreted only to mean that: "subjects have the right to avail themselves of the means of instruction available at a given time". Thus, it was considered to exclude any right to education in one's own language.[41]

As regards later Council of Europe instruments, very little explicit support can be found for language rights as individual human rights. The European Charter for Regional or Minority Languages (hereafter ECRML) contains a wide range of provisions on language and education, calling for minority language education at all levels, from pre-school to adult education. Nevertheless, this document is characteristically a policy resolution expressing what a government might be expected to do, but does not create a right for the language-minority individual to receive instruction through or in her/his first language. Much less does it protect the language rights of immigrants or refugees, as (im)migrant languages are explicitly excluded from its scope.

Contrary to the ECRML, the Framework Convention for the Protection of National Minorities (hereafter FCNM) does not set the importance of language rights merely in the context of the values attached to linguistic diversity.[42] Some of its articles indeed make explicit references to the rights of individuals. One such provision is Article 14(1), which states that the parties "undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language". Thus, this instrument clearly includes the educational rights of individuals associated with linguistic minorities.[43]

An interesting set of standards is the normative framework of the European Union, which emphasises strongly the Community contribution for the *teaching and dissemination of the languages* of the member states, as will be discussed in the Chapter 5 on state obligations. In contrast, the EU framework stipulates nothing on linguistic rights as individual rights, although they as such naturally are not mutually exclusive with the state duty to promote linguistic diversity as a valued cultural asset.[44] The same applies in part to some of

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[41] See paras. 858–862.

[42] For example, the Preamble recognises the identity of each person, instead of some kind of collective identity.

[43] In a recent commentary on the FCNM, de Varennes & Thornberry are critical towards the approach of its Advisory Committee to Article 14. They suggest that, taking into account the overall normative structure of the Framework Convention, the recommendations of the Advisory Committee concerning the language rights of national minorities have been uncommonly weak. See de Varennes & Thornberry 2005, pp. 407–428.

[44] It is apparent that linguistic rights are becoming an increasingly important issue in the European Union context, where the attempts to promote the mobility of workers often may collide with national language laws and policies. This tension is well illustrated by the case *Anita Groener* v. *Minister for Education and the City of Dublin Vocational Education Committee* that was brought before the European Court of Justice (ECJ) back in 1989. The Court confirmed that a worker from another EC Member State may legitimately be affected by the language policy

the political, intergovernmental documents of the Organization for Security and Co-operation in Europe (OSCE) that expressly deal with the issue of language rights.[45]

All in all, the provisions outlined here suggest two quite different approaches to language rights: one emphasising the right of individuals belonging to minorities, the other one considering international standards as measures to promote linguistic diversity for its own sake. These two approaches naturally do not have to be mutually exclusive, but there are some obvious tensions between them. These tensions will be discussed after considering the ways in which international standards deal with the right to become skilled at majority language(s).

3.3.3. *Multi-Lingualism versus Semi-Lingualism in International Human Rights Law*

Most researchers have looked at the right to language education as if it were a specific species of minority rights. Even those commentators that have called attention to the flaws of separating between the language rights of 'old' and 'new' minorities, predominantly discuss only the right to minority language.[46] As far as the right to majority language skills is at issue, the academic discourse has mostly concentrated around whether minority members should have right to *both* majority language education *and* minority language education, or just to *either-or*. Nonetheless, from a very fundamental human rights point of view, it is important to pay attention to those individuals who are at risk of having *neither-nor*.

The range of language skills stretches far more beyond the scale from mono-lingualism to bi-lingualism. Besides, we can distinguish 'super-linguists' on the one end and semi-linguists on the other end. It may be easy for the super-linguists, already comprehending several languages, to criticise the domination of majority languages, the skills of which they already have. In

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requirements of the host state, so long as the basic principles governing free movement more generally—non-discrimination and proportionality—are respected. For a comment of this case, see Nic Shuibhne 2002, p. 104.

[45] For instance, the Document of the Copenhagen Meeting of the Conference on the Human Dimension refers in Paragraph 33 to necessary measures to protect, *inter alia*, the *linguistic identity* of *national minorities*. However, Paragraph 34 gives recognition even for language rights as individual rights by stating that the participating states "will endeavour to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue". In comparison, recommendations by independent groups of experts directly acknowledge the individual rights approach. For instance, the Hague Recommendations Regarding the Education Rights of National Minorities (1996) state unambiguously in Paragraph 1 that "the right of *persons* belonging to national minorities to maintain their identity can only be fully realised if they acquire a proper knowledge of their mother tongue during the educational process" The focus of the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998) is also conspicuously on 'persons' belonging to national minorities, as opposed to references to the rights of collective entities.

[46] E.g. Skutnabb-Kangas 1996, de Varennes 2001.

contrast, for those still lacking majority language skills or for those barely bilingual, correcting the deficiency of majority language skills may appear as the only realistic route to proper education and better living standards.

Consequently, the focus in what follows will be on individuals who are at risk of receiving neither-nor, who are about to remain semi-lingual instead of becoming monolingual, not to mention that they will have no true opportunity to become bi- or trilingual. This question is especially important to pose when youngsters at the borderlines of compulsory school age are concerned, keeping in mind that the proper acquisition of a second language demands several years of apprenticeship.

Is there then a human right to learn a second language in addition to the one spoken in one's family? How far does this right extend according to international standards? And to whom does it belong? Several international instruments underline that the right to maintain a collective identity through a minority language must be balanced by the responsibility to integrate and participate in the wider national society. However, the statement that such integration requires the acquisition of a sound knowledge of both that society and the state language(s) is made mostly in the soft law.

It is noteworthy that both the Convention relating to the Status of Refugees (hereafter Refugees Convention) and the Convention relating to the Status of Stateless Persons (hereafter Stateless Persons Convention) maintain complete silence with regard to language issues. The CDE, for its part, stipulates in Article 5(1)(c)(i) that the right of minorities to carry out their own educational activities is conditional so far that the members of these minorities shall not be prevented from understanding the language of the community as a whole.[47]

Likewise, the UN Migrant Workers Convention states in Article 45(2) that: "States of employment shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language". The wordings of the few provisions mentioned just above are noticeably rather vague. References to majority language skills are more common in legally non-binding UN documents, although often implicit even there.[48]

Regarding the European instruments, the educational provision of the ECHR is *per se* language neutral, as was already noted above. However, the

[47] This Article of the CDE is quoted and discussed more thoroughly in Chapter 5.4.2, below.

[48] The Declaration on Race and Racial Prejudice states in Article 9 (3) that "population groups of foreign origin…should benefit from appropriate measures designed to…facilitate their adaptation to the host environment and their professional advancement". The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities proclaims in Article 4(4) that "[p]ersons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole".

Court made an important point in the *Belgian Linguistics* case when it confirmed expressly 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".[49] It would be irrational to claim that the right to education is fulfilled if the student does not comprehend the language of instruction. Therefore, the right to learn the language of instruction should be considered as a prerequisite for education in other subjects.

An interesting reference to majority language rights can also be found in a more recent *Skender* v. *Former Yugoslav Republic of Macedonia. I*n this decision, the Court recalled that "the drafting history of the Article confirms that the object of the second sentence of Article 2 was in no way to secure respect by the state of a right for parents to have education conducted in a language *other than that of the country in question*".[50] Even in this decision, under consideration is merely the right to education *in* the majority language, whilst nothing is said about an individual right to instruction *of* that language.

It may be that during the drafting of the Protocol No. 1 to the ECHR, a common understanding among the drafters was that language concerned an aspect of ethnic minority issues and that it thus fell outside the scope of the Convention. It is noteworthy, however, that ever since the 1950s, very little has been stipulated on the right to learn the official language(s) of the state, in spite of the fact that many societies have become more and more linguistically pluralist due to migration.

Among early standards, the European Convention on the Legal Status of Migrant Workers (hereafter European Migrant Workers Convention) of 1977 states in Article 14 (2) that, in order to promote access to general and vocational schools and to vocational training centres, the receiving states "shall facilitate the teaching of its language or, if there are several, one of its languages to migrant workers and members of their families". Also in 1977, the Council of European Communities published the Directive on the schooling of children of migrant workers, which, however, is estimated to have been very limited in its ambitions and has meanwhile become completely outdated.[51] As regards more recent documents, the FCNM states in Article 14(3) that the right of persons belonging to national minorities to learn their minority languages shall be implemented without prejudice to the learning of the official language or the teaching in this language.[52]

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[49] *Belgian Linguistics Case* (1968), para. B.4.

[50] *Skender* v. *Former Yugoslav Republic of Macedonia* (2001), para. 3. Emphasis added.

[51] Extra & Yugmur 2002, p. 38. *See also* Fase 1994.

[52] In soft law, the Hague Recommendations contain some interesting paragraphs. First, this document emphasises the responsibility of minority members to integrate into the wider national society through the acquisition of a proper knowledge of 'the State language', and second, it states that the curriculum of vocational schools providing training in the mother tongue should be devised "in a way which ensures that, upon completion of these programmes,

Several commentators on the European integration process have underlined the importance for immigrants and minorities of learning the official language or languages of the country in which they settle themselves in order to be able to succeed in participating fully in the political, socio-economic and cultural life of society.[53] Yet, by and large, neither contemporary UN law nor the European standards contain any unqualified 'right to language skills'. Excluding of a few inconclusive statements, international legal standards pay little attention to situations where individuals do not speak or understand official language(s) of their country of residence. As will be discussed later, there are, however, a number of other provisions, read alone or in combination that can be used to advance everybody's right to language skills in the official language of their country of residence.[54]

3.4. *The Right to Vocational Skills*

3.4.1. *The Right to Vocational Skills as a Legal Right*

The view set forth in the present study, according to which vocational skills should be incorporated into the core of the right to education, is based on two premises. The first is that human rights are not static but dynamic by their nature. The second is that they should be studied in a holistic framework which takes into account the interrelatedness of diverse rights. As to the first premise, it may be natural that in the earlier stages of mass educational provision human rights advocates put their effort into everybody's right to pass beyond primary schooling, so as to have an equal 'first step on the ladder' to the opportunities provided by secondary education. Nonetheless, in so-called developed countries the expansion of educational provision at primary level has inescapably led to a situation in which the attention of the human rights advocates shall be now focused on exclusion that may operate at successively later stages.

As to the second premise, in contemporary Western societies secondary education has become an increasingly critical stage for economic self-reliance. The basic contention at this point is that the right to education should cover even skills necessary for an elementary professional identity of individuals. Is, then, the right to strive towards vocational skills a legal right? Traditionally, vocational education has, in many countries, been considered a private enterprise, at best based on consultation procedures between employers and

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students are able to practise their occupation *both* in the minority *and* the State language". *See* Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note, paras. 1 and 16. Emphasis added.

[53] For instance, Niessen 2000, p. 80.

[54] The discussion on the right to language skills continues in Chapter 4.3.

public authorities. Is, then, the argument above an attempt to read into the human rights law 'something that is not there', as the saying goes? Let us first look what the positive law says and then graduate to the conceptual and substantive clarifications.

a. *Universal Standards*

The UDHR and the CESCR both mention the right to technical and vocational education. Article 26(1) of the UDHR clearly requires 'technical' and 'professional' education to be made generally available. The CESCR makes, in addition, specific reference to 'secondary' education. Article 13(2)(b) reads:

> Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.

Moreover, article 6(2) of the CESCR obliges each state party to adopt and implement technical and vocational training programmes as one of the means to securing the full realisation of the right to work. The CRC also requires, in Article 28(1)(b), state parties to encourage the development of vocational education at the secondary level.

The ILO is a UN agency that has been most active in formulating standards for technical and vocational education, with recommendations being drafted ever since the 1930s.[55] The first legally binding ILO instruments in the field concerned, the Social Policy (Basic Aims and Standards) Convention, was adopted in 1962. Article 15(1) of this instrument obliges state parties to make adequate provision:

> to the maximum extent possible under local conditions, for the progressive development of broad systems of education, vocational training and apprenticeship, with a view to the effective preparation of children and young persons of both sexes for a useful occupation.

Subsequently, vocational education was mentioned in Convention No. 142 concerning Vocational Guidance and Vocational Training in the Development of Human Resources of 1975. According to Article 1(5), vocational education and training policies and programmes of the contracting parties shall "encourage and enable all persons, on an equal basis and without any discrimination whatsoever, to develop and use their capacities for work in their own best interests and in accordance with their own aspirations, account being taken of

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[55] Vocational Training Recommendation, 1939 (No. 57); Apprenticeship Recommendation, 1939 (No. 60); Vocational Training (Agriculture) Recommendation, 1956 (No. 101); Vocational Training Recommendation, 1962 (No. 117). *See also* Convention No. 97 concerning Migration for employment (Revised 1949) and Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975). As these two instruments add nothing concerning educational rights to the UN Migrant Workers Convention that is currently in effect, they will not be dealt with here separately.

the needs of society". Moreover, Convention No. 168 concerning Employment Promotion and Protection against Unemployment (1988) stipulates in Article 7 that each Member shall declare as a priority objective a policy designed to promote full, productive and freely chosen employment by all appropriate means. Such means should include, *inter alia*, vocational training.

UNESCO is another UN agency that has made important contributions through its attempts to strengthen the right to vocational education as a human right. Like the ILO, it started to pave the way by politically more easily achievable soft-law instruments.[56] The legally binding Convention on Technical and Vocational Education (hereafter UNESCO Vocational Convention) was adopted in November 1989, just shortly before the adoption of the CRC. This instrument is noteworthy in a number of respects. First, it strives to provide a coherent set of concepts and guidelines for the vocational education activities in member states, in particular for the assumption of public responsibility for the framing of policies and the definition of strategies for vocational education, considered to be an integral part of the education system.[57] Second, it strives to ensure the need both to "meet the technical requirements of the occupational sectors concerned" and also to "provide the general education necessary for the personal and cultural development of the individual".[58] In addition, and what is most relevant for the present study, the UNESCO Vocational Convention seeks explicitly to contribute to greater equality of access to vocational education for diverse disadvantaged groups.[59]

Regarding special instruments that stipulate on the educational rights of individuals in disadvantaged groups, both the Refugees Convention and the Stateless Persons Convention recognise not only the right of persons with these legal statuses to receive the same treatment as is accorded to nationals with respect to elementary education. They shall also get the same treatment as nationals in respect of, *inter alia*, apprenticeship and training, in so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities.[60]

Likewise, Article 10(a) of the CEDAW specifies that women shall have same conditions as men for access to studies and for the achievement of diplomas in

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[56] Recommendation on Technical and Vocational Education, 1962; Revised Recommendation concerning Technical and Vocational Education, 1974. Traditionally, 'technical and vocational education' has been a matter of UNESCO, whereas the ILO has used the more workplace-oriented concept of 'vocational training'. However, at the Second International Congress on Technical and Vocational Education in Seoul, Republic of Korea in 1999, UNESCO and the ILO were called upon to develop "a common concept of technical and vocational education and training (TVET)."

[57] Articles 1 and 2.

[58] Article 3(3).

[59] Article 2(4). Revised Recommendation Concerning Technical and Vocational Education (2001) specifies in Article 7(g) that as disadvantaged shall in this context be regarded groups such as immigrants, refugees, minorities (including indigenous peoples), demobilised soldiers in post-conflict situations, and underprivileged and marginalised youth.

[60] Refugees Convention, Article 24(1)(a); Stateless Persons Convention, Article 24(1)(a).

educational establishments of all categories, including all types of vocational training. The UN Migrant Workers Convention also makes reference to the right to vocational education. Accordingly, both migrant workers and the members of their families shall enjoy equality of treatment with nationals of the state of employment, *inter alia*, in access to vocational training, provided that requirements for participation are met.[61]

b. *European Standards*

As regards the instruments of the Council of Europe, it has been proposed that the educational provision of the ECHR does not extend to vocational training. The main focus of Article 2 of Protocol Nr. 1 has been on primary education and general higher education.[62] However, taken verbatim it can extend to all forms of education provided or permitted by the state, including vocational education. This was evidenced in *Cyprus* v. *Turkey*, where the Commission held that it might be a violation in certain circumstances to deny education even at the secondary level.[63] However, this type of holding is thus far an exception. In the main, vocational training issues are to date covered by the ESC and its case law.

The original ESC that entered into force in 1965 was the first international legally-binding instrument to recognise the right to vocational training as such, although this matter had been dealt with even earlier in some ILO recommendations and EC directives. Article 10(1) of the ESC, which remained unchanged in the revised version of 1996, obliges the state parties: "To provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped,…, and to grant facilities for access to higher technical and university education, based solely on individual aptitude".

The ESC has been criticised as being discriminatory by its very nature, due to the fact that it is applicable only to selected categories of European residents. On that issue, it is worthwhile to note the interpretation of the Committee of Ministers, according to which in order to satisfy the purpose of Article 1 of the Charter—which is to ensure the effective exercise of the right to work—a state must not only have institutions providing, *inter alia*, vocational training, but must also "ensure access to the institutions for all those interested, including foreigners, nationals of the states parties to the Charter, and the disabled".[64] Likewise, the European Committee of Social Rights has emphasised the special importance of the right to vocational training especially for vulnerable groups in the labour market.[65]

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[61] UN Migrant Workers Convention, Articles 43(1)(c) and 45(1)(b).

[62] Hodgson 1998, p. 56.

[63] *See* above, Chapter 2.3.2.

[64] Samuel 2002, p. 41, with reference to Conclusions XII-1, p. 67 and Conclusions XII-2, p. 57.

[65] Harris 2001, p. 140, with reference to the general introduction to Conclusion XIII-3 32–37 and Conclusion XIV-2 59.

The European Migrant Workers Convention (1977) also establishes the principle of equal treatment, or no less favourable treatment, of migrant workers with nationals with regard, *inter alia*, to vocational training. Article 14, which stipulates on the matter at issue, covers even the right to vocational training and retraining of those members of their families that are officially admitted to the territory of a contracting party. As was mentioned above in the section on the right to language skills, this instrument has largely been held to be ineffective and restrictive in its scope. Nevertheless, it illustrates that the member states of the Council of Europe have recognised the need to stipulate internationally on the right to vocational skills of individuals that may fall into educationally disadvantaged categories.

Just as the ILO was above suggested to be the most active UN agency in formulating standards for vocational rights, there is an agency above others at the European level too. In the European Community (EC), vocational training has been introduced as a matter of community law ever since the Treaty of Rome.[66] The TEC version currently in force constitutes in Article 149 the legal basis for EC action in the field of education, whereas Article 150 is devoted to vocational training. The last mentioned obliges the community to "implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training". Community action in the field concerned shall aim, *inter alia*, to improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market, and to facilitate access to vocational training.[67]

There are some provisions of interest even at the lower levels of the EC norm-hierarchy. Regulation 1612/68 stipulates in Article 7(3) that a worker who is a national of a member state shall, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.[68] In addition, Article 12 stipulates that the children of a national of a member state who is or has been employed in the territory of another member state shall be admitted to that State's apprenticeship and vocational training courses under the same conditions

[66] Signed on 25 March 1957, came into force on 1 January 1958.

[67] With regard to the drafting history of the Treaty of Maastricht, in which this was Article 127, Blekemans (1992, p. 17) reports that the Commission would have preferred an automatic right to vocational training for every individual, but the social partners rejected this. According to him, the problem stemmed from the multi-nationals that opposed to continuing training, which they regard as part of their 'know-how'. Despite their unwillingness to accept an automatic right to vocational training for every worker, the social partners did recognise the need to increase and broaden workers' access to training throughout working life. In October 1991, accordingly, they adopted a joint opinion on ways of facilitating the broadest possible effective access to training opportunities.

[68] Regulation (EEC) No. 1612/68 on the freedom of movement for workers within the Community.

as the nationals of that State, if such children are residing in its territory. Moreover, member states are obliged to encourage all efforts to enable such children to attend these courses under the best possible conditions. Later, when regulation 1612/68 became subject to further legislation, in Directive 77/486, only compulsory school attendance was covered, whereas vocational training was left unreferred to.[69]

The recent Directives on asylum seekers and refugees cover even the right to vocational education. In the case of refugees, activities such as employment-related education opportunities for adults, vocational training and practical workplace experience shall be offered to beneficiaries of refugee status under equivalent conditions to nationals.[70] Asylum seekers shall have access to vocational training irrespective of whether they have access to the labour market, whilst vocational training relating to an employment contract shall depend on the extent to which the applicant has access to the labour market.[71] That is, the right to vocational education of asylum seekers and refugees in the EU area is no longer merely at the discretion of member states.

A most interesting provision in the EC regime is Article 14 of the CFREU, which was already mentioned above in the context of right to basic skills. It is interesting to note that the predecessor of this provision, Article 16 of the Declaration of the European Parliament of Fundamental Rights and Freedoms, adopted by the European Parliament 1989, proclaimed that "[e]veryone *shall have the right to education and vocational training appropriate to their abilities*".[72] The CFREU formulation, in contrast, stipulates only on the right to have *access to* vocational and continuing training. This formulation seems to indicate a step backwards as regards the distinction between formal versus substantive equality, but in any event it does recognise the existence of a right.

In conclusion, at this stage, vocational education obviously is regarded as being a right as described in Article 26 of the UDHR. Likewise, it is included in the generic term 'education' as defined in the CDE. A common nominator for legally-binding documents both at universal and at European level is that they all stipulate on state obligations rather than on the subjective right to vocational education. International human rights law does not require the state to provide a free completion of vocational education for each and every one of its residents, but it does recognise that the general human right standards on education, such as equality guarantees, are applicable to it.

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[69] Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers. For earlier EU instruments concerning access to education, *see also*: the Council Decision Laying Down General Principles for Implementing a Common Vocational Training Policy (63/266/EEC); and the Council Recommendation on Access to Continuing Vocational Training (30 June 1993).

[70] Council Directive 2004/83/EC, Article 27.

[71] Council Directive 2003/9/EC, Article 12.

[72] Emphasis added here.

In Europe, the approach to issues related to vocational training has for a long time been a concern covered not by the ECHR but by the ESC, while the European Community has had a stance of its own towards the topic at issue. This division of competences between different institutions can be contrasted with other regional human rights instruments where vocational education has featured more prominently.[73] In the light of the most recently drafted provisions, it seems that the demarcation of boundaries between vocational training and general education is becoming increasingly fuzzy. Obviously, the right to vocational education is a human right, but it remains somewhat unclear what has been included in the binding treaties. Let us, therefore, examine more closely what vocational training is considered to mean in different regimes.

3.4.2. *The Definition of Vocational Education is a Crucial Factor*

The legally binding universal human rights law remains silent on the concept of vocational education as such, except for one notable exception. According to the definition given in the UNESCO Vocational Convention, this term shall, for the purposes of the Convention, consist of:

> all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life.[74]

Another UN document that strives to define vocational education is the above-mentioned General Comment No. 13 on the right to education, in which the CESCR Committee also took the view that technical and vocational education forms an integral element of all levels of education. In other words, the message of the Committee was that technical and vocational education shall not be seen solely as part of secondary education.[75]

Moreover, in General Comment No. 13, the CESCR Committee stated that the right to technical and vocational education includes the following aspects: (a) it enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities; (b) it takes account of

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[73] Pursuant to Article 48 of the Charter of the OAS, the member states pledge to strengthen vocational education systems. Likewise, Article 6(2) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights obliges state parties to adopt measures that will make the right to work fully effective including the development of technical and vocational training projects.

[74] The UNESCO Vocational Convention of 1989, Article 1 (a).

[75] CESCR General Comment No. 13, para. 15. The Committee refers at this point to the ILO Human Resources Development Convention 1975 (No. 142) and the Social Policy (Basic Aims and Standards) Convention 1962 (No. 117), in which the same view is reflected.

the educational, cultural and social background of the population concerned; (c) it provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes; (d) it consists programmes which give students, especially those from developing countries, the opportunity to receive vocational education in other states, with a view to the appropriate transfer and adaptation of technology; (e) it consists of programmes which promote the technical and vocational education of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.[76]

The last mentioned aspect, which draws attention to non-discrimination and equality, is reiterated in the Revised Recommendation Concerning Technical and Vocational Education (2001). This Recommendation uses 'technical and vocational education' as a comprehensive term referring, *inter alia*, to the acquisition of practical skills, attitudes, understanding and knowledge relating to occupations in various sectors of economic and social life.

European human rights instruments do not contain definitions of vocational education. Even so, some assistance for conceptual clarification can be derived from the case law of the European Court of Justice (ECJ). It is this body in particular that has faced the challenge of clarifying new boundaries between different forms of education in the era of European integration and free movement of its citizens. An often-cited definition was formulated in *Gravier* v. *City of Liége* (1985), where the ECJ defined 'vocational training' as follows:

> Any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students and even if the training programme includes an element of general education.[77]

The ECJ concluded that education which prepared for a particular qualification or provided the necessary training and skills where no formal qualification is required fell within the scope of vocational training. A similar pioneering case was *Blaizot* v. *University of Liège* (1988), where the debate concentrated on the question of whether a study course in veterinary medicine at university level could be considered as vocational training in the sense of Article 150 of the TEC.[78]

As Joseph McMahon (1995) notes, in most member states of the Community, vocational training was intended to mean the courses in which highly specialist skills were taught to future labourers and craftsmen in secondary schools or often also on the workshop floor. To extend the notion of vocational

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[76] CESCR General Comment No. 13, para. 16.
[77] Case 293/83, *Francoise Gravier* v. *City of Liége* (1985).
[78] Until the Treaty of Amsterdam this was Article 127.

training to university courses, traditionally offering a theoretical education based on research, was groundbreaking. Nevertheless, the ECJ considered that to exclude university education from the definition of vocational training would result in unequal application of the EC Treaty in different member states, and thus ruled that at least some higher education can come under vocational training.[79]

The concept of vocational training has been discussed in several ECJ cases that followed *Gravier* and *Blaizot*.[80] However, these two cases are sufficient to illustrate that the lack of a legal basis has not prevented the European Community from acting in the area of education. Through a wide definition of vocational training, the Court made it possible to rule that even higher education may be covered by the TEC, in times when the Treaty text as such still left this question open. Although the underlying motives may be different, the ECJ definition is similar to the UN definitions discussed above in the respect that vocational education has been very broadly defined in all international standards and the legal cases that make a stand on it. Such conceptualisation differs considerably from the way in which the term 'vocational education' is used in colloquial language: worldwide it is most usually taken to connote to acquisition of skills that clearly contribute to successful occupational performance.

It may be well-founded to give the concept of vocational education a wide definition in order to emphasise everybody's right to holistic learning, instead of focusing merely on narrow operative skills that shrink individuals to mere loops in the chain of production. Some of the definitions above can indeed be seen as attempts to overcome the existing divisions between the vocational track and the academic track as two mutually exclusive routes after compulsory education. As a matter of fact, the division between academic and vocational courses may function as a feature of systemic discrimination whenever it unevenly limits the possibilities of students with certain backgrounds continuing their personal project of lifelong learning.[81] On the other hand, a wide definition brings with it a risk similar to that mentioned earlier when we discussed the conceptual fusion between the basic learning of adults and the more generally defined adult education. The risk is that if the courts ponder only on boundaries between academic and non-academic training, as in the *Blaizot* case, the right to vocational skills of the educationally most disadvantaged may sink into oblivion.

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[79] Case 24/86 *Vincent Blaizot* v. *University of Liège* (1988).

[80] For a list of ECJ case law on education, see Gori 2001.

[81] For example, the Revised Recommendation concerning Technical and Vocational Education (2000), para. 26, states clearly that narrow specialisation should be avoided and that a period of common studies providing basic knowledge and generic skills should be required for each broad occupational sector before a special branch is chosen.

To conclude the present sub-chapter, let us settle some propositions. First, the split between vocational education and vocational training existing in several international texts is becoming increasingly artificial and has, as such, less and less legal significance. It is also obvious that the boundaries between vocational and general education have become blurred, while the 'learning to learn'—skills and the language skills are increasingly central elements of professional skills. Second, the analysis of international standards clearly shows that the area of vocational education is not a distinct, clearly defined element, and hence we are forced to draw lines in the water and to choose the benchmarks ourselves. At this point, it hopefully has become clear why it is so essential to put the emphasis on qualifications as a fixed point in the middle of the conceptual muddle that exists in the field under discussion.

3.4.3. *Equal Access to Vocational Qualifications: An Achievable Goal*

The introductory part of this study highlighted the relevance of qualifications from the viewpoint of the educationally most backward groups and individuals. It was argued that one's ability to be economically and socially autonomous is closely related to one's skills acquisition, and that the standardisation and qualification processes therefore should be monitored even from the viewpoint of their human rights accountability.[82] The interrelatedness of the right to vocational education and the development of society is also emphasised by the CESCR Committee, which notes in its General Comment No. 13 the central role of technical and vocational education in helping to achieve steady economic, social and cultural development and full and productive employment. More specifically, the claim of members of socially disadvantaged groups to work for and obtain qualifications is recognised in the revised UNESCO Recommendation Concerning Technical and Vocational Education (2001), which states, in paragraph 28:

> Special provision should be made for out-of-school and unemployed youth and children of socially disadvantaged groups such as minorities, migrant workers, refugees, etc. with little or no primary education, as well as for those not entering education or training programmes after completion of compulsory schooling, in order that they may acquire skills for wage- or self-employment.

Moreover, paragraph 29 reads:

> Given the necessity of integrating people who are disadvantaged due to physical and intellectual disabilities into society and its occupations, the same educational opportunities should be available to them as to those without disabilities in order that they may achieve qualification for an occupation to realize their potential and optimize their participation in the work force; special measures or special institutions may be required.

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[82] *See* Chapter 1.2, above.

The European instruments, insofar as they discuss the right to education that leads to vocational qualifications at all, anchor this question with the right to education in minority language rather than with the right to education as fundamental right. The Hague Recommendations, for example, stipulate that vocational training in the minority language should be made accessible in specific subjects "when persons belonging to the national minority in question have expressed a desire for it, when they have demonstrated the need for it and when their numerical strength justifies it".[83] Whether non-territorial and linguistically dispersed groups have anything to gain from provisions like this will be discussed in the concluding part of the study.

Indeed, the gaining of vocational skills may be the only pathway for educationally disadvantaged individuals to a more self-sufficient life. The UNESCO Vocational Convention acknowledges the importance of the protection of the right to education seen from this viewpoint. Article 2 of the Convention states that "[t]he Contracting States shall pay attention to the special needs of the handicapped and other disadvantaged groups and take appropriate measures to enable these groups to benefit from technical and vocational education". At least implicitly, this provision obliges the state parties to take a holistic view of education that covers access to qualifications, even if reference is made to groups instead of giving recognition to individual rights.

A statement that speaks for the right to qualification-oriented education can be found in Article 3(5) of the UNESCO Vocational Convention, which stipulates that "[A]t each occupational level, the competence required must be defined as clearly as possible…" Except for this provision, the right to qualification-oriented vocational education may seem to be weakly covered by the binding international human rights law.[84] Thus, in the absence of clearly prescriptive international standards, Articles 6(2) and 13(2)(b) of the CESCR—alike with analogous articles in other human rights provisions—are open to various interpretations. However, keeping in mind the multitude of provisions calling for quality in education, the significance of target-oriented vocational education becomes obvious.

3.5. *The Right to Cultural Skills*

3.5.1. *The Legal Framework of Cultural Rights*

Presentation of the quantity and complexity of the conceptual arm wrestling concerning the concept of 'culture' falls outside the scope of this study. It

[83] The Hague Recommendations, para. 15 and the explanatory note.

[84] Even in soft-law documents it has received only a marginal role. For example, the Jomtien Declaration (1990) mentions vocational education only in general terms, while defining specified targets and time limits for basic education for children and adult literacy.

is sufficient to recite in a nutshell Rodolfo Stavenhagen (2001), who classifies different scientific understandings of culture into three main groupings. The first approach examines culture as the accumulated material heritage of mankind, whereas the second conceives of it as a process of artistic and scientific creation. The third generally accepted understanding of culture defines it as the sum total of the material and spiritual activities and products of a given social group. It is easy from these short sentences to realise that we are dealing with an enormous concept that can be approached from many different angles.

Understandably, the concept of 'cultural rights' is also undecided, both in terms of legal content and in term of enforceability. Attempts to list cultural rights have indeed led to embarrassment of riches. For instance, a survey commissioned by the Cultural and Development Co-Ordination Office at UNESCO catalogued no less than 50 different cultural rights classified according to eleven categories.[85] The approach adopted in this study does not draw from listings like these, but focuses instead on the achievement of cultural skills as an element of quality education. In order to grasp what this statement means, we need first to scrutinise some conceptual tools that international human rights law offers for our usage.

a. *Universal Standards*

Cultural rights are declared in Article 27(1) of the UDHR, which states: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." In line with this provision, Article 15(1)(a) of the CESCR proclaims that the state parties recognise, among other things, the right of everyone "to take part in cultural life". One thing that becomes evident from both of these two provisions is that individuals have a right to be active in the field of culture, instead of just remaining passive clients or receiving consumers. A somewhat different aspect is recognised in the CCPR, which addresses specifically the question of the cultural right of minorities. Article 27 reads:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 30 of the CRC contains a similar statement on persons under the age of eighteen years. With regard to these two legally binding provisions, some remarks relevant for the current study can be made. First, they refer to persons belonging to minorities rather than to minority groups as such. Second, they establish and recognise a right that is "distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they

[85] Leander 1996. See also classifications of Prott 1988, and Levy 1997.

are already entitled to enjoy" under the instruments concerned.[86] Third, these clauses do not offer to minorities any special privileges unreachable for other parts of the population. Rather, they guarantee respect and protection in circumstances where minorities live under the threat of becoming assimilated into the dominant culture.

A binding UN provision on cultural rights is to be found in the UNESCO Vocational Convention, Article 3(1)(a), which proclaims:

> The Contracting States agree to provide and develop technical and vocational education programmes that take account of … the educational, *cultural* and social background of the population concerned and its vocational aspirations.[87]

This provision enables a kind of synthetic view of the topic under discussion. By talking about 'population concerned', it indicates that the groups of persons designed to be recognised need not be groups enjoying explicit minority status, but that even other kinds of communities come into question. The adopted concept also covers both individuals and collectives that are connected by a common culture. Moreover, this provision not only calls upon states to take measures enabling groups of persons to enjoy their culture, but also to actively develop it.[88]

Lastly, a recent legally binding UN instrument in the field of culture is the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), which was approved by the General Conference of UNESCO in October 20, 2005 and will enter into force three months after its ratification by 30 States. This instrument uses the concept of culture as an abstraction and considers states as subjects of rights; that is, it reaffirms the right of states to elaborate their cultural policies, but does not recognise individuals as rights-holders. Nonetheless, the contracting parties are obliged to seek to create an environment that encourages individuals and social groups "to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples." The Convention is interesting from the viewpoint of freedom of thought, expression, information and communication on the one hand, and the freedom of trade on the other hand, whereas its relation to the right to education is more remote.

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[86] The formulation in the quotation marks is from the CCPR General Comment No. 23, para. 1.

[87] Emphasis added.

[88] The cultural provisions of the CCPR and the CRC have been reaffirmed, amplified and made more DETAILED in several UN soft law documents. See, for instance, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992); UNESCO Universal Declaration on Cultural Diversity (2001). For a more general discussion on cultural rights under international human rights law, see Donders 2002.

b. *European Standards*

The ECHR does not recognise cultural rights as separate rights, even though in the 1990s there was an attempt to draft an additional Protocol to the ECHR guaranteeing individual rights in the cultural field. The negotiators were unable to identify any cultural rights that were not already implicit in the ECHR, and in 1996 the Draft Protocol was suspended indefinitely.[89] Perry Keller (1998) has estimated that the efforts to create a separate protocol on cultural rights collapsed at least partly due to the issue of positive state obligations.

What then does the FCNM stipulate on the right to culture? The preamble refers to the need of any democratic society to respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority and to the necessity of enabling cultural diversity. In the body text, Article 4(2) stipulates that the parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In Article 5(1) the parties undertake:

> to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

In terms of cultural rights, equality thinking is thus clearly juxtaposed with the promotion and maintenance of diversity. Keeping in mind that the FCNM may at the domestic level be applicable to only a small part of existing ethnic groupings, European provisions on cultural rights are rare and bare. However, one more relevant—and legally binding besides—provision can be found in the revised ESC. Article 30, which guarantees the right to protection against poverty and social exclusion, even refers specifically to culture. The contracting parties shall undertake "to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, *culture*

[89] This Draft Protocol stated in Article 1: "Everyone both has as an individual and shares with others the right to respect for and expression of his values and cultural traditions in so far as they are not contrary to the requirement of human dignity, human rights and fundamental freedoms; that right includes: (a) freedom to engage in cultural activity, whether in public or in private…" Moreover, Article 2(1) stipulated that: "Everyone has the right to an education which allows full and unrestricted development of his cultural identity in a manner recognising and respecting the diversity of cultures." For the initiation of the Draft protocol, see the Vienna Declaration of the Heads of State and Government of the Member states of the Council of Europe on the Reform of the Control Mechanism of the ECHR, on National Minorities, and on a Plan of Action against Racism (1993), Appendix II, at 375. The suspension of the work on the protocol is documented in: Ad Hoc Commission for the Protection of National Minorities (Council of Europe), CAHMIN (95) 22 Addendum, 24 January 1996.

and social and medical assistance.[90] Such recognition of the interplay between crusade against poverty and cultural rights could indeed be significant in the promotion of social inclusion of marginalised groups, if only there were will to make use of it.

In the EU context, the areas identified in Article 151 of the TEC as falling within the scope of the European Community's current action on culture include the following: improvement of the knowledge and dissemination of the culture and history of the European peoples; conservation and safeguarding of cultural heritage of European significance; non-commercial cultural exchanges; artistic and literary creation, including in the audiovisual sector. Additionally, it is stated that: "the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore". And furthermore: "the Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures".[91] A similar provision on the Community duty to contribute to the diversity of the cultures of the member states is included in the CFREU: consistent with the briefly-worded Article 22 the Union "shall respect cultural, religious and linguistic diversity".[92]

When trying to assess in broad outline the Community legislation in the cultural sector, two conspicuous traits can be perceived. One is that it recognises culture as an abstraction in the same way as the abstraction of language, which was commented upon earlier in this chapter. Thus, the EC provisions say nothing about the individual right to culture but seem to give preference to a vaguely defined construct instead. Another characteristic to be noted is that the obligation to respect diversity does not necessarily cover the cultures that are not considered as 'common European heritage', no matter how long their representatives have been living within the borders of Europe.

If anything, the TEC provisions in the cultural sector are inter-linked with freedom of trade, improving the living and working conditions of cultural workers, enlarging the audience for culture and arts, and conservation of the architectural heritage of Europe. Even if the EC standards on the cultural

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[90] Emphasis added.

[91] TEC, Article 151.

[92] Requirements to promote cultural diversity are not a new topic in EC legislation. Both the Treaty of Rome (1958) and the Treaty of Maastrich (1993) contained analogous cultural provisions to those of the Treaties of Amsterdam and Nice, mandating the Community to contribute to the "flowering of the cultures of the member States." As regards specific educational stipulations, it can be noted that the Commission envisaged the creation of a specific mechanism to boost its general training efforts in the cultural sector and presented in 1990 a Communication on Vocational Training in the Arts Field. The role of the Commission in this area was seen as that of a catalyst to promote co-operation in the context of the common vocational training policy. See COM (90)472, quoted in McMahon 1995, p. 149.

sector are different from their universal counterparts, one common characteristic is obvious: they are all ambiguous in certain key respects, as will be highlighted in the following.

3.5.2. *Conflicting Aspects of Cultural Rights*

Commentators on the right to culture commonly take a stance either on the side of individual rights or on the side of a collective right to culture. For example, Asbjorn Eide notes that: "By focusing on individual human rights, we confront the individual as the maker, shaker and breaker of cultures,"[93] whereas Rodolfo Stavenhagen in the same volume argues that the right of groups to exist as groups must be considered as the most fundamental of all cultural rights.[94] It is suggested here, however, that these two aspects shall be seen as complementary rather than contradictory to each other.[95]

A less-discussed topic is that there can be a conflict between the cultural rights of individuals and those of communities, and that clear legally-binding human rights provisions may be important especially in these situations. Collective versus individual approaches are not necessarily in harmony, nor do they have the same implications for education. A clash can exist between them if, for instance, individual members of a minority are forced to lead a restricted existence because of the nature of the culture they share with other members of the minority, which cuts them off from opportunities available in the wider society.

Another example of conflicting rights claims is a state of affairs where historical customs of male dominance—in the rhetoric of 'cultural right'—interfere with women's demands for equal rights. Under these circumstances, should the members of an (assumedly) powerful majority uphold individual rights or the relative empowerment of the leaders of the minority who seek to preserve and promote its culture and traditions? The language of rights as used by the leaders of the minority may lead to paradox or contradiction if they are demanding collective rights in order to deny individual rights.[96]

The very moment the right to culture is detached from the idea of individuals as rights-holders we must question what kind of subject is invoked to replace the individual. Who are the 'we' as holders of collective rights? An often over-looked point in the international provisions promoting the right to 'cultural diversity' is *whose* culture is embraced by this notion. To what extent

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[93] Eide 2001, p. 29.

[94] Stavenhagen 2001, p. 87.

[95] The UN Human Rights Committee confirms this understanding by stating that although the rights protected under Article 27 of the CCPR are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. CCPR, General Comment No. 23, para. 6.2.

[96] On arguments of some distinguished scholars for and against cultural rights as collective rights, see Donders 2002, p. 46 *et seq.*

does it refer to those suffering social exclusion, for example, the economically poorest segments of society in their everyday battle of survival in the midst of the culture of poverty?

Besides potential contradictions between collective and individual rights, several researchers have discerned a certain tension between the attempts to promote cultural diversity and the risks of fencing minority cultures into some kind of 'reserves.' The concept of 'culturalism' describes this phenomenon that has been discussed for decades by scholars on different continents.[97] What the writers from every quarter have pointed out is that the culturalisation of social inequalities carries the risk of generating a new form of racism that focuses on complex differences between cultures. Culturalism, or cultural racism as it also is called, articulates the need for stability, the need to have foundation and security in a climate of social anxiety and identity conflicts. As Schierup & Ålund argue: "The ideology of cultural pluralism has been petrified into a deterministic view of culture with a programme for cultural maintenance as a goal in itself".[98]

Some interesting legal cases from different parts of the world illustrate the complexity of this issue. In the famous *Wisconsin* v. *Yode*, often cited as the 'Amish Case', the US Supreme Court ruled that Wisconsin's compulsory school attendance law could not be applied to the Amish (a religious community). The Court held that—even if there was a legal requirement that children be enrolled in school until the age of sixteen—the state could not compel children to attend school after grade 8, in the face of evidence that the Amish provided continuing informal vocational education to their children designed to prepare them for life in the rural Amish community.[99] Priority was thus given to the community's interest to provide education that is in harmony with its culture. As an other extreme, Thomas Hylland Eriksen reports on Norwegian cases where young Roma accused the Norwegian authorities of having allowed Roma parents to take their children out of school "because the 'Gorgio school' was in conflict with their culture".[100] The state was held responsible for the illiteracy hereby caused, and a separate fund for compensations for the individuals that suffered damage was established. These two examples illustrate that respect for a distinct culture can also lead to segregation, which can with good reason be criticised from an individual rights point of view.

Is then all that has been said above solely a set of moral claims? The UN Declaration on the Rights of Persons Belonging to National or Ethnic,

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[97] For early works see, for instance, Duffield 1984 in Europe, Castles *et al.* 1988 in Australia, Gorelich 1989 in the USA.

[98] Schierup & Ålund 1990, p. 84.

[99] *Wisconsin* v. *Yoder* 406 US 208 (1972).

[100] Hylland Eriksen 1993, p. 143. 'Gorgio,' and 'Gaje' are Roma words for those from outside of their own community.

Religious and Linguistic Minorities (1992) proclaims that maintenance of minority cultural practices should not be supported if they are in violation of national law and contrary to international standards. Seen from the viewpoint of culture as a trap, Article 3(2) of the Declaration is also important; it reads: "No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration." Moreover, Article 5 stipulates that: "States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country." These progressive provisions support the argument that disparities in education shall not be rationalised in terms of cultural differences. However, they are so far found only in a legally non-binding instrument.

3.5.3. *Cultural Skills as an Indispensable Component of Societal Development*

Apparently there are many unarticulated issues in the field of cultural rights. Yet, for the purposes of this study it is adequate to clarify what is being meant by the 'right to cultural skills.' Two main limitations are needed. First, in line with the three other components of the right to education discussed earlier, the right to cultural skills is here understood primarily as an individual right. This definition underlines that it is the individual who has the right to acquire and develop the cultural skills of her or his choice.

Thus, instead of examining a minority's cultural autonomy' the focus is put on an individual's right to acquire generally recognised professional skills in the field of culture. The underlying logic here is that each community ultimately consists of individuals, each with his or her own special characteristics and with the potential to offer something unique. This approach not only is in line with Article 27 of the CCPR, which establishes and recognises a right that is conferred on individuals belonging to minority groups, it also clearly keeps its distance from the view that minority individuals customarily should be 'locked up in a culture.'

Another delimitation of the study in hand is that it is suggested that the concept of cultural skills be defined in context. By this, it is meant that the analysis of the right to cultural skills should cover all the vocations that in the national educational classifications fall in the field of culture. Accordingly, all the educational programmes that are classified under the heading of the 'cultural sector' in the national system of education are regarded as pathways to make the right to cultural skills become a reality. This conceptual delimitation naturally does not claim that any national system is complete—it solely serves as a concrete point of convergence against which everybody's right to cultural skills can be tested. Thus, instead of trying to formulate what cultural rights are, or should be, the present study merely aims to point out that the so-called cultural vocations shall be accessible to on equal terms to individuals from diverse groupings of the national community.

What was just said appears natural if we agree that there is a universal right to strengthen and preserve one's own culture, and that consequently individuals from any group must have the right to learn the skills needed for that purpose. Vocational education and training can be used as a tool both for the maintenance of traditional skills and for the training of cultural experts among minority groups in professions that traditionally are occupied by the dominant groups of society, that is, for instance, museum and library professionals, photographers and journalists, etc.[101]

3.6. *The Right to Education above Primary Level is not Null and Void*

The analysis carried out in the present chapter has indicated that international codification is indeterminate in its outcomes. This is in part due to the vagueness of the relevant vocabulary. The international human rights provisions analysed above attach altogether more than 30 attributes to the concept of the right to education. For example, 'elementary', 'fundamental', 'general', 'primary', 'basic' and 'literacy' are concepts that appear in parallel with each other. Likewise, the notions of 'secondary', 'vocational', 'technical' 'advanced vocational' and 'higher technical', are used without clear distinctions of each from the other. The linguistic aspect of the right to education is recognised by terms such as 'official language education', 'mother tongue education', and 'separate linguistic education', just to mention some examples.

Second, attention is drawn by the fact that the subject of educational rights repeatedly is either undifferentiated, referring to 'everyone', or then merely referring to those categories of individuals that have special instruments devoted to them. For instance, an emphasis on children as subjects of basic education may leave in the shadow the rights of illiterate and language deficient individuals above primary school age. Selective rights talk may as such contribute to maintaining inequalities, despite the general provisions use of emancipatory rhetoric concerning everybody's right.[102] Human rights research that mostly concentrates on school children may reinforce this divergence.

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[101] The right to active contribution as an essential part of cultural rights has been recognised, for example, in the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It. For normative support to the approach adopted here, *see also* Resolution 41/187 of 8 December 1986, of the UN General Assembly in which it proclaimed the period 1988–1997 to be the World Decade for Cultural Development, with a Plan of Action organised around four major objectives: acknowledging the cultural dimension of the development; affirmation and enrichment of cultural identities; broadening participation in culture; and promotion of international co-operation.

[102] Although this study in general does not examine regional instruments other than European ones, it can be noted that other regional human right systems seem to make much

Taken as a whole, this chapter has invited the reader to rethink conventional perspectives on the right to education, and to enquire into the human right to education as a subject of research from the viewpoint of educationally disadvantaged individuals above compulsory school age. The concluding statement is that none of the key areas chosen as objects for closer analysis are merely a privilege or a form of charity. On the contrary, all the four components—the right to basic skills above compulsory school age, the right to language skills, the right to vocational skills and the right to cultural skills—are recognised, more or less clearly, in the international legal instruments. The normative basis for this argument is summarised in Tables 1 and 2 in the appendix.

The specific conclusion concerning basic skills derives from those legally binding instruments that recognise the right to education in generic terms, without making any distinctions between different types or levels of education, nor between different categories of rights-holders. In this situation, such broad provisions are interpreted as giving recognition, as a minimum, to everybody's right to basic skills. Even those provisions in which the right to education is guaranteed simply negatively in the sense that no one 'shall be denied' the right to education may in the light of existing case-law be interpreted as guarantees for positive rights.

As to the conclusion concerning vocational skills, the starting point is what constitutes an identifiable quantum of quality education for individuals living in a knowledge-based, Western society. Instead of seeking to give vague human rights norms a strict minimalist interpretation, the international standards are here taken to mean that states shall focus upon the situation of those individuals who, measured in relation to the average educational level of that society, can be considered as educationally disadvantaged.

The argument that everybody's right to education should be related to the average educational level of a nation state may appear a far-reaching withdrawal from the prevailing universalistic approach to educational rights and their minimum core contents. Nevertheless, this suggestion is not novel, it was already made in the *Belgian Linguistics* case, which contained a statement that the regulation over the right to education "may vary in time and place according to the needs and resources of the community and of individuals".[103]

Actually, conceptual indeterminacy in the international instruments leaves considerable space for interpretation of what the right to education above compulsory school age covers and what it does not. Consequently, it also

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more outstanding contributions in this respect. Article 48 of the Charter of the Organization of American States obliges the Member States to strengthen their adult education systems. Article 3 of the Central American Convention on the Unification of the Fundamental norms of education of 1962 goes as far as to require the Central American educational system to give priority to adult education. Article 13(3)(d) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights essentially repeats the text of Article 1382)(d) of the CESCR. See Hodgson 1998, p. 180.

[103] The *Belgian Linguistics* case, para. 5.

leaves space for governments to choose more or less advanced levels of non-discrimination. At the same time, the fact that the international standards on the right to education leave much scope for debate of their proper meaning can also be an opportunity for diverse voices in changing societies. What matters in essence is that there shall be neither discriminatory distinctions between rights-holders nor arbitrary distribution of resources. In the following two chapters, attention will be drawn to these topics.

CHAPTER FOUR

RECOGNITION OF RIGHTS-HOLDERS

4.1. *On Legal Categorisation of People in the Education Setting*

4.1.1. *The Right to Recognition as a Human Rights Issue*

In this chapter, the phrase regarding everybody's right to receive education "in accordance with their ability and special needs" will be selected for scrutiny from the working definition of systemic discrimination that was settled in Part I. The question in focus is to what degree individuals who have not passed through a 'normal route' of compulsory education have a right to get their educational deficiencies recognised by those who decide over public resourcing on education.

At the outset it can be useful to elucidate how the concept of legal recognition differs from related concepts commonly used in social sciences. Most renowned is the notion of *status groups* created by Max Weber, which he introduced as a distinction from Marx's idea of positioning all groups in a catch-all structure of economic relations. Status groups in the Weberian sense could be organised around economic interests, but also around identities based on other characteristics such as, for instance, religion, ethnicity or language.[1] The legal concept of status differs from the one used in the tradition of sociology in at least one crucial point. Namely, legal status is a characteristic of an individual that has some legal consequences. An example is being a subject to compulsory education. Sometimes legal status may refer to a characteristic wholly created by law, such as being an integration support recipient.

The primary interest in what follows is to examine how international human rights norms contribute to the creation of educational categories on the domestic level. Seen from another side, the same question reads: do legal categorisations support or even constitute discriminatory social orders? This concern is far from simple when we take into account the fact that even superficially neutral law may be discriminatory by its nature, and that discrimination may take place even in a situation where a seemingly neutral provision of law affects a category of persons in a disproportionate way compared to others. Likewise, a seemingly helpful category may have negative counter-effects for people concerned.[2]

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[1] Weber 1968, pp. 302–307.

[2] See for example the case of Roma in Norway, mentioned in Chapter 3.5.2, above.

Compliant with the widespread legal definition, a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination. Substantiation of this definition, however, depends very much on the standpoint from which it is observed. Equality proponents might suggest that direct reference to certain groups in education law should be understood as *de jure* discrimination, due to the unnecessary invocation of distinct categories. Difference proponents, for their part, might put forward that law should more effectively reflect social diversity and help preserve certain selected status markers.

International human rights law can be used to back up any of these pretensions. For the present chapter, the point at issue is the effect of international human rights standards on the creation of categories that can be considered expedient from the viewpoint of disadvantage doctrine. It is thus not sufficient to ask merely which categorisations are justified by equality arguments and which ones by calls for the recognition of difference. In addition, it will be asked which categorisations bring to light individuals that are educationally disadvantaged in the sense that was described in Chapter 3.

Partiality in recognition of individuals as rights-holders can be concealed in various ways. Thinking in terms of non-discrimination, there are some twenty expressly enumerated grounds for prohibited discrimination in international instruments, which themselves are not exhaustive.[3] Tables 3 and 4 in the appendix illustrate what the requirement to disaggregate educational data according to a multitude of grounds that are prohibited as discriminatory in international human rights law would mean in practice. In sum, race and religion are the two most frequently repeated grounds for prohibited discrimination in the United Nations instruments being considered. In contrast, non-discrimination provisions on the European level mention most frequently sex as a single prohibited ground of discrimination, although race and religion are repeatedly pointed out, in like manner with the universal provisions.

Interestingly, several European instruments name prohibition of discrimination grounded on 'association with a national minority', whereas none of the UN instruments mentions this ground. Noteworthy is also that there are only two European instruments with an open-ended non-discrimination clause; the ECHR and the CFREU. Until the entry into force of Protocol No. 12, the first-mentioned prohibited discrimination only regarding the enjoyment of the rights already enshrined in the Convention. The last-mentioned again is not legally binding as such, although it does have a high profile status and it is a general initiative of EU constitutional law rather than a limited attempt to re-launch a specific policy.

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[3] That is to say, several non-discrimination clauses of the UN instruments are open-ended (being illustrative and including 'other status'), which allows further illumination to be sought from case-law where the borderlines of these provisions are tested.

Given the abundance of non-discrimination grounds in international instruments, it is understandable if difficulties occur in the disaggregation of data on educationally neglected individuals. There are, however, several reasons why complications in data collection and processing should in no case be accepted as an easy excuse. One of the most important reasons for rejecting easy excuses for inadequate data disaggregation is that they allow the ruling power to fix public and political attention upon some selected grounds of non-discrimination while others receive much less consideration, even though they may be equally important in terms of outcomes.[4]

In tandem with calls for disaggregated data, it is important to note that quantification of human rights violations has also its opponents. One of the main arguments against monitoring based on quantitative data is that a single human rights violation is one too many, and that the nature of human rights should therefore be seen as qualitative in the first place. An approach advocated in this study proposes that though no victim of human rights violation should remain invisible and neglected, quantitative analysis also can add meaningfully to knowledge of the status of educational rights. Additionally, state negligence in proper categorisation and basic data collection may manifest the existence of systemic discrimination. Thus, the step to be taken next is to explore by which means international human rights law serves to reform education systems that may contain biased categorisations.

4.1.2. *Provisions of Main Relevance in International Human Rights Law*

a. *United Nations Instruments*

Articles 6 and 7 of the UDHR

There are a number of legally binding provisions to rely on when trying to determine the outer limits set out in the international human rights framework for a state party to recognise all the individual subjects of the right to education under its jurisdiction in a non-discriminatory way. In the first place, a positive state obligation in terms of recognition can be drawn from Article 6 UDHR, which reads: "Everyone has the right to recognition everywhere as a person before the law." This article should be seen as an acknowledgement of inherent human dignity of every individual vis-à-vis every universal human right.[5] Such a reading is backed up by Article 7 UDHR, according to which

[4] Katarina Tomaševski, for instance, has pointed out that factual educational needs of the most disadvantaged individuals are often hidden behind the existing education statistics. Tomaševski 2001a, pp. 13, 25.

[5] Michael Bogdan and Birgitte Kofod Olsen (1999:148) correctly put forward that this clause "sets up an obstacle to the degradation of individuals into legal objects through the stripping of their legal status (civil death) and their rights in general or in part".

all are equal before the law and are entitled to equal protection of the law. If anything, a substantive law that unreasonably limits the scope of individuals subject to it should be seen as violating Articles 6 and 7 of the UDHR.

Articles 16, 26 and 27 of the CCPR

Article 16 of the CCPR reiterates Article 6 of the UDHR and thus prohibits in legally binding language any form of stripping the individual of his or her legal subjecthood and degrading him or her to an 'outlawed' legal object. Indeed, recognition of legal personality is mentioned as one of the non-derogable rights under Article 4(2) CCPR: this is a well-founded reference as all other rights of the individual call for it as their prerequisite. A person that is not recognised as bearer of rights would simply not fall under the universal human rights regime.[6] Article 16 is thus the key provision to illegitimise a state policy of non-recognition.

Article 26 of the CCPR is noteworthy insofar that the HRC has established its self-standing nature on the subject of the right not to be discriminated against. Even though this article does not as such contain any obligation with respect to the matters that may be provided for by legislation, it can impose on states obligations in regard to the legislation that they have chosen to enact. That is, any domestic law of the state parties should comply with Article 26 of the CCPR.[7] It is noteworthy also that the HRC has expressly given independent meaning to the first sentence of Article 26, ensuring to all persons "the right to equality before the law and to equal protection of the law". The significant case in this respect is *Kavanagh* v. *Ireland*, where it was established that the applicability of Article 26 does not necessitate specification of any category into which the author should fit.[8]

Article 27 of the CCPR, which calls for the recognition of distinct minority groups, can be considered as having a complementary role for the right to recognition as a person before the law. It leaves open the question of how to define what minorities exist in what states, and who defines them, but nonetheless it also puts pressure on the state to recognise the variety of its population and the diverse expectations falling on the legislation. Articles 16 and 26 leave no space for the denial of subjecthood under education law to the most disadvantaged individuals. This is where the state duty to treat differently persons whose situations are significantly different shall be tested.

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[6] Nowak 2005, p. 369 draws attention to the distinction between the capacity to be a person before the law and the capacity to act. According to his analysis of *travaux préparatoires*, the expression 'as a person before the law' was meant to ensure recognition of the legal status of every individual and of his capacity to exercise rights, whereas Article 16 does not protect the capacity to act.

[7] The self-standing nature of Article 26 was established in the case of *Zwaan-de Vries* v. *the Netherlands*, paras. 12, 13.

[8] *Mr. Joseph Kavanagh* v. *Ireland*, para. 10.3.

Articles 4 and 5 of the CESCR

It may appear a significant failing of the CESCR that it does not reiterate Article 6 of the UDHR. Ideally, one might have hoped that an express mention would have been made of this most important non-derogable right. Nonetheless, there are two CESCR provisions that in this connection highlight the doctrine of interdependence and interrelatedness of all human rights irrespective of which instrument puts them into words. First, Article 4 stipulates that the state may subject rights covered by the Covenant "only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". Second, Article 5(2) reads:

> No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.

Thus, the fact that the CESCR does not recognise legal subjecthood of individuals in the same manner as the CCPR does not allow state parties to degrade some parts of the population to mere objects of law; to be recognised by mercy or to be ignored, whichever better serves interests of the ruling power.

Monitoring procedures also set limits for state discretion in the recognition of rights-holders. The duty of states to keep records on how they fulfil the obligations they have assumed under international human rights law is mentioned in several General Comments of the CESCR Committee.[9] The methods to be used include, *inter alia*, the need to determine the nature and scope of problems within a state, the need to adopt properly designed policies and programmes to meet requirements, the need to enact legislation when necessary and to eliminate any discriminatory legislation. Moreover, the CESCR Committee has emphasised that "the obligations to monitor the extent of the realization, or more *especially of the non-realization*, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints".[10] Likewise, regarding educational rights, the Committee has underlined the state obligation to take steps towards the full realisation of Article 13 and stipulates that such steps must be *targeted.*[11] Data production that mirrors the social reality and changes in it is an essential part of these obligations.

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[9] See, for instance, CESCR General Comment No. 1; CESCR General Comment No. 6.
[10] CESCR General Comment No. 3, para. 11. Emphasis added.
[11] CESCR General Comment No. 13, paras. 37 and 43. Emphasis added.

Article 2(1) of the CRC

The CRC does not reiterate Article 6 UDHR. Nonetheless, the Convention itself intrinsically identifies all children as individuals who need to be recognised. This contention can be derived from Article 2(1), which obliges state parties to respect and ensure the rights set forth in the present Convention to each child within their jurisdiction. Thus, the state duty to enable official registration of each child immediately after birth is to be understood just as a starting shot: down the road, each child shall be recognised as a subject of each right laid out in the CRC. As far as monitoring guidelines and therein defined obligations for proper data disaggregation are concerned, much applies of what was said about the CESCR just above.

b. *European Instruments*

The ECHR

The ECHR does not set forth any explicit right to recognition as a person before the law. As the rationale behind this exclusion in the drafting phase it has been reported that neither Article 6 of the UDHR nor Article 16 of the CCPR was considered to contain any autonomous subjective claims. In contrast, the Committee of Experts of the Council of Europe was of the opinion that this right was unnecessary and could be deduced from other articles in the Convention.[12] Indeed, the reasoning that any individual in a state governed by the rule of law also requires the recognition of his or her existence before the law is correct as such. Thus, the unambiguous commitment of the contracting parties *to secure to everyone within their jurisdiction* the rights and freedoms defined in the ECHR should as such oblige the state parties to give due recognition to each and every one of the individual rights-holders.[13] What is more, the recent ECHR case-law that expressly acknowledges the right of individuals in significantly different situations to be treated differently,[14] puts pressure on the state parties to recognise in an increasingly sophisticated manner the legal subjectivity of individuals under their jurisdiction.

The ESC

The outlook of the ESC on an individual right to recognition before the law is most interesting for two specific reasons. First, as was discussed in Chapter 3, this instrument contains several provisions on education and training that are relevant for students above compulsory school-age. Second, the ESC explicitly identifies several groups which might be in need of special protection in educational issues. This instrument expressly mentions the education

[12] Nowak 2005, p 369.
[13] ECHR Article 1. Emphasis added.
[14] See *Thlimmenos vs. Greece*, discussed above in Chapter 2.3.2.

and training of young persons, adult workers, the long-term unemployed, persons with disabilities, single parents, the poor and socially marginalized. Even the right of elderly persons "to lead a decent life and play an active part in public social and cultural life" may contain some elements of a right to education, with the corresponding state duty to recognise people concerned as rights-holders in a due manner.[15]

Nonetheless, the Appendix of the ESC offers several escapes for those state parties that prefer the policy of non-recognition in the field of education. For one thing, as far as the scope of the Charter in terms of persons protected is concerned, its provisions related to the right to education cover foreigners "only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". Thus, non-nationals by and large cannot make legal claims to be recognised as rights-holders under the ESC.[16] For another thing, existence of education provisions in the ESC does not so much as put pressure on the state parties to recognise all of their nationals as rights-holders in this respect. This is due to the fact that the contracting parties are free to consider themselves bound by just a certain number of articles set forth in Part II of the Charter. A state that chooses not to be bound by any of the articles stipulating on the right to education hardly has any legal obligation to provide data on these provisions for supervision purposes either.

The FCNM

The FCNM does not primarily institute any relationship between the state and the individual. Instead, the status of subjects is given to the governments and at most to some nominated minority groups. Nevertheless, the FCNM may weigh in on the recognition of individuals belonging to minority groups in several ways. Data collection and statistical information is expressly requested in Article 3, which acknowledges the right of every person belonging to a national minority freely to choose to be treated or not to be treated as such. Here information is requested about the numbers and places of settlement of persons to whom the Framework Convention is applied, as well as information about how these data were collected.

Furthermore, the state parties are asked to give information on any linguistic or ethnic groups, whether they consist of citizens or of non-citizens living in the country, which are not considered a national minority. The guidelines given to the state parties on how to present the information to be submitted in their reports acknowledge the relevance of statistical information and

[15] See ESC (revised), Articles 7, 10, 15, 17, 23, 27, 30.

[16] Exceptionally, refugees and stateless persons enjoy under special instruments relating to them a right to be recognised before the education law on equal terms with nationals.

quantitative data in some other respects.[17] However, no explicit request is made for statistics in respect of educational rights.[18]

European Community Law

European Community is worthy of note because of the role of statistical evidence in its case law. In the famous *Bilka-Kaufhaus* case the ECJ introduced a formula of evidence that it has applied ever since in cases concerning indirect sex discrimination.[19] The formula means that if the plaintiff, using statistical material, can show that considerably more women than men are adversely affected by an apparently sexually neutral regulation, a presumption of indirect discrimination arises. The plaintiff is thus required to prove that considerably more women than men are unfairly treated by an apparently neutral regulation.

Several subsequent ECJ cases have contained specific requirement regarding the nature of the statistical material. According to the pronouncement of the Court in *Enderby* case, statistics shall cover so many people that they do not merely reflect fortuitous or short-term phenomena and that they shall be generally significant. In the *Royal Copenhagen* case the Court laid down that in the two sexual groups that are to be compared, all the people who are in comparable situation must be included and the groups must consist of a sufficiently large number of employees to guarantee that the wage differentials are not due to casual phenomena.[20]

The ECJ case law illustrates how quantification may serve both general and particular purposes, i.e., help even particular victims of discrimination. Recently the possibility to use statistical evidence was reaffirmed both by the Racial Equality Directive and the Employment Directive.[21] Nonetheless, EC law has until now not put particular pressure on the member states *a propos* due recognition of the subject-hood of all individuals under their jurisdictions before education law. Whether the CFREU will bring about new pressure

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[17] One of the categories where specific article-by-article information should be presented presumes that "under this category factual information enabling an evaluation of the effectiveness in practice of the measures taken to implement the Framework Convention should be provided, such as statistics and results of surveys. It is understood that, where complete statistics are not available, governments may supply data or estimates based on ad hoc studies, specialised or sample surveys, or other scientifically valid methods, whenever they consider the information so collected to be useful." Source: Outline for reports to be submitted pursuant to Article 25, paragraph 1 of the FCNM, Adopted by the Committee of Ministers on 30 September 1998, <www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/AdvisoryCommittee/Outline.htm>.

[18] As was noted in Chapter 3.3.2 above, the ECRML does not constitute rights for an individual; nor does it contain provisions of direct relevance for the recognition of individuals as holders of linguistic rights.

[19] Case 170/84 *Bilka-Kaufhaus GmbH* v. *Karin Weber von Hartz* (1986).

[20] Case C-400/93 *Specialarbejderforbundet in Denmark* v. *Dansk Industri, representing Royal Copenhagen A/S* [(1995). For comments on these cases, see McMahon 1995, p. 153 *et seq.*

[21] See preamble, para. 15, in Racial Equality Directive (2000/43/EC) and Employment Directive (2000/78/EC), respectively.

in this respect remains to be seen. Its Article 20, declaring that everyone is equal before the law, is at least a good complement for Article 16 CCPR and calls for further explanation of the substance of this phrase.

4.1.3. *The Steering Effect of International Monitoring Bodies*

It is apparent that underlying every human rights instrument lies a request for the member states to let human rights aspects be part of information collection. Likewise, it is also apparent that the monitoring bodies have a strong steering power when deciding what data to request for their consideration of state parties.

All the treaty bodies and even some other UN agencies have given guidelines in print with the purpose of providing decision-makers with a means of interpreting whether the rights at issue have been sufficiently respected, protected and fulfilled. A brief survey of these guidelines shows that several bodies have stressed the importance of comprehensive data collection processes, systems and analysis. The monitoring bodies have also repeatedly suggested that states disaggregate statistics, including in terms of trend over time, so that it is possible to assess and expose discriminatory tendencies.

When reflected against the non-discrimination grounds listed in international instruments, information on language, religion, and gender, as well as attributes related to 'race' or 'ethnicity' are frequently asked for. In addition, the guidelines mention repeatedly such categories as refugees, migrants, asylum-seekers, persons who belong to any vulnerable groups, those in the lowest socio-economic categories, children in social and geographical disparities, in emergency situations, in conflict with the law, and in situations of exploitation.[22]

General guidelines do not stipulate strictly on data disaggregation, but it is axiomatic that a state party that has succeeded in meeting the most elementary level of the implementation of economic, social and cultural rights shall shift the emphasis from aggregate figures towards more advanced disaggregated monitoring that will help to check whether somebody still is excluded or eventually falls between the cracks.[23]

It is obvious that the monitoring of progress becomes more complex in moving beyond basics, but this is not an excuse for the neglect of professional data disaggregation—quite the contrary. As Peter Adamson (1996) points out: "[I]n some cases, the new concerns may in fact be long-standing problems

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[22] The guidelines investigated here are the UNESCO Questionnaire on the Recommendation against Discrimination in Education (undated) along with those mentioned in the Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties, Report of the Secretary-General, HRI/GEN/2/Rev.1, 9 May 2001. *See also* CESCR General Comment No. 1 on reporting by state parties, UN doc. E/1989/22, pp. 87–89.

[23] UNICEF 1996 Progress of Nations Report.

that are simply assuming a higher profile as more common or basic problems are reduced in scale or severity. In other cases, they may be genuinely new problems arising out of, or associated with, the very processes of modernization and economic advance that have allowed 'old problems' to be overcome."

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Next, in order to be able to dig beneath the rhetoric, four specific grounds for educational categorisation will be selected for closer examination. The chosen variables of age, language, gender and ethnicity will be explored one after another.[24] The importance of these variables for the present study will become evident during the course of the analysis. With reference to what has already been said, it can be noted that they relate closely to the four components of the right to education identified in Chapter 3. Thus, it will in particular be explored whether ageism may rule in basic education, linguicism in language training, genderism in vocational training and ethnism in the area of cultural skills. The main undertaking is to explore what kinds of justification are offered for the differential use of age, language, gender and ethnicity as variables in official categorisations in the field of education.

4.2. *Recognition of Age*

4.2.1. *When Age-Based Protection Ends and Ageism Begins*

Concerning diverse age categories, legal protection is most commonly stipulated for children and, to a somewhat lesser degree, for elderly people. Repeatedly mentioned categories of concern in the universal human rights standards are: minimum age for employment; minimum age for marriage and/or delivery of child by guardian(s) to another person; minimum age for the death penalty; minimum age for recruitment in the armed forces; protection of juveniles deprived of their liberty.[25] It does not demand much imagination to see what kind of extraordinary risks for human rights violations the children that are subjects of protection for these minimum ages face, and why special attention is drawn to their recognition by monitoring bodies. The objective is to protect particularly those individuals who are considered as being under the age of consent.

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[24] It is noteworthy that at the same time several other important variables have to be excluded, primarily for reasons of research economy. Economic or social condition is one of them. A great deal of research shows that poverty is related to lower achievement in school, to a greater risk of dropping out, and to a lower eventual occupational status and income. However, the economic aspects of the right to education will be analysed as a part of state obligations in Chapter 5.

[25] For a list of various UN instruments stipulating these subjects, see Gynther 2006, p. 129.

Hence, certain types of differential treatment on the ground of age do not constitute discrimination, on condition that they are objectively and reasonably justified by a legitimate aim. It is important, however, to recognise the conditional nature of the preceding statement. Various reasons speak for drawing all the more attention to the objectivity and reasonability of age categorisations, particularly in the area of education. One reason is related to the fact that most Western countries are currently faced with the task of adapting their employment policies to the ageing of their populations. A corresponding task is to make work a more viable option for individuals that in other circumstances would be left outside the work pool. For many of these individuals to become employable, training in basic skills, majority language skills, and/or vocational skills may be necessary irrespective of their actual age.

Another reason for drawing attention to the potentially discriminatory nature of fixed age categories, relates to increasing multiculturalism alleged to be taking place all over the Western world. In view of that, recognition of age is not just a technical matter. On the contrary, childhood, adolescence, adulthood and old age are to a high degree to be regarded as culturally bound constructions.[26] Thus, even if education provided along certain age cohorts may from one perspective be defended as a means towards equality, it may as well from a culturally sensitive point of view seem discriminatory. In that event, it is important to clarify when a distinction based on age becomes illegal discrimination. Ageism has been broadly defined as "an attitude, action, or institutional structure, which subordinates a person or group because of age or any assignment of roles in society purely on the basis of age", or as "any prejudice or discrimination against or in favour of an age group".[27] Basically, ageism is in most cases simply a matter of depriving people of power and influence due to their age.

The following examination aims to clarify how international legal norms stand with regard to diverse concepts related to age, such as children, youngsters, adults etc. On the basis of that review, we strive to determine which specific age categories of the population should, according to the international standards on the right to education, be made part of the national and international monitoring efforts and thus visible as categories of concern. Only thereafter are we able to discuss the notion of systemic ageism in education.

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[26] On research findings which support the view that attitudes toward the elderly would be most favourable in primitive societies and most negatively viewed in industrialised Western nations, see for example McTavish 1971, Hutchison 1995.

[27] Quotations of Traxler (1980) and Palmore (1990) at <www.webster.edu/~woolflm/ageism.html>

4.2.2. *International Standards against Ageism in Education*

a. *Universal Standards*

Legally binding UN provisions that explicitly prohibit age discrimination in education are exceptional. No more than two instruments expressly mention this ground. ILO Convention No. 168 concerning employment promotion and protection against unemployment prohibits discrimination in activities covered by it on a total of ten grounds, including age. However, as regards different types or levels of education, it contains provisions solely on vocational training. The other instrument that expressly outlaws age-related discrimination, the UN Migrant Workers Convention is for its part more comprehensive concerning educational rights. Notably, the convention does not set a differential standard in relation to primary and secondary education, but as this instrument entered into force just recently, it remains to be seen how its prohibition against age-based discrimination will stand regarding educational rights that also are guaranteed by the Convention.[28]

Nonetheless, the fact that age is seldom expressly recognised as a prohibited ground for discrimination in international human rights law does not give the green light for ageism in education. The CDE serves as a prime example for such an argument. This instrument has a closed anti-discrimination clause that lists only a limited number of forbidden grounds of discrimination; age being excluded from among them. Yet, the Convention refers throughout to 'any person or group of persons' 'at any level' of education, and thus has a wide scope of application although age is not expressly mentioned among prohibited grounds for discrimination.

Moreover, the fact that just two of the leading universal instruments stipulating on the right to education,[29] refer explicitly to age as a prohibited ground does not mean that the other ones conversely would permit ageism. The CESCR, the CCPR, the CRC and the UNESCO Vocational Convention, the four UN instruments containing the most important substantive provisions for the present study, do all prohibit discrimination on the grounds of 'other status', which can be interpreted as applying also to age. This fact is also pointed out by the CESCR Committee, which states in one of its General Comments that the omission of age from among explicitly prohibited grounds of discrimination is not to be seen as an intentional exclusion. Rather, it should be explained by the fact that, when these instruments were adopted, the problem of demographic ageing was not as evident or as pressing as it is now.[30]

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[28] The Convention entered into force on 1 July 2003, thirteen years after its opening for signature. The right of access of migrant workers and their family members to education on an equal basis with nationals is guaranteed under articles 12, 30, 43 and 45.

[29] As listed in appendixed Table 1.

[30] CESCR General Comment No. 6, para. 11.

When tracing universal age standards particularly in relation to a subjective right to education, the scene becomes more obscure. The UDHR stratifies education into three distinct groups of 'elementary and fundamental', 'technical and professional' and 'higher' education. In the subsequent binding provisions of the CESCR and the CRC this stratification has been elaborated to the groups of primary, secondary, and higher education, the CESCR maintaining even the category of fundamental education.[31] This grouping goes in line with the reality that educational rights in contemporary Western nation states are customarily stratified in compliance with the educational structures of primary, secondary and tertiary levels. It may be understandable that the education provider shall be allowed to presume that a person who is accepted into certain education at a post-primary level has the necessary basic learning skills, although this entails differential treatment directed against people who do not fulfil these requirements. Nevertheless, the existence of different educational levels does not as such justify distinctions based on age, as will appear from the following.

In the act of translation of the UDHR into more binding provisions by the CESCR, it was only primary education that was stipulated to be compulsory. Although the Covenant did not establish any express age limits, the underlying rationale seems to have been that the compulsory school-age should equate with the prohibition of child-labour. Thus, children should be both permitted and obliged to devote themselves to education at least until the age of 14 to 15 years.[32] Basic education above compulsory school age was separated into a provision of its own and labelled 'fundamental education.'[33] Only the introductory statement in Article 13(1), according to which the state parties to the Covenant recognise the right of everyone to education, sets outer limits for the interpretation of its character and scope.

What then does the call for recognition mentioned in Article 13(1) concretely mean in terms of a right to education above compulsory school age? A legally binding instrument that contributes to the actuality of this question is the CRC. By stipulating that children are all individuals under the age of 18 and that state parties shall respect and ensure the rights set forth in it to each child within their jurisdiction without discrimination of any kind, the Convention blurs the conventional upper-age limit of the subjective right to basic education. In spite of the fact that the CRC adopted from the CESCR

[31] See UDHR, article 26(1); CESCR, article 13(2); CRC, Article 28(1)(a). Similar stratification is used in the CDE, Article 4(a).

[32] ILO Convention No. 138 of 1973 established that the basic minimum age for child labour should in 'normal circumstances' be in no event be less than 15 years, and in circumstances where economy and educational facilities are insufficiently developed, no less than 14 years. The Convention does state some exceptions according to which children can undertake light work together with education at 13 years old, respectively 12 years in so-called developing countries.

[33] Article 13(2)(d).

the concept of 'primary education', which can be considered as a less age-neutral notion that that of 'basic education', it nevertheless draws onto the agenda even the educational rights of children above the age of 15.

It has been unfolded that the drafters of the CRC purposefully set the upper age limit of childhood at 18 years in order to ensure that the rights set forth therein would uniformly apply to as large an age group as possible.[34] At the same time, however, the sub-paragraph on the right to fundamental education, as phrased in Article 13(2)(d) of the CESCR, was left out, as was described in Chapter 3.2.2 above. This omission can hardly be justified with the argument that children who have not received or completed the whole period of their primary education do not exist. Neither can it be a plausible line of reasoning that the category of fundamental education would be superfluous in the case of children, when on the other hand higher education is expressly named in the CRC. In any society, the number of persons below the age of 18 that are in need of basic education is probably larger than the amount of those below the age of 18 whose access to higher education calls for legal protection.

Thus, on the one hand the CRC is progressive in offering protection for any person below 18 years of age,[35] and consequently exceeding the protection that had been stipulated for example for refugees and stateless persons in earlier special instruments concerning them. On the other hand, by making just vague references to post-primary basic education, it seemingly appears to accord a lower priority to the educationally most disadvantaged persons above compulsory school age, and hence to be a step backwards from the CESCR. What is regrettable is that the wording used in CRC Article 28 leaves a loophole that enables the international statistics of literacy to follow the definition that adulthood already begins at the age of 15, or at the minimum age of employment.[36] However, even if primary education customarily goes in tandem with compulsory school age, it is noteworthy that Article 28(1)(a) as such does not specify an upper age for those who are entitled to primary education.

The CEDAW draws attention to diverse age categories modestly, just stipulating on the necessity of ensuring to both sexes equal access to education, "including adult and functional literacy programmes".[37] The UNESCO Vocational Convention also notes that both young people and adults are covered by it, despite the fact that age is not explicitly mentioned in its anti-

[34] Alston 1992, p. 3.
[35] Note that according to Article 1 of the CRC this definition is conditional and applies only 'unless, under the law applicable to the child, majority is attained earlier.'
[36] See Tomaševski E/CN.4/1999/49.
[37] CEDAW, Article 10(e).

discrimination provision.[38] None of these instruments defines the age-related concepts they make use of.[39]

The CESCR Committee has drawn attention to the concepts of 'older persons', 'the aged', 'the elderly', 'the third age', etc., by this notion referring to persons aged 60 and above.[40] The Committee encourages state parties to the CESCR to pay particular attention to promoting and protecting the economic, social and cultural rights of this age group. In the same context, the CESCR Committee also notes that "unlike the case of other population groups such as women and children, no comprehensive international convention yet exists in relation to the rights of older persons and no binding supervisory arrangements attach to the various sets of United Nations principles in this area".[41] For this reason, the Committee emphasises its own role in pushing state parties to guarantee for older persons, *inter alia*, access to various levels of education through the adoption of appropriate measures regarding literacy training, life-long education, etc.[42]

It is interesting to note that the CESCR Committee stresses its own role in regard to older persons and their educational rights, whereas it in another General Comment confirms that the principle of non-discrimination extends to "all persons of school age residing in the territory of a State party…", thus by-passing the problem of potential ageism against individuals above compulsory school age.[43] Thus, a confirmation by the CESCR Committee that the principle of non-discrimination in education extends even to 'youngsters', 'juvenile', or 'adolescents' is still awaited.

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[38] UNESCO Vocational Convention, Article 2 (1).

[39] Since the CCPR is used as source material for some parts of the present study, its provisions related to age can also be remarked even though they do not relate directly to educational rights. The CCPR prohibits, in Article 6(5), imposition of the death penalty for 'persons below 18 years of age.' In addition, special provisions for 'juvenile persons' are found in Article 10(2)(b) and (3) and in Art. 14(1) and (4) in relation to the deprivation of personal liberty and rights in criminal trials. Moreover, Article 24(1) stipulates that every child shall have,… [t]he right to such measures of protection as are required by his status as a minor…" According to Manfred Nowak (2005, p. 550 f.) the term 'minor' in this context extends to majority age and covers both children and juvenile persons. Accordingly, the age limit of 18 years set down in Article 6(5) can be employed as a guideline in determining when majority age is reached. Nowak further notes that the term 'juvenile person' is principally used in connection with criminal law, and it thus falls natural that this age begins with the age of criminal liability, which in most states is lower than the age of majority. The main rule should therefore be that anybody below the age of 18 years shall be considered as a 'minor' and thus entitled to corresponding protection against violations of his or her human rights. Note, however, the observation made by the UN Human Rights Committee according to which the CCPR does not indicate the age at which a child attains his majority. Consequently, the Committee states that age of majority is to be determined by each state party in the light of the relevant social and cultural conditions. CCPR General Comment No. 17, para. 4.

[40] CESCR General Comment 6, para. 9.

[41] Ibid., para. 13.

[42] Ibid., para. 37.

[43] CESCR General Comment No. 13, paras. 34, 37. Emphasis added.

b. *European Standards*

Council of Europe Instruments

Neither the ECHR nor the ESC mentions age on their lists of prohibited grounds for discrimination, but they do contain the expression 'other status', which indicates that these lists are not meant to be exhaustive.[44] Protocol No. 12 to the ECHR, which provides for a general prohibition of discrimination, and which is applicable to any right set forth by law and thus is applicable even in the education sector, also leaves ageism without a separate reference. Actually, the enumeration of discrimination grounds in Article 1 of Protocol 12 is identical to that in Article 14 of the ECHR.

The explanatory report to Protocol 12 states that, even though new discrimination grounds have become more important since Article 14 was drafted, it was not considered necessary to add further grounds to the list. This was supported by the argument that the list is non-exhaustive and that the Court has already applied Article 14 to grounds of discrimination not explicitly enumerated on the list. The inclusion of new discrimination grounds was considered able to: "give raise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included."[45] Thus, age is one of the grounds that remains unmentioned in the Protocol, but according to the Explanatory Note nevertheless is principally included in its non-exhaustive list.

As concerns age limits in respect to educational rights in particular, it pays to bear in mind that Article 14 of the ECHR is not a stand-alone right and should be considered in conjunction with the protection of other rights. Likewise, a relevant matter when talking about ageism is that the protection of the right to education is divided so that the ECHR protects against restrictive state action and for parental rights, whereas the ESC provides first of all for the state duty to ensure the effective exercise of the right to vocational training. The European Court of Human Rights has thus far not been challenged to test whether Article 14 could be considered in conjunction with the protection of basic educational rights of those above compulsory school age. The Convention does, in another provision, mention the category of 'juveniles' but like the CCPR and the CESCR, it does not provide for a definition of this term.[46]

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[44] ECHR, Article 14; ESC, Part V. Article E.

[45] Explanatory Report to Protocol No. 12 to the ECHR, para. 20.

[46] ECHR, Article 6(1). The ECHR case-law on age-related issues seems to be quite rare. B*ouamar* v. *Belgium* 29.2.1987 can be mentioned as an example. In that case, the distinction between juvenile and adult offenders was found to be justified as it arose out of the protective nature of the measure in question. One of the questions tackled was whether the lack of possibility to have the lawfulness of the detention decided speedily in juvenile cases compared with adult cases was discriminatory.

The ESC is more illustrative in so far that it not only contains provisions that apply specifically to 'children', 'young persons', or 'adults' in the context of educational rights, but also defines some of these concepts.[47] Such a definitional clarification is given in Article 17, which provides for the right of children and young persons to social, legal and economic protection, including their right to education and training. Accordingly, this provision covers "all persons below the age of 18 years, unless under the law applicable to the child majority is attained earlier, without prejudice to the other specific provisions provided by the Charter, particularly Article 7". Most importantly from the viewpoint of the present research problem, it is expressly stipulated that ESC Article 17 "does not imply an obligation to provide compulsory education up to the above-mentioned age".[48] Regrettably, then, the ESC leaves the educationally most disadvantaged youngsters from 15 to 18 years of age categorically without legal protection. This exclusion stands in contradiction at least with some Council of Europe soft-law documents that conversely urge the need for additional protection of young persons.[49]

European Union Instruments

Even if the standard-setting instruments of the Council of Europe have so far recognised the problem of ageism only in passing, the same cannot be said about the European Union instruments. Already in the 1970s, the Gender Directive was used to challenge the differential retirement ages between men and women.[50] As regards occupational pensions, a Directive on occupational social security from the mid-1980s specifically prohibited the fixing of differential retirement ages for the two sexes.[51] And since the early 1990s, the Young Workers Directive refers—among other things—to the duty of member states to ensure that working time and working conditions of 'children', 'adolescents' and 'young people' shall not adversely affect their ability to benefit from education. For the purposes of the Directive, each of these concepts is defined separately. Accordingly, 'young person' shall mean a person under 18 years of age having an employment contract or an employment relationship defined by the law in force in a Member State and/or governed by the law

[47] ESC Articles 7, 9, 10 and 17.

[48] Appendix to the Revised ESC, Part II, Article 17.

[49] See Council of Europe1996. Children and Adolescents: Protection within the European Social Charter. Human Rights, Social Charter monographs—No. 3. Note specially p. 8 where it is argued that, although the Charter does not explicitly say so, the age of eighteen set a limit to the personal scope of Article 7, due to the fact that this indication is given in other paragraphs of the same article.

[50] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[51] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, amended by the Council Directive 96/97/EC of 20 December 1996.

in force in a Member State. 'Child' is stipulated to mean any young person of less than 15 years of age or who is still subject to compulsory full-time schooling under national law. As a third term defined in the Directive, 'adolescent' shall mean any young person of at least 15 years of age but less than 18 years of age who is no longer subject to compulsory full-time schooling under national law.[52]

Nonetheless, it was not until Article 13 of the TEC, added by the Treaty of Amsterdam, that the Council was expressly empowered to take appropriate action to counteract discrimination on the grounds of age. The insertion of Article 13 subsequently led to the adaptation of the two Directives of 2000, the Employment Directive[53] and the Racial Equality Directive.[54] The approaches of these two measures to ageism are quite distinct from each other. The Racial Equality Directive, prohibiting discrimination only on the grounds of racial or ethnic origin, but applying to all forms of education leaves it open for interpretation whether age-based discrimination can be tackled by it. The Employment Directive for its part stretches only to vocational training, thus leaving other forms of education uncovered, but nevertheless prohibits expressly discrimination on the ground of age.

Is then ageism in education effectively covered by these measures? Obviously, the Racial Equality Directive can address the issue of ageism only by tackling it jointly with discrimination based on race or ethnicity, whereas the Employment Directive prohibits discrimination on the grounds of age independently but at the same time covers only a slight part of education. Moreover, the Employment Directive has a special article that justifies several differences of treatment on grounds of age. Article 6 stipulates that certain actions shall not constitute discrimination:

> if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Differences in the setting of special conditions on access to employment and vocational training are mentioned as an example.

Additional pressure to find a response to the problem of ageism comes from the CFREU, which in its Article 21 expressly lists age as one of the prohibited grounds of discrimination. Besides, Article 32—relating to protection of children and young people—stipulates that the minimum age of admission to employment may as a rule not be lower than the minimum school-leaving age, and that young people admitted to work must be protected against any

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[52] Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, Articles 2(1) and 3.

[53] Employment Directive (2000/78/EC).

[54] Racial Equality Directive (2000/43/EC).

work likely to interfere with their education. The first-mentioned provision brings as such nothing new to the already existing universal human rights standards. As regards the second, the Charter does not define the concept of young people, but it can be assumed that the definition given in the Young Workers Directive that was cited above is applicable in this context. Regarding the options of asylum seekers and refugees of different ages to enjoy their right to education, it can be noted that the EC law makes a distinction merely between 'minors' and 'adults.' The Asylum Seekers Directive stipulates in Article 10(2) that minors in respect of the provision of education "shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined", whereas the Refugees Directive expressly defines in Article 2(i) minors as persons below the age of eighteen.

So far, European discussion on ageism seems to be primarily focused on discrimination against elderly people in the area of employment, and it is hardly reasonable for the time being to expect that European provisions would provide the context for enhanced legal protection of other age groups and in other areas.[55] Rather, it is more likely that legislative reforms at the national level are needed to increase activism in the interpretation of relevant European provisions. The age discrimination legislation of the US has been estimated as having been quite unsuccessful, but nevertheless it at least recognises the need for broad strategies to address the problem of ageism.[56] Such recognition is still awaited in most of Europe. Even if the European legal framework to tackle ageism in education is not very sophisticated, it nonetheless does leave space for progressive development.[57]

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[55] The battle that the former European Ombudsman Jacob Söderman run to end age discrimination in all EU institutions is particularly noteworthy when talking about measures against ageism in Europe. As of today, both the Commission and the Parliament have taken decisions to end the use of age limits in recruitment. Correspondence of the Ombudsman on the subject matter can be found at <www.euro-ombudsman.eu.int/age/en/default.htm>. Note also the Commission Communication of 21 May 1999: Towards a Europe for All Ages—Promoting Prosperity and Intergenerational Solidarity, which focuses on the age issue, but nevertheless concentrates solely on raising awareness of the ageing of the workforce and on the importance of keeping older workers actively in work.

[56] A country with longstanding legislation and case-law in the area of age discrimination is the US, which ever since 1967 has an Age Discrimination in Employment Act, prohibiting discrimination in employment against individuals between 40 and 70. Moreover, the Age Discrimination Act of 1975 requires that no person shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programme or activity which receives benefits from federal financial assistance. On the evaluation of US experience, see McGlynn 2001, p. 295 with references.

[57] As a non-binding document that nevertheless may perform a function in developing further legal EU norms on this area, see the European Commission White Paper: A new impetus for European Youth COM (2001) 681 final, November 2001.

4.2.3. *Young People as a Category of Particular Concern*

When talking about ageism in education, a special category of concern seems to be those that fall between the established categories of 'children' and 'adults', and those that fall between the cracks of primary education on the one side and diverse forms of adult education on the other side. At the same time, youngsters from 15 to 18 years of age represent a most interesting test-case for the question of who may appropriately be thought of as a subjective rights-holder in the domain of education.

Despite the fact that there has been an international law of youth rights ever since the League of Nations System,[58] and although concepts such as 'lifelong learning' are in our time to be found even in legally binding international instruments,[59] the educational rights of this in-between group have not been systematically elaborated and codified in international instruments. It might be paradoxical if the legislators, while being aware of the changing demographic situation all over the Western world, were nevertheless to retreat from the clarification of the right to education as applied to educationally disadvantaged youngsters, many of whom come from ethnic or linguistic minority groups.

It will be explored in a latter phase of the study whether this segment of Roma population is in an especially critical situation due to the fact that no system is being provided to bear comprehensive responsibility for their education.[60] For now, let us wrap up by noting that some identifiable quantum of education for all, irrespective of age, falls under the international protection of human rights, and this fact calls for a critical examination of restrictive definitions of age in domestic education law. Whenever there are distinctions based on age that rule out some individuals permanently from the enjoyment of the right to education, those distinctions should be carefully scrutinised as potential manifestations of systemic ageism.

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[58] Angel 1995, who also notes that for many years the age group 15 to 24 years has been defined as 'youth' both by statistical offices and youth offices of the UN system as well as by most national census agencies throughout the world, although this definition lacks legal recognition.

[59] See, for example, UNESCO Vocational Convention, Article 3(2); Employment Directive (2000/78/EC), para. 27.

[60] A social ground for drawing attention to ageism in education against young people is the issue of youth-at-risk and the connection of increasing school dropout rates to the divisive and destructive forces of polarisation and marginalisation. Several commentators have pointed out the need for governments to address seriously the dropout and literacy problem for the most vulnerable groups (see, for example, Grover 2002). This calls also for an inclusion of the school dropout youngsters more overtly than before in the national statistical surveys related to education.

4.3. *Recognition of Language*

4.3.1. *The Issue: Language Inheritance, Language Affiliation, or Language Proficiency?*

Language as a potential concern of systemic discrimination in education was already referred to in Chapter 3.3, where the notion of an 'individual right to language skills' was settled. Two main questions were then postponed until this chapter, of which the first one reads: To what degree does international anti-discrimination law give protection to individual language rights? The other question that remained unanswered runs: When does the non-recognition of language rights of certain individuals or groups on the territory of the nation state become a matter of systemic discrimination? In what follows, an attempt will be made to give some clarification on these issues.

In the case of language rights, it is probably more obscure than in the case of many other rights as to when lawful distinction ends and discrimination begins. Language rights advocates use the concept of linguicism to describe processes where discrimination is produced and maintained on the basis of language. According to one of the most exhaustive definitions, linguicism stands for "ideologies, structures and practices, which are used to legitimate, effectuate and reproduce an unequal division of power and resources (both material and immaterial) between groups which are defined on the basis of language".[61] More precisely, it involves "representation of the dominant language, to which desirable characteristics are attributed, for purposes of inclusion, and the opposite for the dominated languages, for purposes of exclusion".[62]

Similar to the concept of ageism, the definitions above clearly indicate that, fundamentally, linguicism is a matter of depriving people of power and influence due to their language. Keeping in mind that the present study focuses solely on the system of written norms as a bearer of discriminatory tradition, we can simplify the definition by eliminating from it any references to attitudes and prejudiced actions, and thus state that systemic linguicism in what follows concerns "written legal norms that promote or maintain subordination of a person or group because of language". Does the state then have any duty to officially recognise the linguistic inheritance, the linguistic affiliation, or the linguistic proficiency of individuals under its jurisdiction? And what would the state duty to entitle them to equal protection of the law in these respects actually mean?

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[61] Skutnabb-Kangas 1990, p. 85. *See also* Skutnabb-Kangas & Phillipson 1995, p. 104; Skutnabb-Kangas 1998, p. 16.

[62] Phillipson 1992, pp. 54–55.

The call for individual linguistic rights has commonly been contrasted with the perceived linguistic needs of nation-building. The basic premise here is that the capacity of the state to plan and control its economic and educational policies should not be diminished as long as it takes universal human rights sufficiently into account. It is, however, far from clear how far the state concern may have precedence over educational needs of individuals, in the event that these two interests are not convergent. The nation state's insistence on a shared national language may constitute a threat against the very survival of minority languages. Conversely, leaving deficiency in the official language unrecognised can become a hindrance for the well-being of many minority members. As Niamh Nic Shuibhne puts it, whenever one or more languages are employed for official use, those who are fluent in the languages selected are favoured and those outside are potentially within the arena of discrimination.[63]

Discussing the same issue in relation to educational rights, Vernon van Dyke dichotomises the dilemma of language in education into two options, of which neither one is principally better than the other. He points out that if students who speak different languages are in the same school and if one of the languages becomes the medium of instruction, then some students automatically gain an advantage and others are handicapped. At the same time, to teach some in a language that is little used would mean that the life chances opened up to members of the two groups may be very unequal. Consequently, what is equal treatment from one point becomes unequal from another.[64] Purely equal treatment in the domain of linguistic rights thus seems to be unfeasible. We can, however, set a minimum standard from the viewpoint of individual linguistic rights, according to which the claim for national coherence does not justify anybody being left in linguistic isolation, locked in by an inability to communicate in language(s) by which one is surrounded.

In what follows, attention will be drawn to the state duty to recognise both sides of the concern: the mother tongue proficiency as well as the official language proficiency of its inhabitants. The underlying thought is that the registration of language inheritance alone does not help much in efforts to promote the individual right to language skills as defined in Chapter 3. Systemic linguicism may appear whenever the official education framework impedes individuals belonging to a particular language group in the exercise of rights enjoyed by other students. Moreover, discrimination may take place whenever the state without an objective and reasonable justification fails to treat differently persons whose linguistic situations are significantly different.[65]

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[63] Nic Shuibhne 2002, p. 195.
[64] Van Dyke 1973, p. 384.
[65] *Cf.* the *Thlimmenos case*, above in Chapter 2.3.2.

On the other hand, a government that has no comprehensive data on the linguistic composition of the state population scarcely can provide evidence for the objectiveness of its language policy.

4.3.2. *International Standards against Linguicism in Education*

a. *Universal Standards*

Universal anti-discrimination clauses recognise language relatively often as an unreasonable ground to justify discrimination.[66] Moreover, several of these provisions oblige the state parties not only to respect but also to ensure to all individuals subject to their jurisdiction the rights recognised in the instrument at issue. In contrast to the multitude of provisions prohibiting linguicism, it is interesting to note which of the UN instruments relevant for the right to education contain no similar clauses.

As far as CERD and CEDAW are concerned, it may fall naturally that they do not include language in their non-discrimination provisions, as they are special instruments focusing solely on discrimination based on race/ethnicity and gender respectively. The same cannot be said about the two ILO Conventions covering educational rights,[67] nor about the two relating to the status of refugees and stateless persons. The way that the non-discrimination on the basis of language is circumvented in these instruments asserts intrinsically that the language question becomes more complicated the closer we come to those categories of persons whose official language deficiencies are most obvious.

Nonetheless, language is, by and large, relatively often mentioned on a par with other non-discrimination grounds, and what is more, its significance is raised by the fact that it is additionally mentioned in some substantive provisions. The CDE does accept differences of language as valid reasons for educational segregation, on condition that participation is optional and approved standards are maintained.[68] The Convention makes no express requirements for the separate provision of mother tongue instruction, but it is apparent that its non-discrimination clause is deprived of practical value if access to education in a certain language does not go in tandem with the factual population size of its speakers.[69]

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[66] UDHR Article 2, CDE Article 1(1), CCPR Articles 2(1) and 26, CESCR Article 2(2), CRC Article 2(1), UNESCO Vocational Convention Artic1e (3), UN Migrant Workers Convention Articles 1(1) and 7.

[67] That is ILO Conventions No. 111 and No. 168.

[68] See discussion on Article 5(1)(c) of the CDE in Chapter 5.4.2, below.

[69] This view finds support from the HRC decision over the case *Diergaardt* v. *Namibia*, which was presented in a nutshell in Chapter 2.3.1, above.

The state duty to adequately acknowledge the linguistic needs of the younger members of the population can be revealed even by Article 24(1) of the CCPR, according to which every child shall have the right to such measures of protection as are required by his status as a minor, without any discrimination as to language, among other grounds. Again, the prohibition of discrimination on the grounds of language remains an empty letter if serious deficiencies in the linguistic capital of any child are left without official recognition and interference. In contrast, Article 27 of the CCPR does not seem to put specific pressure on state parties to identify minority language speakers in person, as this provision solely notes that the right to use minority languages shall not be denied. On the basis of this article alone, the state thus has no positive obligations regarding recognition of minority language speakers on an individual basis.[70] The same goes for Article 30 of the CRC.

Tove Skutnabb-Kangas (2000) has declared as a serious loss for linguistic rights the fact that the universal instruments including language in the list of prohibited grounds of discrimination nevertheless are silent about it when proclaiming the right to education. Likewise, Niamh Nic Shuibhne suggests that prohibition of linguicism should be spelled out in the substantive provisions, in addition to its inclusion in general non-discrimination clauses. As a support for this argument she asks why, for example, Article 27—an explicit provision on the rights of minorities—was included in the CCPR, if non-discrimination on its own was enough.[71] Basically, however, these worries and demands are superfluous when the principle of interdependence between the various provisions of the instrument at issue is seriously taken into account.

As a matter of fact, the principle of interdependence was already used in the drafting process of the UDHR. Namely, in several drafts of the Article 26 on right to education, reference was made to non-discrimination on the basis of race, sex, language, religion, social standing, political affiliation, or financial means, but this text was excised as it was considered redundant, since the principle of non-discrimination was considered protected by other articles in the Declaration.[72] Accordingly, what is important for language

[70] CCPR General Comment No. 23 makes clear that although Article 27 is expressed in negative terms, it, nevertheless, does recognise the existence of a "right." Simultaneously, it makes clear that rights envisaged under Article 27 are "that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language." Moreover, General Comment No. 23 specifies that individuals protected by Article 27 need not be nationals, citizens, or permanent residents, but even migrant workers or visitors in a state party. Thus, it is reasonable to conclude that the right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, as protected in Article 27, does not expressly put pressure on the state to identify minority language speakers on an individual basis. See CCPR General Comment No. 23, paras. 5.2 and 6.1.

[71] Nic Shuibhne 2002, p. 196.

[72] See World Education Report 2000, pp. 95–96.

rights advocates is to read the non-discrimination clauses and the substantive provisions constantly together, and on that basis demand equal recognition of rights-holders from diverse language groups before the law.

b. *European Standards*

Council of Europe Instruments

What does the expression in Article 14 of the ECHR that "the rights and freedoms set forth in the Convention shall be secured without discrimination on any grounds such as…language…" mean? A similar wording is used in Article E of the revised ESC: "the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as…language…" Likewise, Protocol No. 12 to the ECHR, which contains a general clause prohibiting discrimination in the enjoyment of rights set forth by law, uses the expression 'shall be secured' identically. According to the Explanatory Report on Protocol No. 12, para 26: "it cannot be totally excluded that the duty to 'secure' under the first paragraph of Article 1 might entail positive obligations." A situation when there is a clear lacuna in domestic law preventing discrimination is given as an example.

Thus, the legislature cannot avoid its responsibility in the area of anti-discrimination work by simply remaining silent and passive. Analogously, it can be argued that the state cannot avoid its responsibility in protecting the linguistic rights of residents living permanently on its territory by leaving the language affiliation of some of these individuals totally without official recognition. This would first of all violate Article 16 of the CCPR when read together with any of the anti-discrimination clauses prohibiting discrimination on the basis of language. Moreover, it would violate Article 1 of the Protocol No. 12 to the ECHR, as the word 'law' used in it may also cover international law.[73] As a conclusion, the prominent anti-discrimination clauses of the Council of Europe do oblige administrative state authorities to pay due attention to the existence of diverse language groups within the state territory.

As regards provisions on the right to education in the ECHR and on the right to vocational training in the ESC respectively, there is no mention of the language of instruction. Similarly to the UN provisions they keep silent on this point, but—again analogously to the UN provisions—it can be noted that the general anti-discrimination clause covers all rights mentioned in the instrument, and thus an additional reference to language rights might, strictly speaking, be redundant.[74]

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[73] See Explanatory Report to Protocol No. 12 to the ECHR, para. 29.

[74] It is noteworthy that the *travaux préparatoires* of Article 2 Additional Protocol 1 did contain a Danish proposal for a protection of linguistic minorities, but it was rejected. Moreover, there was an attempt in the beginning of the 1990s to get adopted an Additional Protocol on the Rights of National Minorities to the ECHR, which would have contained a provision on the

It was already remarked in Chapter 3 that the ECRML explicitly excludes immigrant languages from its scope. Thus, no state obligation to pay attention to the existence of any other language than "the historical regional or minority languages of Europe" can be drawn from it. Quite the reverse in fact, it was even argued that the FCNM leaves contracting states a measure of discretion as regards recognition of diverse groups as national minorities. Guus Extra and Kutlay Yagmur (2002) have criticised both of these documents for the fact that they allocate special rights to one group of minorities and deny the same rights to other groups. In the case of the ECRML, such a biased allocation is definitely and in the case of the FCNM potentially exclusive. According to Extra and Yagmur, the exclusion-oriented policies that these instruments enable are compatible with neither language rights nor human rights. However, legal experts in minority rights have pointed out that even though the FCNM is a broad framework convention, states have to be cautious not to infringe upon any of its provisions. In the words of Lauri Hannikainen, one potential example of such an infringement would be "if a state gave preferential treatment to a particular minority, which had the effect of discriminating against other minorities".[75]

The risk of ending up in the unreasonably disadvantaged position of those Europeans that speak 'non-European' languages as their mother tongues has been recognised *in passim* in Recommendation 1383 on Linguistic Diversification of 1998. It draws attention, *inter alia*, to the importance of the acquisition not only of English but also of other European and world languages by all European citizens, in parallel with the mastery of their own language. Concurrently, European education systems are encouraged to teach the languages of local minorities at school if there is sufficient demand. Most importantly, the member states are invited in the context of language planning not only to promote regional languages, but also to take account of the presence of non-native population groups.[76] This document has no legally binding force, but it nevertheless calls for a national language policy that is not biased towards any language group, nor leaves any group totally unrecognised.

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right to minority language education. Nonetheless, the Committee of Ministers of the Council of Europe never adopted this Draft Protocol. The educational provision as formulated in the Draft Protocol later found its way into Recommendation 1255 (1995)1 on the Protection of the Rights of National Minorities, which does recognise the state duty to identify the size and geographical distribution of the languages spoken by its national minorities. Article 8(1) of this recommendation entitles every person belonging to a national minority "to receive an education in his/her mother tongue at an appropriate number of schools and of state educational and training establishments, located in accordance with the geographical distribution of the minority." The Recommendation creates no binding international legal obligations. In fact, it might have been contradictory for the Committee of Ministers to adopt a legally binding Protocol that would create rights only for members of so-called national minorities, whilst the ECHR as such strives to guarantee rights for all individuals under its jurisprudence.

[75] Hannikainen 2005, p. 560.

[76] Recommendation 1383 on Linguistic Diversification, adopted by the Council's Parliamentary Assembly in September 1998, Articles 5, 6, 8.

European Union Instruments

What draws one's attention in the European Union instruments is that language is, with only one exception, omitted from their non-discrimination clauses. Discrimination on the basis of language was not expressly prohibited by the TEC non-discrimination clause as introduced in the Treaty of Amsterdam. Neither does the Racial Equality Directive nor the Employment Directive expressly prohibit linguicism. Such an omission is interesting insofar that language is a category of discrimination that for decades has been included in the leading human rights instruments both universally and in Europe.[77] Thus, no legally binding EU instrument expressly bans discrimination on the grounds of language. On the other hand, the CFREU—an authoritative instrument in the political sense, though legally non-binding—does outlaw discrimination based on language. Besides, as was discussed in Chapter 3, the CFREU calls the member states to respect linguistic diversity, and this call is made without giving priority to any particular languages.[78]

Is there then a contradiction between Article 13 TEC as amended by the Treaty of Amsterdam and its implementing directives that do not prohibit discrimination based on language on the one hand, and Article 21(1) of the CFREU that does prohibit discrimination based on language on the other hand? Obviously, linguistic equality is a challenge for a multilingual European Union striving towards unification, and too many unconditional legally binding provisions on language rights would easily block the courts. Nevertheless, the pragmatic cautiousness of the legislature should not give space for placing individuals from linguistic minority groups at a disadvantage within the public education systems of the EU member states.

4.3.3. *The Ambiguity of International Case-Law*

The question of when the non-recognition of language rights becomes a matter of systemic discrimination is so vital for the research problem in hand that it is justified to devote a sub-chapter of its own to the case-law that has evolved hitherto. This question was already touched upon earlier when it was noted that according to the interpretation made in the *Belgian Linguistics* case the ECHR contains no subjective right to education in one's own language.[79]

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[77] Speculating on the close relationship between language and education, Mark Bell (2002, p. 127) states that it is easy to imagine cases where education providers refuse access to education for persons that have a 'foreign accent' even if fluency of the language as such would is evident. This being the case, one could assume that the explicit omission of language should already have triggered a lively debate. It has been reported, however, that during the drafting process of the Treaty of Amsterdam, language was not even proposed for inclusion: 'social origin' was the only ground that was lost from the original list proposed by the Irish Presidency. See Barnard 2000, p. 284.

[78] CFREU (2000), Articles 21(1) and 22.

[79] See Chapter 3.3.2, above.

Accordingly, the first sentence of Article 2 of Protocol No. 1 would in itself contain no linguistic requirement, but guarantees solely the right of access to educational establishments existing at a given time. Such a strong emphasis put on purely formal equality has later been challenged several times both in international law and in academic literature, whilst more attention is drawn to the principle of substantive equality and to equality of outcomes.

Of utmost interest for the present chapter is the fact that the *Belgian Linguistics* case did touch upon the question of the right to be recognised as a person before the law, although only implicitly. The applicants namely based their arguments on, among other things, Article 6 of the Belgian Constitution, which guarantees the equality of all Belgians in the eyes of the law.[80] The Court did not comment upon this particular point at all, as the ECHR does not contain a provision corresponding to Article 16 of the CCPR. Nevertheless, the majority of the Court did take a stance in favour of 'public interest' prior to individual rights, whether one hereby refers to language rights, educational rights or the right to be recognised before the law. This decisive interpretation that individual rights shall give way to the priorities set by the state needs to be discussed more thoroughly, as it is exactly in this point where systemic discrimination may establish itself.

The *Belgian Linguistics* case concerned justification of the Belgian state-subsidised education that was provided in the language of the region in areas designated as unilingual, in the maternal language in bilingual areas and optional in 'special-status' areas. Against the claims of the applicants, the Court found this system, with one minor exception, to be justified.[81] In its decision, the Court referred to the public interest in protecting linguistic homogeneity, to the principle of subsidiarity, and to the principle of territoriality.[82] These three measures taken together quite effectively subdue the principle of non-discrimination that was put forward by the applicants, as will become apparent from the following.

By referring to the public interest and linguistic homogeneity, the Court drew on the history and development of Belgian legislation, which divided the country into several unilingual regions. Hence, only one language group could have a special claim to the preservation of their language in one region, whereas the claims of other language groups on that region were ignored. With reference to the state interest in the homogeneity of language groups, de Varennes has argued that non-discrimination can only be invoked successfully where there is "a sufficiently large or concentrated number of individuals

[80] See Summary of the arguments presented by the applicants, para. A.1.

[81] The treatment found discriminatory was that French-speaking children who were not resident in the Brussels area could not attend French-language schools existing in the 'special-status' areas around Brussels, while Dutch-speaking non-residents were allowed to attend Dutch-language schools of the same area.

[82] Paras. 7, 13, 19, and collective dissenting opinion of Judges Holmbäck, Rodenbourg, Ross, Wiarda and Mast.

affected in relation to the type of state service or activity, such as public education in a particular language".[83]

Naturally, size is important so far as language rights require that certain institutions be able to operate in certain languages. As Denise Reaume realistically notes: "A community must be of a certain size before it is feasible to provide the appropriate services by delivering them within the community itself."[84] Nonetheless, in the *Belgian Linguistics* case feasibility of services was not the priority from the applicants' point of view. What they apparently first of all wanted was to get recognition for their individual right not to be forcefully assimilated. By due recognition of Article 27 CCPR, which most clearly enshrines this right, the Court could hardly have ignored the counter-pressure that the prohibition of forced assimilation puts on the public interest argument.

The principle of subsidiarity, which the Court introduces as another rationale for its judgment, is applied by putting the margin of appreciation doctrine into use. Ever since the *Belgian Linguistics* case it has been assumed that the ECHR grants states wide regulatory discretion in justifying 'objective and reasonable' criteria for dissimilar treatment of individuals in different language groups. Thus, if the Court does not consider the discrimination to be especially harsh, and if it finds no common ground among national jurisdictions on the issue, "it will be reasonably easy for a State to show that a difference of treatment pursues a legitimate aim".[85] By and large, the ECHR jurisprudence has for decades considered language as a characteristic that requires only lenient scrutiny.[86]

Nonetheless, more recent ECHR case-law shows some progress as regards recognition of individual rights-holders prior to anonymous state interests. In its *Cyprus* v. *Greece* judgement the Court acknowledges that the denial of minority-language schooling at the secondary school level must be considered in effect to be a denial of the substance of the right to education. In other words, the Court here moves away from its stance taken in the *Belgian Linguistics* case that linguistic rights shall be separated from the substantive right to education. Still more progressive development can be discerned in *Thlimmenos* v. *Greece*, with its statement that the right not to be discriminated against is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. This breakthrough concerning the state duty to accommodate for differences may well in the future have its implication even in the interpretation of language rights.

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[83] de Varennes 1997 (unpaged).
[84] Reaume 2000, p. 266.
[85] Jacobs & White 1996, p. 291.
[86] See analysis of the ECHR case-law by Arnardóttir 2003, p. 140.

One further aspect in the *Belgian Linguistics* case to be critically analysed is the way the Court referred to the principle of territoriality, which disclosed that all who reside in a given area are taught in the same language regardless of their mother tongues. Luzius Wildhaber notes that, as a result of this case, the principle of territoriality is basically compatible with the guarantees of the ECHR in a country with different languages in different regions.[87] At the same time, however, the principle of personality—according to which each person is taught in her or his mother tongue—is conspicuous by its absence.[88]

It holds true that the Court—among many other principles—did make reference to the principle of equality of treatment, which was considered to be violated if the distinction has no objective and reasonable justification.[89] The principle of personality in language choice covers, however, more than just formal equality. For one thing, it includes the individual right not to be deprived of one's own cultural heritage, whereof the linguistic heritage comprises an essential part, as recognised in Article 27 of the CCPR.

Moreover, the principle of personality discloses the right of ordinary folk to make decisions for themselves, and to choose their language of empowerment prior to the promotion of languages as abstracts. This principle is most clearly enshrined in Article 3(1) of the FCNM, which stipulates that every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such. As national minorities most often are simultaneously linguistic minorities, it has become very difficult to adhere to the *Belgian Linguistics* case as a precedent since the FCNM entered into force.

The US Supreme Court has recognised the principle of personality in language choice in its famous case *Lau* v. *Nichols*. The case dealt with a failure of the public education system to provide English lessons to students of Chinese ancestry. None of the children could speak English, but the school provided neither special teaching to correct this situation nor standard teaching in a language that the children could understand. According to the decision of the Supreme Court, the Chinese-speaking minority was denied meaningful education, which constituted an unlawful act of discrimination.[90] This case thus recognised, in contrast to the *Belgian Linguistics* case, the factual effect of education, not just formal equality. Fernand de Varennes speaks in his analysis

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[87] Wildhaber 1993, p. 541.

[88] Except for the partly dissenting opinion of Judge Terje Vold, who raised the principle of legality before the law and argued that the right to education, as any other human rights, must be the same for everyone.

[89] In the case under discussion, the majority of the Court considered, inter alia, that the Belgian legislation was not arbitrary, because it was based on a public interest, namely, "to ensure that all schools dependent on the State and existing in a unilingual region conduct their teaching in the language which is essentially that of the region". Belgian Linguistics, para. 7 of Part II.

[90] *Lau* v. *Nichols*, 414 US 563 (1974).

of this case of a state preference resulting in an 'actual discriminatory exclusion' from education.[91]

Thus far, the body of international case-law has not acknowledged an individual linguistic rights preference prior to the public interest in the same manner as in *Lau* v. *Nichols*. Nevertheless, on the basis of the law review above we can say that interrelated human rights instruments do recognise a state duty to provide schooling for linguistic groups of sufficient size. This was confirmed by the HRC decision in *Diergaardt* v. *Namibia*, which made clear that no arbitrary or unreasonable preferences are permissible in domestic language policies.[92]

It appears from the existing case-law that an attempt to strike a balance between individual linguistic rights and societal interests is an ambiguous issue. The discussion on the pros and cons of diverse mediating principles will continue in later parts of this study. For now, we conclude by suggesting that systemic linguicism takes place at least when the official record-keeping system is allowed to disregard the most elementary language deficiencies and the language learning needs of individuals coming from the educationally most disadvantaged segments of the society.[93]

4.4. *Recognition of Gender*

4.4.1. *Genderism Defined*

The notions of gender and genderism used in the present study refer to a social construction of men and women as different categories of persons. That is, genderism takes place when bio-sexual characteristics of women and men are presented as the cause and the justification for their dissimilar social, economic, and political positions in society.[94]

To conceptualise this sub-chapter by gender and genderism is a conscious choice based on two grounds.[95] First, by making use of these and related

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[91] De Varennes 1996, p. 197.

[92] Language rights were also touched upon in *J.H.* v. *Canada*, in which the HRC faced a complaint that there is no legislation in Canada prohibiting discrimination on the basis of language. The author of the communication alleged that persons of French mother tongue are preferred for promotion within all ranks of the Armed Forces, to the corresponding disadvantage of persons of English mother tongue. As there was no specific indication in the communication that the author had himself been adversely affected by the policy, which he complained about, the communication was declared inadmissible.

[93] There is a lot of research evidence available showing how disparity in educational achievement is partly due to failure to recognise existing language barriers. The need to carry out language statistics in an accurate and profitable way has been remarked, e.g., by Extra, & Yagmur 2002, pp. 8, 23.

[94] For the commonly understood meaning of term 'gender', see, for instance, Annex IV to the Bejing Platform for Action.

[95] Queer theorists, assuming that sexual identities are complicated and disrupted by over-

concepts, the feminist theory already questioned essentialising simplifications long before ideas of race as innate or biological became impugned. Thus, much can be learned from the feminist research tradition about risks of dicotomisation even when other grounds than gender are in focus.[96] Second, the notion of genderism encompasses not only the exclusion, demeaning and debasing of women, but also that of men. The stress that contemporary Western equality discourse lays on women's issues may well place minority men between a rock and a hard place in several respects. Men of many minority cultures are often stereotypically seen as repressive against 'their' women and children, who consequently need 'our' protection and support. What is more, minority men and boys may remain disregarded even when the statistics suggest that their underachievement in education is an issue of concern.[97]

With this prologue about the complexities of the topic, we move on to examine how categorisation based on gender is justified in international human rights standards. As a matter of course, the law may by the power of naming hold people to certain expectations and it may also exclude those who do not conform to such expectations. The interest in the following is particularly directed towards how strongly gender as a social construct is perpetuated by international standards on the right to education. That is, how international human rights law maintains the idea about the binary opposition of male and female subjects of the right to education, and what function such polarisation is supposed to serve. The axiom here is that gender by itself does not justify segregation of a group of learners from one another.

4.4.2. *International Standards against Genderism in Education*

a. *Universal Standards*

With the CERD as an exception, all UN treaties embracing non-discrimination clauses expressly mention sex among the prohibited grounds of distinction.[98] The foundation for this practice was already laid in Article 2

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simplified categorizations of individuals, might prefer the notion of queerism to be used. The binary categorisation of human beings to 'authentic' male and female identities may indeed label those who do not fit into such a dichotomy. For an introduction of the queer theory see, for instance, Jagose 1996. However, queerism as an umbrella notion for culturally marginal sexual self-identifications has not found its way into legal terminology to date.

[96] Simone de Beauvoir had already suggested in 1953 in *The Second Sex* that a search for some essence of 'woman' is deeply misplaced. More recently, for instance, Elizabeth Spelman (1988) has made known how difference has been ignored or treated superficially in writings about women. Judith Butler (1990/1999) is also renowned for her arguments against the binary division of male and female identities, which according to her should be challenged by 'subversive confusion and proliferation' of the constitutive categories.

[97] For the educational under-attainment of minority males see, for instance, by Neville Harris *et al.* (2000, p. 78) with references.

[98] The CERD is a special instrument focusing on 'racial' discrimination and as such brings up no other grounds. However, even this instrument refers in its Preamble to observance of human rights and fundamental freedoms for all, without distinction as to 'race, sex, language

of the UDHR, which had already been applied to educational equality by the ECOSOC in the early 1950s.[99] ILO Convention No. 111 of 1958 also contained provisions both on prohibition of sex-based discrimination and on access to certain forms of education. In the latter-day UN instruments these two things frequently co-exist side by side.[100] Yet, of interest for the present chapter are particularly those instruments that substantively add something to the notions of sex or gender.

Such an instrument is the CDE, which on the one hand defines the term 'discrimination' to include any distinction based on sex, but on the other hand specifically permits gender-based segregation in education. Article 2(a) then identifies situations that should not be considered as grounds for discrimination and stipulates that "when permitted in a State" the establishment or maintenance of separate educational systems or institutions "for pupils of the two sexes" is acceptable. The prerequisites *sine qua non* are that separate institutions for girls and boys: (i) offer equivalent access to education; (ii) provide a teaching staff with qualifications of the same standard; (iii) provide school premises and equipment of the same quality; and (iv) afford the opportunity to take the same or equivalent courses of study. In other words, the Convention permits school officials to engage in differential treatment of male and female pupils and to set up private educational institutions, as long as these meet standard quality requirements.

It is questionable whether provision of single-sex public educational facilities would survive constitutional scrutiny in much of Europe today. For one thing, we can draw an analogy from the well-known *Brown* v. *Board of Education*, which plainly judged the 'separate but equal' doctrine to be an expression of racial discrimination. Even so, it is this very same doctrine that still goes strong in the provisions that enable maintenance of 'separate but equal'—facilities for males and females in education. For another thing, separate schools for male and female students may well be part of the cause of gender-based occupational segregation, with wage gaps, women's disproportionate representation in low status jobs and in informal employment, *et cetera* as interrelated drawbacks that persist. Thus, even if the CDE contains many progressive elements, it is conservative insofar that it rather props up than calls into question division and boundaries based on gender.

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or religion.' Actually, even the interpretative documents of the CERD have at a later time become concerned with gender issues. See Chapter 4.6, below.

[99] The Economic and Social Council of the UN (ECOSOC) recommended as early as in Res 547K of 1954 that UN Member Sates should, *inter alia*., "Take the necessary steps to ensure that women have equal access with men to all types of education" and "Enact the necessary laws and regulations to eliminate all forms of discrimination against women in education and to ensure access for women to all types of education, including vocational and technical education, and equal opportunities to obtain State scholarship for education in any field and in preparation for all careers." See Hodgson 1998, p. 169.

[100] For instance, Articles 2(1) and 28 of the CRC; Articles 7 and 30 of the UN Migrant Workers Convention.

The CCPR and the CESCR both interestingly duplicate the gender issue. They first prohibit any discrimination based on 'sex' and then additionally oblige the state parties to ensure the equal right 'of men and women' to the enjoyment of all rights set forth in each instrument.[101] Nowak reports regarding CCPR that the additional obligation laid down in Article 3 was already viewed by some delegates as redundant in the drafting phase.[102] The HRC has however shown the groundlessness of any fears of redundancy by adopting as many as two General Comments on this particular provision. The first one, General Comment No. 4, was adopted in 1981 and highlighted in fairly general terms concerns over the fact that a considerable number of State reports had dealt insufficiently with Article 3, regarding measures of protection as well as affirmative action designed to ensure the positive enjoyment of rights.[103]

The second one, General Comment No. 28 from the year 2000, is much more detailed and indeed provides a gender-sensitive reading of most Covenant rights.[104] In this document, the HRC identifies a parcel of factors hindering the equal enjoyment by women of the rights under the CCPR. Abortion of female foetuses, female infanticide, the burning of widows and dowry killings, rape and abduction in times of armed conflicts, domestic violence, genital mutilation, forced abortion, forced sterilisation, forced prostitution, slavery disguised as domestic service, regulation of clothing to be worn in public and confinement within the house are but a few of the examples given. The document also spells out the type of information that the HRC requires with regard to the enlisted rights violations. It persuasively illustrates that equality of rights between men and women is not to be taken as granted in any part of the world.

On the other hand, General Comment 28 is lopsided in its emphasis on women and girls. It is axiomatic that not only women of contemporary societies are being treated as objects and thereby prevented from functioning as human beings to their full potential. Consider the prevalence of ritual practices such as male circumcision, castration, infibulation, or incision. Men are also constantly objectified by gendered stereotypes that dehumanise them as greedy, dominating, oppressive, aggressive, insensitive, unemotional creatures for whom nothing is more 'natural' than to become destructive machines of war. Seen from this viewpoint, the attention of state parties could also be drawn to their responsibility to restrict the publication and dissemination of material that inculcate violence and war, in the same manner as the General Comment calls them to restrict the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of

[101] See Articles 2 and 3 of both instruments respectively.
[102] Nowak 2005, p. 78.
[103] CCPR General Comment No. 4.
[104] CCPR General Comment No. 28.

violence or degrading or inhuman treatment. Moreover, state parties could be obliged to eradicate laws and practices that jeopardise the freedom of all men and boys to develop their full capacity in service of peace and reconstruction instead of war and destruction.[105]

The process of awareness-raising is often slow and it may take another 20 years for a third General Comment focusing of the equal rights of men to a life free from stereotyped images of masculinity. At any rate, General Comment 28 attacks plausibly laws and practices that by denying women's full and equal enjoyment of the human rights protected under the CCPR impair the full effect of its Article 3. It also seems indisputable that the gender provisions of the twin Covenants of 1966 open no door for efforts to undo progress in the realisation of human rights as may do the gender-enforcing provision of the CDE reviewed above. Whenever the monitoring bodies of these instruments deal with Article 3 of either of them, the initiative has come from individuals who consider that they have been discriminated against on the basis of their sex or gender. Thus, these gender-specific provisions as such are not creating any artificial category of 'womanhood'. Quite the contrary, they expressly stipulate that both sexes shall have equal protection of the law. The obligation to ensure equal rights obviously refers to non-discrimination, but not necessarily to mere formal equality: differences may also be taken into account.

As far as the effect of more recent UN law on the gendered categories in education is concerned, there are three legally binding instruments worthy of note. First, ILO Convention No. 168 (1988) stipulates in Article 8 that member states shall endeavour, *inter alia*, to encourage freely chosen and productive employment for "identified categories of disadvantaged persons" having or liable to have difficulties in finding lasting employment. It gives guidance in the identification of such categories by explicitly naming women, along with categories of "young workers, disabled persons, older workers, the long-term unemployed, migrant workers lawfully resident in the country and workers affected by structural change". Second, the UNESCO Vocational Convention considers the need to make a special effort to promote the technical and vocational education of women and girls, even if only in its preamble. Last but not least, the CEDAW strongly drives the mainstreaming of the women's perspective into the totality of the UN human rights regime.

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[105] An example of genderism against men worth investigation might indeed be the state of affairs where men due to their sex are trained to be killers or the ones to be killed, whatever the case may be. In any part of the world it is still mostly men that are conscripted into legalised military training of nation states—or into private armies, for that matter. It is men that are required to perform at least alternative service, refusal from which is punishable with imprisonment, whilst women are largely free to refuse to render military service, apart from some exceptional countries. Although closely interlocking with educational rights, this topic falls beyond the scope of the present study.

Indeed, the CEDAW does not target discrimination against gendered biases on the whole, but only discrimination against women. Article 10 on the right to education is thoroughly characterised by the principle of equal protection, attempting to address the subordination of women and girls. Its emphasis is thus on the requirement of equal treatment of women and girls who are considered as being significantly different in their level of educational advantage as compared to men. It is obvious that Article 10 covers not only formal but also substantive equality, taking into account that Article 1 forbids any measures that have a discriminatory *effect or purpose* on the female sex.[106] Less obvious is to what degree the CEDAW rationalises status-enforcing relations that anti-essentialists rather would like to disrupt. For instance, the call in Article 10(h) for women's access to educational information to help to ensure the health and well-being of families can be seen as reinforcing the classic dichotomy of men's work in the public sphere versus women's duties in the private sphere of care-taking of the family.[107] The strengthening of bipolar universes between the two sexes may thus take place as an undesirable concomitant of women's liberation, even if the main aim would be to strengthen the right of individuals to be judged on the merits of their own.

The idea of the educationally privileged males and disadvantaged females is noticeable throughout the CEDAW and its interpretative documents. Governments are called to take appropriate measures to eliminate illiteracy amongst girls and women, and also to identify and address the causes of absenteeism and high drop-out rates of girls in the educational system.[108] As far as statistical data production is concerned, the Committee on the Elimination of Discrimination against Women has expressly urged state parties to make every effort to ensure that their national statistical services disaggregate data according to gender "so that interested users can easily obtain information on the situation of women in the particular sector in which they are interested".[109] However, the integration of gender perspectives into educational rights is certainly not for one-sided monitoring of the situation of women, but rather for the identification and elimination of all gender stereotyping in education: provision of sex-disaggregated data is by no means an end in itself.

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[106] Emphasis added here.

[107] Likewise, the CEDAW General Recommendation touching this provision seems to take for granted that women bear the main responsibility of raising children, and because of that shall have guaranteed access to sex education and family planning services. See CEDAW General Recommendation No. 21, paras. 21, 22. Yet, sharing parental responsibility more equally between the two sexes requires that boys are not left behind girls in sex education and related subjects. For the same reason, it sounds incoherent to associate education aiming at the improvement of health status, decline of premature pregnancies, etc exclusively with women.

[108] CEDAW Articles 10(e) and 10(f).

[109] CEDAW General Recom. No. 9. For the development of gender statistics, see, for instance, the Handbook for Producing National Statistical Reports on Women and Men 1997, published by the UN Statistics Division. On the fundamentals of Gender Statistics, *see also* Hedman Perucci & Sundström 1996. For a comprehensive compilation of international statistics on gender, see the United Nations Women's Indicators and Statistics Database, Wistat.

Last, there are two UN instruments where the notion of gender is conspicuous by its absence, namely the Refugees Convention and the Stateless Persons Convention. One could argue that gender issues do not require specific categorisation, for the reason that it can be dealt within the existing Convention categories.[110] The notion of a particular social group indeed enables at least the recognition of sex as part of the nexus clause of the Refugees Convention. Some writers on refugee law advocate an approach according to which this instrument would discriminate against women by making use of the male focus of the definition point.

Seen from the viewpoint of the present study, that is not the most pertinent approach.[111] The crux of the matter is rather that the list of 'Convention reasons' caters only for violations of civil and political rights, disregarding refugeeism based on sustained or systemic violation of economic, social and cultural rights, inclusive of the right to education. Nonetheless, the preambles of these Conventions do not restrict themselves to civil and political rights when stating that 'human beings shall enjoy fundamental rights and freedoms without discrimination.'

Thus, even though sex or gender is not listed among the prohibited grounds for discrimination at this point, it is beyond dispute that official categorisations in education at the domestic level should enable availability of gender-disaggregated information on the educational situation of refugees and stateless persons under the state's jurisdiction.

b. *European Standards*

Broadly speaking, the construction of gender in the European human rights regime seems to have taken place in three distinct discourses. The first, most traditional one is premised on non-discrimination on the grounds of sex, as recognised in Article 14 of the ECHR, Article E of the revised ESC, Article 1 of Protocol No. 12 of the ECHR, Article 12 of the TEC, and Article 21 of the CFREU. In particular the ECHR is in its body text fairly economical as far as gender as a construction is concerned: men and women are mentioned as separate categories solely in Article 12 stipulating on the right to marry and to found a family. The fact that the ECHR expressly mentions neither 'equality' nor 'gender equality' but merely 'non-discrimination,' might

[110] The non-discrimination clauses of these conventions forbid discrimination regarding race, religion or country of origin. The categories of persons to which the Refugees Convention shall apply are race, religion, nationality, membership of a particular social group or political opinion.

[111] Some experts on this issue are in favour of the introduction of sex or gender as a separate category, due to the fact that human rights abuses in the situations where refugeeism and statelessness emerge often are gender-determined. The particular vulnerability of female refugees to human trafficking and sex slavery are commonly mentioned as examples. Others fear that such a clause would risk reducing female experience of persecution to the sex/gender aspect. On gendered refugeeism, see, for instance, Refugee Watch, July 2000, No. 10 & 11, <www.safhr.org/refugee_watch10&11.htm>. For a terse introduction, *see also* Markard (undated).

indicate insufficiency to guaranteeing substantive equality between the two sexes. Nonetheless, the Court has repeatedly mentioned the advancement of the equality of the sexes as a major goal of the member states of the Council of Europe and consistently extended the importance of this principle by its case law.[112]

The second set of gender norms in the European human rights regimes consists of provisions that aim to protect or promote equality between men and women in particular areas. The ESC, for example, stipulates on the right to equal opportunities and equal treatment for men and women in matters of employment and occupation.[113] However, it is first and foremost the European Community law that has most diligently substantiated the equality of men and women. Reference has already been made to the Gender Directive of 1976. Ever since, the European Community has adopted more than a dozen Directives on the implementation of the principle of equal treatment for men and women in a multitude of areas such as equal pay, equal conditions with respect to access to employment, vocational training and retirement, and equal treatment in the area of social security systems.[114]

Yet, provisions against genderism in education being the case in point, it is noteworthy that there are no special legally binding instruments to protect and promote equality of males and females exclusively in this area. Sure enough, the Council of Europe has adopted resolutions and initiated activities for educational equality almost every year since 1946.[115] Also, the ESC obliges state parties to ensure equality of opportunity and treatment, *inter alia*, in the field of vocational training and retraining, but does not cover the educational sphere in its entirety.[116]

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[112] In the case of *Abdulaziz et al.* v. *the UK*, the Court referred explicitly to the formula of a 'very weighty reason' as indicating strict scrutiny on differentiation based on sex.

[113] ESC Articles, 20 and 27.

[114] The Commission of the European Communities has in April 2004 given a proposal for a Directive that would simplify, modernise and improve the Community law in this area by putting together in a single text the provision of many separate Directives. See Proposal for a directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. COM(2004) 279 final, 2004/0084 (COD).

[115] For early inputs, see, e.g., resolutions of the General Assembly in 1949 (Resolutions B, C, and D, A/923, Annex II), 1952 (A/C.4/L.173), and 1957 (A/C.4/L.459). A soft-law document of the European Community worth special mention in the present context is the Commission communication (1985) on 'Equal Opportunities for Women—Medium-Term Community Programme 1986 to 1990', which included education and training as one of the seven fields of action defined therein. Also noteworthy is Commission Recommendation (1987) on Vocational Training for Women (87/567/EEC), a document from which it is clear that its drafters indeed know what lies behind the phenomenon of gender-segregated vocational education.

[116] ESC Articles 20(2)(b) and 27(1)(a). The TEC also contains provisions that can become applicable specifically in some sub-sectors of education. Article 137 stipulates on community support for activities in the member states in equality between men and women with regard to labour market opportunities, which can be widely interpreted as covering even preparatory education. Article 141 TEC allowing special measures to make it easier for underrepresented sex to pursue a vocational activity can be applied by the same token.

The absence of specific equality instruments for the education sector naturally does not mean that general equality provisions do not apply. Quite the contrary, the commitment to eliminate inequalities and to promote equality between men and women has been given weight consistently; in some instruments even recurrently. This is the case with the TEC, where the commitment to the promotion of equality between men and women is articulated both in Article 2 and in Article 3. The principle of gender mainstreaming is also expressly mentioned in connection with the reporting obligations of the member states to the Employment Directive and the Racial Equality Directive. Accordingly, an assessment shall be provided of the impact of the measures taken on women and men by virtue of these Directives.[117] What is more, gender equality as such is defined by more than just a few judgments of the ECJ.[118] All in all, the EU instruments guarantee gender equality in much more advanced terms than those of the Council of Europe. Concurrently, they put pressure on the member states to provide gender-disaggregated data over a wide range of societal issues.

The third set of European legal provisions that tackle gender as a construction is characterised by an approach to equality and non-discrimination in wider terms than the traditional male-female dichotomy. This repositioning has expressly taken place within the framework of European Community law, whilst the ECHR case-law has served to maintain the binary gender divide.[119] The reformist stance of the EU legislature finds its source in the fact that sexual orientation is included in several of its recent anti-discrimination provisions.[120] In most of the present day discourse, the notion of sexual orientation refers merely to the question of which sex one finds erotically attractive, whereby only variations of gay, lesbian and bisexual are acknowledged in addition to the prevailing heterosexuality.

The notion of sexual orientation is thus narrower than the notion of gender identity as defined, for instance, by queer theorists. Nonetheless, its usage in the EC law indicates an attempt to move away from the dichotomous and essentialising binary of male/female and towards openness in the expression of gender identities. That is, the EU law of today acknowledges that the

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[117] Employment Directive (2000/78/EC) Article 19(2); Racial Equality Directive (2000/43/EC) Article 17(2).

[118] It is noteworthy that many ECJ cases and preliminary rulings expressly affirm that Community law on gender equality protects equal rights of men too, as contrasted with the unmitigated CEDAW focus on women's rights. Illustrative cases are C 306/99 of *Joseph Griesmar* (29 November 2001) and C 206/00 of *Henri Mouflin* (13 December 2001).

[119] Several claims under the ECHR have concerned the question of whether there exists a positive obligation to recognise for legal purposes the new gender identities of persons that have undergone sex reassignment surgery, but generally the Court has not found violations of Convention rights. See *Rees* v. *the UK* (1986), *Cossey* v. *the UK* (1990), *B* v. *France* (25.3.1992), *Stubbings and Others* v. *the UK* (1996), *X, Y and Z* v. *the UK* (1997), *Sheffield and Horsham* v. *the UK* (1998).

[120] TEC, Article 13; CFREU, Article 21; Employment Directive repeatedly in the preamble and Articles 1 and 2(2)(b).

male/female dichotomy is not the one and only way to see sexuality and gender. This may well signal the impending breakthrough of recognition of transgender identities, which again may affect rights and responsibilities even in the field of education, but thus far international law does not contain any right to be classified as something other than as a man or a woman.[121]

Another gender-related law reform of the European Community relates to what was earlier said about the 'unisex' nature of UN instruments on refugees and stateless persons. The recent European directives on refugees and asylum are more gender-sensitive by calling attention to the situation of pregnant women, persons who have been subjected to sexual violence etc. Member states are also called upon for the production of data on refugees and asylum seekers broken down by sex and age.[122] In the long run, provisions like this may have their effect also in categorisations in education. At least, verbal extensions from sex to sexual orientation and from gender to gender identity imply that research on genderism can by showing the importance of new vocabulary also serve research on other '-isms.'

4.4.3. *Main Concerns from the Viewpoint of Systemic Discrimination*

The international instruments that have the most gendered view of the law are the CDE, the CEDAW and the EU Gender Directive of 1976. The option acknowledged in the CDE to divide education into male and female categories was impugned above, whereas the gender divide of the two other instruments indubitably has as its purpose the promotion of progress towards true equality between men and women. The idea of the privileged male and disadvantaged female is strong both in the CEDAW and the Gender Directive, but that again results directly from the factual situations they aim to remedy. The effect these instruments have on the creation and maintenance of gendered categorisation in public education is thus well justified.

UN Conventions on refugee and stateless persons proved to be instruments that most noticeably compromise gender roles. If indeed the dominant interpretation of these instruments is such that women's claims are less likely to succeed than men's claims, and if women therefore are more prone to second-class protection under refugee law, this will inevitably make a biased impact on the recognition of their educational rights. What is needed first is, therefore, recognition of difference. Gender as a focus of analysis may well be exhausted for some women, whilst data and comparisons still are lacking with

[121] In fact, there exist already international standards that acknowledge several categories for the representation of human sexes; for instance, the ISO 5218 standard uses four different categories of 'male', 'female', 'not known' and 'not specified.' However, this standard specifically disclaims its use in the contexts of hermaphrodity or transsexuality: it only applies to foetuses for whom an unambiguous assignment of male or female cannot be made.

[122] Directive 2003/9/EC, Articles 17 and 22.

regard to equality in education in some other sub-categories such as refugees and asylum-seekers. At the same time, the diversity among women is a theme that is being increasingly brought to the forum. The issue of gender statistics is no longer simply about differences between men and women, if it ever was, but has to take on board differences among both of these categories. The data production regarding educational needs and achievements should neither overplay nor underplay the differences between men and women.

4.5. *Recognition of Ethnicity*

4.5.1. *Ethnism Defined*

The notion of ethnism refers here to the classification of people into groups on grounds of their ethnicity, coupled with an unequal treatment because of such group affiliation.[123] Ethnicity as such has been acknowledged as a notoriously difficult concept time and again. Its usability very much depends on within which discipline it is applied. In the natural sciences, an ethnic group may be defined as a group of people that consistently practice endogamy, i.e. members of the group choose their partners for reproduction within the group that as a result becomes genetically self-perpetuating. In social sciences 'ethnie' alike with 'race' has been questioned over the years due to the fact that the very idea of dividing the humankind either into biologically distinct races or into clearly perceived ethnic groups has been considered as unscientific.[124]

Criticism of the primordial concept of ethnicity has however not dispensed with research on it. One of the reasons to examine ethnicity is its persistence as a social construction based on social relationships even if its basis on genetic differences is rejected. James Goldston expresses the need for this kind of research in the following words: "Even if race and ethnicity are socially and historically constructed, they are living concepts which continue to affect (and distort) the distribution of resources and power in many contemporary societies."[125] To stop questioning about ethnicity indeed does not make it disappear as a social construct, even if it can sometimes be difficult for the questioners to define what they are asking.[126]

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[123] Note that ethnism is here to be distinguished from 'ethnicism' which, according to a number of dictionaries, is a synonymous to heathenism, paganism, or idolatry.

[124] See, for example, Barth 1969, Hall 1992, Fredman 2001.

[125] Goldston 1998, p. 40.

[126] Theodore W. Allen (1999) gives an illustrative example of how difficult it is to find a customary meaning of the notion of ethnicity. The topic was discussed in the Joint Canada-United States Conference on the Measurement of Ethnicity, Ottawa, Canada, in April 1992. The printed proceedings "*Challenges of Measuring an Ethnic World: Science, Politics and Reality*" took up 576 pages, in which the Conference was forced to conclude that "participants reached a consensus that there was no universally acceptable definition of ethnicity."

At the same time there is a risk that purportedly 'ethnic' labels may hide differences that have nothing to do with ethnicity, in common with what was said about the notion of gender in the previous sub-chapter. Essentialism also brings with it the risk of segregation: the dominant group of the society may willingly recognise the so-called ethnic attributes—indeed even applaud them—but only on the periphery, or in their own 'separate sphere'. Requirements on identification and categorisation of 'ethnic' groups may thus result in institutionalising ethnicity rather than challenging the negative sides of its social construction.

Human rights researchers in particular should reckon with the fact that ethnic categorisation may cut both ways. It may contain divisive subtexts, but it may also yield important information for the struggle against discrimination. Those opposed to data collection on an ethnic basis are justly mistrustful as such data has been used for grave and massive human rights violations, and nothing has proven incontrovertibly that the humankind has grown any wiser in this respect. Those advocating a break-down of official data by ethnicity argue, for their part, that governmental efforts to combat discrimination should be based on reliable statistical data and other quantitative information reflecting as correctly as possible the situation of different ethnic groups in society. The two aspects of the dilemma are both accurate and must be taken equally into account.

What the human rights-accountable legislature ultimately must reach in this issue is a rational balance between integrity and publicity; that is, between the right to privacy and the right to information. The individual rights approach adopted in the present study suggests that whenever these two rights collide with each other, priority should be given to the subjective, interpretative, dimension of ethnic classification. That is, in any case, the right of an individual to identify her/himself as a member of a group or alternatively to maintain difference from the group shall be respected. It is in reverse situations that ethnism most probably takes place. With this prologue we proceed to examine the social and legal construction of ethnicity as it appears in the human rights regimes of the UN and the European institutions.

4.5.2. *International Standards against Ethnism in Education*

a. *United Nations Provisions on Ethnicity and Record Keeping*

Much, if not all, of international human rights law that calls for defining the boundary between different 'races' or 'colours' or 'ethnic origins' does this in the name of non-discrimination. The pre-eminent instrument in this respect is the CERD and particularly Article 9, which obliges the state parties to submit, at regular intervals, reports on measures which they have undertaken to eliminate all forms of racial discrimination. The CERD Committee has on several occasions striven to give instruction regarding the information that

this article calls for. As the main motivation for the description of the ethnic characteristics of the country, it has frequently proposed that progress in eliminating discrimination calls for indication of the number of persons who could be treated less favourably on the basis of race or ethnicity.[127]

Unsurprisingly, the CERD Committee has faced several difficulties in its monitoring work. Examples of such are given as being, amongst others, the unwillingness of the member states to draw attention to factors like race lest this reinforce divisions they wish to overcome, and recognition of the presence on their territory of some national or ethnic groups or indigenous peoples while disregarding others. The Committee has clearly drawn to the attention of state parties that application of different criteria that lead to the recognition of some groups and the refusal to recognise others shall not be permitted to violate the generally recognised norms concerning equal rights for all and non-discrimination.[128] Thus, privileging some ethnic groups by making them visible and leaving others invisible is as such against international human rights law.

Yet, when the complexity of notions of race and ethnicity are taken into account, it is far from simple to say what kind of criteria the member states should apply in the data production on these grounds. Insofar that race and colour are considered to be imprecise and unscientific, how can they on the whole be used as basis for valid and reliable data disaggregation?[129] On the basis of Article 1 of the CERD, the related grounds of differentiation of race, colour, descent and national or ethnic origin should all be taken together to belong to the general category of 'race.' The CERD does not prohibit as 'racial discrimination' distinctions based on nationality,[130] whilst the non-discrimination clause of the CCPR contains no similar exception. Even when the question of overlaps between national origin and nationality are left aside, it is quite obvious that statistics about 'race, colour and ethnic origin' cannot be anything else but inherently inaccurate. On the other hand, mere administrative inconvenience caused by the fact that boundaries between different categories are not clear has not been considered to justify withdrawal from data collection.[131]

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[127] See, for instance, '"General Guidelines Regarding the Form and Content of Reports to be Submitted by States Parties under Article 9, Para. 1, of the Convention" (1980), para. 8.

[128] CERD Gen. Rec. 24, paras. 2 and 3.

[129] According to Nowak 2005, p. 49 it was already suggested in the drafting phase of the CCPR that the words 'race' and 'colour' should be replaced with the term 'ethnic origin', but the motion was defeated, since race and colour were considered as more easily understood in their general usage. Still today, 'race' and 'colour' figure repeatedly in the non-discrimination clauses of the UN instruments, whereas 'ethnic origin' is used much more seldom. See Table 3 in the appendix.

[130] See Article 1(2) of the CERD.

[131] *Cf.* the case of *Ibrahima Gueye* where the HRC expressed as its opinion that administrative inconvenience cannot be invoked to justify unequal treatment on the basis of nationality. *Gueye et al.* v. *France*, para. 9.

In addition to the desire for scientific consistency and anti-essentialism, there is one more argument that governments reluctant to collect ethnic data may plead, namely the argument based on privacy rules. That argument is indeed legally stronger than any of the two formerly mentioned ones. In the UN regime, the right to privacy is most clearly guaranteed in Article 17 of the CCPR, which explicitly provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy…" Moreover, the provision stipulates that everyone has the right to the protection of the law against such interference.

The CRC reiterates in its Article 16 the privacy provision of the CCPR word for word. A noteworthy fact is that both of these instruments expressly mention 'the right to the protection of the law' against any attacks that may arbitrarily or unlawfully violate the privacy rule. In contrast, interference that is based on law is not prohibited. Thus, the privacy rule laid down in these instruments is not illimitable: they are not as such to be interpreted so as to hinder the collection of race- or ethnic-coded statistics.[132]

Taken together, the legal framework endorsed by UN human rights law and its monitoring bodies does call for the collection for ethnic data but simultaneously obliges state parties to guarantee by law that such public data are not misused. There are two minimum requirements that both legal and soft-law instruments concerned with this issue indisputably suggest. One is that no information about persons should be collected, processed or used for ends contrary to human rights.[133] The other is that the collection of ethnic data is acceptable insofar as the identification of ethnic origins is made on the basis of a voluntary declaration. The CERD Committee has expressed this requirement clearly in its General Recommendation VIII by stating as its opinion that the identification of individuals as being members of a particular racial or ethnic groups shall "if no justification exists to the contrary, be based upon self-identification by the individual concerned".[134]

Seen from another angle, the existing UN law does not stipulate an all-embracing collection of ethnic data; a fact that may be considered as an unfortunate imperfection of international human rights law by those non-discrimination advocates who believe that measurable ethnic data on education-attendance rates is the key to more egalitarian education. The foremost provisions on the right to information are Article 19 of the CCPR and the similar Article 13 of the CRC, the last mentioned applicable just to individuals below the age of 18.

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[132] The HRC expressly puts forward that the term "unlawful" in Article 17 of the CCPR means that no interference can take place except in cases envisaged by law. See CCPR General Comment No. 16, para. 3.

[133] This can be considered as the essence of Article 17 CCPR and Article 16 of the CRC. For more detailed soft-law provisions on the subject matter, see, for instance, the UN Guidelines Concerning Computerized Personal Data Files (1990).

[134] CERD Gen. Rec. No. 8.

Substantively both of these articles provide the right to freedom of expression, which shall, *inter alia*, include "freedom to seek, receive and impart information and ideas of all kinds". Nowak has in his commentary on the CCPR estimated that the right to seek information in any event relates to all generally accessible information.[135] Inasmuch as the ethnic composition of the state population is at issue, neither Article 19 CCPR nor Article 13 CRC by themselves impose an obligation on state agencies to make such information generally available.

It might be reasonable to assume that the CERD Committee, if anybody, should have open access to information on race, ethnicity or any related characteristics of the populations present within the territories of the states. Nonetheless, in its General Recommendation XXIV concerning article 1 of the CERD, the Committee softens its requests on information by stipulating that state parties shall provide the Committee with information 'as far as possible', 'as appropriate', etc. States which do not collect information on information on these characteristics are even given an opt-out to provide, as a substitute, information on mother tongues as indicative of ethnic differences.[136] The monitoring body of the CERD is thus notably flexible in its requests for information on race, colour, descent or national or ethnic origin.[137]

Additional provisions that could be used to put pressure on state parties to provide ethnic data are Articles 26 and 27 of the CCPR. In the first case, the guarantee of the law to all persons for effective protection against discrimination could be argued as remaining a mere fiction if the government, the legislature and civil society are not informed about the demographic composition of the state population. In the second case, the terms used in Article 27 might indicate that the person designed to be protected shall also be actively included in the public record-keeping of the state party. However, none of these provisions have thus far been interpreted as including any categorical state obligation to collect ethnically disaggregated data regarding its population. This is rational for the very reason that a self-proclaimed call for attention to ethnicity could not otherwise take precedence over attributed fixing. In this light, it seems reasonable that the universal human rights provisions on ethnic data collection are fairly cautiously formulated.

b. *European Provisions on Ethnicity and Record Keeping*

Ethnicity is at least as highly undetermined a ground for data disaggregation in Europe as it is in the universal human rights law. Regarding the Council of Europe instruments, the ECHR and its Protocol No. 12 both enlist race and colour as prohibited grounds for discrimination, whilst avoiding the notion

[135] Nowak 2005, p. 446.

[136] See the CERD 'General Guidelines Regarding the Form and Content of Reports to be Submitted by States Parties under Article 9, Para. 1', para. 8.

[137] CERD Gen. Rec. No. 25, paras. 1, 4.

of ethnicity. The same goes for the non-discrimination clause of the ESC. On the other hand, European legal literature has widely argued for race as a suspect ground of differentiation requiring strict scrutiny, even if the chorus is not totally in unison: for instance van Dijk and van Hoof do not mention race among sensitive grounds of differentiation.[138]

It is reasonable to assume that ethnicity is considered to be included in the notions of race and colour, but this assumption has not been severely tested in practice. This is due to the fact that the European Court of Human Rights has usually circumvented dealing with claims of discrimination on the grounds of race or ethnicity, whichever has been invoked. Most claims of such discrimination have simply not reached the level of objective justification scrutiny.[139] At any rate, in *Cyprus* v. *Turkey*, the Court expressly endorsed that a special importance should be attached to discrimination based on race.[140] Nonetheless, the Court held that there had been no violation concerning complaints raised under Article 14 as such. It did not find it necessary to examine whether in this case there had been a violation of Article 14 taken in conjunction with other articles of the ECHR.

Among other European instruments, it is the FCNM, in particular, that has been criticised for providing means for simple reactionary essentialisation, as it allows a categorical distinction between 'new' versus 'old' minorities and also enables public record-keeping that accompany this distinction. According to Perry Keller, this instrument as such is a manifestation of the acceptance of a caste system of rights in which national minorities are privileged at the expense of immigrant minorities, even if the weaknesses of such a distinction are apparent in the light of universal human rights law as well as in the light of any intellectual thinking.[141] In any case, the guidelines given to the state parties on how to present the information to be submitted in their regular reports on the implementation of the FCNM call for *factual* information, not for random figures on isolated cases.[142]

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[138] *See* Arnardóttir 2003, p. 146 with references; van Dijk & van Hoof 1998, pp. 728–729.

[139] On ECHR cases that have lacked proof of *prima facie* racial discrimination, see Arnardóttir 2003, footnote 668.

[140] *Cyprus* v. *Turkey* para. 306.

[141] Keller 1998, p. 45 *et seq*. Fottrell & Bowring (1999:xiv) describe as a significant step backwards the fact that many members states of the FCNM in their interpretative declarations expressly exclude from its protection some minorities, even thought according to them the very reasons for failing to include a definition of 'national minority' within the Convention was the desire by its drafters and proponents not to exclude from its protection any person within the jurisdiction of a state party.

[142] The state parties are expected to report regularly on the implementation of the FCNM. The guidelines given to the state parties on how to present the information to be submitted in their reports acknowledge the relevance of statistical information and quantitative data. One of the five different categories where specific article-by-article information should be presented presumes that "under this category factual information enabling an evaluation of the effectiveness in practice of the measures taken to implement the FCNM should be provided, such as statistics and results of surveys. It is understood that, where complete statistics are not

A provision under which statistical information is expressly requested is Article 3, acknowledging the freedom of choice to be treated or not to be treated as member of a national minority. Here information is requested about the numbers and places of settlement of persons to whom the FCNM is applied, as well as information about how these data were collected. Furthermore, the state parties are asked to give information on any linguistic or ethnic groups, whether they consist of citizens or of non-citizens living in the country which are not considered a national minority.

The European Commission against Racism and Intolerance (ECRI), operating under the auspices of the Council of Europe, has tackled the topic of ethic record-keeping in its recommendation on a large scale. In its General Policy Recommendation No. 1 it notes that it is difficult to develop and effectively implement policies without good data, and therefore recommends governments to collect "in accordance with European laws, where and when appropriate, data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, anti-Semitism and intolerance". The importance of good population statistics including information about ethnic origin, among other variables, is expressly mentioned in ECRI Recommendation No. 4 (1998). Wordings used are however so vague that there is not much to take home, even if the vitality of statistical data on the situation of ethnic groups as such is acknowledged.[143]

As to the question whether European provisions on the right to information as such put pressure on the state parties to provide public data on the ethnic composition of its population, Article 10 of the ECHR is similar to Article 19 of the CCPR insofar that it does conceive of freedom of expression as including both freedom of opinion and freedom to receive and impart information and ideas.[144] On this point, the European Court of Human Rights has in its jurisprudence kept to an interpretation that Article 10 guarantees no right to information but simply prohibits governments from interfering with "information that others wish or may be willing to impart".[145]

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available, governments may supply data or estimates based on *ad hoc* studies, specialised or sample surveys, or other scientifically valid methods, whenever they consider the information so collected to be useful." See "Outline for State reports to be submitted pursuant to Article 25, para. 1, of the Framework Convention for the Protection of National Minorities", in the Framework Convention for the Protection of National Minorities, Collected texts, 2nd edition, Council of Europe 2001, pp. 49–68. For recent state practices concerning collection of demographic data under the FCNM, see Heintze 2005, pp. 126–130.

[143] ECRI General Policy Recommendation No. 1 (1996); ECRI Recommendation No. 4 (1998). On the topic of ethnic data collection and the Council of Europe activities in general, see Gachet 2001.

[144] Article 10 ECHR reads: "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."

[145] *Leander* v. *Sweden*, para. 74, and *Gaskin* v. *the UK*, though the Court was careful to tie the proposition to the facts of the particular case.

Furthermore, privacy rules that the European law calls its members states to respect are at least as stringent as their UN counterparts. Thus, data disaggregation based of ethnicity is not left totally to the discretion of the member states of the Council of Europe, even if a high degree of deference is granted to the domestic authorities in balancing between publicity and privacy.[146]

Finally, European Community law is worthy of note in the context of the legal construction of ethnicity for a specific reason; namely the possibility to use race- and ethnic-coded statistics as tools in the combat of discrimination. The Racial Equality Directive not only prohibits indirect discrimination, but it also expressly authorises the use of statistical evidence to prove it.[147] However, the statement that statistical evidence is permissible does not as such justify a claim that a government failure to provide demographic information broken down by ethnicity would violate its international obligations.

4.5.3. *Ethnic Data Cutting Both Ways*

What should be indisputable is that any government recognising the rule of law shall promote tools that guarantee for everybody equal protection of the law, and for that purpose insure accurate and proper identification of diverse right-holders under its jurisdiction. However, provisions that call the governments to show proactive concern in collecting ethnic-coded information seem to be formulated with care. Even if ethnic statistics are acknowledged as an essential element in the monitoring work against discrimination, concerns about their potential use in counterproductive ways must constantly be kept in

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[146] The core of the European privacy rules are codified in the following documents: the OECD Guidelines on the Protection of Privacy and Trans-Border Flows of Personal Data (1980, reaffirmed in 1998); the Council of Europe's Convention 108 for the Protection of Individuals with Regard to Automatic Processing of Personal Data (1981); Recommendation No. R (97) 18 of the Committee of Ministers Concerning the Protection of Personal Data Collected and Processed for Statistical Purposes (1997); the EU Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data (1995).

[147] Racial Equality Directive (2000/43/EC), Article 15. It should be noted that the European Community law has already been using statistical evidence in its case law already since the 1980s, even if only as evidence for alleged violations against equality between men and women. In the famous *Bilka-Kaufhaus* case (1986) the ECJ introduced a formula of evidence that it has applied ever since in cases concerning indirect sex discrimination. The formula means that if the plaintiff, using statistical material, can show that considerably more women than men are unfairly treated by an apparently sexually neutral regulation, a presumption of indirect discrimination arises. The plaintiff is thus required to prove that considerably more women than men are unfairly treated by an apparently neutral regulation. Several subsequent ECJ cases have contained specific requirements regarding the nature of the statistical material. According to the pronouncement of the Court in the *Enderby* case (1993), statistics shall cover so many people that they do not merely reflect fortuitous or short-term phenomena and that they shall be generally significant. In the *Royal Copenhagen* case (1995) the Court laid down that in the two sexual groups that are to be compared, all the people who are in comparable situation must be included and the groups must consist of a sufficiently large number of employees to guarantee that the wage differentials are not due to casual phenomena.

mind. Data revealing racial origin is commonly defined as a special category of personal data that may not be processed automatically unless domestic law provides appropriate safeguards. On the other hand, international law does not prohibit collection of anonymous statistical information that is not linked to an identified or identifiable natural person.

What international human rights law does make clear is that ethnic categorisations shall not be based upon government-imposed identity. It is axiomatic that on some occasions ethnicity may be an elective, pleasant form of identity, whereas in others it may well be an imposed and stigmatising one. It is due to the unsteady nature of the concept itself that the international human rights standards so strongly underline the priority of the right to self-identification. Violation of this right can be justified neither by difficulties in collecting voluntary data nor by the fact that such statistics may be distorted by identification and/or perception bias.

4.6. *Mis-Recognition and Non-Recognition as Human Rights Concerns*

All in all, any attempt to take literally the claims that all educational statistics should be disaggregated by all internationally prohibited grounds of discrimination sounds a futile enterprise, when simultaneous attention shall be given to diverse possible intersections and combinations between all these grounds.[148]

The intellectual challenges introduced both by anti-essentialist scholars and by human rights advocates are valuable in so far as they show that educational categories are not self-explanatory and unchangeable. However, neither a far-reaching anti-essentialist 'hit and run' approach nor a 'keep an eye on everything' talk gives tools for governments at the domestic level that must tackle the question of data disaggregation in a sensible way. It is understandable that categories based on distinctly bounded pairs are the rule rather than the exception in educational statistics, even if none of the non-discrimination grounds discussed in the present chapter ultimately are as dichotomous as the prevailing view may suggest. The question then becomes crucial as to which data may be missed and which not.

From the above, it emerged that the legislative developments as regards the ban on differential treatment and the categories developed to implement

[148] Katarina Tomaševski, for example, has called attention to the need to identify all categories and individuals deprived of the full enjoyment of the right to education, and to include in the educational statistics disaggregation by all internationally prohibited grounds of discrimination. See the Annual report of the Special Rapporteur on the right to education Katarina Tomaševski, E/CN.4/2002/60; para. 28. *See also* CESCR General Comment No. 13, para. 37. Futhermore, see Tomaševski 2003, p. 57, where she reiterates the difficulties to monitor progress and retrogression in education due to lack of comparable statistics.

the ban have not been identical in different human rights regimes. At the universal level, the normative circle defining those who shall 'belong' has been widened little by little.[149] As to the four '-isms' being considered in this chapter, it transpired that the CEDAW, by its very essence, calls for gendered data disaggregation in any sector of the society, inclusive of that of education. The CERD, facing the dilemma of reinforcing the very distinctions it strives to eliminate, is much more cautiously worded in its requests for disaggregated record-keeping on ethnicity, as are also its interpretative documents. The CRC, for its part, weighs in on the creation of a specific category of concern for individuals from their birth up to the age of 18. Indirectly, it also contributes to the construction of age-based educational subcategories by using the concept of 'primary' instead of a more age-neutral concept of 'basic' education.[150]

Among the four attributes examined, it is the classification of language that remains most untouched. None of the legally binding UN standards expressly reinforces national data collection to combat discrimination in education based on language, even though membership in any of the unrecognised language categories without doubt is strongly associated with educational marginalisation.[151]

In Europe, the trend has recently been towards increasing recognition of difference, in the respect that both the FCNM and the ECRML criticise the conception of linguistically homogeneous nation states. On the other hand, they at least tacitly leave space for the sidelining of non-nationals as a category of concern. Similarly in the EU regime, Article 13 of the TEC leaves open the question of its application to resident third country nationals. Moreover, the fact that Article 13 expressly names six grounds of prohibited discrimination, whilst leaving other grounds unnamed, will most likely have some effect on category construction in the member states, even if the official rhetoric says that the naming of some and the non-naming of other grounds does not aim to create hierarchies between them.[152] It does matter which categories are acknowledged as legal constructions and what kind of official data collection is thereby set in motion.[153] This goes also for Article 13 and for the directives flowing from it.

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[149] On the widening of normative circles in discrimination law, see Numhauser-Henning 2001, p. 20 with references.

[150] On the different connotations of primary and basic education, see above, Chapter 3.2.1.

[151] Biased language-categories in domestic record-keeping can be monitored case by case by, for instance, the HRC on the basis of Articles 26 and 27 of the CCPR.

[152] The six grounds mentioned in Article 13 of the TEC are sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.

[153] In the words of Leslie Bender (1993): "Naming controls how we group things together, which parts of things are noted and which are ignored, and the perspective from which we understand them. We also learn that 'things' that are named somehow count, and that things without names do not merit our attention."

The notion of multiple discrimination brings an additional challenge for data disaggregation in education. Among the many alternative combinations, the intersection of age and sex as grounds for discrimination has for long been acknowledged in employment, but it may well occur in the field of education as well. Furthermore, both of them may overlap for instance with ethnicity.[154] Due to the fact that the legally binding provisions were adopted just recently, legal cases giving recognition to claims on double or multiple discrimination are still rare. At any rate, the statutory acknowledgement of multiple discrimination in the EU directives challenges earlier court decisions that reject as 'super-remedy' the combination of statutory remedies for claims on several different grounds.[155]

Are there then any guidelines on which kinds of data disaggregations should be prioritised? This is the question that arises in the wake of what has been said above about the mutability of practically all identity attributes and about the intersection of different grounds of discrimination. In the European context, several commentators on the ECHR case-law have suggested that the development by the Court of 'strict scrutiny grounds' would indicate a hierarchy between grounds that call for heightened protection against discrimination as contrasted to those of more insignificant character. Analyses of the Court case-law vary somewhat, but most commonly they suggest that sex, birth (legitimate and illegitimate children) and nationality would have received a relatively high degree of judicial scrutiny in the Court case-law. Any other grounds of non-discrimination would in this respect be regarded as less significant and consequently also allow more random record-keeping.[156]

Similar speculation on the hierarchy of different non-discrimination grounds have been raised concerning Article 13 of the Amsterdam Treaty.[157] Nonetheless, it is reasonable to bear in mind that that the Commission, when proposing

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[154] On gendered ageism in employment, see how Meenan (1999) discusses the UK case law establishing that age limits in recruitment can amount to indirect sex discrimination. McColgan (2000a, p. 68) reports on women who have taken time out of employment to bring up children as being considered to be particularly unprotected in this respect. Regarding the intersection of genderism and ethnism, see how Essed (1991) develops the concept of 'gendered racism.' On gender and cultural differences, see Okin 1994.

[155] Note the case of *DeGraffenreid* v. *General Motors*, discussed by, amongst others, Kimberle Crenshaw (1993, p. 384), where five black women brought suit against their employer on the basis of multiple discrimination, and where the Court stated that the plaintiffs should not be allowed to combine statutory remedies to create a new "super-remedy."

[156] See Fredman 2002, p. 31; Arnardóttir 2003, p. 155. Van Dijk & van Hoof (1998, p. 728) put forward that the case law of ECHR defines even religion as a category requiring strict judicial scrutiny.

[157] Lisa Waddington for instance has argued that among the six grounds mentioned in Article 13 it would be protection against age discrimination that will be provided lowest level of protection. McGlynn (2001, p. 294) argues that the two directives flowing from Article 13 as such rank discrimination on the grounds of race and ethnic origin above other forms of discrimination. Fredman (2002, p. 70) also speculates on sprouting hierarchy of forms of discrimination in the EC law and suggest that race and ethnic origin would be given the widest reach, followed by gender discrimination.

the Employment Directive, argued that the forms of discrimination mentioned therein were not to be ranked in any way, this being particularly important for cases of multiple discrimination.[158] Indeed, hierarchy thinking in this context appears pretty narrow inasmuch as people's identities are multidimensional and different grounds more or less overlap with each other.

A substitute approach according to which attributes outside the gambit of an individual's control would demand higher attention from the public record-keepers than those chosen voluntarily has also proved to be untenable in this chapter. For, at the end of the day, which of the attributes discussed above would not be capable of alteration? And who would be the one to decide which parts of our identity shall deserve recognition and which shall be ignored as contemptible or at the most as worthy of reduced acknowledgment? The conclusion is that a hierarchy between non-discrimination grounds is not the solution for the official record-keepers on what data to prioritise if human and economic resources for data collection are limited.

In sum, the positive obligation of the state to disaggregate data on rights-holders in education is unambiguous in the case of gender and qualified in case of ethnicity, but selective in the case of age and language. That is, domestic legislatures that wish to create a sound legal framework in the field of education shall identify and remove any barriers that hinder the recognition of women and girls as rights-holders in education equal to men and boys.

As far as ethnicity is concerned, international human rights law acknowledges that group differences may need protection and even positive measures if those concerned so wish. In contrast, there are but few reference standards for states creating educational categories on grounds of age or language. Thus, individuals of the 'wrong age' or 'wrong language' claiming that the state fails to recognise them as right-holders in education in a non-discriminatory way, may face the fact that international law does not help them much in the pursuit of equal official recognition.

Evidently, international standards do have an effect on domestic legislation, on what is enacted by law and what is left unlegislated. International standards that build upon binaries between men and women or between diverse ethnic groups have been sources of inspiration to many domestic pro-equality laws. At the same time, domestic legislatures are under no pressure from the international community to define categories of human beings that may suffer from linguism or ageism in education.

As a consequence, seemingly well-intentioned special instruments can have negative counter-effects for those categories that are left unnamed on the international level. For example, womanhood as a category encloses both illiterate and schooled individuals, and the same goes for most 'ethnic' and

[158] Proposal for a Council Directive for a general framework for equal treatment in employment and occupation (COM(99)565 final at 6.

linguistic groups. By upholding the dominance of certain binary dichotomies, international anti-discrimination clauses themselves may well draw attention away from individuals that fall between the cracks.

Does then international human rights law put any pressure on states to guarantee that educational categorisations and statistics are responsive to the reality facing the functionally most disadvantaged individuals irrespective of their particular group affiliations? Indeed, this chapter discussed some general provisions prohibiting the use of biased classifications leading to non-identification of individuals in the most disadvantaged positions. Focal in this respect is the right to be recognised everywhere as a person before the law, as expressly mentioned by the UDHR, the CCPR and the CFREU.

In so far that the right to equal protection of the law recognised in these instruments shall be taken into consideration in the interpretation of any human rights, then it also includes the right to be recognised before the education law. In an imaginary case where, for instance, illiterate individuals above primary school age wanted to litigate over ageism in domestic education law, they could appeal to general non-discrimination clauses reviewed in this chapter. However, with merely the force of such vague international provisions, they would be hardly likely to win.

CHAPTER FIVE

RESOURCES

5.1. *The State as a Guarantor of the Human Right to Education*

5.1.1. *On State Obligations in Relation to Programmatic Rights*

The subject matter of this chapter is the state obligation to 'appropriately guarantee' that the law of education safeguards everybody's right to an identifiable quantum of quality education, as was pronounced when the working definition of systemic discrimination was settled in Part I. The first undertaking below is to revisit the established discourse on obligations as opposed to rights in the light of the widened concept of educational rights, as defined in Chapter 3 above. Then, attention will be drawn to the fact that the concept of resources in international human rights law also covers other aspects than mere money-talk, including human, technological and informational resources as central elements for the provision of quality education.

The positive obligations of states arising out of international human rights law form a widely discussed topic among legal scholars, even if there thus far is no generally accepted theory on the subject matter.[1] A most frequently cited theoretical contribution is the tripartite typology of state obligations to respect, protect and fulfil human rights, which was first introduced in 1980 by Henry Shue and subsequently commonly acknowledged in studies on the legal nature of human rights.[2] According to this typology, adapted to the sphere of educational rights, it is not sufficient for the state government merely to abstain from any legal measures that deprive individuals residing on the state

[1] Indeed, some scholars argue that economic, social and cultural rights should not at all be understood as legal rights, but merely as moral rights. Beiter describes the views of Maurice Cranston, Marc Bossuyt and Egbert Vierdag as examples of scholars according to whom provisions of the CESCR do not impose legal obligations on states. See Beiter 2006, pp. 54–64.

[2] See Shue 1980, p. 52; also quoted by Craven 1995, p. 15 and by Hunt 1996, p. 31. On subsequent writings, see, for instance, the report of Special Rapporteur Asbjorn Eide on the Right to Food: E/C.12/1989/SR.20; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 6. Some scholars have even discussed the need for an additional fourth obligation: the duty to promote. See van Hoof 1985, p. 97, similarly Scheinin 1999, p. 16. A number of writers have also elaborated this classification on positive state obligations further within specific human rights regimes. Particularly noteworthy are David Harris *et al.* (1995) who focus on positive state obligations arising out of the ECHR; Cordula Dröge (2003) who discusses how ECHR jurisprudence has developed the concept of state positive obligations by classifying them into two main categories of horizontal and social obligations; and Magdalena Sepúlveda (2003), who particularly examines the CESCR from the perspective of its obligations.

territory of basic entitlement to education: the first duty 'to respect' requires that legislative and administrative codes take account of educational rights for every person under the jurisdiction of the state. Neither is it sufficient just to prevent the violation of rights by other individuals or non-state actors, even though the second duty 'to protect' from deprivation is an essential part of state obligations. The additional third duty to fulfill imposes a state obligation to aid the deprived, to take active legislative and administrative measures to guarantee that every subject of human rights has true access to the benefits of education.

It is uncontested among scholars of contemporary international law that primary responsibility to realise the human right to education lies with government. Yet, instruments on economic, social and cultural rights do not contain any explicit equivalence to the dual obligation under Article 2(1) of the CCPR "to respect and to ensure" the rights recognized therein.[3] In contrast, Article 2(1) of the CESCR stipulates in vague wording as follows:

> Each State Party to the present Covenant undertakes to take steps…to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant…

Commentators of the drafting process for this instrument have pointed out the necessity of finding a compromise expression that would establish binding state obligations while simultaneously acknowledging the fact that immediate full realisation of economic, social and cultural rights would be impossible for most, if not all, contracting parties.[4] As far as the right to education is concerned, Articles 13 and 14 reiterate the compromise solution, by stipulating an unconditional state obligation to provide for primary education whilst calling merely for progressive realisation of secondary and higher education. The character and the scope of the state obligations with regard to Article 13(2)(d) on basic education above compulsory school age was left open to interpretation by still more vague wording.

Nonetheless, an established understanding is that even the CESCR contains cogent rules, such as the duty to provide for free basic education at primary level and the duty to guarantee the implementation of rights covered by the Covenant without any sort of illegal discrimination. The CRC takes an intermediate form between the twin Covenants of 1966 insofar that its Article 2(1) obliges state parties to 'ensure' the rights set forth in it, whilst its Article 4 includes a general reservation about resource conditionality similar to CESCR Article 2. That is to say, it incorporates an obligation of progressive achievement as regards the full realisation of the economic, social and cultural rights recognised in the CRC.

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[3] See CCPR General Comment No. 3.

[4] See, for instance, Craven 1995, p. 151.

Continuous argumentation is needed, however, on the precise nature and extent of the state duty to guarantee the realisation of educational rights. The present chapter strives to contribute to the ongoing discourse by focusing on the state duty to create a sound legal framework that enables the enjoyment of an individual right to education. Moreover, attention will be drawn to the fact that neither positive state obligations nor the related concept of resources are fixed once and for all. Instead, they may change with time and shall be interpreted in their due social context.

5.1.2. *The Evolving Concept of Minimum State Obligation: From Quantity to Quality*

Before continuing, there is still reason to reconsider what has been said earlier about the general aim of education to provide for everybody sufficient skills and knowledge necessary for a self-sufficient life, rather that merely providing a certain amount of education in quantitative terms. We need to highlight the state duty to provide for 'minimum essential levels' of the right to education from the viewpoint of *qualitative* criteria.

As has already been discussed, international law clearly acknowledges the concept of quality as an inherent element of the right to education. Of particular significance in this respect is the CDE, which not only prohibits any distinction, exclusion, limitation or preference which has the purpose or effect of, *inter alia*, 'limiting any person or group of persons to education of an inferior standard'. What is more, the Convention expressly stipulates that the term 'education' includes the standard and quality of education.[5] The same instrument also specifically provides that the contracting parties shall ensure that the standards of education are equivalent in all public educational institutions of the same level.[6] When these concepts of standard and quality are taken seriously, it is obviously not sufficient to talk about mere 'minimum core responsibility'. Instead, the analysis of state obligations needs to be widened to encompass 'quality minimum education for all.'

In consequence of national standard-setting procedures, most Western states now have standards of what students should know and be able to do at each educational level. The standardisation processes in education clearly show a trend shifting from equalising access to providing adequate resources to meet standards and reach educational goals that suffice for the requirements of the society. Standards can thus be considered as something guaranteeing that adequate skills are achieved to enter the next level of education or, alternatively, to enter the labour market.

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[5] See discussion in Chapter 1.2, above.
[6] CDE, Article 4(b).

An approach to quality education advocated here is that when national standards are set all students should have an option to get their progress assessed in meeting these standards. The UNESCO provisions quoted above are noticeably in harmony with this approach. That is, the relevant criterion is not whether a person or group of persons are getting equally low-quality education in comparison with other despised parts of student population. It is more relevant to estimate whether the education received is of sufficient quality by reference to absolute standards determined by the state.[7] The CESCR General Comment No. 13 also obliges state parties to establish 'minimum educational standards' to which all educational institutions established in accordance with Article 13(3) and (4) are required to conform.[8]

The very same General Comment encloses a requirement for state parties to ensure that curricula for all levels of the educational system are directed towards the objectives identified in Article 13(1) of the Covenant. According to this reference, the state parties "agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace".[9] The CESCR Committee here refers to a fairly abstract provision, reminding the member states to keep in mind the ultimate aims of education, but bypasses the aspect of practical skill acquisition.

Unsurprisingly, universal human rights case-law has not provided any specific standards on how 'adequacy' or 'sufficiency' of public resources in education should be measured. In any case, it appears from what has been said above that mere quantitative provision of educational opportunities is not in line with the concept of substantive equality. In those sub-sectors where the goals are standardised, the standards can be used to define what good quality education is. Those sub-sectors of publicly funded education that are lacking national standards are quite another challenge. In those areas it is particularly important to ensure by other means that the quality requirements are met. Next, the four components of the right to education—that is, the components of basic, language, vocational and cultural skills—will be reviewed one after the other from this particular point of view.

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[7] The question of who should have a right to participate in the standard-setting procedures will be discussed in Chapter 6.

[8] CESCR General Comment No. 13, para. 54.

[9] Ibid., para. 49.

5.2. *On State Duties Regarding the Universal Right to Education*

5.2.1. *State Duties in Respect of Basic Skills above Primary School Age*

There is a wide consensus among scholars that the right to basic education, understood as a right to primary education, calls for immediate state obligations. Contracting parties to Article 13 of the ICESCR and Article 28 of the CRC are considered to have a duty to act immediately in order to give full effect to these provisions that make primary education both compulsory and available free to all. In the European context, the question of whether the peculiar formulation in the ECHR according to which "no person shall be denied the right to education" brings about corresponding state obligations was already thoroughly discussed in the *Belgian Linguistics* case. The interpretation then adopted by the Court stated that in spite of its negative formulation the provision at issue undoubtedly enshrined a right, even if the scope of the obligation which was thereby placed upon states remained to be determined separately.[10]

Yet, subsequent elaborations on the state duty to provide for education occasioned by Article 2 of the Protocol 1 ECHR are noticeably both rare and cautious. Gerard Quinn and Philip Alston (1987), for instance, note that certain facts seem "to concede that Article 2 is capable of being interpreted robustly to give rise to substantive claims of State resources". Van Dijk and van Hoof (1998) are more straightforward by arguing that the exercise of the right to education requires by implication the existence and the maintenance of a minimum of education provided by the State. They deduce that if this was not the case, the right itself would be illusory, especially for those who have no sufficient means to maintain their own educational institutions.[11]

Conceptual systematisation of government obligations with respect to the right to education has been much livelier within the UN regime. In particular, the contributions of Katarina Tomaševski in her position as the former Special Rapporteur on the right to education are noteworthy in this respect. According to her well-known 4A Scheme, primary schools and compulsory education should exhibit the four essential features of 'availability', 'accessibility', 'acceptability' and 'adaptability.'[12] Yet, in spite of the fact that the

[10] Interestingly, in the *Belgian Linguistics* case the Belgian Government argued that the first sentence of Article 2 of the Protocol 1 ECHR would only oblige the State "not to prevent persons within its jurisdiction from obtaining education", but would not require it to provide itself "education and teaching for its citizens." Similar opinions were expressed by several state parties when ratifying the First Protocol; see Bradley 1999. Nonetheless, the ECHR has even in other cases noted that a right formulated in negative terms in the Convention does not mean that a state party would be free from taking active measures in order to give full effect to the right. See, for instance, the case of *Marckx* v. *Belgium*, which discussed this topic in relation to Article 8 of the ECHR.

[11] van Dijk and van Hoof 1998, p. 647.

[12] In a nutshell, 'availability' means ensuring that primary schools are available for all children;

4A scheme was elaborated for the analytical needs of the right to education, it will not be applied in the present study. This is primarily for the following three reasons.

First, distinct from the 4A Scheme, the study in hand is not only concerned with governmental obligations, but strives instead to re-examine them holistically in relation to the concepts of rights, recognition and representation, as has been described in Chapter 2 above. Second, the four features of the '4A Scheme' overlap with each other in several respects. For instance, 'acceptability' is said to contain a call for culturally appropriate education, and similarly 'adaptability' is said to call for the needs of students within their specific cultural contexts.

Likewise, the call for quality education figures under several headings, which somewhat dilutes its significance as one of the key concepts for the present study. Third, and most importantly, the dimension of non-discrimination is in the 4A Scheme classified as a sub-category for 'accessibility', whereas the concept of discrimination in the present study is the main factor against which all the four dimensions of rights, recognition, resources and representation ultimately shall be analysed.

Thus, however widely propagated the 4A Scheme may be in other contexts, it seems not to be the most useful format to analyse systemic discrimination in education. Neither is it developed for an analysis of educational rights above compulsory school age. The fact is, however, that as soon as the right to basic education is understood as a right to fundamental education above the primary school level, the question of corresponding state obligations becomes a good deal more obscure. A state's duty to prioritise the provision of free primary education ahead of education on secondary and tertiary levels seems to be much of a truism, due to the fact that it contains no reference to progressiveness.[13] But is there an internationally agreed state obligation to provide basic education for educationally disadvantaged individuals above compulsory school age?

'accessibility' that education shall be implemented on the basis of non-discrimination, which is not subject to progressive realisation; 'acceptability' points out the regulatory role of the state to set and enforce educational standards while respecting the right of the parents to have their children educated in conformity with their religious, moral or philosophical convictions; and 'adaptability' focuses on the issue of what children should learn at school and how the learning process should be organised. For a more thorough definition and illustration of the '4 As' see CESCR General Comment No. 13, paras. 6 and 50. *See also* UN Document E/CN.4/1999/49, paras. 42–74. Note that CESCR General Comment 4 on the right to adequate housing (1991) already made use of a similar 'typology of As', even if 'affordability' then was mentioned as a crucial element of its own and the concept of 'adequacy' was also employed and carefully elaborated therein. Later, the elements of availability, accessibility and acceptability have been reiterated, for instance, in CESCR General Comment No. 14: The right to the highest attainable standard of health. Beiter also discusses at some length the idea that education at all levels must be available, accessible, acceptable and adaptable. See Beiter 2006, pp. 476–510.

[13] See, for instance, General Comment No. 13, paras. 14, 25, 51, which state that the CESCR explicitly requires state parties to prioritise primary education.

Incontestably, Article 13(2)(d) on 'fundamental education' falls under the general statement according to which the CESCR recognises the right of everyone to education, and a right without corresponding recognition and implementation can be reasonably argued to be close to meaningless. On the other hand, the sub-article on fundamental education is not articulated in unconditional terms like the one on primary education, but not either in similar conditional terms as the sub-articles on secondary and higher education. Instead, fundamental education shall be "encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education".[14] The vagueness of the wording has sometimes led to conclusions that the obligations of state parties in relation to basic education above compulsory school age would be at most equal to their obligations *vis-à-vis* secondary and higher education.[15] The erroneousness of such reasoning will be discussed later.

European human rights law is still more open to interpretations as far as the state duty to provide for basic education above compulsory school age is concerned. Some analysts have suggested that the second sentence of Article 2 of the Protocol 1 ECHR offers support for an interpretation that merely primarily education should be included in the ambit of the Article. Accordingly, the reference to parents' as opposed to students' religious and philosophical convictions could be taken as suggesting that the Article relates merely to children that are still under the guardianship of their parents.[16] A contrasting argument suggests that the duty to respect parental convictions cannot require the first sentence to be read as applying only to a child as opposed to a person.[17] In respect of most recent European standards on the subject matter, the EUFRC fails to make any statement about free non-compulsory or vocational education, despite the implication within the CESCR that wealthier signatory states should be able to assure progressively free education at all levels.

Judicial reviews of state duties with regard to basic education above compulsory school age are scarce so far. Yet, there are several arguments that speak for a certain minimum of positive obligations. One such line of reasoning is that regional human rights law shall not be in conflict with universal human rights law, which requires state parties somewhat more wordily, *inter alia*, to ensure the satisfaction of minimum essential levels of each right,

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[14] CESCR, Article 12(d).

[15] See, for instance, CESCR General Comment No. 11, para. 52, which considers the duty to include the provision of fundamental education to be equal with the duty to include secondary and higher education in the national education strategy. Likewise, CESCR General Comment No. 13, para. 51, which implicitly puts fundamental education on a par with secondary and tertiary education: "…the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical."

[16] See Kerrigan & Plowden 2002, p. 22.

[17] Bradley 1999, p. 406.

the protection of vulnerable members of society, and the development of a comprehensive and inclusive education system.[18] All these essentials speak in one way or another for the argument that functional basic education—consisting of literacy, numeracy and basic life skills—shall be given sufficient consideration in terms of the governmental allocation of public resources. In line with this reasoning goes the argument made by Asbjorn Eide that whenever there is systematic difference in the enjoyment of economic, social and cultural rights, then measures should aim at redressing the situation of those who least enjoy these rights.[19] Undoubtedly, many of those who have least enjoyed educational rights are above primary school age.

Nevertheless, when tracing a strictly legal state obligation to provide for basic education above compulsory school age, it would be too far-reaching to argue that international law considers adult basic education subject to immediate and direct implementation in the vein of primary education. Is a regulatory void on this area then the solution for states that want to avoid unduly burdensome obligations? We will return to this question in Part III of the study.

5.2.2. *State Duties in Respect of the Provision of Sufficient Language Skills*

The analysis of linguistic rights in education that was made in Chapters 3 and 4 showed that international provisions on the right to education hardly ever make a stand on the language aspects.[20] An interpretation based on that fact that governments have no obligations as far as provision of education in a certain language is concerned is, nonetheless, objectionable. The HRC decision in *Diergaardt* v. *Namibia* has already been mentioned as a landmark case clarifying that no arbitrary or unreasonable preferences are considered as permissible in domestic language policies. From this statement, an elementary state duty to provide schooling for linguistic groups of sufficient size was also derived.

Moreover, European minority instruments in particular call upon their member states to take action on the issue of the linguistic educational rights of individuals permanently residing under their jurisdictions. Accordingly, the stated purpose of the ECRML is to protect and to promote "the historical

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[18] See CESCR General Comment No. 3, paras. 10 and 12; CESCR General Comment No. 13, paras. 25 and 48; the Limburg Principle No. 28, which reads: "In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services. Maastricht Guideline No. 9 confirms the Limburg Principles in this regard.

[19] Eide 2001, Chapter 3. Note also "Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies" (2002), para. 125, according to which "all poverty reduction strategies should give close attention to progressive realization of the right to education and ensure that the poor are the first to benefit from improved access to education."

[20] See Chapters 3.3 and 4.3, above.

regional or minority languages of Europe". When seen from the viewpoint of concrete state obligations, it is noteworthy that this instrument is in many respects very flexible. Its à la carte approach enables contracting states to choose a minimum of 35 different undertakings from a total of 68. The extent of a country's commitment to these undertakings can also vary. For example, with regard to education, a country can undertake to offer teaching in a minority language at one or more of the following levels: pre-school, primary, secondary, vocational, higher, adult or continuing education. Moreover, it is at the discretion of the state to decide whether it provides all teaching in the regional or minority language or just some parts of it. Most noteworthily, it enables an avoidance of an approach based on language rights as universal, fundamental rights to which all individuals are entitled.

The same goes to a large extent for even the FCNM. The very title of this instrument as a 'framework' refers to the fact that it primarily consists of programme-type provisions. Nonetheless, the FCNM does also create legal obligations for the parties. The contracting states are obliged to realise the principles of the Convention by taking special measures, refraining from certain practices, and guaranteeing specific rights. Most of the provisions are worded as state obligations, even if some of its articles make explicit reference to rights of individuals, as was mentioned in Chapter 3.3.2. Another important point to take notice of is that although the FCNM deals only with 'national' minorities, it does not expressly exclude any language groups, while it leaves each state a measure of discretion as regards recognition of diverse groups as national minorities.

State duties in relation to the provision of linguistic educational rights can also be traced in the normative framework of the EU, even if this regime clearly gives emphasis to the promotion of linguistic diversity at the expense of individual language rights. The TEC stipulates in its Article 149(1): "The Community shall contribute to the development of quality education by encouraging cooperation between member states and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the member states for the content of teaching and the organisation of education systems and their cultural and *linguistic diversity*. Moreover, sub-article 2 lays down that Community action shall be aimed at "[…] developing the European dimension in education, particularly through the *teaching and dissemination of the languages* of the member states".[21]

In the same manner, the CFREU plainly states in its Article 22 that the Union "shall respect cultural, religious and *linguistic diversity*".[22] A fundamental question in this context is: which languages are recognised and respected as part of this diversity? If some languages regularly used in the territory of the

[21] In the Treaty of Maastricht this was Article 126.
[22] Emphases added here.

European Union are totally neglected, then, obviously, the Union standards are in tension with universal human rights. Moreover, due attention shall be paid to the recent Directives on asylum seekers and refugees from the years 2003 and 2004 respectively.[23] Even if these Directives do not overtly put pressure on the member states in relation to language skills acquisition, the emerging legislation and jurisprudence on substantive equality/indirect discrimination simultaneously call upon the member states to accommodate appropriately for difference. We will return to this particular question in Chapter 5.3.3.

As far as instruments expressly stipulating on the right to education are concerned, a corresponding state duty to adequately consider the linguistic aspects of educational rights can be derived from the joint reading of relevant provisions. For instance, Articles 2(2) and 13 of the CESCR should be read in conjunction. Similarly, Article 2(1) of the CRC should be read in conjunction with Article 28 and/or 30, depending on circumstances. Nonetheless, the international case-law on the state obligations has so far mostly revolved around the duty to provide for official minority language instruction on equal terms with majority language instruction. Often repeated is the interpretation of the Court in the *Belgian Linguistics* case that Article 2 of Protocol No. 1 does enshrine a right and correspondingly calls for certain state duties, even though the ECHR lays down no specific obligations concerning the extent of these duties and the manner of their organisation, and, in particular, does not specify the language in which education must be conducted in order that the right to education should be respected.

The limits of the state duty to provide for majority language training at public expense, particularly for those above compulsory school age, has been rarely tested in the courtrooms. Yet, the *Belgian Linguistics* case, in all its abundance, pointed to the necessity of noting the interdependence of linguistic and educational rights. Even if more rarely cited, this case namely contains Court statements according to which, first, the ECHR must be read as a whole, and second, the right to education would be meaningless if it did not imply in favour of its beneficiaries. These two statements, when taken seriously, call for positive state action rather than mere abstention, albeit the Court in other parts of the case maintained a distance from the positive state duty to act for individual linguistic rights in education.

Thus, even if state obligations in relation to language rights to some extent can be evaluated as "a mixture of confusion, contradiction and unpredictability",[24] that is not the whole story. International human rights law does offer actual guidance for the contracting states in this respect, in addition to more aspirational ideals towards which they are invited to strive for. Such guidance

[23] See above, Chapter 3.2.1, where it was noted that these two directives call for education provision for the subjects concerned to be "under the same conditions" as for the nationals.

[24] This phrase is from Higgins 2003.

becomes evident when the state duty to provide for language skills is analysed with interdependency, interrelatedness and indivisibility of all human rights in mind. That is to say, even if state duties in relation to educational rights and language rights have historically developed in two separate theoretical strains, this does not allow the state parties to turn a blind eye to the consequences of that separation. Nor does the silence of international human rights law about some aspects of linguistic educational rights as such justify inaction from the part of the state.

5.2.3. *State Duties in Respect of Vocational and Cultural Skills*

State obligations relating to the provision of vocational and cultural skills will here be dealt with jointly due to the pragmatic definition of cultural skills outlined in Chapter 3. Accordingly, any programmes classified under the heading of 'cultural sector' in the national system of education are regarded as potential pathways to realise the right to cultural skill, irrespective of whether they focus upon the acquisition of 'traditional minority skills' or 'modern mainstream skills' in the field of culture. In this sense, the state duty to provide for vocational and cultural skills is regulated very much in one and the same provision.

In their most narrow interpretation, Article 2(1) of the CECSR and Article 4 of the CRC would suggest that states need only 'take steps' towards achieving free vocational and cultural education. Thus, in contrast to the uncontested subjective right to primary education, there would be only 'right of equal access' to post-primary levels of education, and a corresponding state duty would consist merely of ensuring that no applicant is excluded from existing educational opportunities on unjustified grounds. However, several arguments can be posed to highlight the fact that focus on mere formal access is outdated and even in conflict with leading principles of contemporary international human rights law.

A most important argument is related to the repeated statement made by the European Court of Human Rights that the ECHR is a 'living instrument'. Accordingly, changing legal and social conditions in the member states shall be taken into account in its interpretation. The instant we apply this statement seriously to the issue of education, we have to admit that, in contemporary Western society, primary education is rarely enough for decent employment. Rather, a minimum amount of generally recognised vocational skills are needed before a person can draw profit from education in the competitive labour market. Thus, vocational qualifications have in many cases become imperative for successful employment.

The shift of understanding in what is a sufficient minimum for employment seems to oblige states increasingly to provide resources for the acquisition of vocational competence. Switching the emphasis from inputs to outputs, and a corresponding linkage of public funding in some way to pre-defined

'successful' and 'measurable' outputs, is a generally recognised phenomenon in virtually all levels of Western education systems. What is needed, above all, is to ensure that this switch will not become counterproductive to the simultaneous efforts towards the realisation for all of the right to education. Individuals with the weakest starting positions are the most likely to be excluded from output-related programmes, whereas those most likely to meet the output criteria will be enrolled. This fact does, however, not justify the provision of inferior education to those with most severe deficiencies as far as practicable skills are concerned.

At their best, educational qualifications serve as means of qualitative accountability stipulated, for example, in the CDE. Indeed, several articles of this particular instrument can be read as plausible textual sources for the state duty to provide for equality of opportunity in the matter of quality education that leads to vocational and cultural expertness.[25] This argument does in no way mean that the state should be responsible—nor able—to redress all variations in individual capacities; but it does mean that the state should afford everybody an equal opportunity to develop their full potential. The point with the focus on formal qualifications is that all students should have the right to expect that their diplomas or certificates issued upon completion of a course or programme will be recognised as valid and worthwhile by potential employers and/or providers of further education.

The emphasis is here on equality of opportunity, which is notably a wider concept than equality of access. Chloë Wallace & Jo Shaw make the point when they note that the failure to grant anything more than a basic right of access to vocational training has significant potential to exclude. As they put it: "This might particularly affect people historically excluded from the workforce, such as those with little previous education, or people with disabilities, who may not be in a position to pay for training, and for whom training may not be seen to be 'cost-effective' by employers or potential employers".[26]

The key question in the context of human rights accountability of vocational and cultural education should thus increasingly be: have all students been provided with quality instruction and sufficient resources? In other words, the educationally most disadvantaged parts of the population need not content themselves with just any kind of tuition, but they have the right to demand from the state quality education, which in an earlier part of this study was defined as targeted and progressive and leading to generally recognised certification.[27]

As far as post-primary basic education and language education are concerned, the minimum amount of quality education maybe could be measured by the amount of hours delivered. On the contrary, when vocational skills

[25] See in particular Articles 1(1b) and 4(b) of the CDE.
[26] Wallace & Shaw 2003, p. 236.
[27] See Chapter 1.2.

are at issue, education should be delivered to bring about the achievement of certain skills. Just imagine a plumber that does not know how to stop water leaking out of the main, or a boat-builder that does not actually know how to make a boat that keeps above water.

The point with increasing skills standardisation processes is that, as far as vocational skills are concerned, the crucial step from generic human rights language on quality education to specific substantive criteria has already been taken. Professional bodies in diverse vocational fields have already defined the standards in respective sectors. These bodies are unlikely to set their sights too low. Instead, they are apt to produce standards that aim at sufficiency in respect to labour market demands. Thus, neither the claimants of quality vocational education for all, nor the courts potentially facing these claims, need to take it upon themselves to define the contours of adequacy.

Even if the prevalence of output-related funding schemes has a side effect of 'creaming off' the most competitive candidates to the programmes of the highest quality, this fact does not by any means justify state inaction regarding progressive realisation of the right to vocational education even for the less competitive parts of the population. In the legally binding universal standards, this obligation receives added strength when provisions on progressive realisation are read together with, for instance, Article 13(1) CESCR, according to which education shall enable all persons "to participate effectively" in a free society. In the fulfilment of this objective, quality vocational education is crucial for an individual who wants to carry out her/his effective participation by practicing competently a trade, craft or occupation for which there is societal demand.[28]

Most importantly in the European context, the revised ESC signals towards a state duty to promote VET for educationally disadvantaged groups such as the long-term unemployed and individuals that need protection against social exclusion and poverty. The ultimate aim of these provisions is to enable an individual—irrespective of her/his identity attributes—to function as meaningfully as possible in the society and, whenever possible, in the job market. However, this provision extends merely to the nationals of contracting parties.[29]

5.2.4. *Rights versus Duties in the Light of the Disadvantage Doctrine*

As a conclusion, the state duty to 'appropriately guarantee' a right to education, as included in the working definition of the present study, should comprise

[28] A more focused, but only soft-law requirement can be found in the UNESCO Revised Recommendation concerning Technical and Vocational Education of 1974, which suggests that vocational and technical education should be available to disadvantaged and disabled persons in a manner which caters for their needs and facilitates an easier integration into society.

[29] On the exclusion of non-nationals from the scope of the ESC, see Chapter 5.4.4, below.

of adequacy rather than of formal equality. Talking about formal equality does not help much, if it means merely that the 'haves' shall have equally and the 'have-nots' shall remain equally without. Rather, focus shall be put on the idea of a sufficiently high level of achievement for all. Thus, instead of merely asking comparative questions about opportunities available, education rights monitors should look at the quality of services and ask evaluative questions about whether those services are sufficient to satisfy the education needs of marginalised individuals and groups.

When searching for the bottom-line of systemic discrimination in education, attention should also be drawn to the legal meaning of the prohibition of retrogressive measures.[30] In the light of the disadvantage doctrine, it should be apparent that the principle of non-retrogression prohibits a government from cutting back on the basic educational services of those in the most disadvantaged situation. This view is confirmed, for instance, by the CESCR Committee, when it in General Comment No. 3 states that "even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected". In no case does the concept of progressive realisation permit the perpetuation of educational disparity.

5.3. *State Duties under the Convention against Discrimination in Education*

5.3.1. *The Evolving State Obligation to Accommodate for Difference*

Tensions between the 'politics of redistribution' and 'the politics of recognition'—or between demands for equal treatment and respect of diversity—has become an increasingly popular topic among scholars in recent years, and not least because of the fact that the international human rights régime increasingly encourages member states to approach minority rights in a proactive manner.[31] What the following strives to highlight is, however, that the UNESCO Convention against Discrimination in Education (CDE) had already addressed the dual state duty to integrate the issues of pluralism and equal treatment in education. Keeping in mind that this instrument also obliges states to achieve substantive equality[32] and to promote adequacy instead of

[30] This concept is conventionally recognised as an integral part of the state duty to promote educational rights, but still it is not clear what kind of retrogressive measures are the ones that require particular justification in the legal sense of the word. CESCR General Comment No. 3, para. 9; CESCR General Comment No. 13, para. 45.

[31] For an interesting contribution in legal philosophy on how to integrate the respect for pluralism with the promotion of equal treatment, see Fraser 1997.

[32] The call for substantive equality becomes apparent from Article 1(1), which reads, in part: "[t]he term «discrimination» includes any distinction, exclusion, limitation or preference

mere quantity[33] it appears indeed to be at the hearth of this study in many respects. There is therefore good reason to address the potential for enforcement of positive state obligations under this specific instrument.

By becoming parties to the CDE, states agree expressly to exclude from the ambit of discrimination discourse certain categorical distinctions in education. In earlier parts of the study we have already discussed the fact that the maintenance of separate educational systems for males and females shall not be deemed to constitute discrimination within the meaning of the Convention, whenever such arrangements are permitted in a state. According to Article 2(a) discrimination is *not* constituted by:

> The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study.

Later, this approval of separation into 'them' and 'us' defined by gender has been qualified by a number of provisions striving to guarantee that no space is left for education system that factually advantages one sex at the expense of the other one. For instance, state parties to the CEDAW undertake to ensure, on the basis of equality between men and women "the same opportunities to benefit from scholarships and other study grants". Likewise, they undertake to ensure "the reduction of female student drop out rates and the organization of programmes for girls and women who have left school prematurely".[34] Clearly, provisions like these oblige states to actively address the particular nature of gendered discrimination in education.

Separate educational systems for linguistic reasons are another form of distinction that according to the CDE shall not be deemed to constitute discrimination. Article 2(b) stipulates as a situation of non-discrimination:

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which…has the purpose *or effect* of nullifying or impairing equality of treatment in education…" Emphasis added here.

[33] According to Article 1(2), the term "education" refers, *inter alia*, to the *standard and quality* of education.

[34] See CEDAW Articles 10(d) and 10(f). Among European standards, a noteworthy progressive instrument concerning the promotion of substantive gender equality in vocational education, even if not strictly legally binding by its nature, is the Commission Recommendation of 24 November 1987 on Vocational Training for Women (87/567/EEC). Under Article 2 it calls member states, *inter alia*, to: encourage the participation of girls in higher education, particularly in technical and technological fields, by: making provision within the grants system for ways of compensating for the double sexual and social handicap borne by girls from underprivileged backgrounds, adopting measures enabling girls to benefit on an equal footing from the programmes set up in the context of the links to be developed between universities and industry, making efforts to steer girls towards key areas of new technology. Moreover, it calls member states to introduce support measures such as the provision of flexible childminding arrangements and the establishment of the appropriate social infrastructures so as to enable mothers to take part in training schemes, and the introduction of financial incentives or the payment of allowances during training.

> The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.[35]

Optional attendance and conformity with competently approved standards are mentioned as preconditions for the establishment and maintenance of such institutions. Again, it is important to note that this provision shall be read together with the above-mentioned requirement, according to which the education law shall have neither the purpose nor the effect of nullifying or impairing an individual's right to education. The state duty to guarantee that the linguistic aspects of its law of education do not have discriminatory effects certainly requires more than mere formally equal treatment of individual rights-holders.

The interpretation above suggests that the CDE *per se* puts certain pressure on the state parties to recognize linguistic diversity among the subjects of its law of education, and to take the findings actively into consideration in its public education policy. That is to say, state parties to this instrument undertake to do more than refrain from interference in the sense of negative state obligations. At first glance, this argument may seem to be contrived—partly due to the vagueness of provisions over linguistic educational rights, partly due to the wide margin of discretion that, under the ECHR, was left to the state party in the *Belgian Linguistics* case.[36]

Nevertheless, it is inevitable that through Article 1(1) CDE taken together with Article 2(b), state parties agree to reform educational arrangements that preclude some subjects of education law, due to their distinct linguistic capital, from receiving education that can be considered adequate for them. For non-discrimination 'in effect' to exist, it is the educational outcome that is crucial, which means that a state's education policy shall recognise differences and treat individuals from different language groups differently so that they will eventually end up on the same footing.

Even if provisions addressed here have lain dormant for decades, they do enable an advancement of claims for the positive state obligation to recognise linguistic differences in education. This option may be of growing importance in multilingual societies where many minority students emerge from schools cognitively illiterate, due to the very fact that the state has not accommodated for their linguistic needs.

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[35] Article 2 of the CDE also covers the establishment and maintenance of separate educational systems or institutions for religious reasons, but the issue of religion falls outside the scope of the present study.

[36] See discussion in Chapters 3.3 and 4.3 above.

The development of more recent human rights theory and jurisprudence acknowledges a positive state duty to promote substantive equality by means of accommodating for linguistic differences among the state population. An allusion was already made to *Diergaardt* v. *Namibia*, where the HRC decided that the authors were effectively being discriminated against by virtue of the official English-only language policy. A similar approach by the European Court of Human Rights in *Thlimmenos* v. *Greece*, although not focusing on linguistic discrimination, has the potential to impact upon the issue of state duties with regard to abolition of linguicism in education. In the light of these cases, any exclusive language policy of a state party, which cannot be justified as being reasonable, can be held to constitute a discriminatory measure under international human rights law.

Human rights discourse on linguistic educational rights has so far mostly emphasised state responsibilities to protect and promote education in minority and indigenous languages.[37] The point argued above is, however, that the CDE requires from the state parties positive measures to eliminate linguicism in education. Even if the CDE does not provide a mechanism for the adoption of General Recommendations or General Comments, there are other interpretations that support this understanding. For instance, when the HRC discusses in General Comment No. 23 state obligations concerning positive provision on language rights of minorities, it defines the corresponding state duty as an obligation "to ensure that the existence and the exercise of this right are protected against their denial or violation". Thus, the call for positive measures relates not only to the state duty to protect against violations, but also to the duty not to deny the existence of this right; that is, to afford voice and visibility to the linguistic disadvantage that factually is present.[38]

In addition to educational arrangements segregated along the lines of gender, language or religion, Article 2(c) of the CDE mentions the establishment and maintenance of private educational institutions as the third situation that—under certain conditions—shall not be deemed to constitute discrimination.

> The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

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[37] See, for instance, arguments by Skutnabb-Kangas and de Varennes, referred to in Chapter 3 above. *See also* the Hague Recommendations, para. 4 and its explanatory note, where OSCE states are encouraged "to strive to achieve, progressively, the full realization of minority language education rights to the maximum of their available resources."

[38] CCPR General Comment No. 23. Indeed, if there is a need for a fourth state obligation, in addition to the established obligations to respect, to protect and to fulfill, this very obligation might be a duty to give agency. This idea will be elaborated upon in Chapter 6.

A conditional clause attached to this provision is worthy of notice. Accordingly, it is required that the object of such institutions shall not be to secure the exclusion of any group, but to provide educational facilities in addition to those provided by the public authorities.

Can then a state evade its responsibility to accommodate for difference under cover of this provision? The *Belgian Linguistics* case contains a statement that is often cited when this question arises. The Court expressed as its opinion that the contracting parties to the ECHR 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.[39] Even some fairly recent interpretations of this judgment suggest that state parties consequently would have no wider obligations than to guarantee that every applicant has formally equal access to existing institutions. For instance, Gisella Gori contends that a contrary interpretation would have imposed on the state the odd obligation "to satisfy each individual demand".[40] Such an interpretation exaggerates, however, by suggesting that the state should choose between two extremities: either to stick to 'one size only' education, or to indulge every whim that may arise in society.

The prevalent legal usage clearly acknowledges that the rule of non-discrimination is not only about formal equality, and that positive obligations are part of state obligations not to discriminate. In particular, the *Thlimmenos* case, although not dealing with the right to education as such, indicates clearly that the right to non-discrimination does not rest on a norm of equal treatment.[41] Quite on the contrary, a state that does not guarantee adequate resources for the non-discriminatory implementation of educational rights is not fulfilling its positive obligation, and is thus discriminating. We will discuss the proviso that this statement is subject to in subchapter 5.4 on resources. Before that, we address the provision that expressly requires state parties of the CDE to ensure elimination of discrimination in education.

5.3.2. *The Positive Obligation to Eliminate and Prevent Discrimination*

Articles 3 and 4 of the CDE are wide-ranging, insofar as they obligate state parties not only to eliminate existing discrimination, but also actively to prevent the emergence of its new forms or manifestations. These general undertaking

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[39] Para. B.3.

[40] Gori 2001, p. 368.

[41] See the case of *Thlimmenos* v. *Greece* in Chapter 2.3.2, above. Particularly relevant is para. 44, where the Court considers that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

articles are of sufficient importance for the subject matter under consideration to be set out in full. Article 3 reads:

> In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:
>
> (a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;
> (b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;
> (c) Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;
> (d) Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;
> (e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals.

By this article, the contracting parties accept a duty to achieve the stated objectives instead of merely to strive towards them. Most challenging is the first sub-article, which obligates state parties to address the very nature of discrimination in education. That is, it requires state parties to recognise that a multitude of phenomena with potentially discriminatory effect may merit special response from the legislature. In the terminology of the present study, it is indeed inaction under sub-article 3(a) that most apparently constitutes systemic discrimination.

The other four sub-articles are also important to achieve the result of eliminating discrimination in education. Even if the emphasis in most recent discourses, including the present study, is increasingly on passing through the chosen education programme, it does not diminish the need to guarantee that admission procedures are non-discriminatory, as required in Article 3(b). Likewise, obligations that state parties assume under Articles 3(c) and 3(d) are continuously topical to prevent public financers from obstructing equal opportunities for good quality education by denial of equitable grants and subsidies. Progressive case-law around this issue has started to evolve only recently, as will be discussed below in the section of financial resources, but it is noteworthy that this UNESCO instrument from 1960 already prohibits state parties from allocating resources for the provision of education in a discriminatory manner.

Article 3(e), which clearly prohibits educational discrimination against non-citizen learners residing within the state territory, is possibly even more topical in today's world of accelerating migration than it was at the time of its drafting. As to subsequent instruments, legal analysts discussing state obligations

under Article 2 of the CESCR often make a distinction between its first and second paragraph and underline that only the first one is progressive in nature. In contrast, the separate existence of Article 2(2), together with the inclusion of the word 'guarantee' has been interpreted to mean that in cases of discriminatory laws or practices the rule of progressive realisation does not apply. Instead, states are under an obligation to eliminate any forms of discrimination.[42]

The state duty to abolish discrimination in education under the ECHR has been subject to somewhat more conceptual pedantry, due to the variety in the wording of the relevant provisions. Article 1 stipulates that Contracting Parties "shall secure" the rights defined in the Convention, and likewise, Article 14 stipulates that the enjoyment of the rights and freedoms set forth in the Convention "shall be *secured* without discrimination." In contrast, as has been discussed earlier, the right to education in Protocol No. 1, Article 2 is formulated negatively, and a question has been raised whether such a negative formulation diminishes state obligations in some respect.

This question is particularly relevant as the Court has not determined any general theory of positive obligations, and accordingly, it has become necessary to consider the question in relation to each particular right separately.[43] The prevailing interpretation is, however, that 'to guarantee' and 'to secure' are concepts that imply the existence of a state obligation to take action. To this category belongs also the concept 'to ensure', which is used in Protocol No. 12, Article 1 of the ECHR and which is explained as referring to the duty incumbent upon states to 'secure' the enjoyment of non-discrimination.[44] Does then the CDE or subsequent instruments offer potential for enforcement of

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[42] To the letter, the states parties undertake to guarantee that the rights enunciated in the CESCR "will be exercised without discrimination of any kind…" For instance, the CESCR Committee states in its General Comment No. 13 unambiguously: "The prohibition against discrimination enshrined in article 2(2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination." See CESCR General Comment No. 13, para. 31. Similarly, CESCR General Comment No. 11 stresses in para. 10 that the state party's other obligations, such as non-discrimination, are required to be implemented fully and immediately. For further observations on Article 2(2) CESCR *see* Craven 1995, p. 181.

[43] Positive state obligations in relation to educational rights were already discussed in the *Belgian Linguistics* case, in which the Commission agreed that the word 'secured' did imply the placing of "an obligation which is not simply negative" on the contracting states. Moreover, the Commission argued that when a state "without being under any obligation to do so", takes positive action with regard to the rights laid down in the Convention, it must do so without discrimination. For example, David Harris *et al.* (1995:19) have also interpreted Article 2 of Protocol No. 1 as clearly encompassing both negative and positive obligations, whereas van Dijk & van Hoof (1998, p. 655) give examples of cases where the Government obviously is not obliged to defray the costs of education.

[44] It is also noteworthy that, according to para. 24 of the Explanatory report, the wording used in Protocol 12, Article 1 "reflects a balanced approach to possible positive obligations."

positive state obligations especially in relation to the abolishment of ageism, genderism, linguicism or ethnism in education?

The State Duty to Abolish Ageism in Education

The state duty to abolish ageism in education is far from a commonly acknowledged undertaking. Yet, it is reasonable to ask, in the epoch of so called life-long learning more than ever, whether exclusion from basic education holds with the rule of non-discrimination, all other attributes being more equal than the age of the person concerned. In the earlier parts of this study, an argument has been developed for an individual right to receive minimum basic education irrespective of age, drawing from the disadvantage doctrine. Strictly legally speaking, the question of state obligation in this respect is open to interpretation. As has already been discussed, the UDHR says that 'elementary' or 'fundamental' education should be free, without making reference to the age of the learners.[45] In contrast, the CDE and the CESCR both make use of a conceptual distinction between the primary education and the education of persons who have not received their primary education, whereby state parties explicitly become obliged to make only primary education compulsory and free.

The CRC as an epoch-making instrument in the abolishment of an unjustly dichotomised right to basic education has already been mentioned. By Articles 28(1)(a) and (b), state parties not only agree to make primary education available free to all, but also to take appropriate measures to introduce free secondary education. Taken together with Article 1, no person below the age of 18 years shall be excluded from the entitlements that these provisions offer, "unless under the law applicable to the child, majority is attained earlier". The CRC thus puts pressure on the state to provide for basic education for every person defined as child.

Unfortunately, the same cannot be said about the ESC Article 17(2), albeit that the contracting parties even there undertake "to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools" and albeit that Article 17 generally applies to children up to the age of 18, alike with the CRC.[46] The decisive disconnection is to be found in the Appendix to the ESC, which expressly stipulates that Article 17(2) does not imply an obligation to provide compulsory education up to the above-mentioned age.[47] Similarly regrettable when seen, for instance, from the viewpoint of many young refugees, is the corresponding clause in the CFREU. In Article 14(2) it lays down the principle to free compulsory

[45] Article 26(1).
[46] Harris 2001, p. 269.
[47] According Article N of the revised ESC, the appendix to this Charter forms an integral part of it.

education, but according to the explanatory note this principle only implies that each child in compulsory education should have the right to attend a school free of charge.

Nonetheless, the interdependence doctrine of human rights supports the interpretation that the age-insensitive provisions of the ESC and the CFREU should give way to more recent legal reforms that oblige contracting parties not only to abolish ageism, but also to pay attention to different forms of multiple discrimination. Reference is here made in particular to the EU anti-discrimination directives of the year 2000, which also progressively lay the onus of proof more on the state. Hence, it is reasonable to expect that where the legislature limits the general access to basic education, the exceptions must be reasoned by the party that sets such barriers.

Indeed, it is difficult to imagine how, for instance, the state parties for the ESC factually could ensure that young persons have the education and the training they need, as accepted in Article 17(1), if they simultaneously are allowed to turn a blind eye to the basic educational needs of the most disadvantaged ones. It is possible to argue that an age bar in access to basic education discriminates at least against those young refugees that have entered the country at such an age that they are unable to catch up with their own age group in the education system.[48]

The State Duty to Abolish Linguicism in Education

The state duty to abolish linguicism in education is another sensitive and controversial topic. As was discussed above, Article 2 of the CDE makes clear that the establishment or maintenance of separate educational systems of institutions for linguistic reasons shall not be deemed to constitute discrimination, on condition that certain criteria on voluntariness and quality are met. On the other hand, at least ever since the case of *Diergaardt* v. *Namibia* it has been clear that the state duty to provide for non-discriminatory language legislation, inclusive of its use in education, can be successfully challenged before the HRC. This means that states face a double challenge of neither assimilating by force nor marginalising by indifference. In general wording, even the UN human rights regime puts state parties under an obligation to abolish both of these two sides of linguicism from education. Yet, it is most illustrative to examine how the European minority rights instruments cope with the challenge of balancing in language issues.

[48] *Hussein* v. *Siants Complete House Furnitures* (1979) is an illustrative case from the UK jurisdiction. In this case, an age bar was held indirectly to discriminate against people who had immigrated to the country as adults. The court ruled: "A requirement that an applicant for a manual job should be able to read and write English where there is virtually no reading or writing required is unlikely to be justifiable. An age bar has been held indirectly to discriminate against people who have immigrated to this country as adults and therefore started their careers later than others." This case is discussed thoroughly in McColgan 2000a, p. 68.

The ECRML as such is a manifestation of an awareness of the need to adopt constructive measures for the protection and promotion of minority languages in the member states of the European Union. Yet, it has several inherent limitations seen from the viewpoint of rights enforcement. First, as has been discussed already, it is only the 'regional or minority languages' that are entitled to the benefit of the specific positive measures of support which the state is required to take in various areas, such as education.[49] Second, it is up to the state to specify which of the language communities under its territory shall be recognised as languages covered by the Charter. Thus, not only does the Charter exclude immigrant languages but, moreover, it enables even exclusion of those autochthonous languages the state prefers not to specify for the purposes of the Charter. Third, wide discretion is given to the state as to which of the measures enlisted in the Charter it will apply to the languages it has specified.

Likewise, the FCNM is an instrument that does not oblige the contracting parties to guarantee individual linguistic rights as such. The parties merely undertake "to adopt adequate measures" and "to promote the conditions necessary" for persons belonging to national minorities, *inter alia*, to preserve their language. Several steps are enumerated to achieve that objective, and resources are undoubtedly needed to realise them, but the resourcing itself is a matter of political will rather than a legal, enforceable obligation. As far as the right of persons belonging to a national minority to set up and to manage their own private educational and training establishments is concerned, Article 13(2) expressly states that the exercise of such a right shall not entail any financial obligation for the parties.

Thus, both the ECRML and the FCNM recognise the need for positive state action, but not in terms of a rights-duties dichotomy. An important fact to be underlined, however, is that even if much criticism has been directed towards these two instruments, their very existence shows the positive attitude of the contracting states towards accommodating and promoting minority and lesser-used languages. Indirectly the ECRML and the FCNM also may provide backing to the enforceability of individual linguistic rights in education. Such an interpretation, however, demands recognition of the fact that the protection of regional and minority languages forms an integral part of the international protection of human rights, as clearly stated in Article 1 of the FCNM. European language rights instruments thus cannot live a life of their own, but are essentially attached to the principles of interdependency and equality, both generally acknowledged in international human rights law. In this context it is also to be kept in mind that Article 14 of the ECHR covers, among other grounds, discrimination on the ground of language.

[49] I.e. the measures listed in Part III of the Charter.

The main argument put forward here suggests that the state duty to abolish unjustified linguicism covers also educational rights related to the acquisition of majority language skills. This requirement is recognised in both of the two European minority rights instruments under discussion. The ECRML contains a preamble statement according to which the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them. Moreover, in Article 7(3) the parties undertake to promote mutual understanding between all the linguistic groups of the country. As far as the FCNM is concerned, the parties undertake, in Article 4, to guarantee to persons belonging to national minorities the right of equality before the law and to 'adopt adequate measures' in order to promote *full and effective* equality between persons belonging to a national minority and those belonging to the majority. Again, it is logical to argue that the law of education shall be included in this statement. Moreover, FCNM Article 14 clearly stipulates that minority language education shall be provided without prejudice to the learning of the official language or the teaching in this language.

It is difficult to see how these undertakings could be implemented without any positive state action. Once the call for substantive equality is taken seriously, not just any factor will do when state parties make distinctions between diverse regional and minority languages. The politically strongest and geographically most concentrated language groups may well be able to demand greatest entitlements to positive measures of support. Nevertheless, international standards require simultaneous consideration of the potential prevalence of discrimination and the particular vulnerability of individuals belonging to immobilised language groups.

The recognition of substantive equality and related positive state duty to act in a non-discriminatory way becomes crucial whenever the state education system requires fluency in certain selected language(s) as a condition for graduation or for access to the next level within the education system. The US Supreme Court case of *Lau* v. *Nichols* is illustrative, where non-English speaking Chinese-American students successfully alleged that instruction only in English prevented them from obtaining a meaningful education. The court decided that those who could not understand English were not receiving effective education and thus were being discriminated against.[50]

Even if clear-cut cases combining the right to education and the right to non-discrimination on the ground of language are so far not available in the international jurisprudence, several cases recognising substantive equality require that the minimum ensured by the state responds to the needs of the

[50] *Lau* v. *Nichols* 414 US 563 (1974). For a compact analysis of US, Canadian and UK legislation and case-law regarding language under the principles of equality, freedom of expression and minority protection, see Higgins 2003.

rights-holders. At the same time, it is clear that any education system will create linguistic distinctions of some variety. Due to the necessity of contextualisation, it is obvious that a wide margin of discretion must be left to the domestic legislature and courts. The point is, however, that the state itself is in breach of its duty to abolish discrimination under Article 3 of the CDE as soon as it fails in its obligation to enact legislation that is responsive to local circumstances.

* * *

It is easy to argue for the state duty to identify and eliminate ageism and linguicism in education where they maintain illiteracy or semi-lingualism. The focus of state activities should then be in the abrogation of any statutory provisions and lacunae, which maintain these types of disadvantages. State obligations *vis-à-vis* socially constructed categories, of which none as such is a handicap that the system should abolish, demand a different approach. This distinction will be clarified in what follows.

5.3.3. *The State Obligation to Promote Equality of Opportunity and of Treatment*

The value of Article 3 of the CDE in attempts to define when the margin of discretion is misused and turned into a violation of the rule of non-discrimination is not particularly high. Indeed, it can in many cases be more judicious to avoid using violations language, and instead focus on state duties under Article 4:

> The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:
>
> (a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;
> (b) To ensure that the standards of education are equivalent in all public education institutions of the same level, and that the conditions relating to the quality of education provided are also equivalent;
> (c) To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;
> (d) To provide training for the teaching profession without discrimination.

Even if this article leaves state parties a choice of means, it does create for them a legal duty to take steps to continuously improve people's enjoyment of educational rights. In what follows three kinds of positive state obligations that can be derived from Article 4 of the CDE are examined one after

another: (A) the state duty to establish a non-discriminatory educational infrastructure; (B) the state duty to accommodate for differences; and (C) the state duty to take action to eliminate conditions that cause or maintain educational deprivation.[51]

(A) *The state duty to establish a non-discriminatory educational infrastructure.* The introductory undertaking clause of Article 4 imposes an obligation to formulate, develop and apply an education policy that does not rule out any parts of the population in a discriminatory manner. Thus, a paramount duty of the state is to acknowledge the variety of its population and to safeguard that each and every rights-holder in education receives true equality of opportunity and of treatment. The wording in sub-article 4(a) reveals that the instrument is a product of its own time, insofar that it is stratified along the 'levels' of the educational systems. As such, it does not mirror any intrinsic division of the persons on grounds of their educational disadvantage.

It is obvious that if functional inability had been used as a starting point for the design of legislation to cover the basic educational rights of everybody on equal basis, one would have ended up with a different pattern. Nonetheless, it should go without saying that those functionally most disadvantaged shall not be left hidden within or in-between the system levels. That is, the state education policy shall reflect on the functional disability of individuals rather than on the structural solution of the system. This idea may be merely latent in Article 4, but becomes obvious when read together with the preamble of the CDE where every person's right to education is recognised.[52] States that enter international regimes on the human right to education and strive to be accountable simply cannot turn a blind eye to those parts of their population that suffer from severe educational disadvantages.

This argument consists of two lines. The first relates to the state duty to create an infrastructure that enables provision of adequate educational services to everybody, without anybody needing to bring particular claims for it. That is to say, human rights law should bestow legal rights upon those individuals that lack a political voice, that are unable to organise themselves, and thus

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[51] This categorisation of state duties into three distinct groupings goes together with Kymlicka's typology on group-differentiated rights, which will be discussed in Chapter 6 below. In contrast, it makes a sharper distinction between core state obligations and affirmative action than Hunt (1996, p. 97), according to whom "the legal protection of social rights is itself a form of affirmative action and should be seen as one of the strategies available to states when they endeavour to conform to the equality obligations imposed by international law."

[52] Concerning development after the CDE, Bossuyt (1987, p. 486) reports that when criteria such as 'educational attainment' or 'illiteracy' were discussed in connection with the drafting of Article 26 CCPR, the drafters of the Covenant ultimately decided to back away from any of these and used the formulations 'such as' and 'or other status' to cover a multitude of unnamed grounds. It remains an open question whether the HRC case-law today would contain more educational issues if these attributes had been included in Article 26. Naming certainly matters, as has been discussed in Chapter 4 above.

unable to secure budgetary allocations for themselves. Children of primary school age are commonly recognised as a category of concern in this respect, but—as has been argued in earlier parts of the present study—the state duty to provide for basic education covers any individuals under its jurisdiction that due to severe educational disadvantage are unable to carry 'average civil responsibilities'.[53] P. van Dijk & G.J.H. Hoof put this core state obligation aptly when they argue that the right to education in itself implies "the existence and the maintenance of a minimum of education provided by the State, since otherwise the right would be illusory, in particular for those who have insufficient means".[54]

The second line of argument concerns the concept of progressiveness. As has been described earlier, the vague formulations of state obligations in this respect were reiterated in Articles 2(1) and 13 of the CESCR, as well as in Articles 4 and 28 of the CRC. A number of interpretative guidelines have, however, brought some clarity to the complex relationship between core obligations and progressive realisation. The group of experts that introduced the Limburg Principles specifically relating to Article 2(1) CESCR, although recognising that a margin of discretion must be left to the state parties in determining what constitute a failure to comply progressive realisation of ESC-rights,[55] emphasised especially the distinction between the 'promotional' aspect and the 'unconditional' aspect of the provision. Accordingly, the full realisation of the rights recognised can indisputably be achieved only little by little, but an unconditional obligation is that the state parties start to take immediate steps and to move as expeditiously as possible towards the full realisation of the rights listed in the Covenant.[56]

Also illustrative are statements made by the CESCR Committee that has repeatedly drawn attention to the risk of misinterpretation according to which the clause of progressive realisation would release state parties from positive obligations. As early as 1990 the Committee reiterated in its General Comment No. 3 that the *raison d'être* of human rights law is to establish clear obligations for state parties in respect of the full realisation of the rights in question and called for deliberate, concrete and targeted steps towards meeting these obligations.[57] In 1999, the Committee restated that state parties have an immediate obligation to take steps towards the realisation of secondary, higher and fundamental education for all those within its jurisdiction. Moreover, state parties were required, as a minimum, to adopt and implement a

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[53] Tomaševski draws attention to the distortion of education provision by pointing out that in a large part of the world the highest level in the education pyramid obtains the largest share of available funding. Right to Education Primer No. 2 (undated, p. 10).

[54] van Dijk & Hoof 1998, p. 467.

[55] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Principle 71.

[56] Ibid., Principle 21.

[57] CESCR General Comment No. 3, paras. 2 and 9.

national educational strategy including the provision of education at all levels mentioned in the Covenant.[58] The very same year, the Committee restated once again in its General Comment No. 13 on the right to education that state parties have "a specific and continuing obligation" to move as expeditiously and effectively as possible towards the full realisation of Article 13.[59]

The existence of "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of each right enunciated in the CESCR, including "the most basic forms of education" had been confirmed already in the above-mentioned General Comment No. 3.[60] General Comment No. 13 strived to specify further the meaning of this obligation in the context of the right to education. Accordingly, the core under Article 13 of the CESCR includes a positive state obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in Article 13(1); to provide primary education for all in accordance with Article 13(2)(a); and—last but not least—to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education.[61] From the viewpoint of the disadvantage doctrine it is crucial to underline that the concept of progressive realisation shall under no circumstances be interpreted as implying for states the right to defer indefinitely the implementation of these rights.[62]

Another important point made within the academic scholarship is that the distinction between the promotional approach on the one hand and the violations approach on the other as such is untenable, because of the fact that the failure to promote is a violation *per se*.[63] This accuracy connects with an argument that it is an on-going state duty to provide continuous recording of the progressive realisation of educational rights. A state that commits itself to respect international human rights standards can hardly be expected to comply with its obligations without records showing that progress is being made to provide a certain identifiable quantum of quality education for all.

(B) *The state duty to accommodate for differences*. Actually, a dawning state duty to accommodate for difference in education was already made manifest in

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[58] CESCR General Comment No. 11, para. 52.

[59] CESCR General Comment No. 13, para. 44.

[60] Chapman (2002, p. 14) suggests that we should instead of the word 'minimum' use the phrase 'core obligations' or 'core elements.' As has been discussed in Chapter 1.2, this study resorts predominantly to the phrase 'an identifiable quantum of quality education.'

[61] CESCR General Comment No. 13, para. 57.

[62] Similar argumentation has been set forth by Craven 1995, p. 109, Alston 1997, p. 65 ff, Eide 2001, p. 22.

[63] See, for instance, Chapman 1996, Leckie 1998. The analytical distinction made in the present study is that a violations approach to ESC rights might focus primarily on the role of the courts as a last resort, whilst a systemic discrimination approach draws attention to the proactive and redressing measures of the legislature.

Article 2 of the CDE, where state parties that permitted the establishment and maintenance of separate educational arrangements for religious, linguistic or other plausible reasons were given confidence to carry on with such arrangements. However, when read alone, this provision contains at most a negative state obligation, preventing direct government interference with established forms of minority education.

As far as the scope of the freedom to establish private educational institutions is concerned, a clarifying statement can be found in CESCR General Comment No. 13. This statement deals with article 13(4) of the CESCR, which is substantively related to Article 2 of the CDE. Accordingly, "everyone, including non-nationals, has the liberty to establish and direct educational institutions". Furthermore, the paragraph stipulates that this liberty also extends to 'bodies', i.e. legal persons or entities, and that it includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Most importantly, the CESCR Committee states in the same context that "the State has *an obligation to ensure* that the liberty set out in article 13(4) does not lead to extreme disparities of educational opportunity for some groups in society".[64]

The CESCR Committee backs up this positive obligation by three generally recognised human rights principles of non-discrimination, equal opportunity and effective participation in society for all. The first principle contains, *inter alia*, an assumption that where the state is not in a position to ensure the rights itself, it *must regulate private interactions* to ensure that individuals are not arbitrarily deprived of the enjoyment of their rights by other individuals: again, a positive state obligation is accentuated.[65] The second principle was in fact already applied in relation to educational rights as early as in the *Belgian Linguistics* case of 1968, where the Commission reasoned that the obligation not to discriminate is neither positive nor negative but 'conditional'. The reasoning went that the state may be free to assume functions in the sphere of education, but as soon as it assumes such functions, it must carry them out in a non-discriminatory manner. This reasoning apparently launched an interpretation that goes beyond mere formal equality, even if it was not repeated in the final statement of the Court.

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[64] CESCR General Comment 13, para. 30. Emphasis added here. It is interesting to note that the HRC, when dealing with similar questions in CCPR General Comment No. 23, uses a seemingly careful balancing between the concepts of the duty to protect and the duty to fulfill. The statement at issue requires 'protection' on the one hand *against* harmful acts of the state as well as of other persons within the state party, and on the other hand *for* 'the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.' In this connection, the HRC also expressly reiterates that provisions on non-discrimination and equal treatment are to be respected as regards the treatment between different parts of the population.

[65] The question of *drittwirkung* or 'horizontal effect' falls in all its complexity outside the scope of the present study. Briefly, on state duties in this respect in the sphere of education, see, for instance, Craven 1995, p. 112.

Two main functions that the state typically takes upon itself are legal regulation and budgetary commitments to education providers, both of which shall be undertaken with respect to substantive equality. The principle of equal treatment does not as such require that education should be provided to individuals merely by government agencies. What it requires is that when the non-governmental sector is involved in the provision of educational services, state agencies that have approval authority over these activities shall have in place a uniform set of rules regarding the public support to be applied even-handedly to all the interested parties.[66] This obligation has later been detailed in the HRC case *Waldman* v. *Canada* that will be discussed in the next sub-chapter.

(C) *The state duty to take action to eliminate conditions that cause or maintain educational deprivation.* The third principle mentioned by the CESCR Committee, the principle of effective participation in society for all, links the state obligation to guarantee equal educational opportunity most clearly with the disadvantage doctrine. For minority communities where a substantial number of individuals live under conditions of poverty, it would be hard, if not impossible, to establish educational institutions of their own. Therefore, formally available state support through incentives and subsidies does not fulfill the requirement of substantive equality. The positive state obligation to deliver education directly can be required where the complexity, low economic profit prospects, and difficulty of providing quality education in accordance with the needs of the students mean that private providers are unable to undertake the task.

This is the critical point where, in the terms of Nancy Fraser (2000) state attention is called to "non-identitarian politics that can remedy misrecognition without encouraging displacement and reification of collective identities".[67] Legally binding international human rights law does not suggest the presence of a strong state duty to take action towards the elimination of restricted educational situation. The South African *Grootboom* case, with its famous argumentation that the state is obliged to pay special attention to the situation of the most vulnerable groups in its policy formulation and implementation, has no direct counterpart in international jurisprudence.

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[66] David Harris *et al.* (1995, p. 540) talk in this context about the state duty to take into account both efficiency and fairness.

[67] In the sphere of education, the same challenge is expressed in plain language in the New Delhi Declaration for a Holistic Vision of Education for All, which proclaims that it is a duty of states and governments to first guarantee basic education for all their citizens. This Declaration is reprinted in NQHR 4/1991, pp. 468–469. Another soft-law statement at this point can be found in the Hamburg Declaration, para. 9, which states that "It is essential that the recognition of the right to education throughout life should be accompanied by measures to create the conditions required to exercise this right."

When trying to establish the essentials of positive state obligations as regards promotion of equal opportunity and treatment in education, it is important to keep in mind that the CDE impugns even discrimination that is detrimental in effect, even if neutral in its form. It is reasonable to argue that this statement also encloses a state duty to examine how the law of education fails to take into account the disadvantaged position that seem more typical of marginalised communities. Moreover, it places on the state a duty to continuously contest assumptions of the education law's neutrality; to ask which differences are taken for granted that in changing circumstances may serve as a justification for laws that neglect those already in a most disadvantaged position. Effectively, this obligation places a duty on states not to neglect any aspect of Article 4 CDE discussed above.[68]

5.4. *The Concept of Resources Revisited*

5.4.1. *The Distributive Paradigm as a Precondition for the Equality and Adequacy of Education*

Distributive equality is a topic that has been discussed a lot within many disciplines. A *Theory of Justice* by John Rawls that was mentioned in the introductory part of the present study is one of the well-known works on this subject matter. Among established critics of the distributive paradigm, Iris Marion Young argues that it focuses too much on the allocation of material goods, and thereby ignores social structures such as decision-making power, the division of labour and culture, or the symbolic meanings attached to people, actions and things.[69] More recently, for instance, Ronald Dworkin (2000) has proposed that many of the objections to equality of welfare could be resolved if the focus of egalitarian concern was shifted from the distribution of goods to the effect of that distribution on individuals.

Such weighty arguments from political and legal philosophers make it interesting to examine what international human rights law, in point of fact, says about resource distribution: what does it say about the meaning of distributive equality and how does it specify the resources to be redistributed? What, in concrete terms, is meant by the requirement according to which a state party to the CESCR shall demonstrate that it has *used all resources at its disposal* "in an effort to satisfy, as a matter of priority, those minimum obligations" it has undertaken under the Covenant?[70] And what is being discussed

[68] The fact that Article 4(d) has not been discussed thus far is not meant to imply that it is considered to be insignificant. It has only been postponed to the next subchapter where the related theme of human resources will be focused upon as a matter of its own.

[69] Young 1990, p. 16.

[70] CESCR General Comment No. 3, para. 10. Emphasis added.

when it is said that: "In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to *equitable and effective use of and access to the available resources*".[71] General statements like these illustrate that the concept of resources in human rights discourse is far from clear-cut. A more precise definition of what is meant by resources is necessary for the determination of state obligations in the subject matter.

Indeed, educational resources are only in part about finance, as it is not ultimately money that empowers, but rather knowledge and the means of distributing this knowledge. Thus, we need to look into other types of key resources as well, and comprehend how they in optimum conditions function as self-reinforcing 'virtuous circles' that lead to the empowerment of deprived individuals and groups. In the following review of international human rights stipulations over the concept of resources, the key concept is divided into four subcategories: financial resources, human resources, information resources and technology resources. These four types do not attempt to be a definitive list; the argument says only that they are all crucial for securing quality education in a knowledge-based society.[72] The discussion below strives to demonstrate that each of the selected four key resources can be claimed to have legal basis in international human rights law, even if relevant provisions are scattered and therefore easily put into the shade by mere money-talk.

5.4.2. *State Duties Relating to Financial Resources*

Contemporary human rights theory takes it as a matter of course that state parties have a positive obligation to fulfill the right to primary education, as stipulated in Article 13(2)(a) of the CESCR and Article 28(1)(a) of the CRC. The obligation that primary education shall be free for all in compulsory school age is apparently the most uncontested of state duties under the concept of the human right to education.[73] Provisions that stipulate on positive

[71] Limburg Principles, para. 27. Emphasis added.

[72] This conceptualisation of resources is inspired by Robert E. Robertson (1994). In addition to the four types of resources focused upon here, Robertson also discusses natural resources, which, however, are left outside the present study due to the fact that they are of significance more when studying the rights of indigenous peoples than when focusing on Roma right to education. Himes (1992) discusses organisational resources as a category of its own, which, however, are left outside of the study in hand due to the fact that they can be covered largely by analysing other forms of resources. That is to say, organisation is seen primarily as a channel for the delivery of resources discussed in the present study. The expression 'available resources' might in addition mean even more abstract types of resources, such as those related to traditions, culture, or a spirit of solidarity. See, for instance, how Thomas Hammarberg (2001, p. 365) lists resources of non-quantifiable types.

[73] This is not to say that state duties in relation to primary education are clear-cut. The concept of 'free' itself evokes a number of questions as to whether free availability of education means only 'free of charge' or whether it means that school supplies in a broader sense—such as free schoolbooks, free transportation, free meals and school health care—should also be

duties beyond the realm of primary education are much more divisive. Yet, state parties to international human rights law indisputably undertake to take steps "to the maximum of available resources, with a view to achieving progressively the full realization" of the right to education even beyond the primary level.

What kinds of obligations are included, for instance, in Article 13(2)(b) of the CESCR, which reads: "Secondary education in its different forms shall be made generally available and accessible to all in particular by the progressive introduction of free education." And concerning basic education above compulsory school age: do imprecise formulations according to which fundamental education shall be "encouraged or intensified as far as possible" factually place any positive obligations on state parties?[74] Or should the duty to provide free basic education take precedence over higher forms of education, due to the very fact that it is a prerequisite to the meaningful exercise of other rights?

The silence concerning the state duty to introduce free basic education above compulsory school age in a progressive manner affects the subjects of this category, at least indirectly, as it is particularly easy to argue that the government cannot afford to meet expectations where the law keeps silent.[75] As the situation is now, much is left to the discretion of state parties. Instead, international human rights law provides instruction in two other important dimensions of education financing. The first concerns how the costs of education could be equitably distributed between the state and alternative education providers, the second concerns the cost-bearing capacity of individual students. Both these two dimensions will be discussed below in sequence.

a. *Non-Discriminatory Funding of Education Providers*

The theme of public funding for private schools has preoccupied legal scholarship for decades. Even the drafting of Article 2 of Protocol No. 1 to the ECHR in 1952, as the first internationally binding instrument after the UDHR that explicitly refers to a right to education, aroused debate in this respect. During the course of years, several scholars have deemed that

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included the concept of 'free.' For operationalisation of this concept, see for instance CESCR General Comment No. 11, para. 7.

[74] Article 13(2)(d) of the CESCR reads: "Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

[75] For individuals above compulsory school age lacking basic education, wholly or partly, it might be profitable if the relevant human rights provisions contained a limitation clause similar to Article 23(3) of the CRC, which reads: "Recognizing the special needs of a disabled child, assistance . . . shall be provided free of charge, whenever possible, *taking into account the financial resources of the parents or others caring for* the child . . ." In the case of basic education above compulsory school age, a similar statutory provision for the partial or complete exemption from such fees of individuals who cannot afford them might increase the force of legal protection. More importantly, the main worth of such provision would be the prohibition of turning learners in need of basic education away on account of their inability to pay.

at that point the negative wording was adopted expressly in order to avoid an interpretation according to which an obligation arises for a state party to arrange the education required.[76]

Afterwards, the Court has repeatedly rejected claims submitted by private education providers that the government should subsidise their activities. In the *Belgian Linguistics* case, the Court considered that the negatively phrased language of Article 2 of Protocol No. 1 does not oblige a state party to establish or subsidize at its own expense an educational system of any particular kind or level. Also in *W and KL* v. *Sweden* the Court stated unambiguously that a state party has no obligation under the ECHR to fund or subsidise private systems of education which it has permitted.[77] In these earlier cases, the Court operated within the concept of formal equality. The trend away from formal interpretation started to pave its way first elsewhere, namely within the UN regime.

There are several sets of provisions in the legally binding UN instruments under which the issue of state duties regarding funding of non-governmental educational arrangements can be raised. The outer limits are set in Article 3(d) of the CDE, which obliges state parties:

> not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group.

It is the spirit of equality manifested in this provision that has been proposed as a justification for many rejections of funding claims by private educational systems. The meaning of Article 3(d) as such has not been exhausted thoroughly, due to the insufficient monitoring mechanism of the CDE, but the same subject matter has been raised several times under the CCPR. In the 1980s, several cases were brought to the consideration of the HRC where the main issue was whether the authors of the communications were victims of violation of Article 26 CCPR because the state party was not providing the same level of subsidy for private and public education.

In all of these cases, the Committee found that the state party was not violating Article 26. As reasoning, the HRC put forward several arguments. It considered, *inter alia*, that there was no state duty to subsidise education that was not subject to state supervision, that there existed reasonable and objective

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[76] Vierdag (1978, p. 87), van Bueren (1994, pp. 339, 341), Arajärvi (1999, p. 558 f.) and Hodgson (1998, p. 56) mention as an explanation for the negative formulation also that in 1952 all the member states of the Council of Europe already had a general education system, whereby it would have been unnecessary to require them to establish such a system.

[77] *W and KL* v. *Sweden* (1985). Pellonpää considers in his early 1990s text (1991, pp. 373–374) that private schools are not entitled to state subsidies on the basis of the formulation used in Article 2. Nowak (2001, p. 265) also draws attention to the fact that all applications submitted by private schools concerning state obligations to finance private schools and provide them with the same facilities as public schools have been rejected with regard to Article 2 of protocol No. 1 to the ECHR at the admissibility stage.

criteria for the preferential treatment given to public sector schooling, and that it was the free choice of the authors not to avail themselves of benefits which were generally open to all.[78] After these precedents, it appeared, therefore, to be beyond doubt that state parties are not obliged under the CCPR to subsidise private schools either directly or indirectly. Rather, public financing of private education was considered to undermine the spirit of equality which was expected to pervade the entire universal human rights framework.

An alternative approach, acknowledging the call for substantive equality, started to gain a footing in HRC jurisprudence in the 1990s. It became apparent that educational benefits "generally open to all" seldom responded equally to the diverse needs of the student population in a pluralist society. Indeed, even the CDE contained a requirement for substantive equality, by obliging the state parties to abolish discrimination 'in effect'. Moreover, also pertinent to the issue under consideration was Article 5(1)(c) of the CDE, according to which the state parties agreed that:

> It is essential to recognize the rights of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:
>
> (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
> (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
> (iii) That attendance at such schools is optional.

In the light of Article 5, it is axiomatic that states seeking to abolish private education would directly breach international human rights law. Nonetheless, this provision was long seen as containing merely negative state obligations, as the educational standards of the majority population were considered as a norm and minority individuals' lives and needs were regarded as something redundant. It is only since *Waldman* v. *Canada* that state parties of the UN human rights regime have explicitly been required to actively consider that differing educational needs among the population may justify equal public funding. The issue in this case was whether public funding for Roman Catholic schools, but not for other religious schools constituted a violation of the author's rights under the Covenant. The HRC observed that the CCPR as such does not oblige state parties to fund schools which are established on a religious basis.

[78] For a brief description of these cases *Blom* v. *Sweden* and *Lindgren and Lundquist* v. *Sweden*, see above Chapter 2.3.1.

The crucial statement in the *Waldman* case was, however, that if a state party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria.[79] This statement was reiterated by the CESCR Committee in 1999, when in relation to the liberty of parents to choose for their children schools it observed: "A State party has no obligation to fund institutions established in accordance with article 13(3) and (4); however, if a State elects to make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds".[80]

The *Waldman* case is significant also insofar that in connection with it the importance of Article 27 of the CCPR was underlined concerning the issue of the state duty to promote religious and linguistic education impartially.[81] Concurring individual opinion annexed to the decision identified a number of criteria with the help of which it could be estimated when the funding of some but not all minorities is non-discriminatory. First, attendance of such education should be optional, which is a requirement that is rightly in line with Article 5(1)(c) cited above. As a second criterion, a constant demand for particular education by some minorities would justify their funding when other minorities voluntarily refrain from particularistic claims of their own. The sufficiency of the number of students is proposed as the third legitimate criterion for deciding whether it would amount to discrimination not to establish a public minority school or not to provide comparable public funding to a private minority school.[82]

In the European context, *Thlimmenos* v. *Greece* has been mentioned as ground-breaking case in attempts to correct overgeneralisations based on the formal equality approach.[83] Although not dealing with education financing as such, it is crucial for the topic under consideration insofar that the Court there acknowledges the state duty to accommodate for difference. From that

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[79] *Waldman* v. *Canada*. See particularly paras. 10.2 and 10.6.

[80] CESCR General Comment No. 13, para. 54.

[81] Prior to that, the state duty to take all religious and linguistic communities of society objectively into account in its education funding schemes tended to be covered by soft-law statements only. For instance, Article 5(2) of UNESCO Declaration on Race and Racial Prejudice of 1978 enjoins states to make "resources of educational system available to all groups of the population without racial restriction."

[82] *Waldman* v. *Canada*; individual opinion by member Martin Scheinin (concurring) para. 5.

[83] Similar attempts can be traced even in earlier ECHR jurisprudence. For instance, in *Abdulaziz, Cabales & Balkandali* v. *UK*, the Court determined that the Article 8 right to respect for private and family life could impose positive obligations in some circumstances, even if it did not entail any concrete government obligation to subsidise or provide services in support of the private or family lives of ethnic minorities.

reasoning, a requirement for positive state action when relative disparities between different groups apparently exist in education can also be derived.

As far as the EU is concerned, the granting of financial aid is a common steering mechanism, but it is considered to be a political rather than legal matter. The EU uses widely differing funding mechanisms to encourage member states to fulfill certain objectives, follow specific policies or refrain from particular activities. By using this steering mechanism, the EU can factually promote such issues as the fulfilment of everybody's right to an identifiable amount of basic skills or the strengthening of minority education. EU subsidies may be linked to certain obligations, such as an increase in the number of illiterate immigrant women integrated into the education provision, but ultimately they are merely a matter of incentives, which the member states remain free to reject if they so like. In any case, it is obvious that the distribution of diverse funding mechanisms shall be in line with the fundamental rights and principles mentioned in the CFREU, along with other international clauses on non-discrimination and equality.

b. *Enhancement of Individual Funding*

Exclusive of basic education that shall be free, the requirement of fee payment in education is not as such to be considered discriminatory. However, international law repetitively imposes a state duty to establish a financing system that enhances equality of educational access for individuals from economically deprived families. State parties to the CESCR recognise this duty in Article 13(2)(e) which requires forthrightly, *inter alia*, that an adequate fellowship system shall be established. Similarly, Article 28(1)(b) of the CRC stipulates that contracting parties shall, on the basis of equal opportunity, make different forms of secondary education available and accessible to all children, and "take appropriate measures such as the introduction of free education and offering financial assistance in case of need".

The CESCR Committee has on several occasions reminded state parties of the importance of the establishment and maintenance of an adequate fellowship system. As a decisive factor for adequacy, individuals with sufficient merit to allow access, but lacking financial resources, should be able to participate through provision of government-guaranteed loans, scholarships, grants, and the like. Moreover, the CESCR Committee reiterates that the requirement for an adequate fellowship system should be read in conjunction with the Covenant's non-discrimination and equality provisions. That is to say, disparities in availability of individual financing opportunities should not depend on unjustified distinctions on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status" as stipulated in Article 2(2) of the CESCR.

Very clearly, the CESCR Committee lays down that under Article 13(2)(e) state parties "are obliged to ensure that an educational fellowship system is

in place to assist disadvantaged groups".[84] The relatively strong expression of 'ensuring' is used also in Article 10 of the ESC which stipulates on state duties in the subject matter of individual capability to cover educational costs.[85] Accordingly, the contracting parties undertake "with a view to ensuring the effective exercise of the right to vocational training", *inter alia*, to encourage the full utilisation of the facilities provided by appropriate measures such as "reducing or abolishing any fees or charges" and "granting financial assistance in appropriate cases".

In the European context, it is particularly within the jurisprudence of the ECJ that the topic of student fees and study assistance has been most frequently challenged, even if not actually from the human rights viewpoint. In the 1970s, the Court had already stated that the Regulation on the Freedom of Movement for Workers within the Community (No. 1612/68) obliges contracting states not only to guarantee children of foreign workers access to general education, but also general measures intended to facilitate educational attendance, such as grants and the like.[86]

In the 1980s, the ECJ stated in a number of cases that imposition of a duty to pay a specific enrolment fee on a citizen from another member state who is lawfully residing on the territory of the host state was contrary to Article 7 of the TEC. Accordingly, all special fees directed at students coming from other EU member states shall be prohibited. Although the Community has no competence in the field of educational policy, access to education and training was considered to fall within the Treaty's scope of application. In contrast, the case law of the ECJ has limited the duty of the member states to provide for study assistance to certain categories of Community nationals, that is workers and their family members. That is to say, there is no state duty to provide study assistance for individuals who move within the Community only for study purposes, whilst they shall receive equal treatment to the nationals of the host member state as far as enrolment fees are concerned.[87]

5.4.3. *State Duties Relating to Human Resources*

The amount of money spent on education does not always reflect the quality of the education, as the relationship between financial resources and quality is not that straightforward. In monitoring the right to education, the

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[84] CESCR General Comment 13, paras. 26, 53.

[85] See Chapter 5.3.3 above on the concepts of 'to ensure', 'to guarantee', and 'to secure' in relation to positive state obligations.

[86] ECJ case 9/74, *Casagrande* (1974), para. 9.

[87] Case 152/82 *Forcheri* v. *Belgium* (1983); Case 293/83 *Gravier* v. *City of Liège* (1985); Case 39/86, *Lair* v. *Universität Hannover* (1988). For description of these cases, see Gori 2001, p. 379 *et seq.*

pupil/teacher ratio has often been suggested as a good measurable indicator of quality.[88] However, a number of research findings call into question the validity of that indicator and instead maintain that the competence of teachers is a more important indicator than group sizes. Among other things, the correlation between dropout rates and teacher qualifications is clearly documented.[89]

The quality of teachers is a major factor in guaranteeing quality of education, yet, it is seldom discussed in the literature whether teacher qualifications are as clearly covered by legal requirements as are, for instance, student-teacher ratios. The state duty to guarantee that the educationally most disadvantaged students are not disproportionately supervised by unqualified teachers seems to be overshadowed by talk about money, which in any case is merely a matter of exchange: what individuals want to have is skills, and what is needed to receive decent skills is good instruction by competent teachers.

There are several international human rights standards that demand that the governments provide sufficient and non-discriminatory teacher training. Under the CDE, one of the undertakings to which the state parties expressly commit themselves is "to provide training for the teaching profession without discrimination".[90] The CESCR also touches upon this subject, even if on a very general level, by stipulating in Article 13 that the development of a system of schools at all levels shall be actively pursued, and that any substitute forms of schooling shall conform to certain minimum educational standards. Without doubt, the qualifications of the teaching staff are an essential aspect of these standards.

The commitments made in the CDE and the CESCR are operationalised in contemporaneous and later soft-law instruments. The joint UNESCO-ILO Recommendation Concerning the Status of Teachers stipulates that all aspects of the preparation and employment of teachers should be free from any form of discrimination on grounds of race, colour, sex, religion, political opinion, national or social origin, or economic condition. Differing from the non-discrimination clause of the CDE, language is not mentioned in this enumerative list. That fact should, however, in no case be interpreted as granting permission for unjustified linguistic discrimination in teacher training. What the Recommendation under consideration makes clear is that no state should be satisfied with mere quantity as an educational objective, and

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[88] See, for instance, CESCR, Committee on Economic, Social and Cultural Rights, Background Paper submitted by World University Service, 24/09/98. E/C.12/1998/15, para. 12.

[89] See, for instance, research finding by Ashton (1996), according to whom teachers with formal certification receive higher student achievement than formally unqualified teachers. He suggests that states reducing certification requirements obviously worsen inequities in the quality of education offered to low income children.

[90] The CDE Article 4(d).

that completion of an approved and appropriate teacher-training should be required of all persons entering the profession.[91]

One universal and legally binding human rights instrument that unmistakably stipulates on state duties in relation to teacher training is the CEDAW. Article 10(b) reads, in part, that state parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure: "…access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality". This provision is, without doubt, of utmost importance for any legal strategies aiming to stop the devaluation of women and girls as subjects of education.

A similar provision might be appropriate for many historically undervalued categories of learners, but general undertaking clauses of this type are exceptional. Advantageously, even other international instruments contain stipulations that put pressure on states to provide appropriate teacher training for the needs of diverse learner categories. An analysis of human rights standards suggests two kinds of state duties on the subject of the teacher education issue. First, a non-discriminatory teacher training system shall not be assimilatory, but rather give due recognition to multiculturalism. Second, education of most disadvantaged individuals shall not be qualitatively inferior to that existing in the rest of the society. Arguments for each type of obligation come next.

a. *Teachers for Particularistic Claims*

The state duty to consider in teacher training the diverse conditions of the student population of the country is embodied primarily in minority rights soft law. Article 4(3) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is illustrative, according to which states should "take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue". Article 8(1)(h) of the ECRML stipulates that state parties shall undertake to provide the basic and further training of the teachers required to implement those types of education that they pick from the à la carte list of the Charter.[92] Likewise, Article 14(2) of the FCNM provides that persons belonging to national minorities shall on certain conditions have adequate opportunities for being taught in the minority language or for receiving instruction in that language.

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[91] Recommendation Concerning the Status of Teachers, adopted by the Special Intergovernmental Conference in 1966. *See also* the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997).

[92] See Chapters 3.3 and 4.3 above on the character of the ECRML.

The Hague Recommendations put emphasis on the last-mentioned provision by underlining the importance of the availability of teachers trained in all disciplines in their mother tongue. Accordingly, states are pushed to provide teacher training that takes the diversity of the society into account and to facilitate access to such training.[93] A commitment to provide teacher training that responds to the needs of the target group is also at least implicitly included in Article 19 of the revised ESC, where the state parties undertake "with a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance" to promote and facilitate for the persons concerned the teaching of both the national language of the receiving state and the mother tongue of the migrant worker.[94]

All examples above speak about the state duty to account for teacher training that is responsive to the linguistic diversity of the population. Nonetheless, it is not only the linguistic mixture of the rights-holders in education that publicly funded teacher training programmes shall reflect on. The state duty to guarantee the availability of teacher education that is responsive to the needs of different categories of learners, as regards their divergent ethnic, cultural or religious affiliations is also covered by international standards. This finds expression, for instance, in Article 8(1)(g) of the ECRML, where the contracting parties undertake "to make arrangements to ensure the teaching of the history and the culture which is reflected by the regional or minority language". Similarly relevant is Article 4 of the FCNM, which confirms that adequate measures shall be taken to promote full and effective equality in society in all areas of economic, social, political and cultural life. Provisions like these could put pressure also on the decision-makers over teacher training programmes that receive public funding to include within those programmes adequate cross-cultural education components.[95]

b. *Teachers for the Functionally Disadvantaged*

The argument that states have a positive obligation to provide adequate teacher training to comply with the needs of functionally disadvantaged learners is principally based on general requirements for equality and non-discrimination

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[93] The Hague Recommendations Regarding the Education Rights of National Minorities (1996), Recommendation No. 14.

[94] The relevant paragraphs of Article 19 provide that state parties undertake: "…11. to promote and facilitate the teaching of the national language of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families; 2. to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker."

[95] ECHR case-law around the issue of religious minority teaching has not directly touched the question of teacher qualifications. *Al-Nashif* v. *Bulgaria* (2001) concerned the appointment of a teacher of Islam by the Muslim population and his deportation as a threat to security or interest of the state following a police investigation that he was "teaching religion without authorization." In *Raif Oglu* v. *Greece* (1999) the applicant was a teacher who claimed that he was subject to persecution as a result of his religious beliefs and ethnic origin. The Court dismissed the application because he had regained his job and received compensation.

in education. There are at least two challenges that the life situations of individuals suffering from severe skills deficiencies pose for teacher training. One relates to the special pedagogic skills needed in the instruction of illiterate individuals above primary school age. Most likely, the basic training of primary education teachers provides neither readiness nor willingness to act in response to the special needs of older analphabetic individuals.

Where illiteracy interconnects with language deficiency, the pedagogic challenge becomes compounded. As has been discussed in earlier parts of the study, language-expertise in education is a two-fold issue. On these occasions, the state duty to ensure the availability of teacher education that is adequately responsive to the situation of multiply disadvantaged students can be derived also from provisions that call attention to the abolishment of multiple discrimination. A common prejudice may prevail in society that students that have dropped out from the system at some phase cannot achieve the same level of learning as those who can build on a solid basic education in their childhood. Yet, the key concern should be whether the most disadvantaged have access to competent teachers. Their suffering from shortages of qualified teachers in a disproportionate manner may well disclose elements of systemic discrimination.

As far as the professional valuation of literacy teaching is concerned, difficulties in finding qualified teachers may depend on the fact that there is no option in teacher education programmes to specialise in the pedagogy of analphabetic youngsters and adults. Neither are there any legally binding international provisions that expressly oblige states to prepare teachers for teaching adults that suffer from basic skills deficiencies.[96] In contrast, instruments concerning vocational education stipulate explicitly that teachers shall not only have appropriate teaching skills consistent with the type and level of the courses they are required to teach, but also that teaching staff shall be given the opportunity to update their knowledge and skills through diverse organised forms of activity.[97] It is also important to note that the Recommendation Concerning the Status of Teachers, which amongst other things calls states to provide adequate preparation for the profession, applies expressly to all those persons who are responsible for the education of pupils, including paraprofessionals with instructional duties.[98]

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[96] ESC Article 17(1) can be considered to include a request for adequately trained personnel even in some special education arrangements. By that provision the contracting parties undertake, *inter alia*, to ensure that children and young persons have the education and training they need, "in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose." As has been mentioned earlier, the duty to provide basic education for those above compulsory school age is, however, expressly left outside the scope of this article.

[97] UNESCO Vocational Convention, Article 5; ILO Revised Recommendation Concerning Technical and Vocational Education (2001), Articles 75, 76, 78.

[98] Recommendation Concerning the Status of Teachers (1966), Article 1(a).

5.4.4. *State Duties Relating to Information Resources*

The distinction between human resources and information resources may sound artificial when the information is conveyed by human beings. Nonetheless, the importance of information resources in a knowledge-based society has grown so great that it is reasonable to raise these two issues separately. As a matter of fact, even when a state has legislation that explicitly confirms the right to education, it may happen that individuals have no knowledge about their rights. And even if they have knowledge about their right to education, they may not have proper information relating to the choices that they have the right to make. Educational and vocational guidance, when functioning well, serves both individuals and society by promoting awareness of occupational choices and the employability of persons after they have finalised their studies. In contrast, restricted access to information about education programmes, services and entitlements can serve as a barrier to the effective use of opportunities and resources provided by the government. A positive state obligation to disseminate knowledge about the right to education can therefore be an essential prerequisite for the fulfilment of this right.

The state duty to give qualified help in the choice of education and training appeared in international standards through various recommendations as early as the 1940s.[99] Vocational guidance has existed as a separate, fully fledged right ever since the original ESC, which was adopted in 1961. Article 9, which remained in its original form when the Charter was revised in 1996, provides as follows:

> With a view to ensuring the effective exercise of the right to vocational guidance, the Contracting Parties undertake to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity; this assistance should be available free of charge, both to young persons, including school children, and to adults.

This clause illustrates that there is a positive obligation for those states having accepted it to operate a service that helps all persons, free of charge, to solve their problems relating to vocational training and occupational choice. Later, similar legally binding provisions have been adopted within other international regimes as well.[100] In the European context the quotation of Article 9 ESC is

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[99] E.g., Vocational Guidance Recommendation, 1949 (No. 87); Vocational Guidance and Vocational Training in the Development of Human Resources Recommendation, 1975 (No. 150).

[100] For instance, the ILO Convention (No. 168) concerning Employment Promotion and Protection against Unemployment (1988) stipulates in Article 7 that "each member shall declare as a priority objective a policy designed to promote full, productive and freely chosen employment by all appropriate means" and that such means should include, *inter alia*, vocational guidance.

sufficient to make the point: guiding assistance shall be placed at the disposal of all categories of individuals, including the handicapped along with non-handicapped ones, and children along with young persons and adults.

By virtue of the fact that educational guidance plays an essential role in the promotion of equal opportunity for male and female students in access to further training and/or to employment, states are additionally obliged to ensure that educational choices are not influenced by considerations based on gendered stereotypes that have the effect of segregating individuals categorically in certain sectors or occupations. This obligation is laid down in Article 10(a) of the CEDAW, where state parties expressly undertake to ensure for women and girls the same conditions for career and vocational guidance as for men and boys. The persistence of gender-biased guidance that stems from inadequately trained counsellors has subsequently been targeted by some soft law provisions on the state duty to guarantee that the guiding staff is competent in gender equality issues.[101]

The state duty to abolish discriminatory or biased counselling of individuals from ethnic or linguistic minorities has not been confirmed by specific clauses similar to Article 10(a) of the CEDAW, even if they also are most obviously affected by any potential incompetence of the guiding personnel. A number of studies suggest that people from particular ethnic, social and linguistic backgrounds are treated less favourably, for instance, by guiding them away from academic courses and into certain vocational lines.[102] Most striking are cases where students are assigned to segregated education that leads to dead-ends; that is, from where students have limited or no access to further education or adequate employment options.[103]

A question that has arisen in educational segregation cases is whether the consent required from students or their parents for such arrangements, in order to have legal effect, must be informed consent. In other words, is the government overlooking some of its positive obligations under international human rights law if the people concerned are not adequately informed of facts of significance that follow from segregation? Over and above general undertaking clauses that oblige state parties to abolish discrimination in

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[101] See, for instance, the European Commission Recommendation of 24 November 1987 on Vocational Training for Women (87/567/EEC) Article 2(b), which calls members states to "staff the guidance, training and placement services with persons qualified to deal with the specific problems of women (e.g. equal opportunities counsellors) and to take measures to increase the awareness of instructors." Moreover, in Article 2(e) the states undertake to "develop awareness and information measures so as to offer women and those around them images of women engaged in non-traditional activities, particularly those related to occupations of the future." Focusing upon the same defect, the revised UNESCO recommendation concerning training and vocational education (2001) stipulates in paraphrase 57(a): "Particular attention should be given to guidance for girls and women to ensure that guidance is gender-inclusive and covers the whole range of education, training and employment opportunities."

[102] For a Finnish case-study, see Gynther 2000a.

[103] *D.H. and Others* v. *Czech Republic* discussed in Chapter 2.3.2 deals with this type of discriminatory segregation in education.

education, there are a number of special provisions that can be applied to cases that deal with this question. For instance, Article 6 of the ECRML is a particular information clause where the parties undertake to see that the authorities, organisations and persons concerned are informed of the rights and duties established by the Charter. Appropriate information can naturally be spread by non-governmental actors as well, but the duty to facilitate diverse activities lies on the state.

As a rule, there are two levels of educational and vocational guidance, one carried out with the general education system and the other in the labour market. Those individuals that fit into neither of these systems are often in educationally the most disadvantaged position and unable to make conscious and positive choices without information that gives them an unbiased view of the opportunities available. At first glance, one would think that international human rights law surrenders before the challenges that an obligation to deliver information on the right to education to those who are in an educationally disadvantaged position involves. The difficulties of reaching the people concerned, in the language they understand, by a media that is available to them, and that crosses diverse barriers of gender, age, religion, language or culture, or a combination of these, may give an impression that the government cannot afford to meet expectations for an educational guidance system that spans the entire society.

However, there are several provisions in international human rights law that spell out the fact that educational guidance shall not be treated as merely a remote element on the edge of the scope of the right to education. First, Article 28(1)(d) of the CRC requires state parties to "make . . . educational and vocational information and guidance available and accessible to all children". This means that no children below the age of 18 shall be left without professional guidance services, even if they fit neither into the general education system nor into the labour market. Second, several ILO conventions oblige member states to ensure that comprehensive information and guidance is available to all children, young persons and adults, including handicapped and disabled persons.[104]

Third, and most importantly, a state duty to provide adequate information resources can be based on Article 26 of the CCPR. As already mentioned, this clause provides a distinct right for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the states. It shall govern the exercise of all rights that the state party confers by law on individuals within its territory or under its jurisdiction.[105] This provision can be used even to plug the loophole in Article 9

[104] See, for instance, the ILO Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources (No. 142) 1975, Article 3(1).

[105] *Diergaardt et al.* v. *Namibia* is illustrative as a case that includes the right to information. In that case the HRC found a violation of Article 26 when regional authorities had prohibited

of the ESC, which—although explicitly requiring guidance services for 'all persons' in need of it—factually extends only to the nationals of contracting parties.[106] In contrast, to comply with Article 26 of the CCPR, the rule *ratione personae* does extend to everybody irrespective of nationality.

A fact that diminishes the usability of Article 26 concerning the issue under consideration is that the right to educational and vocational guidance is not a right expressly protected under the CCPR, whereby state parties are not in the monitoring process asked to submit information on the distribution of guidance services to the educationally most disadvantaged parts of the population, nor on the competence of the staff assigned to their guidance. In any case, when the provisions discussed above are read in conjunction, it becomes apparent that international human rights law at least obliges state parties to create an enabling infrastructure for the distribution of information to individuals legally residing under their jurisdiction about educational services to which they are entitled, irrespective of their nationality, age, language, gender, religion, ethnicity, or any other grounds that according to law are to be considered discriminatory.

A state duty to provide adequate information resources does not need to mean that the state should provide all the required information itself. Quite on the contrary, in a pluralist society, the role of the public sector is, perhaps more than ever, to facilitate, to give thought to the best ways to reach all the people concerned in a language that they comprehend, and then to mandate suitable bodies/organisations/groups to do the dissemination work. Provincial or local authorities may be obliged to inform all individuals living in their geographical areas, but in many cases it may be that non-governmental organisations are best in contacting the target groups most difficult to reach.

5.4.5. *State Duties Relating to Technology Resources*

Last but not least, in the era of globalization, technology resources are increasingly important in every part of the world. The rapid development and deployment of new technologies has opened up opportunities for open and distance learning (ODL) that principally allows access to information in

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public servants from answering telephone calls or correspondence in the Afrikaans language even when the civil servant in question was able and willing to use that language instead of English, which was the official language of the country.

[106] That is, to comply with Article 9, a contracting party must ensure that such a service is provided for nationals of the other contracting parties legally residing within the territory of the contracting party in question. It is noteworthy, however, that the ESC Committee has repeatedly underlined the growing importance of educational guidance for the more vulnerable categories, such as young persons, the disabled, women, the unemployed and foreigners. The Committee has also stressed the steps to be taken to increase awareness of vocational guidance services and emphasised the importance of information on the effective exercising of the right to vocational guidance. See, for instance, Conclusions XIII-3, p. 318.

most environments. The multitude of ODL methods and channels making use of modern technology resources offer enormous potential to help the most disadvantaged groups gain access to quality education, and thus also the potential to increase human rights accountability in education.

By enabling the provision of more decentralised and more widely distributed education and training facilities, ODL can equalise access to education that in traditional modes of teaching for reasons of timing, place of residence, transport facilities, etc. has been more accessible to certain population groups than others. Modern forms of distance learning can serve as a crucial tool for the fulfilment of the right to education of small dispersed minority populations. Likewise, new technologies offer great prospects for the promotion of multilingualism and for language preservation and diversity. Recourse to new communication technologies might indeed enable effective accommodation of the various educational needs of pluralist societies.

The same development that opens up all these possibilities also brings in new types of threats. The one most discussed is the risk of a digital divide between those who have unrestricted access to educational networks on the one hand, and people who have neither the necessary tools nor knowledge to take advantage of their potential on the other.[107] International human rights provisions on the right to education have already long ago required state parties to address in a progressive way issues such as the digital divide. Just consider Article 2(1) of the CESCR where state parties undertake to take steps, "individually and through international assistance and cooperation, *especially economic and technical*" . . . with a view to achieving progressively the full realisation of the rights recognised in the Covenant. Article 23 also specifically identifies *the furnishing of technical assistance* as being among the means of action for the achievement of the rights recognised in the CESCR.[108]

Moreover, the phrase 'every appropriate means' in Article 13(2)(b) of the CESCR reinforces the point that state parties should adopt the best available approaches for the delivery of education in different social and cultural contexts. Further arguments for a positive state obligation regarding non-discriminatory redistribution of technology resources can be found in Article 10(b) of the CEDAW, where state parties undertake to ensure for male and female students access to school premises and equipment of the same quality. Also applicable is Article 28(3) of the CRC, according to which:

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[107] At the same time as we have been witnessing the rapid development of information technology, general working conditions in the field of education have reportedly deteriorated in many parts of the world. This decline in development has been documented for instance by the CESCR Committee in its General Comment No. 13, para. 27.

[108] Emphasis added here. See observations on these provisions by the CESCR Committee in General Comment No. 3, para. 13.

> States parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and *facilitating access to scientific and technical knowledge and modern teaching methods*…[109]

Albeit the last-mentioned provision calls attention particularly to the needs of developing countries, it is obvious that even 'developed' countries shall place their 'information society—missions' in a human rights context.

In Europe the risks of a digital divide have been discussed most vividly in the political forums of the European Union. '*Europe 2002—An Information Society For All*' is a Community initiative expressly intended to promote computer literacy and to secure equal access to digital systems and services for all Europeans. Concerning the educational sector, the Lisbon Summit in March 2000 agreed to adapt the member states' education and training systems to the latest developments as regards new information and communication technologies. Moreover, one of the asserted objectives in the fight against poverty and social exclusion, approved by the Nice European Council of December 2000, was to exploit fully the potential of the knowledge-based society and of new information and communication technologies and ensure that no-one is excluded from its benefits.

In contrast, European minority rights instruments, in the sphere of which new technologies could be most helpful to overcome educational barriers, are completely silent about widening access by means of the ODL. The ECRML stipulates that regional and minority languages are "used within a given territory" and that the contracting parties undertake to make minority language education available "within the territory in which such languages are used" and to pupils "whose number is considered sufficient". Similarly, the provision in the FCNM stipulating on the right to be taught minority language or for receiving instruction in this language is restricted to "areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand…"[110] Both geographical and numeric barriers could be overcome by means of ODL, but in this respect the two instruments are regrettably old-fashioned.

5.5. *Positive State Obligations in Resource Redistribution: An Interim Conclusion*

Negligence of obligations is not necessarily synonymous with systemic discrimination, as state obligations can be fulfilled also by other means than legislation. The question of when systemic discrimination begins will be discussed in the

[109] Emphasis added here.
[110] ECRML, Articles 1(i) and 8(1)(a)(iii); FCNM Article 14(2).

concluding analytical part of the present study. In this phase it is sufficient to make some interim conclusions. First of all, an attempt has been made above to develop arguments for an extensive reading of the concept of resources and corresponding state duties. Tables 5 and 6 in the appendix provide a summarising overview of the provisions that have been discussed above. What needs to be recapped is that a narrow focus on the reallocation of money is not sufficient when we try to capture the essence of systemic discrimination. Instead, an unbiased reallocation of all four forms of resources in a socially contextualised way is needed to safeguard adequacy as the standard to which all education provision should be held.

As far as financial resources are concerned, international human rights law suggests that a state cannot escape its obligation to guarantee adequate education provision on the grounds that the necessary resources are not available. In such cases, reference is made to the obligation of the international community to assist countries that are lacking in the financial resources and/or expertise.[111] The wording of international law also leaves it open to interpretations whether states have a duty to maintain a comprehensive public education system. That is to say, the government may well place a duty on various private or semi-public institutions to take responsibility for implementing the right to education.[112]

In the issue of individual funding, it is apparent that the student population in many countries has become more heterogeneous since the days when the main instruments dealing with this question were drafted. As has been advocated in the present study, a contextualised reading of the right to education recognises a right of an individual to participate in a continuing process of targeted, goal-specific education. Seen from this viewpoint, international human rights law does not give clear answers. The state duty to guarantee the availability of grants and government-guaranteed loans may not be a sufficient measure to help the educationally most disadvantaged individuals. Yet, it is obvious that the practice of charging enrolment fees impedes in particular the exercise of the right to education for those who cannot afford to pay.

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[111] See in particular CESCR General Comment No. 11, para. 9. It should be acknowledged that courts both in international and domestic jurisdiction have thus far rarely dealt with cases where the system of educational funding has been challenged on the grounds that it discriminates against less well resourced groups or communities, even though property and economic conditions are expressly mentioned among the prohibited grounds for discrimination in several international instruments, as listed in Tables 3 and 4 in the appendix. For a general discussion on court silence around inequalities of wealth, see Fredman 2002, p. 79.

[112] Indeed, distinction between public and private education provision is not that clear. Tomaševski (2001c, p. 20) describes the variety in the classification of schools as public and/or state schools and private schools. For instance, UNESCO divides schools by the criterion of their management, and government-aided schools are considered private if they are privately managed, whereas the English system classifies schools into public and private by the criterion of the source of funding. If a school's funding comes out of public revenue, it is defined as a state school regardless of how it is managed.

Finally, it has been suggested above that the solution for abolishment of systemic discrimination is not merely to be found in the reallocation of funds, but rather in curing underlying problems such as lack of human resources. A sound legal framework in this respect recognises, *inter alia*, that teachers will have to be qualified to work with diverse categories of students, and that teacher education respectively shall be reflective of linguistic as well as age and gender aspects of this diversity. Likewise, information resources should be reflective of the people they are designed to serve. That is, information on educational options should be comprehensible and intelligible, not only for those who send the message, but also for the addressees. These criteria for a sound legal framework in education find support at least in soft international law.

If there only is the will, modern information technology opens the way to fulfill this requirement more easily than ever before. Whose will counts depends on which groups have their representatives in public decision-making procedures, as will be discussed next.

CHAPTER SIX

REPRESENTATION

6.1. *Group Representation as a Panacea for Educational Disadvantage?*

The rights-based approach should include an attempt to make people the subjects of development by allowing them to speak and act for themselves—to articulate their own interest and needs. The underlying rationale is that any form of truly sustainable development depends on enhancing people's capacities to improve their own lives and to take responsibility over their own future. Representation as one of the key elements in the present study, as one of the 'four Rs' indicates the necessity of letting human beings be agents of their own life and to take responsibility for what happens to them.[1]

The concept of the right to representation used below is not part of international rights-language and not a legal term in the same sense as 'the right to participation'.[2] Hence, the human rights school of thought might argue that it has no significance in determining the soundness of education law. Nonetheless, it is suggested here that this separate concept is needed to bring to light the problems of the educationally most disadvantaged individuals. Many of these individuals lack active participatory rights, such as voting rights or workers rights, due to lacking preconditions such as citizenship, employment or work permits. In addition, the premise for representative democracy is that groups of people stand up for their own well-being, but at the same time it is the educationally most disadvantaged individuals that most often fall outside any organised group representation.[3]

Particularly when segmental participation outside of parliamentary representation is at issue, persons making claims for representation must as a rule be able to set up their own organisations to articulate and defend their

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[1] Victimatisation and emancipation as contrasting approaches have been lengthily discussed among feminist scholars. See, for instance, Nussbaum 1999, p. 18.

[2] International human rights law acknowledges participatory rights, for instance, in Article 25 CCPR, Article 3 ILO 135, Articles 22 and 27 ILO 169, Article 2 ESC, and Article 15 FCNM. The general right to participation in public affairs, as recognised in Article 25 of the CCPR, will be discussed in Chapter 6.2.1, below.

[3] Factual difficulties of participation as regards the most disadvantaged communities are discussed, for instance, by Shaeffer (1994, p. 25 *et seq.*). As examples, he mentions that such communities may not only lack experience and skill in participatory and collaborative activities, but also have a shortage of motivation due to earlier frustrations or alienation from the mainstream society which may function as obstacles. Moreover, participatory processes may bring about added expenses that the members of the most disadvantaged communities cannot bear.

interests.[4] Are then those parts of the population that are unable to organise themselves and to communicate their needs to be automatically left without representation? Children are a prime example that demonstrates that this is not the case. On the contrary, the state duty to promote the interests of the weakest members of society is at the very heart of the universal human rights doctrine.

The prominence of representation is by no means a novelty in human rights discourse. Quite the contrary: international standards of recent decades have made use of it or related concepts diligently. However, these issues are by and large covered by soft-law instruments that leave a wide margin of discretion for the contracting parties as far as their interpretation and implementation is concerned.[5] The analysis below will show whether any backing can be found in the legally binding international human rights law for state responsibilities concerning this issue.

In what follows, an attempt will be made to sort out what actually—beyond the common eloquence about participation—is expressed about representation of educationally disadvantaged individuals above primary school age. The analysis will be anchored to the instruments that stipulate on the 15+ education from the basics up to the level of the first generally recognised vocational qualification. First, the focus will be placed upon how potential requests for group representation in the four 'ladders' of the right to education—those defined in Chapter 3 as basic skills, language skills, vocational skills and cultural skills—are acknowledged in international human rights law. Second, in line with Chapter 4, the kind of mechanisms for achieving representation based on age, language, gender and ethnicity respectively that are proposed in the international standards will be examined.

Last, a set of standards will be inferred from international human rights law to be applied when discussing whether the national legislation is sound from the perspective of educationally disadvantaged individuals and their right to representation.

When talking about systemic discrimination being possibly rooted in national law, it is interesting to note that the acknowledgement of the right to representation seems not to be a 'soft-law' matter only. This interpretation

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[4] 'Organised interests' is one of the concepts used, for instance, by Jürgen Habermas. According to him, the main route for citizens to participate in the democratic process is through organised interests, such as political parties and interest associations. The concept of organised interests is crucial for the fulfillment of two tasks: for the rational management of different private interests, and for the strengthening of private interests in comparison with the structural-institutional. See Habermas 1989, pp. 211, 232. *See also* Weller (2003:14) who notes that in order to fulfill the right to effective participation of non-governmental associations they must additionally be given a means of influencing relevant decisions.

[5] For an illustrative chronicle of excerpts from international 'soft-law' that calls for the recognition of effective participation and partnership in education, among other aspects of society, *see* Gynther 2006, pp. 220–221.

requires, however, that the close relationship of representation rights to and consistency with the underlying principles of equality and non-discrimination also is taken into account, as will be illustrated next.

6.2. *Individual Rights versus Collective Power*

6.2.1. *The Individual Right to Representation in an Education Setting*

Educational rights are not merely an arrangement between the individual and the state of which s/he is inhabitant. Whether there exists a specific right to representation in the education setting is, however, not a clear-cut question. International instruments stipulating on the right of peoples to self-determination do often contain extensive provisions on education and training, thus leaving at least some margin for the peoples concerned to decide on these matters in co-operation with—or even independently from—the state.[6] In such cases, it is up to the legislature to decide how much space is given in the state construction to self-government rights, for which groups, and on what conditions. When the topic to be analysed is who represents whom in the national education policy, meaning the mainstream policy, the issue becomes complicated in several respects, as can be illustrated by the following two examples.

(i) The first thorny issue is to whom does the right to representation belong that it is not granted by vote in a political process? Civil and political rights recognised, for instance, in the CCPR, such as the right to vote and the rights ensuring freedom of assembly and association are rights of individuals by which they grant a mediator the mandate to represent them. However, the legislator may grant the right to representation also for specific purposes, a prime example being everybody's right to professional legal assistance in criminal proceedings. Moreover, some bodies with strong interests in the subject matter may be granted a right to segmental representation that is not subjugated to the line-hierarchy of parliamentary democracy. For the purposes of the present study it is important to examine whether there are any outer limits for segmental autonomy from the viewpoint of international human rights law: for whom and for what purposes can such specific representation rights be granted?

(ii) The second ambiguous question deals with the margin of discretion granted to states in choosing mechanisms which they may use in order to guarantee a

[6] See, for instance, Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Parts IV and VI.

right to representation for diverse stakeholders in segmental decision-making. The positive obligations of the state to provide for non-discriminatory representation for the plural interests of a plural society in an education setting are not clearly defined in international law, which is because of the fact that states enjoy a certain margin of discretion in many issues relating to societal power sharing. Even so, it should be possible to identify some parameters of the right to representation provided by international law that a state shall take into account when determining its formal education policy.

Of interest for the testing of the systemic discrimination framework is whether we can argue that any of the educational components (as defined in Chapter 3), or any of the categories of rights-holders (as discussed in Chapter 4), shall have a narrow margin of discretion. In other words, can we argue that a 'high burden of justification' is called for whenever the right to representation in decision-making is not guaranteed to those parts of the population that are most obviously effected? The most interesting point in this context is who represents those parts of the population that are most unable to stand for themselves. If democracy is seen essentially as a mediation among conflicting interest groups, and human rights law is seen as a prime mediator for the most vulnerable ones with no pressure groups of their own, then should not the state margin of discretion be narrowest in matters where the rights of the weakest are at stake?

Basically, the argument for the existence of an individual right to representation, as stipulated for the purposes of the present study, can be anchored to Article 25 of the CCPR, which protects the right and the opportunity of every citizen to take part in the conduct of public affairs, directly or through freely chosen representatives. As becomes apparent from the wording of Article 25 as well as from the General Comment on its implementation, this right shall be interpreted as a broader right than merely the right to vote at periodic elections. It acknowledges an individual right to seek to influence the conduct of all aspects of public administration, and the formulation and implementation of policy at the international, national, regional and local level, by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves.[7] Thus, we are talking about an individual right that can be limited or restricted by the state only for legitimate and objective reasons.

6.2.2. *Representation of Individuals with Basic Skills Deficiency*

In Chapter 3, it was argued that the minimum core of the right to education should transcend any group differences. The perspectives and interests

[7] As stated by the HRC, the rights recognised in Article 25 are expressly individual rights that can give rise to claims under the first Optional Protocol of the CCPR. See CCPR General comment No. 25, paras. 2, 5, 8.

of privileged groups should not be allowed to dominate when defining which categories of individuals have access to basic skills and which ones are left without. A non-discriminatory education system should thus leave no gulf between basic educational rights provided for majority individuals and those provided for minority individuals, be the concept of minority defined as it may. As little as torture can be defended by arguing that only a few individuals are suffering from it, as little is it acceptable to violate the right to basic skills of some individuals because of their numerical scarcity or political powerlessness. Idealistically, the individual approach to the right to education hence encloses a requirement that the minimum amount of it is available for everybody.

The role of state as guardian of persons under legal disability is traditionally called *parens patriae*, literally parent of the country.[8] *Parens patriae* authority implies that the state must care for those who cannot take care of themselves, such as minors who lack proper custody by their parents, or lone mental incompetents who lack the capacity to act in their own best interests. As concerns the right to education, the question is whether the state shall be the protector of any educationally disadvantaged individuals within its jurisdiction lacking the knowledge and the organisational power to make basic rights claims of their own. And, if yes—how long shall such *parens patriae* last? These two questions will be examined in turn.[9]

Concerning the first question, it is possible to argue that the *parens patriae* doctrine should not be associated with the right to basic education of children only. Instead, it should apply to any persons in need of state protection and support in relation to the realisation of the minimum right to education. The rationale here is that it is basically the disadvantaged situation of the individuals, rather than the specific attribute of childhood that gives rise to *parens patriae*. It is easy to accept the customary reasoning that parents have a duty to represent their children's rights due to the vulnerability of their children. As a consequence, it should also be admitted that if the educational disadvantage does not end when compulsory school-age ends then care should somehow continue until functional ability to provide for oneself is achieved. Educationally disadvantaged individuals often lack both the knowledge of how to get organised and well-informed parents to represent them in their stead. Should not, therefore, *parens patriae* in an education setting be tied to functional disability instead of merely formal age limits?

The second, interrelated question is how long *parens patriae* authority should last? Again, an analogy can be made to a customary reasoning that parents

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[8] On the concept of *parens patriae* authority and the related concept of state police power, see, for instance, Magsino (1995); Columbres (undated).

[9] The relation between the interests of the child, the parents and the state, as well as potential need to balance them against one another will be discussed below, in Chapter 6.3.2. However, because the present study has espoused the individual rights approach and its internal logic as the focus of the analysis, it would be illogical to contrast the rights of an individual to education with other 'rights' such as the rights of parents or the state.

lie under an obligation to maintain their children so long as they are unable to maintain themselves—but no longer than that. If this contention is not taken seriously, then it becomes impossible to fit the ideal of representative democracy together with the human rights call for a guarantee that the right to self-determination of every individual shall be respected, including those who lack political power and are in risk of having their interests overlooked. 'Empowerment' or 'self-reliance' as objectives of the right to education require that *parens patriae* authority is not exaggerated. This idea is enshrined in the first sub-article of the CESCR Article 13, which posits the individual as the primary subject of development by stating that "education shall *enable all persons to participate effectively* in a free society".

Thus, the argument that educationally disadvantaged individuals shall have a right to representation is not solely a moral one. It is international human rights law itself that brings about a duty for the state to represent the interests of the most disadvantaged. In so far as a state ideologically acknowledges educational rights merely as freedom rights, then its margin of discretion may be fairly wide. In contrast, if a state admits that educational rights are rights deprived of which any person sustains permanent harm, then its margin of discretion in choosing whether or not to represent those that are unable to speak for themselves is narrower. Even in this case, the representative role should be only temporary, to be ended when those suffering from basic skills deficit are able to manage their own interest in educational matters.

6.2.3. *Applicability of* Parens Patriae *Authority in Cases of Double Language Deficiency*

Much of what was said above about the right to a *parens patriae* type of representation of those that lack basic educational skills applies also to those individuals that are unable to provide for themselves skills in the official language by which they are surrounded in their everyday life. The question thus becomes: does the responsibility of a state to protect from human rights violations all individuals residing on its territory also include representative tasks on behalf of those who suffer from serious linguistic disability and who because of that are unable to take proper care of themselves? Even if the state enjoys a certain margin of discretion in ensuring the fulfilment of linguistic rights within its jurisdiction, it may in no case make use of that latitude arbitrarily.[10]

Shall then the state ensure that none of its permanent residents is excluded from the benefits that are to flow from the publicly funded education merely due to language deficit? The underlying principle is that a state as a party of the human rights treaty system has a fundamental interest in the non-

[10] See discussion in Chapter 3.3.2, above.

discrimination of its linguistically disabled populace. Thus, if the argument is accepted that every individual has a right to an education that entrusts them with a certain minimum of official language skills, then a state need not try to calculate when there is a sufficient amount of individuals whose rights in this respect are unfulfilled.[11] Instead, the state shall take the role of *parens patriae* whenever there is a risk that an individual will otherwise remain linguistically isolated. Such a risk most often faces the least-educated members of small linguistic minorities.

The ethical idea of the state acting in a kind of guardian role until an individual learns to speak for her- or himself should be easy to comprehend: *parens patriae* acts as a backup ensuring that all individuals under the state jurisdiction get a true opportunity to enjoy the rights belonging to them, irrespective of lack of intellectual or economic resources to pursue those rights. Another matter altogether is whether the *parens patriae* doctrine in relation to linguistically disadvantaged persons has any legal significance. In what follows, this question will be considered from two different angles, in line with the remarks made at the beginning of the chapter. The two questions raised for closer examination were: (i) Which assemblages of society shall have the right to representation in non-parliamentarian decision-making procedures? (ii) What are the outer limits for the state margin of discretion when it decides to share segmental power with non-governmental organisations?

(i) First, as concerns the concept of representation in the international standards on linguistic educational rights, not many clear stipulations can be found. Some commentators have criticised the fact that language rights in education on the whole are conceptualised so unsatisfactorily that they are virtually meaningless.[12] If that was an absolute truth, then not many guidelines could be expected to be found in the international standards on the representation matter. Scarcely a social scientist denies the fact that the language policy of any state is closely related to power politics and to interrelated processes of integration or assimilation, and is thus essential for the very survival of a nation state. In that way, it might be rather naïve to expect that detailed regulations could be stipulated at the international level, to be obediently implemented by states. This does not mean, however, that the opposite is true either, i.e. that international law lacks all strength in relation to how seriously a state takes the language rights in education of the individuals under its jurisdiction.

Even if most language-related provisions in the international human rights standards are weak by themselves, they become stronger when read together with other relevant provisions and when the indivisibility, interdependency and

[11] See the different view proposed by Columbres (undated), according to whom a state, in order to invoke its *parens patriae* authority, needs to allege injury "to a sufficiently substantial segment of its population."

[12] For references, see Chapter 4.3.2.

interrelatedness of all human rights, as affirmed in the Vienna Declaration of 1993, are acknowledged. Thus, language-related provisions shall not be disconnected from the general anti-discrimination or equality provisions of the instruments concerned, neither from any other instruments that are part of the international human rights regime. Regarding the right to representation of persons belonging to national or ethnic, religious and linguistic minorities in particular, the Vienna Declaration also stipulates that measures to be taken "where appropriate, should include facilitation of their full participation in all aspects of the political, economic, social, religious and cultural life of society and in the economic progress and development in their country".[13] A wide margin of discretion is thus left to the state, but even so, the onus of representation deficit is also ultimately on the state.

The legally binding international human rights law seems to say more on the right of persons belonging to minorities to segregate themselves than on their right to integrate into the dominant society. This is manifested, for instance, in Article 27 of the CCPR, which expressly acknowledges the segregation right by choice to a certain degree. It could be contended that the right to integrate does not need any legislative back-up, as individuals are free to choose whether to affiliate themselves to the minority lifestyle or to that of the dominant society. An argument proposed here is, however, that a person should have a right *both* to maintain his or her minority lifestyle *and* to be actively involved in the on-going project of defining society in large. Thus, the meaning of inclusion in the national language policy should include the right to representation of persons belonging to small language communities on relatively equal terms with persons belonging to the dominant language group(s) of society.

The two European main instruments on linguistic rights stipulate in very general terms on the state duty to involve the minority language communities in decision-making concerning language and education issues. The ECRML calls the contracting parties to promote mutual understanding between all the linguistic groups of the country, and to take into consideration the needs and wishes expressed by different language communities.[14] The FCNM, for its part, contains a provision on a segregation right similar to CCPR Article 27, but concurrently requires the contracting parties to "encourage intercultural dialogue" and to "promote co-operation among all persons living on their territory", irrespective of those persons' linguistic identity, among other characteristics.[15] Thus, beyond dispute, linguistic minorities shall have a genuine opportunity to participate effectively in the language-policy making of the state. Insofar that the state makes much use of segmental autonomy, this

[13] Vienna Declaration 1993, para. 27.
[14] The ECRML, Articles 7(3) and 7(4).
[15] The FCNM, Articles 5(1) and 6(1).

right to participation may well call for segmental arrangements for minority representation.

Moreover, some international soft law instruments impose a requirement, even if an implicit one, to involve minority language communities in the overall societal decision-making. Above, a reference was already made to Article 2(2) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which provides that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. It is noteworthy that this provision is not delimited solely to activities where no collective decision-making is needed, nor solely to decisions concerning some narrowly-defined minority issues. Moreover, Article 5(1) requires that national policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities. Similarly noteworthy is Paragraph 35 of the Copenhagen Document, which is not delimited merely to minority issues in a narrow sense when obliging the participating states "to respect the right of persons belonging to national minorities to effective participation in public affairs".

The Oslo Recommendations also emphasise that there must be a balance between an option for segregation, in the sense recognised in CCPR Article 27, and an option for integration into the wider society. According to the explanatory report to the Oslo Recommendations, the rights of persons belonging to national minorities to use their language(s) in public and in private "must be seen in a balanced context of full participation in the wider society". The report further explains that the Recommendations "do not propose an isolationist approach, but rather one which encourages a balance between the right of persons belonging to national minorities to maintain and develop their own identity, culture and language and the necessity of ensuring that they are able to integrate into the wider society *as full and equal members*".[16]

(ii) As concerns the second matter to be discussed, the margin of discretion given to states, the provisions mentioned above are quite generous. The measures to be taken shall be 'appropriate' and 'effective', but the content of these attributes is to be defined on the domestic level. In spite of criticism often directed at imprecise formulations like these, they can be considered useful from two different standpoints. One is that the vague formulation gives space for the principle of subsidiarity, which in the area under consideration is enshrined, for example, by the Lund Recommendations. The experts who elaborated these recommendations emphasised that education and the use of minority languages are among the issues most susceptible to cultural autonomy

[16] Explanatory note to the Oslo Recommendations (1998), General Introduction. Emphasis added here.

arrangements and that states should favourably consider "territorial devolution of powers" concerning these issues.[17] Thus, more explicit stipulations would, in contradiction to the principle of subsidiarity, delimit a degree of independence for domestic authority in relation to international bodies.

Another practical value of the international frame provisions referred to above, in all their vagueness, is that they remind the contracting parties that there are some parameters of the right to representation that a state shall take into account when determining its formal language policy. The most important is that the state shall be designated as the state of all its citizens, not just as the state of the language groups that have most political power. Ultimately, linguistically handicapped individuals could have a right to *parens patriae* representation alike with illiterates, who are unable to stand as claimants of their educational rights themselves. In line with this reasoning, the state margin of discretion might be narrowest in matters where the rights of the linguistically weakest individuals are at stake. A holistic interpretation of international human rights law should justify the *parens patriae* doctrine at least in relation to the linguistically most disadvantaged persons below the age of 18 years.

6.2.4. *Vocational Deficiency and Reconciliation of Interests*

Notwithstanding the fact that the right to a vocational education generally speaking seems to have received less attention in the international standards than the right to primary and higher education, it appears as if the right to representation is the most extensively acknowledged in this particular subsector. The right of association in general and the right to form and to join trade unions, as recognised in several international instruments[18] are by themselves rights that belong to everyone, but they have also had a contributory influence on even more specific forms of legalised interest protection in the field of vocational education and training.

Particularly the ILO standards indicate that specific groups (social partners) have something that might be described as a right to representation. The principle of tripartism, composed of representatives of governments, workers and employers, is acknowledged practically by ILO Conventions dealing with vocational education and training.[19] What is at issue in this form of the right to representation is, however, rather a matter of interest-balancing between the most powerful social groups than a matter of maximising the rights of

[17] The Lund Recommendations on the Effective Participation of National Minorities in Public Life; Recommendations Nos. 18, 19 and 20.

[18] See the UDHR Article 23(4), the ILO No. 87, the CESCR Article 8(1), and the ECHR Article 11.

[19] See, for instance, the following ILO Instruments: Convention No. 117 Article 16; Convention No. 142 Article 5; Convention No. 168 Article 3.

the vocationally most disadvantaged individuals. Labour unions may in the name of solidarity champion issues on behalf of the educationally most disadvantaged members of society: it is a fact, however, that the union mandate is primarily based on obligations to their own membership, which may be in conflict with the interests of those outside the labour force.

In contrast, the UN Migrant Workers Convention does include a provision for the empowerment of disadvantaged groups in the regulatory processes. Article 42(1) stipulates that state parties shall consider the establishment of procedures or institutions through which account may be taken of the special needs, aspirations and obligations of migrant workers and members of their families and, moreover, "shall envisage the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions". Likewise, the UNESCO Vocational Convention calls for the recognition as stakeholders in the development of technical and vocational education not only public authorities, workers and employers, but also "other interested parties".[20] These provisions challenge more clearly than the ILO standards the likelihood that strong negotiators pursue only the interests of their own group members and thereby maybe counteract the rights of the least competitive part of the population.[21]

Thus, even though international human rights law does not give exact stipulations, it nevertheless does contain at least some legally binding provisions that call upon contracting states to enable even members of disadvantaged groups to be drawn into the decision-making procedures of vocational education. European Standards are along the same lines. The interpretation above about tripartism in ILO standards as an 'ism' for most powerful social partners only is backed also in the ECHR case-law. Accordingly, the right to form and join trade unions, as confirmed in Article 11 of the ECHR, does not confer a right to consultation upon all existing unions.[22]

Article 10 of the ESC acknowledges entitlement to consultation for employers' and workers' organisations in matters related to everybody's right to vocational training.[23] The European Committee of Social Rights—the body judging the conformity of national law and practice with the ESC—has indicated as its view that Article 10 does require states to allow trade unions to play a proper role in the planning and delivery of vocational training.[24] The

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[20] Article 2(2d).

[21] As concerns legal material, there are not too many international segment-specific documents concerning access to public participation in decision-making. An exception is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, submitted by the ECE Committee on Environmental Policy through the Ad Hoc Preparatory Working Group of Senior Officials. United Nations, Economic Commission for Europe, ECE/CEP/43:.21 April 1998.

[22] See *National Union of Belgian Police* v. *Belgium; Swedish Engine Drivers' Union* v. *Sweden*.

[23] ESC (rev.) Articles 10(1) and 10(5d).

[24] See Harris (2001, p. 141) and C XII-1 165 (UK) as concerns the case-law of the ESC.

European Migrant Workers Convention, for its part, obliges each contracting party to allow to migrant workers the right to organise for the protection of their economic and social interests on the conditions provided for by national legislation for its own nationals. Obviously this provision also includes a right to organise for the promotion of the right to vocational education of migrant workers and their families.[25]

The most interesting European provisions on the right to segmental representation in the field of vocational education are nevertheless to be found in European Community legislation, where the diffusion of societal power in both vertical and horizontal directions is a renowned phenomenon. In the vertical direction, ever since the Treaty of Rome of 1957, the subsidiarity principle has attempted to ensure that Community institutions take decisions as closely as possible to the citizens of its member states. This provision has been later reiterated in Article 5 of the Maastricht, Amsterdam and Nice treaties respectively.[26]

In the horizontal direction, EC Law makes social partnership a cornerstone of its vocational training policy, among several other policy areas. Article 139 of the TEC[27] requires the Commission to develop a joint consultation procedure involving negotiations between European social partners and the Union institutions. The partners of this social dialogue are commonly drawn from representatives of three categories: employers, workers and independent occupations, but there is no legal hindrance for voluntary organisations and non-governmental organisations also to be acknowledged as social partners in this respect. Within the member states, this horizontal devolution of control occurs within the overall context of regulation by the central state, which determines both the roles and responsibilities of the different actors. Thus, the roles played by the state and other social partners in the determination and implementation of vocational education policies may vary from one member state to another. The main message from the Community level is, however, that the social partners are encouraged to play increasingly significant roles at all levels.[28]

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[25] European Migrant Workers Convention, Article 28.

[26] Article 3b of the original Treaty Establishing the European Community read: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." *See also* the Protocol on the Principle of Subsidiarity agreed by the Edinburgh European Council of December 1992, later annexed to the Treaty of Amsterdam. On subsidiarity as a rule and a principle, see Schilling 1995.

[27] In the Treaty of Maastricht this was Article 118b.

[28] On the increasing role of social partners in law and policy making in the EU and in its member states, see "Enhancing democracy: A White Paper on Governance in the European Union", COM (2001) 428 final. *See also* ELJ 2002, Vol. 8 (Special Issue on Law and New Forms of Governance in the European Union); Bernard 2003. Thus far, the concept of social dialogue lack generally recognised legally definition; it may include different types of negotiation, consultation or simply exchange of information, varying from one context to another.

The margin of discretion of states regarding choosing for whom to guarantee a right to representation in vocational education policy is not unlimited. Parameters provided by international law that a state shall take into account when determining this issue are, once again, to be found in the international non-discrimination law and in the canon of the indivisibility and interdependency of human rights. Thus, even though there is no reason to deny the fundamental importance of administrative-bureaucratic-commercial coalitions in the effective provision of vocational education, it is yet to be kept in mind that the state as a contracting party to international anti-discrimination law shall bring together the roles and responsibilities of the different partners in a non-discriminatory manner.[29]

More recently, the double challenge posed for the state to co-ordinate the interests of social partners and non-governmental organisations on the one hand, and to promote the principle of equal treatment on the other hand, is expressly acknowledged in Articles 13 and 14 of the EC Employment Directive. The formulation of these provisions is very vague, using expressions such as 'adequate measures', 'appropriate organisations', and 'in accordance with their national traditions and practice.'[30] Nonetheless, the built-in message is that the labour market demands—as defined by the most powerful social partners—do not justify the neglect of other demands arising from the civic society, inclusive of those from minority communities.

There are tensions between the promotion of vocational education as an attempt to strengthen global competitiveness and the claims for representation rights of the educationally most disadvantaged groups. Private enterprises may prefer to set up their own vocational education centres in order to become more competitive and responsive to market demands. For the same reasons these enterprises may prefer to focus on the further training of their better skilled workers. This trend does not directly have to gnaw at the educational rights of educationally disadvantaged minority members, but relatively speaking it leaves them, more than advantaged majority members, outside of advanced vocational education and training. Tripartism can be seen as an

[29] Such a balancing role of the state is recognised in general terms, for instance, in the ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation, Article 2, which commits states to pursue a national policy designed to promote "equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof".

[30] Article 13(1) reads: "Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of work-place practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices." Article 14 reads: "Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to promoting the principle of equal treatment."

attempt to involve the private sector in the development of vocational education, instead of letting the enterprises focus just on narrow self-interests.

A clear connection between vocational studies and labour market needs as such is reasonable in so far as the skills learned will be more applicable to the students' working life. Nonetheless, just as important is a clear connection between vocational studies and needs of minority groups, in order to ensure that deliberate assimilation does not occur and that the right of minority individuals to become self-sufficient in the labour market—either as employees or as private entrepreneurs, in accordance with their own aspirations—is not violated. Otherwise, only the fixed preferences and interests of the strongest partners may compete with each other whereas the interests of the groups with weak preparedness for negotiations are trodden underfoot.

The provisions on social dialogue reviewed above can be seen as an attempt to promote a more 'talk-centric' democracy and a widening participation in the power-share of the system. In other respects, international provisions seem not to guarantee access to the segmental decision-making bodies for marginalised groups.[31]

6.2.5. *Cultural Representation: A Means for Release from Stereotypes?*

It is reasonable to start by repeating the statement made in Chapter 3.5.3, according to which the present study does not look at culture as part of ethnicity, but rather at cultural skills as part of individual professional identity. Hence, the question of to whom the right to possible segmental representation in cultural policy issues actually belongs is most interesting.

Alike with the sector of vocational education, there are in the cultural sector some international provisions indicating that members of particular groups have something that might be described as a right to representation. Nevertheless, in contrast to tripartism, these provisions focus primarily on the different degrees of cultural autonomy of well-established minority groups and indigenous peoples. Provisions on cultural autonomy frequently contain formulations such as 'the right to be consulted' or 'shall be heard' etc.[32]

A right to representation in the cultural sector of a nation state is most unambiguously recognised in the UNESCO Vocational Convention, which in Article 3(1)(a) proclaims that "the Contracting States agree to provide and develop technical and vocational education programmes that take account of . . . the educational, cultural and social background of the population concerned and its vocational aspirations". It is difficult to imagine how this

[31] On the recent shift from vote-centric to talk-centric democratic theory in general, see Kymlicka & Norman 2000, p. 9 *et seq.*

[32] The interpretation that everybody has a right to participate actively in the formulation and implementation of cultural policies of their own communities was acknowledged, for instance, by the HRC in its General Comment No. 23, para. 7.

provision could be properly implemented without giving the populations concerned access to decision-making procedures in the cultural cluster of vocational education.[33]

At the European level, Article 15 of the FCNM requests states to "create conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, *in particular* those affecting them". It is important to note that the wording of the provision is not restrictive but supplementary, i.e. that segregation right provisions shall not nullify the right of minorities to participate in the development of the wider society which they also belong to. Hence—alike with Article 27 CCPR and other provisions that protect minority cultural rights—it shall be read as an added-protection clause, not as a means for segregation by force, which most likely limits subjugated groups' chances of success in public life.[34]

Article 15 FCNM has been named as a groundbreaking provision insofar that it introduces the right to participation into hard law and, moreover, covers the economic and social dimensions of the participation, in addition to political participation that has already been addressed in some earlier standards.[35] Nonetheless, when seen from the viewpoint of the educationally most disadvantaged individuals, whether belonging to a national minority or not, this provision remains conditional.

The interpretation presented above is confirmed also by soft-law documents. The Oslo Recommendations mention the right of persons to act 'in community' with other members of their group as one of the hallmarks of an open and democratic society, and furthermore the involvement of public authorities *in the internal affairs* of such entities therefore as non-desirable. On the other hand, the same argument can be turned around by stating that the right of persons to participate in a constantly on-going construction of the state project is also a hallmark of democracy, and therefore public authorities should take steps to promote equal access of any groups to decision-making in public affairs that concern one and all under the jurisdiction of the state. The right to representation, taken seriously and supported by the provisions discussed above, may well serve as a channel for freeing minority members from stereotypical traps of culture.

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[33] Noteworthy in this context is also an observation made by the HRC in its General Comment 23. In Paragraph 9, the Committee underscores that the protection of the rights recognised in Article 27 of the CCPR is directed, *inter alia*, towards ensuring the *continued development* of the cultural identity of the minorities concerned. This remark calls for arrangements that facilitate intercultural dialogue of permanent character within the nation state.

[34] The concept of segregation rights provision refers here to Article 27 of the CCPR and Article 17(2) of the FCNM.

[35] See Weller 2003, p. 4. For a thorough analysis of Article 15 FCNM, see Weller 2005, pp. 429–461.

The concept of culture as such is not recognised in international non-discrimination clauses, and if a group were to try to make a case of being discriminated against in the composition of decision-making bodies in the cultural cluster of vocational education, the claim would hardly call for strict scrutiny. In contrast, Article 15 of the FCNM unmistakably recognises the right of persons belonging to national minorities to participate effectively also in cultural life. If minorities have no right to have their representatives in collegial bodies that enjoy true decision-making power, it can hardly be a matter of effective participation in the spirit of Article 15. However, even if the FCNM does narrow down the margin of discretion of the contracting parties where the right to representation of minorities in cultural issues is at stake, it does not as such safeguard the right to representation of most vulnerable minority members.

Summing up, there is one thing to be kept in mind when tracing systemic discrimination in the particular matter discussed in this subchapter. The thing is that conceding a segmental right to representation exclusively for selected minority groups is legitimate only when based on reasonable and objective criteria. Several human rights documents have clearly stated that the effective participation of any minority communities in public life shall not be at the expense of others' rights.[36]

6.3. *Hybrid Identities and the Riddle of Representation*

6.3.1. *Rights as Sites of Dialogue*

This sub-chapter examines what international human rights standards stipulate regarding representation on the basis of the four variables of age, language, gender, and ethnicity. The risk of essentialisation in relation to any of these variables was already discussed in Chapter 4. It is sufficient here to recall that a person, simply by being of a certain age range, a certain sex, a certain ethnic background, or speaking a certain language may not necessarily represent the interests of all the other persons that fall into same category. Yet, if we accept the argument that rights are not only 'trumps' or 'debate-stopping conclusions' but rather 'sites of dialogue', that is: "metaphorical forums in which members of society converse about different claims regarding basic values

[36] See, for instance, CCPR General Comment No. 23, para. 6.2; Copenhagen Document, para. 33; Explanatory Note no. 3 of the Lund Recommendations. On how the judicial marginalisation of social rights reflect the social marginalisation of communities with least lobbying power, see Hunt 1996, pp. 71–106.

and relationships"[37] then it is vital to ask who speaks for whom in different forms of delegated power-sharing.[38]

The premise here is that withholding the right to representation on the basis of any of these four variables without objective justification may—possibly but not definitely—constitute systemic discrimination. The dialogue approach, as such, advocates an activist role for educationally disadvantaged groups even in sector-specific decision-making procedures. This is even more important concerning those groups in the society towards which the prejudices are strongest, as it is well know that tolerance is not measured by how much space you grant to those you like, but rather by how much space you grant to those you do not like.

The fundamental questions to be clarified in the following are: (i) Is the right to representation on the basis of the chosen four categories acknowledged in the international standards? (ii) How wide a margin of discretion is left to state parties concerning representation of these categories? (iii) What is the nature of the right to representation on the grounds of the four categories under examination?

6.3.2. *Representation Based on Age*

(i) *Entitlement to representation on the grounds of age*. Representation in educational decision-making on the basis of age is touched upon by several international standards. Likewise, these standards are interpreted in several different ways, the relationship between 'rights of parents' and 'rights of children' being the main point of controversy. A number of commentators have argued for specific parental educational rights[39] and even put forward that educational rights are "almost always conceptualised as parental rights, with children's rights being limited to certain aspects of their experience within education".[40]

Quite a few international provisions stipulate that religious instruction in public schools must take place in conformity with the liberty of parents to choose their children's religious and moral education.[41] The existence of

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[37] See Hunt 1996, p. 185 *et seq.*

[38] Taylor (1992) distinguishes two levels where the discourse on recognition can be run: the public sphere and the 'intimate sphere'. In the latter sphere, the formation of identity and the self is understood as taking place in a 'continuing dialogue and struggle with significant others'. The concept 'significant others' comes from George Herbert Mead, meaning those other persons that matter to us as partners in the ongoing dialogue by which we attempt to define our own identity. Even if the focus of the present study is on the level of the public sphere, it should be clear that these two spheres are by no means completely isolated from each other.

[39] See, for instance, Hodgson 1998, p. 189 *et seq.*

[40] Wallace & Shaw 2003, p. 241. For pioneering opposing arguments, calling for stronger recognition of the right to education as a right of the child, see Holt 1964, pp. 240–241.

[41] See Article 5(1)(b) of the CDE, which records the agreement of the state parties that it is essential to respect the liberty of parents and, when applicable, legal guardians, and to ensure the religious and moral education of the children in conformity with their own convictions.

'parental rights' is manifested, for example, in Articles 3(2), 5, 14(2), and 18(3) of the CRC and in Article 2 of Protocol No. 1 of the ECHR. A cursory reading of the ECHR provision on the right to education might indeed suggest that there is a parental right to education, however, when read verbatim, Article 2 of Protocol No. 1 recognises "the right of parents to ensure" that education and teaching of their child is in conformity with their own religions and philosophical convictions.

Thus, it might be preferential to classify this type of 'parental right' under the right to freedom of thought, conscience and religion, whereas the right to education should be understood as far as possible as an individual right, irrespective of the age of the rights-holder. It is above all the CRC, especially when Articles 28 and 29 on the right to education are read together with Articles 12 to 16 on children's participatory rights, that calls for a recognition of the child not only as the primary rights-holder but also noticeably as a social actor. In accordance with the view of the child as a social actor, the approach promoted here is that the parent merely exercises an opportunity to provide guidance until the child is sufficiently mature to make his or her own informed judgements. It is important to note that in this situation there are three sets of interest involved, to be balanced against one another—those of the state, those of the child and those of the parents—but not three sets of rights.[42]

Consequently, the first conclusion to be drawn concerning representation based on age is that a child has a right to be represented in educational matters by her/his parent(s) or legal guardians prior to any other social actors. Even if there are several other actors involved in the upbringing of a child, including teachers, youth leaders, educational administrators and supervisors, among others,[43] it is the parent that has a special law-based advantage in the discussions about the child's education. It is thus reasonable to argue that at least any subject of the right to education below the age of eighteen has a right to representation in educational matters by her/his parent(s) or other legal guardians, whilst any child shall be given an opportunity to express her/his views and to have those given due weight.[44]

Article 13(3) of the CESCR and Article 18(4) of the CCPR are couched in virtually identical terms.

[42] On the risk of conflict between the rights of the child and the interest of parents and/or the state, see Magsino (1995), Gustafsson (2001), Lundy (2004). Note that, contrary to the reasoning proposed here, they all discuss the conflicting 'rights' of the three parties involved. In this connection, we can also reject the oft-brought accusation that individual legal rights are somehow in fundamental opposition to the 'caring' character of collective rights, inclusive of those of 'parental rights'. On the contrary, I concur with those opinions according to which the economic, social and cultural rights in general are essentially preconditioned by a sense of social connectedness with those others whose rights are recognised.

[43] See CRC General Comment No. 1, para. 22.

[44] The outer limits for these talks are set out in the CRC Articles 1 and 12. Article 1 reads: "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" and Article 12 reads: "States parties shall

(ii) *The state margin of discretion concerning representation on grounds of age*. Let us first consider how wide a margin of discretion the state parties of international human rights instruments enjoy in assessing who or which entities shall have a say in the fulfilment of a child's right to representation in educational matters. Two questions are worthy of note here: what is to be considered a family, and what is its mandate in the topic under consideration? These questions are most interesting from the viewpoint of those minority communities within which the concept of family is understood in a wider sense than the 'nuclear family' of contemporary Western societies.

As regards the first question, most relevant is the definition given in the CRC. It does not only reiterate the simple clause made in the twin Covenants of 1966 that the institution 'family' is 'the natural and fundamental group unit of society'.[45] What is more, Article 5 of the CRC also stipulates that state parties shall respect the responsibilities, rights and duties of parents or:

> where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

Thus, an option for recognition is given even to different types of extended family, tribal or clan justice, etc. The implication made in this provision is that the Western nuclear family should not automatically be seen as superior to any other family form or type.

Regarding the question of a family mandate to represent its members, it has already been argued above that parents have the right to represent their minor children in educational matters prior to any other social actors, insofar that their guardianship is not removed. Moreover, international human rights law recognises a state duty to give special institutional protection to the family. Nevertheless, one cannot from these provisions directly derive that parents or families should be acknowledged as active agents, as stakeholders in education planning processes.

As to the opinions of legal scholars, at least Luzius Wildhaber has called into question the narrow interpretation concerning the exercise of the parental entitlements mentioned in Article 2 of Protocol No. 1 of the ECHR. The Strasbourg organs have repeatedly decided that legal persons are not entitled to defend their interests collectively through an association of parents or through the private school or church which they might prefer. According to Wildhaber, it is, however, not self-evident why other units than parents should

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assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

[45] See Preamble of the CRC, Article 23(1) of the CCPR, Article 10(1) of the CESCR.

not be entitled to speak on behalf of children, if several parents want to have joint representation.[46]

Scepticism towards truisms, as Wildhaber upholds, is important in drawing attention to the fact that 'guardianship' and 'family' are themselves creations of laws and institutions that recognise some groupings of people and not others as salient for power-sharing in the field of education. In an increasingly multicultural society, we should keep on asking which groupings of people are favoured for purposes of the law regarding education. Likewise, we should constantly enquire into the underlying reason whenever a single institution is considered as more relevant to educational decision-making than some others. Answers to these questions are not to be found straightforwardly in international human rights law, but rather in the dialogue it calls for.

(iii) *The nature of the right to representation on grounds of age.* Last, the nature of the right to representation on the basis of age is not an unambiguous matter either. By virtue of common sense thinking, the young age of a child should not be the only criterion for the conclusion that a person may require representation. Rather, emphasis should be on the general importance of the principle of those being heard who cannot speak for themselves. It is, hence, irrational to argue that the right to representation in educational decision-making should end automatically at the age of 18. Nevertheless, no legally binding international standard recognizes that individuals in proceedings concerning their right to education may require representation irrespective of their age. On the contrary, there seems to be a difference in the international human rights provisions as regards the right to representation that centres on the early years, and the lack of the right to representation for those in need of post-primary basic education.

As regards individuals below the age of 18, the CRC recognises unmistakably that children should be allowed to participate in making educational decisions affecting them to an extent corresponding to their age and understanding. The incapacity of childhood is thus not absolute: the role of third parties shall rather decrease progressively as a child gradually develops the ability to make responsible decisions. As Wildhaber puts it: "Finally, the rights of parents vanish, after children have come of age".[47] Of interest for the present study are, however, those individuals that due to their age no longer fall under the protection of the CRC. What if the educational rights of individuals in the age category from 18 to 25 and suffering from illiteracy or language deficiency clash with the interests of other stake-holders in educational decision-making? Do these youngsters have any right to representation until they reach the capacity to make informed decisions?

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[46] Wildhaber 1993, p. 549.
[47] Wildhaber 1993, p. 546.

Vague support for representation claims can be found in the general idea of inclusiveness, according to which those who are affected by decisions should be part of the decision-making process, but on the other hand there are even provisions that seem to give the opposite signal. This is particularly noteworthy at the European level, as young people can be burdened by law with extra duties but not protected by a corresponding right to representation. For instance, the Employment Directive of the EC allows member states to set special conditions for young people in order to promote their vocational integration, but says nothing about the right of the persons concerned to participation nor to representation, in decision-making affecting them.[48]

As to the question of when a child's right to representation ends, the answer is not so clear, apart from Article 1 of the CRC. In *Kjeldsen, Busk Madsen & Pedersen*, for instance, the ECHR held that the states are obliged to respect parents' religious convictions or other beliefs "through-out the entire State education program". On the other hand, a well-established body of international case-law underscores that the rights of children are to be 'crucial' or 'paramount' whenever there is a clash between the rights of children and interests of adults and these two have to be balanced.[49] It would be unreasonable to argue that when a person crosses the legal threshold from childhood to adulthood, the necessity to take her/his interest into account should vanish. Even if the principle of 'first call for children' is reiterated in much of the rhetoric around the right to education,[50] this priority does not justify the abandonment of persons above the age of 18 with a functional inability to claim their rights.

An increasing number of international instruments can be used to claim educational rights without discrimination based on age.[51] This argument becomes unambiguous when the interconnectedness of non-discrimination clauses and substantive rights are taken into consideration. Advocates of young educationally disadvantaged people could, on the basis of these interconnected provisions, argue that such youngsters are equally entitled to representation in decision-making as are children below the age of maturity. Thus, there is space for representation rights claims for the educationally disadvantaged over the age of 18, even if such claims have not received any strong legal impetus internationally so far.[52]

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[48] Employment Directive (2000/78/EC), Article 6(1)(a).

[49] See, for instance in the ECHR case-law *Scott* v. *UK* and *Yousef* v. *Netherlands*.

[50] See, for instance, the Vienna Declaration, para. 45.

[51] For this purpose, read jointly: Articles 6 and 7 of the ILO 168; Articles 7 and 30 of the UN Migrant Workers Convention; Articles 13, 149 and 150 of the TEC; Articles 1 and 3(1)(b) of the Employment Directive (2000/78/EC); Articles 14 and 21 of the CFREU. Naturally, even any non-discrimination clauses which are open-ended as to the possible ground of discrimination can be invoked in conjunction with the provisions on the substantive right to education. Moreover, the right to non-discrimination contained in Article 26 of the CCPR can be applied as an autonomous right even in relation to education, in spite of the fact that educational rights are not provided for in the Covenant. See CCPR General Comment No. 18, para. 12.

[52] As far as political standards are concerned, the Council of Europe and the European

6.3.3. *Representation Based on Language*

(i) *Entitlement to representation on grounds of language.* The crucial role of language in the promotion of equality in education has already been in focus in the present study twice: the right to language skills was discussed in Chapter 3, and the right to get one's severe language deficiencies recognised by the educational decision-makers in Chapter 4. It was summarised then that different types of tensions exist in the discourse over what language rights are all about. Such tension may arise between language rights as the rights of individuals, language rights as measures to promote linguistic diversity for its own sake, and the linguistic needs of nation-building. Likewise, tensions that may arise from exclusion of 'new' minorities from the sphere of language rights discourse were remarked upon. As a conclusion, it was suggested that the claim for national coherence does not justify anybody to be left in linguistic isolation, and that the doctrine of indivisibility of human rights could back up claims for equal recognition of rights-holders from diverse language groups.

(ii) *The state margin of discretion concerning representation on grounds of language.* The question still remains unanswered as to when the domestic legislation on language(s) in education *per se* can be considered discriminatory. It was noted that the size of a group as such is a weak criterion for the recognition of language rights: to argue that a human right does not become applicable until numbers warrant is a slippery sort of reasoning. On the other hand, language rights are obviously a sensitive area where international bodies readily abdicate from settling the case. Do international standards then provide for any tools at all to oppose national language policies that appear to be unreasonable or unjust for individuals belonging to the most disempowered language communities?

We get quite different answers when examining language rights under the title of minority rights on the one hand, and under equality and non-discrimination provisions on the other.[53] Once again, Article 15 of the FCNM serves as a prime example of relevant minority rights provisions as it requires contracting states to "create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them". The right to effective participation in decision-making concerning linguistic educational

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Union have both distinguished themselves as proponents of youth participation at different levels of public decision making. Worthy of note are, for instance the CLRAE Resolution 237, European Charter on the Participation of Young People in Municipal and Regional Life (1992), and the Council Resolution on youth participation, adopted on 26 November, 1998. Both of these documents put strong emphasis on the necessity of promoting youth participation at different levels of public decision-making.

[53] For a compact review of the international, regional and selected domestic case law regarding language rights under the three principles of equality/non-discrimination, freedom of expression and minority protection, see Higgins 2003.

rights falls under this provision whenever the minority at issue constitutes a linguistic minority. Likewise, at the universal level, Article 27 of the CCPR can be invoked as a justification for claims for minority representation in educational decision-making.

In contrast, language groups that lack official minority status could not—at least not easily—make successful claims for participation under FCNM Article 15 nor CCPR Article 27. Instead, they could make the case under CCPR Article 26 that segmental decision-making which recognises as stakeholders only selected language groups is discriminatory because it excludes other groups from promoting the linguistic educational rights of individuals belonging to such minorities. The case of *Diergaardt* v. *Namibia*, discussed in Chapter 4, paved the way for such claims by concluding that any exclusive language policy of a state party which cannot be justified as being reasonable can be held to constitute a discriminatory measure under Article 26 of the CCPR.[54] The burden of proof to justify that preference of merely some language-groups in the decision-making procedures is reasonable and non-arbitrary would then rest on the state.

What has been said above holds good—in theory. Discrimination against socially invisible language groups can be challenged by means of existing human rights standards. Linguistic imperialism can be called into question and the disadvantaged situation of those language groups that lack the status of 'national' minorities can be disputed.[55] Moreover, the concept of multiple discrimination calls for a state duty to recognize the interconnectedness of the educational and linguistic needs of students from non-privileged backgrounds, often suffering from 'double semi-lingualism' i.e. from linguistic incompetence in both their mother tongue and in the official language of their country of residence.[56] In reality, however, individual linguistic rights are frequently conditioned with terms such as 'balancing of interests' and 'margin of discretion.'

A peculiarity is that the call for balancing between different interests is so strongly involved in the discourse over linguistic rights, considering that there is a relatively marked abundance of international non-discrimination clauses that expressly mention language as a prohibited ground for discrimination. Given that a dozen or so international non-discrimination clauses mention language expressly, it might also deserve a great degree of attention.[57] This

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[54] See *Diergaardt et al.* v. *Namibia*, paras. 10.10 and 11.

[55] This argument is defendable in the light of HRC case-law, in particular ever since *Diergaart* v. *Namibia*. At the same time, the fact should be kept in mind that particularly the European documents treat the languages of 'new' and 'old' minorities very differently, as was highlighted in Chapter 4.3. Likewise, from a universal human rights point of view a weakness of the three Minority Guidelines of the OSCE—the Hague, Oslo and Lund Recommendations—is that they bypass situation of those language groups that lack the status of 'national' minorities.

[56] The concept of 'double semi-lingualism' comes from Schierup & Ålund 1990, p. 91.

[57] Cf. how Bayefsky (1990) lists 'race', 'sex' and 'religion' as international suspect classifications

is, however, not the case—in fact quite the opposite, as the wide application of the doctrine of margin of appreciation in the ECHR case-law indicates.

The ECHR applied the doctrine of the margin of discretion to the complex of linguistic and educational rights as early as in the *Belgian Linguistics* case. First, the Commission stated that it 'in any case' reserves a 'certain margin of discretion' to the contracting states in examining whether the motives of its language policy are reasonable, the aims legitimate and the effects justifiable. In a latter phase, the Court emphasised the subsidiary nature of the international machinery of collective enforcement by pointing out that: "the national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention".[58] Afterwards, commentators on linguistic rights have reiterated this doctrine more or less uncritically by suggesting that the balancing of interests is an inescapable necessity whenever linguistic educational rights are concerned.[59]

Nonetheless, several reasons call for a closer re-examination of how and by whom the linguistic rights of individuals are defined in the context of a *de facto* multilingual country. One is that, during course of the years, prominent scholars have questioned the generaliseability of the reasoning in the *Belgian Linguistics* case according to which Article 2 of Protocol No. 1 contains no linguistic requirement. For instance, Wildhaber estimates that it appears too harsh to claim that the right to education "contains in itself no linguistic requirement".[60] According to him, it remains open whether a denial of a right to be educated in a language that is spoken in a state but not defined as a national language should not be considered as a violation of Article 2.[61] Moreover, Wildhaber draws attention to the fact that the Commission and Court never had to decide on a system of enforced multilingualism, or on an allegedly arbitrary definition of 'national languages' or on a prohibition of education in a small minority language. Thus, the evolution of societies towards increasing linguistic pluralism calls for a more sophisticated analysis of cases where a majority standard is imposed on linguistic minorities.

In sum, there are two strong arguments that call for additional scrutiny on the potential of linguistic discrimination in education. One is that provisions on linguistic educational rights shall be interpreted in the light of the present-day conditions, where the promise of international enforcement of everybody's

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above any other grounds by arguing that they set up the minimum common denominator in all treaties which contain non-discrimination norms and include lists of grounds of discrimination. Following the reasoning of Bayefsky, language might also deserve a great degree of attention, given that a dozen or so international non-discrimination clauses mention it expressly. This is, however, not the case—in fact quite the opposite, as the wide application of the doctrine of margin of appreciation in the ECHR case-law indicates.

[58] *Belgian Linguistics*, para. 12.

[59] See, for example, de Verannes 2004. See also Chapter 4.3 above.

[60] Wildhaber 1993, p. 541.

[61] Similarly, de Witte 1989.

right to education shall not capitulate to national policies.[62] Another argument is the particular vulnerability of those individuals that have insufficient language skills to make individual rights-claims or to carry the related burden of proof. The *Belgian Linguistics* case already introduced the well-established interpretation according to which the right to non-discrimination is violated when "there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised". Additionally, it is argued here that when discrimination on grounds such as language deficiency is coupled with claims of violation of the right to education, then weighty reasons should be put forward by the state to justify difference in treatment between diverse language groups.

(iii) *The nature of the right to representation on grounds of language.* How should the state react before diverse representation claims in order to recognise the equality of different language communities sufficiently? Contemporary European standards, above all, call for the satisfaction of particular demands of national minorities, whose claims reach beyond temporary special measures. Into the bargain, multilinguals are increasingly demanding rights to learn, to maintain and to use all the languages they master. Even so, the responsibility to guarantee the availability and accessibility of basic language skills for the linguistically most disadvantaged individuals lies on the state. In line with the argument developed above in Chapter 5.2.2, the question of turning a semi-linguist into functional mono-linguist shall not depend upon numbers.

All in all, the present study puts strong emphasis on the representation claims of those minority individuals who are at risk of having sufficiency neither in their mother tongue skills nor in the official language of their domicile. Their right to representation may well be just temporary, but nonetheless prior to the claims of the individuals that already have their 'minimum core' fulfilled. Moreover, it is important to take notice that the principle of 'demonstrated needs' cannot be applied to those people who have neither sufficient language skills nor civic skills to co-operate with the authorities.

The final proposition at this stage is that all international provisions prohibiting discrimination on the basis of language implicitly call upon the contracting states to formulate an equalising education policy in terms of language rights as individual human rights.

6.3.4. *Representation Based on Gender*

(i) *Entitlement to representation on grounds of gender*. The right to representation on the basis of gender is most comprehensively acknowledged in the CEDAW; an

[62] This argument is recognised in several ECHR cases, although none of them deal expressly with language rights. See Arai-Takahashi 2002, p. 172 *et seq.*

instrument that makes a strong call for equal representation in public life and covers all levels from local communities to national and international levels as well as all sectors of governance. However, it does not expressly acknowledge the right of the most marginalised women to be represented, as comprehended in this study, but merely the access of women to power structures on equal terms with men, and the right of women to represent their governments at the international level.[63] As regards multiple identities of women, the CEDAW Committee has during the course of the years drawn the attention of the state parties to the especially vulnerable situation of disabled women, and in that context even to the necessity to ensure that they can participate in all areas of social and cultural life.[64] Likewise, attention has been drawn to the fact that particularly older women hold decision-making positions much more rarely than older men and that women of different age groups shall be included more resolutely in political and public decision making at all levels.[65]

The European legally binding human rights instruments are rather constrained with regard to an express right of women to participate or have their representation in public life. To read in such a right to the ECHR, even in combination with Article 14, seems farfetched. Neither does the Gender Directive of the EEC (now the EC) from 1976 unconditionally acknowledge the right to participate in public decision-making, as it focuses merely on access to employment, vocational training, and social security. In contrast, the question of gender-mainstreaming has been touched upon in European soft law documents ever since 1990s.[66] A greater need to involve women from ethnic and cultural minorities in public decision making is also acknowledged in soft law documents.[67]

All in all, an analysis of the most pre-eminent international provisions dealing with the gender of representation shows that the multiple risk of exclusion from the decision-making procedures due to intersection of age, gender and ethnicity is increasingly recognised.[68]

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[63] *See* especially Articles 7, 8, and 14. The CEDAW Committee has also provided Recommendation No. 23 with the particular goal of promoting the broad representation of women in public life. For relevant soft law, s*ee also* the Vienna Declaration (1993) para. 43, and Beijing Platform for Action 1995, paragraph 134.

[64] CEDAW General Recom. 18.

[65] Among UN documents, see, for instance, Gender Dimension of Ageing 2002, p. 16. At European level, see Recommendation (2003)3 of the Committee of Ministers, preamble and paras. 24, 25.

[66] Recommendations of the Committee of Ministers to Member States of the Council of Europe No. R(85)2 and No. R(98)14. The European equivalent to the CEDAW Recommendation No. 23 saw daylight in 2003, when the Committee of Ministers to Member States of the Council of Europe adopted the Recommendation No. R(2003)3 on the balanced participation of women and men in political and public decision making.

[67] Rec(2003)3, para. 26.

[68] The complex relationship between representation and the multitude of female identities has also been increasingly recognised in the women's rights discourse. For instance, Judith Butler (1990/1999:8) suggests that the task is not to refuse representational politics, but to formulate within the historical present "a critique of the categories of identity that contemporary juridi-

Among the four categories chosen for a closer examination in the present study, the dual status of being female and language deficient has remained largely in the background so far. There is, however, a range of reasons as to why representation based on language is just as important a correlative issue to be examined from a gender aspect as age and ethnicity. One reason is the increasing burden placed on the migrant labour force on account of demographic trends, as was mentioned in the introductory part of this study. Another is that persons above compulsory school age and with insufficient official language skills continue to be vulnerable as far as access to education is concerned. Thus, representation of those women that are both of the 'wrong' age and 'wrong' language group present a compelling challenge to traditional representation arrangements in the field of post-compulsory public education.

(ii) *The state margin of discretion concerning representation on grounds of gender*. As to the state margin of discretion concerning women's right to representation in public decision-making, it is reasonable to note that the CEDAW puts forward a pretty wide-ranging interpretation of representation rights. This becomes apparent by the fact that the Convention recognises on the one hand the right to representation for 'specialized agencies' and on the other hand to 'different forms of civilization' and to 'different forms of the principal legal system.' These broad-minded phrases were obviously adapted with the effort to co-operate rather than to create tension between the contracting parties in mind. General Recommendation No. 8 is a notable complementary document to the CEDAW inasmuch as the right to representation is concerned. With this document, the Committee—having become concerned over the reports it received—calls state parties expressly to ensure to women on equal terms with men the opportunities to represent their government at the international level.[69]

Additionally, three facts are to be noted when the margin of discretion is under consideration. First, as has been discussed earlier, discrimination based on gender is generally subjected to strict scrutiny in international human rights law. Consequently, the full enjoyment of rights protected, for instance, in Article 25 of the CCPR shall be guaranteed with no distinction on the grounds of sex.[70] Violations of the right to gender-based representation could thus as such give rise to claims under the first Optional Protocol of

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cal structures engender, naturalize, and immobilize." Her view is more collaborative that that of those who reject activities within the international human rights regime as such due to its fundamentally gendered nature, arguing that women's concerns are in fact largely ignored, whilst the 'universal' is premised on the needs and concerns of men. On this approach, see, for instance, Bunting 1993. As a more recent contribution to the subject matter at issue, see Littleton 1998.

[69] CEDAW General Recommendation No. 8.

[70] See discussion on Article 25 CCPR above, Chapter 6.2.1.

the CCPR. A problem might be, however, that the CCPR does not focus on women's rights in particular, nor does Article 25 address the issue of a right representation in segmental decision-making in any greater detail.

In contrast, even if the CEDAW addresses specifically the right of women to participate in public life, it does so in very broad formulations, which leaves for states space to argue for a wide margin of discretion in the domestic implementation. The key phrase in Articles 7, 8 and 14 that requires states solely to take "all appropriate measures" could indeed be interpreted as simply leaving the method of implementation to the discretion of states. However, as stated by the CEDAW Committee, equality of opportunity in public decision-making is of such importance that a more rigorous interpretation of the phrase at issue is justified.

Accordingly, Article 7 requires state parties to ensure that women have the right to be represented in public policy formulation in all sectors and at all levels. Similarly, the Committee holds that state parties "have a responsibility" to consult and incorporate the advice of groups which are broadly representative of women's views and interests.[71] Furthermore, the Committee calls state parties to explain the reason for, and effect of, any reservations to Articles 7 or 8 and simultaneously to ensure that effective legislation is enacted prohibiting discrimination against women.[72]

No matter how devotedly the CEDAW Committee argues against the wide margin of state discretion concerning women's right to representation, it would still be powerless against disagreeing states if it only had its original enforcement mechanisms to resort to. The third fact to be noted is, therefore, that the chance of CEDAW developing international precedents over state obligations increases via its Optional Protocol, operational as of December 2002. This complementary document strengthens the notoriously weak enforcement ability of CEDAW and brings it onto an equal footing with other international instruments in this respect, inclusive of the enforcement of the right to representation.

(iii) *The nature of the right to representation on grounds of gender.* The nature of the rights recognised in Articles 7 and 8 of the CEDAW is by and large considered to be programmatic; i.e. the state obligation to fulfill women's right to participate on equal terms with men in public life is one of progressive implementation.[73] The CEDAW Committee, in its General Recommendation No. 23, makes reference to special measures adopted by some state parties in order to ensure equal participation by women, but does not claim any universal validity for them as such. Nonetheless, it does elaborate a list of

[71] CEDAW General Recom. No. 23, paras. 25, 26.

[72] Ibid., paras. 44 and 47.

[73] This notwithstanding the fact that in many countries women's participation has actually been reduced. See CEDAW, General Recom. No. 23, para. 24.

special measures that state parties should identify and implement to ensure equal representation of women in all fields covered by articles 7 and 8.[74]

Among European instruments, a fairly detailed list of indicators for measuring progress in gender parity in public decision-making is to be found in the aforementioned Recommendation No. 3(2003).[75] Lists like these demonstrate that the implementation of participatory rights is measurable and that it is possible to determine whether states are taking progressive steps towards fulfilment of corresponding obligations. Nevertheless, seen from the viewpoint of disadvantage doctrine, they should not only focus on gender biases, but also on educational inequalities among women in different social living conditions.

6.3.5. *Representation Based on Ethnicity*

(i) *Entitlement to representation on grounds of ethnicity*. Legally binding universal human rights law *per se* does not acknowledge any right to descriptive representation on the grounds of ethnicity. Surely, CCPR Article 25 applies to persons belonging to ethnic minorities as well as to other citizens of the state, but the distinctive criteria in that provision is the citizenship status, not ethnicity. Quite the reverse, CCPR Article 27 and the similar CRC Article 30—although recognising the segregation right of ethnic, religious and linguistic minorities[76]—provide no right for these minorities to join in the conduct of public affairs of the larger national society they belong to. In contrast to UN instruments calling for state co-operation with representatives of categories such as indigenous peoples[77] and migrant workers,[78] ethnic groups are not a legally recognised category of concern as far as the right to representation is concerned. The UN Minorities Declaration calls expressly for a right of persons belonging to ethnic minorities to participate effectively in the conduct of public affairs, but that instrument has no legally binding force.[79]

Contemporary European instruments follow a somewhat different pattern. Strictly speaking, there is no correspondent provision to CCPR Article 25.

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[74] Ibid., paras. 29, 43.

[75] Committee of Ministers Rec(2003)3, para. 44. For instance, the following indicators are suggested for measuring progress in the field of public decision-making: the percentage of women and men in national, federal and regional governments; the percentage of the highest ranking women and men civil servants and their distribution in different fields of action; the percentage of women and men in bodies appointed by the government; the percentage of women and men members of employer, labour and professional organisations and the percentage of women and men in their decision-making bodies at national level.

[76] For the definition of segregation right, see Chapter 6.2.3 above.

[77] Particularly concerning representation in education policy, see ILO 169, Articles 22(3) and 27.

[78] See, for instance, UN Migrant Workers Convention (1990) Articles 43 and 45, both recognising the right of migrant workers to participate in cultural life, which widely interpreted should include even the right discussed in the present chapter.

[79] UN Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities, Articles 2 (2), 2(3) and 4(5).

However, Article 3 of Protocol No. 1 of the ECHR, which places emphasis on the duty of the contracting states to hold free elections, also gives rise to individual rights that can be brought to the Court. According to the ECHR case law, these rights are, first of all, the right to vote and the right to stand for election to the legislature.[80] The ECHR also stipulates in Article 11 on the importance of societal power-sharing recognising everyone's right to freedom of peaceful assembly and to freedom of association with others. Moreover, the right of the citizens to vote and to stand as candidates in elections to the European Parliament and in municipal elections in the member states is recognised in the legally non-binding CFREU.[81] With regard to specific categories of individuals, there are several special instruments on the right to participation at some levels of the government of migrant workers,[82] foreigners,[83] and persons with disabilities,[84] which all partly—but not expressly—apply to persons belonging to ethnic minorities as well.

Among all European instruments, the FCNM is the one that most clearly underlines the minority right to participate in governmental decision-making processes.[85] Nonetheless, this instrument applies only to national minorities, and leaves it up to the contracting states to decide whether they interpret 'national' to cover any ethnic groups or not. Thus, in comparison with the CCPR Article 27, the use of term 'national' in fact enables narrowing of the beneficiaries of the rights granted.[86] In any case, those ethnic groups that receive the status of national minorities may enjoy the right to effective participation by means such as consultation through their representative institutions, by involving the minority in the preparation and implementation of diverse development activities, *et cetera*. The ethnicity aspect in participatory right provisions is especially interesting when the issue of Roma is at stake. We will return to this topic in Part III of the study.

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[80] See *Mathieu-Mohin and Clerfayt* v. *Belgium*, paras. 48–51. See also the case of *Matthews* v. *the UK*, which dealt with the duty of the United Kingdom to organise European Parliamentary elections in Gibraltar. The Court held that a resident of Gibraltar shall not be denied her right to vote in elections to the European Parliament. Also in the circumstances of that case, the Court found that Article 3 of Protocol No. 1 had been violated.

[81] CFREU, Articles 39 and 40.

[82] European Migrant Workers Convention (1983) Article 29 provides for the participation of migrant workers in the affairs of the undertaking on the same conditions as national workers.

[83] Convention on the Participation of Foreigners in Public Life at Local Level (ETS, No. 144), Article 5 makes provision for the access of foreign residents, if certain conditions are fulfilled, into, *inter alia*, consultative bodies to represent foreign residents at local level.

[84] ESC (rev.) provides in Article 15 for the right of disabled persons, *inter alia*, to social integration and participation in the life of the community.

[85] See discussion on Article 15 FCNM above in Chapters 6.2.5 and 6.3.3.

[86] Already in the beginning of 1990s Rosalyn Higgins criticised the inclusion of 'national' in the UN Minority Declaration, and warned that this regressive and troubled concept should not be carried forward to legally binding instruments. See Higgins 1994, p. 203.

(ii) *The state margin of discretion concerning representation on grounds of ethnicity.* The universal human rights law leaves wide latitude to individual states as regards estimation of which ethnic groupings among the population shall have their representatives in decision-making that takes place outside the parliamentary legislature. In the HRC jurisprudence, this was made clear for instance in the so-called *Mikmaq* v. *Canada* case where the HRC deduced that Article 25 of the CCPR does not oblige state parties to guarantee special representation rights to any directly affected group.[87]

The ECHR, for its part, leaves a nearly unlimited margin of discretion to national authorities in the subject matter, in the respect that the Convention does not embody the right to representation as substantive right; even the right to participation is delimited to the freedom of associations and assemblies. On the other hand, ethnicity is recognised in the ECHR jurisprudence as one of the grounds that call for strict scrutiny, which can be stretched to a requirement that any claims of exclusion of the grounds of ethnicity shall be carefully examined.[88] Likewise, as has been noted already, the FCNM leaves a wide margin of discretion to state parties concerning the nomination of groups as national minorities and thereby making them subjects of Article 15. It is important, however, to keep in mind that this provision shall be read jointly with FCNM Article 6, which calls for effective measures to promote co-operation among all persons living in the state territory, irrespective, *inter alia*, of those persons' ethnic identity. The joint reading in fact hinders the possibility of exorbitantly limiting the right to representation to selected groups and of excluding others.

(iii) *The nature of the right to representation on grounds of ethnicity.* Roma as a heterogeneous ethnic grouping offer a challenging opportunity to explore the legal-institutional dimensions of accommodation in an education setting. That challenge will be picked up in the concluding part of the present study. At this phase, it is sufficient to draw attention to the fact that ethnicity *per se* does not automatically provide any secure, solidarity-based form of identification. Moreover, it is to be kept in mind that the occurrence of multiple discrimination makes the topic of representation in education still more complicated.

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[87] *Grand Chief Donald Marshall et al. (Mikmaq People)* v. *Canada*, para. 5.5.

[88] Article 12 of the Racial Equality Directive (2000/43/EC) also calls the Member States to encourage dialogue with non-governmental organisations, but only with organisations that have 'a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.' Thus, the scope of this provision does not range to segmental decision-making as such.

6.4. *New Forms of Governance—New Challenges for Representation*

6.4.1. *The Fragmentation of Law and Risks of Counter-Productivity*

The previous exploration showed that universal and regional human rights regimes cover two seemingly competing approaches to the educational system's representation of diversity: On the one hand, the universal human rights approach calls for the elimination from the law of any categorical differences that may perpetuate discrimination. According to this approach, the law of education may in no case adhere to an ideology of difference that serves to reproduce inequality between individuals. On the other hand, the minority rights approach challenges the objective and neutral stance of the law of education towards plural society: instead, it calls for the recognition of difference and for the right of minority communities to speak for themselves. According to this approach, the education law's denial of the recognition of difference more or less inevitably ends up reproducing the dominance of the majority population.

Furthermore, a review of relevant provisions indicated that the regulation on the right to representation in post-compulsory education consists of two parallel schemes of ruling. The international legal framework that governs tripartite processes with selected trade unions, employers' organisations and the state government as the three official parties has been set up primarily within the ILO and the EU. At the same time, the minority right to representation in the governance of the public education system rests predominantly on Article 27 of the CCPR, Article 30 of the CRC, and Article 5 of the FCNM. This fragmentation of the legal systems is in itself a challenge for a modern nation state.

Different international regimes may be pulling in opposite directions and the most vulnerable individuals and groups may be in increasing risk of falling between each of them. The state's double-role as 'creator of dialogue forums' and as 'fair decision-maker' calls for a holistic estimation of whether (i) the sphere of law enabling tripartite processes and (ii) the sphere of law facilitating minority representation are in harmony with each other.

(i) The tripartite system of representation is characteristically a top-down process, where the state has a dominant role in deciding which groups get the status of social partners. Usually corporatist representation is also based on occupational affiliation rather than on membership of ethnic, linguistic, gender or age categories. Nonetheless, there are provisions that expressly

call upon the partners of the tripartite process to actively combat discrimination: the EU Racial Equality Directive as a sort of binding instrument is an example.[89] In addition, the CEDAW Committee has proposed that trade unions have an obligation to demonstrate their commitment to the principle of gender equality in their constitutions, in the application of those rules and in the composition of their memberships with gender-balanced representation on their executive boards. Furthermore, the Council of Europe calls for the promotion of balanced participation of women and men in positions of responsibility and decision-making, both within their own ranks and in the context of collective bargaining.[90] Provisions such as these do not necessarily bring any substantive addition to the universal non-discrimination clauses, but they do make an extra call for the parties in the tripartite processes to take the issue of diversity in representation seriously.

(ii) As to the representation clauses under the international minority rights regime, it was noted earlier in this chapter that they serve first of all as guarantees for the 'segregation right.'[91] Article 15 of the FCNM was pointed out as a ground-breaking exception in so far that it obliges contracting states to facilitate effective minority participation even in public affairs on the whole. On the other hand, this instrument leaves it to the individual contracting parties to determine the groups to which it shall apply. Thus, even if any community may distinguish itself in cultural terms from those that already exist, it is only the ones that enjoy the status of 'national' minorities that can make representation claims by appeal to Article 15.

Nonetheless, in the same manner as the governance based on social partnership, the minority rights regime is justified by an endeavour towards more democratic involvement.[92] Whenever some forums are opened up to minorities but cardinal power simultaneously escapes to partnerships dominated by interests of market forces, then we have to rethink what a 'genuinely democratic society' truly is about. It is obvious that a failure to ensure adequate minority representation in bodies that determine the standards of educational

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[89] Racial Equality Directive (2000/43/EC), para. 23 in the preamble reads: "Member States should promote dialogue between the social partners and with non-governmental organisations to address different forms of discrimination and to combat them." Article 11(1) reads: "Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices."

[90] See CEDAW General Recom. No. 23, paras. 34 and 42; Rec(2003)3 of the Committee of Ministers, Council of Europe, para. 28.

[91] This statement refers primarily to CCPR Article 27, CRC Article 30, and FCNM Article 5.

[92] This becomes evident for instance from the preamble of the FCNM which recognises that the creation of appropriate conditions enabling persons belonging to a national minority to express, preserve and develop their identities is a distinctive feature of "a pluralist and genuinely democratic society."

qualifications may lead to the weakening of the relative position of minorities in the common labour market.

6.4.2. *The State as the Lead Agency for New Forms of Governance*

International standards that have been examined in the present chapter might suggest that a wide margin of discretion is left to a single state as regards estimation of when differences among the population are taken sufficiently into account in segmental decision-making. It holds true that segmental autonomy is often authorised without explicit requirements to incorporate anything more that gender-equality. On the other hand, many provisions that touch upon the right to participation put forward the common will to challenge and transform paradigms that subjugate any part of the population. Fragmentation that quietly paves the way for exclusion is thus not in line with international human rights standards.

Yet, it is difficult to determine where 'under-achievements' by states in the implementation of the right to segmental representation transgress what is acceptable under international law, as it gives guidance on neither how representation should be facilitated nor how the most important actors should be identified. Tables 7 and 8 in the appendix summarise the heterogeneousness of the examined standards in this subject matter.[93] Participation as such is considered as an important issue in international human rights and minority rights standards. It is obvious that the prime role of the state in the fragmented world of education is to balance between different (justified) interests. That means, for instance, to equalise the distribution of educational opportunities, to affect the underlying system producing the inequalities, and to guarantee that access to qualifications is not biased toward particular groups.

Thus, the state needs not only to continuously focus on those public activities that guarantee the core content of individual human rights to everyone, but also to increasingly match its role so as to guarantee that a multitude of semi-public bodies respect human rights standards. In accordance with this, the state apparatus should not be seen as a national institution for maintaining the collective identity of the majority group, but rather as a bridging social order.

There are several challenges facing a state that strives to transform itself into a 'bridging social order' from having traditionally been primarily a mechanism for maintaining boundaries. First, the state may find it impossible to share representative mandates fairly to the increasing mixture of groups

[93] Provisions that are in brackets stipulate on resources only in a restricted manner.

and identities that make their claims for representation. Second, it may also have to face the risk that new forms of governance place power in the hands of the 'wrong' people, that is, to the promotion of people who speak only for their narrow self-interests.[94] It is not easy to decide on the nature and the membership of groups that should be allowed to have their representatives in semi-public decision-making processes. Hence, it becomes crucial that any new forms of representation entail that all the stakeholders function on the principle of human rights accountability. This statement will be contextualised in the concluding part of the present study.

[94] For research findings on multi-cultural arrangements for dialogue with minority groups that actually involve negotiations only with elderly traditional and usually male leaders, whereby most voices of the group may remain silenced, see for instance Bond & Gilliam 1994. On the other hand, as Entzinger (1999, p. 32) notes, the presumed lack of representivity of spokespersons for diverse groupings in the society should not be exaggerated. When it is commonly accepted that unions speak on behalf of all workers although not all workers are unionised, why should minority spokespersons be accepted only on condition that they have an express mandate from all members of the group they speak for?

PART THREE

CONTEXTUALISING THE FRAME

CHAPTER SEVEN

THE LAW OF EDUCATION FROM THE VIEWPOINT OF ROMA

7.1. *Roma as a Category of Educational Concern*

The choice of the prime case for this study might not demand any specific justification, as reports from all over Europe show evidence of persistent gaps in the educational attainment of Roma when compared to the statistical average. It has been repeatedly documented that Roma drop out from formal education at high rates and that their literacy levels have remained low.[1] Gaps in their educational attainment have been related, *inter alia*, to inadequate funding, lack of understanding of the importance of bi-lingualism, and segregation of Roma in 'resource poor schools'. Indeed, hardly any other commodity has been discussed as much as education whenever the specific situation of Roma is under discussion.

The topic of Roma education is by no means new. In actual fact, Roma have been objects of governmental 'education' policies since the beginnings of the Enlightenment. The evolutionary theories of change were used not only for the justification of colonialism but also for the 'civilisation' of those parts of the domestic population that were considered as having stagnated at a more primitive stage of evolution.[2] The chorus of those that swear by the name of education has not been purely univocal, though. Some scholars have questioned education as the key word for the empowerment of Roma

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[1] It is estimated that, on average, only 30 to 40 per cent of European Roma children attend school regularly, and about 50 per cent never attend school at all. See Liégeois 1994, 1995, Bengtsson 1999, Donati 2001. Generally on Roma marginalisation in education, *see also* KRUT 92/93; Roma Rights Number 3 and 4, 2002. Regarding statistics, "School Provision for Gypsy and Traveller Children: Report on the implementation of measures envisaged in the Resolution of the Council of Ministers and the Ministers of Education Meeting with the Council, European Commission, EC Doc. (89/C 153/02), Com(96) 495 final, 22 May 1989, pp. 22–24. On illiteracy and the scholastic failure of Roma *see also* "Report on the Situation of Roma and Sinti in the OSCE Area", March 2000, Office for Democratic Institutions and Human Rights (ODIHR), pp. 63–95; "Barriers to the Education of Roma in Europe" Written Statement of the European Roma Rights Centre to the Congressional Hearing of the US Helsinki Commission. April 9, 2002; Thornberry 2005, pp. 386–390.

[2] As a curiosity, it may be mentioned that in Germany as early as 1783, education for the 'Gypsies' was urged by following words: "And now, let us imagine the Gypsy when he has ceased to be a Gypsy, imagine him with all his fertility and his numerous progeny, all of them transformed into serviceable citizens, and we will perceive how uneconomic it was to cast him aside as dross." Heuss 2000, further to the original work by Grellmann.

and argued that all talk about Roma educational needs is just evidence of the very paternalist character of the Enlightened Europe.

A British anthropologist, Judith Okely, for example, has criticised the educational policies in Western countries where Roma children are prevented from accompanying their parents and thereby from learning their traditional multi-occupations. In her view, it is not the parents that exploit their children as unpaid labour, but, on the contrary, the mainstream society that wants to exploit these children by assimilating them into industrial wage labour while simultaneously systematically ignoring alternative cultures and modes of being.[3] The arguments of Okely are worth noting as a dissenting opinion to the major chorus that unconditionally advocates integration of Roma into the larger society by means of education. However, Okely's views on 'anti-schooling', and her statement on 'non-literacy as a force of freedom' may also be a form of paternalism, if Roma thereby are not allowed to become 'modern' members of the society whenever they wish so and to let them have their equal share of the social heritage of modern civilisation.

As regards the sources of the present study, education is by far the most discussed topic in Roma-related texts issued between 1969 and 2000 by the European Union, the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE), the United Nations and the Organization for Economic Co-operation and Development (OECD). The popularity of the Roma issue becomes apparent from my analysis of a total of 160 official documents published by the above-mentioned organisations. This analysis indicates very clearly the priority of education as the most frequently repeated topic. The European Union, the Council of Europe and the OSCE all mention education in approximately two thirds of all of their documents referring to Roma that were issued during the thirty-two-year period in question. Roma documents issued by diverse UN agencies and included in the compilation under consideration do not, for their part, raise education as a specific topic.[4]

Moreover, in many documents drafted during the last thirty years, Roma are considered more as objects of paternalistic benevolence than as actors to be entrusted with empowering tools. The texts of the European Union and the Council of Europe in particular have seeded concepts such as 'educational backwardness', 'social deprivation', 'disadvantaged position', 'social exclusion', and 'marginalisation', etc. There were but few exceptions to the rule of 'victimisation' to be found among the international texts on Roma that were analysed for the purposes of the present study.

Pertaining to 'law as a system' as comprehended in the present study, an interesting statement can be found in the concluding observations of the UN

[3] Okely 1997, pp. 72, 76.

[4] The documents that are under consideration here are compiled in Danbakli 2001.

Human Rights Committee regarding the report on the Czech Republic (July 2001). In these observations, the HRC notes that the steps taken by the state party to improve the socio-economic condition of Roma do not appear to be adequate to address the *de facto* discrimination. The Committee expresses its concern at the absence of legislation prohibiting discrimination in the educational system and encourages the state party to adopt further legislation to remedy the matter.[5]

Likewise, the European Union Network of Experts in Fundamental Rights calls in its report published of May 2004 for the European Union to adopt a specific Directive in order to encourage the integration of Roma and in particular to take measures aimed at their desegregation in education.[6] The educational situation of Roma and Travellers is also underlined as specifically vulnerable in many opinions of the Advisory Committee for the FCNM.[7] Thus, education both as a key reason and as a key solution to the difficulties faced by Roma has been identified both by the UN and the European expert bodies.

What follows is an attempt to dig somewhat deeper into what a particular 'Roma' perspective on the law of education might mean. The viewpoint below does not examine to what degree Roma marginalisation from quality education may be a product of their specific culture and isolation from the mainstream society. Such a study belongs rather to the realm of anthropology and related disciplines. In contrast, the topic of interest here is how it might be worthwhile to deconstruct the 'mainstream' law of education when seen from the viewpoint of Roma in educationally disadvantaged positions.

7.2. *Educational Rights from a Viewpoint of Disadvantage*

7.2.1. *Pro a Functional Definition of the Right to Education*

In Part II of this study it was suggested that a functional definition of the right to education might be a feasible way to help educationally disadvantaged individuals out from the exclusion trap. The review of relevant standards also confirmed that there is no indication in international law or jurisprudence that the right to education should be limited to a particular stage of education, even if international codification turned out to be quite vague in some

[5] Concluding Observations of the HRC: Czech Republic. 27/08/2001. CCPR/CO/72/CZE, paras. 8 and 9. In literature concerning Roma, the concept of systemic discrimination is often used as a synonym for the notions of intersectional or structural discrimination. See, for example, Gheorghe in the OSCE Seminar Report, Bratislava 2000, Summary pp. 12–13. See also Mirga, ibid., p. 20, Thornberry 2005, p. 372.

[6] EU Network of Independent Experts on Fundamental Rights 2004. "Report on the Situation of Fundamental Rights in the European Union for 2003", On the NGO activities in combating discrimination against Roma in education, see Rekosh & Sleeper (eds.) 2004.

[7] See Weller 2005, p. 23.

respects. Claims for a certain quantum of quality education should in any case be transferable to rights language. Indeed, the existence of education laws that truly respect the principle of lifelong learning appears to be crucial for students of Roma background. Let us substantiate this assumption by some examples.

First, a repeatedly reported characteristic of Roma is that as one grows up in the community, one acquires something called 'seniority rights.'[8] The moving up in the hierarchy of the community is strongly connected to this specific right. The question that then arises is: whose right to education shall take precedence? Or rather: why should educationally disadvantaged individuals be placed in opposition with each other on the basis of age? An argument that is proposed time after time in Western human rights is that the children must in any society be given a 'first call', i.e., that the educational rights of children are to be prioritised over rights of adults. This statement has been justified by the claim that governments have an exceptional obligation to provide for those individuals who are unable to provide for themselves. Nonetheless, a counter-argument that also holds strongly is that young and adult illiterate and language deficient individuals may be as unable to provide for themselves as the average child. The respect for 'seniority rights' among Roma is but one reason to question the education system based on strict age cohorts prior to the recognition of functional educational disadvantages.[9]

Second, Roma communities are time and again characterised as societies where early marriage and child-bearing is a norm. Consequently, an education system that uses age limits for free basic education may constitute a condition that many minority women cannot comply with. Simultaneously, it should be borne in mind that it is not only Roma women that may suffer from age bars in compulsory education. In cultures where early marriages are a norm, it is often also a boy's 'honour' to ground and support his family, to become a breadwinner. This concurs with the suggestion made in Chapter 4 that people from different cultures may hold quite different views about the appropriateness of activities such as the proper age to finish school, to start working or to marry and have children, to take responsibility for the maintenance of one's own family.

Obviously, the law of education shall not support 'reactive culturalism'. However, lack of awareness of age-related characteristics of Roma cultures may well have a marginalising and exclusionary effect on individuals that are raised within these communities. In the light of what has been said just above, it might make more sense for many Roma to group the learners by ability

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[8] See, for instance, Grönfors 1977 & 1981.

[9] The biased coupling of basic educational rights merely with children's rights seems indeed to be a Western phenomenon. See what was said about the Central American Convention on the Unification of the Fundamental Norms of Education of 1962, and about the Charter of the Organization of American States in Chapter 3, footnote 102, above.

levels, instead of cramming the subjective right to education into a person's first fifteen years of life. In what follows, this proposition will be deepened for each of the four components in turn: basic, language, vocational and cultural skills.

7.2.2. *Basic Skills as Prerequisites for Other Forms of Learning*

In any part of the world, it is a fact of life that most individuals who lack basic skills in literacy and numeracy are marginalised both in economic and political terms. In the face of this fact, it is important to keep in mind that there is nothing in international human rights law that excludes adult basic education from the ambit of international protection of the right to education. Instead, it is in line with international human rights law that that basic education is conceived of in its more inclusive sense of primary education and adult literacy. Moreover, an acknowledgement of the right to an identifiable quantum of quality education of illiterates irrespective of age is definitely in line with the interdependency theory of human rights. A denial of this right to those individuals that for one reason or another have been unable during their childhood years to acquire sufficient basic skills needed in society has many negative repercussions on their meaningful exercise of other rights.

From the viewpoint of educationally marginalised individuals, it is important to underline that universal standards do not equate the universal right to basic education with compulsory primary education.[10] Concurrently, it seems reasonable to attach a word of warning to some terminological shifts that have taken place within international regimes since the adoption of the UDHR. It is possible that the new emphasis of some instruments on absorbing literacy into an expanded concept of 'adult education' may underline a shift away from the rights of the educationally least advantaged. This may happen when adult education is defined in a broad sense that includes on-the-job skills training and other continuing-education programmes that would not normally be considered 'basic' education. If basic adult education is not constantly maintained as a claim of its own, then the distribution of adult education services may become highly concentrated among the better-off segments of the population. Losers will be those who already are most disadvantaged.

In contrast, it is likely that the most disadvantaged individuals and communities gain most when functional literacy is made a priority. In the case of Roma, it is worthwhile to combine this argument with what was said about 'seniority rights' above. The established view, according to which basic education should be arranged along age cohorts, can be challenged by the idea of cross-age learning. This means learning that engages adults and teens as teachers for pre-teens or younger children, while simultaneously enabling their

[10] See discussion in Chapter 3, above.

own basic education. Indeed, research shows that cross-age learning can be a useful strategy in many respects. Older learners can get motivation by an active role in programme implementation whereas younger ones can look up to and emulate the older learners.[11] Likewise, it may have an encouraging effect when the learning environment treats a Roma child not only as an individual but also a member of her/his family.

Universal instruments containing provisions on the right to education do not as such require stratification along age cohorts. Thus, it is up to national systems to take advantage of a cross-age learning strategy when ever it proves to have functional value. The above-mentioned seniority rights might call for the use of this option in the case of Roma.

7.2.3. *Language Skills as Prerequisites for Successful Integration*

In Chapter 3, language was proposed to be so intimately connected with education that it cannot be ignored without causing injury to the substance of the right to education. Likewise, it was argued that the right to language skills covers not only the right to mother tongue skills, but also to an officially recognised language of the state where one permanently lives.[12] Particular focus was placed upon the distinctive position of semi-lingual individuals and upon the fact that limited language proficiency may make even simple activities of daily life, such as food shopping or communication with local authorities, difficult. Therefore, it was suggested that a functional approach to language skills might be most beneficial for those individuals whose proficiency in the official language and the mother tongue are both insufficient.[13]

As to the language skills, many Roma are touched by both two aspects of the linguistic educational rights mentioned above. That is to say, the law should acknowledge simultaneously their right to mother tongue education and their right to tuition of the majority language. It appears that the argumentation which assumes that only teaching linguistic minority members in their native languages will reinforce their sense of self-worth in many cases may be flawed for Roma. Especially for those individuals that suffer from semi-lingualism, it can be equally important to pay attention to the right of

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[11] Meyer et al. 2000.

[12] For the definition of 'officially recognised language', see Chapter 1, footnote 2.

[13] It can be worthwhile to note that the linguistic aspect of the right to education is much more complex and linguicism in education can be traced from many more angles than the ones mentioned here. Does law impose dominance of just one or two language(s)? Does it allow for individuals from different linguistic minorities to be bilingual? In an officially bilingual state, is there explicit space given to the concept of language maintenance of third languages? And so forth. As an extreme approach towards individual language rights, a case has been reported from a Texas court where a judge stated that a Spanish-speaking mother who spoke Spanish rather than English to her child was in fact guilty of child abuse. See Wright 1996, p. 33.

minority individuals to learn majority language(s). When such discussion takes place, it should not be described merely as an attempt by the nation state to assimilate its minorities. Instead, it should be acknowledged that a right to majority language skills—at least a practical definable level of such skills—may be an essential part of decent conditions of living and for integration into the surrounding society.

The question of whether and in which way the exclusion or marginalisation of Roma is related to their linguistic isolation or linguistic handicap may vary from one country to another. International standards do not build up a holistic framework on this issue. As was discussed in Part II, some provisions on language rights are applicable only to national minorities, leaving the question of language skills acquisition of those without national minority status unnoticed. Moreover, due attention was called to general non-discrimination clauses mentioning language as a prohibited ground for discrimination.

Regarding mother tongue education, the situation can be particularly difficult in countries where Roma are a small and dispersed minority. First, the question of numbers evokes a question in relation to mother tongue tuition: How can a right to such education be safeguarded for members of a group consisting of just a small percentage of the population, being dispersed all over the country and possibly having even several 'competing' languages or dialects? The task of providing effective education is surely a different challenge from education provision to linguistic minorities that are a significant portion of the nation. Under such circumstances, the above-mentioned cross-age learning might be one way to guarantee that a sufficient student population exists for the right to instruction in or through Roma language to become a reality.

Another aspect to be taken into consideration is that the right to get some education in the official language of the country of domicile may be vital for dispersed Roma, due to the fact that they often are inescapably forced to adapt themselves to the dominant group in order to be able to sell their labour outside their own community. Too strong claims for mother tongue tuition can also be inherently paradoxical, if individuals concerned thereby lose their opportunities for social mobility that the learning of the dominant language would enable for them. In their situation, it may be more important to be fully conversant with the dominant language of public life than to get instruction in their mother tongue. In any case, the law should be able to guarantee that mother tongue provision will not become a trap for those Roma who prefer to learn more widely used languages.

A related question deals with the linguistic educational rights of Roma with the status of asylum-seekers or refugees. As was discussed in Part II, education provision to asylum-seekers and refugees 'under the same condition' as nationals safeguards only formal equality when it does not put pressure on the member states in relation to preparatory official language schooling. Especially

when living in a foreign language environment is caused by non-voluntary immigration, it is easy to see how crucial it is to have a right to language tuition in the official language of the new country of residence.

An argument sometimes put forward is that refugees may not be staying in the country, and therefore no resources should be wasted on their language education. Nonetheless, such reasoning hits hardest those refugees—be they Roma or others—who are not counted as labour reserve and therefore fall outside any employment training efforts. Moreover, these individuals hardly know much about their future: they may return to their country of origin, but they may as well remain, particularly if given a genuine chance to integrate themselves. Instruction in the national language(s) of the country may be the priority even for those individuals that simply are unwilling to identify themselves as members of any minority group.[14]

As discussed in Part II, international law leaves it very much open for interpretation as to whether language rights should be treated as part of the individual rights tradition.[15] A clearly supportive court case is the US case of *Lau* vs. *Nichols* (1974), which required that students who do not speak and understand English are entitled to education programs that teach them English. No similar cases were found in international human rights case-law. Instead, as has been discussed earlier, international jurisprudence recognises that in certain circumstances there may be 'necessary restrictions', which are justified by a process of weighing-up their importance for the individual on the one hand and for the society as a whole on the other.

Elementary language skills being the case in point, when the society pinpoints deficiency in the knowledge of the majority language as one of the principal causes of unemployment, and the legislature simultaneously leaves the right to language skills acquisition unregulated, then language most obviously operates as a tool that contributes to the marginalisation of individuals belonging to lesser-used language groups. It should be apparent that when domestic law remains silent on this issue, the risk of semi-lingualism—meaning that individuals concerned remain linguistically handicapped both in their mother tongue and in the majority language—grows. Seen from the disadvantage doctrine viewpoint, it should also be indisputable that there is a need for linguistic rights to be guaranteed for every individual, irrespective of

[14] Surveys carried out by the present author among immigrant and Roma students in Finland support this argument. Many minority individuals with poor majority language skills have estimated that they cannot, for that reason, fully participate in the society and would prefer majority language tuition prior to a right to develop their minority language identity. See Gynther 2000a and 2000b.

[15] As a one-track conclusion, one might suggest that either the numbers limitation is unjustified or language rights are not universal individual human rights. See, for example, Green (1987, p. 667) who makes an illustrative analogy and asks what it might mean if we had the right to freedom of expression only when numbers warrant. *See also* Pierre Coulombe (2000, p. 273) who questions not only size as a criterion, but also the invocation of the notion of historic priority of English and French in the Canadian context.

his or her length of residence or of potential ancestors. As a minimum, every Roma permanently residing in the state territory should be guaranteed either access to minority or to majority language education, in order not to leave anybody in linguistic isolation. A functional definition of a certain minimum amount of language education might be a tool with a positive effect, but such definition does not exist in international law.

As to the relationship between basic skills acquisition and language learning, some pedagogues suggest that alphabetisation of illiterate adults should be achieved first in their native language and that this will help them more easily learn a second language. A counter-argument for this view could be that in the absence of written materials in the mother tongue, literacy in a second language may often be the form of literacy that learners could more realistically aspire to. Whatever the case may be, the uniting argument here is that formal assessment arrangements can be used for scrutinising the human rights accountability of the education system with regard to any of these components. To the extent that they remain unregulated sub-areas of education, they should be shifted to the realm of law where they can be brought more clearly under the scrutiny of non-discrimination.

7.2.4. *Vocational and Cultural Skills as Professional Possessions*

The advantage of a functional approach to educational rights becomes most apparent when vocational and cultural skills are at issue. Self-evidently, educationally disadvantaged individuals require a sufficient level of profitable skills to escape a life of dependent ignorance. Thus, the right to vocational skills becomes an essential element of empowerment for individuals that suffer from joblessness with all its marginalising spin-offs. Nevertheless, this aspect of the educational rights of the most disadvantaged is constantly at risk of being sacrificed on the altar of competition.

In Part II, we were able track down several international provisions on which the right to vocational and cultural skills can be anchored. Regrettably, one of the most significant instruments, the UNESCO Vocational Convention, has as of October 2005 only 15 state parties.[16] A conclusion to be drawn from the review over international standards seems to be that provisions on vocational and cultural rights can serve both as a means of inclusion and as a means of exclusion. They can open pathways for constant progress, but they can also promote ethnification that further increases the marginalisation of minority individuals from educational options open for the so-called majority students.

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[16] States that have deposited with the Director-General of UNESCO an instrument of ratification, acceptance, accession, or approval are: Bahrain, Bulgaria, Iraq, Jordan, Kuwait, Kyrgyzstan, Lithuania, Mongolia, Niger, Oman, Rwanda, United Arab Emirates, Uzbekistan, Zambia and Zimbabwe.

The pathway for progress consists of two main lines. First, Roma, as any other individuals, are not merely 'consumers' of culture but also cultural creators. Therefore, the skills approach emphasises that the right to 'consumption' of culture shall be reinforced with a non-discriminatory right to professionalism in vocations by which diverse forms of culture are constantly created. Instead of an artificial confrontation between the modern nation state and traditional versus non-traditional ethnic communities, the law should be able to guarantee that all individuals making up the society have equal access to new types of cultural (as well as any other) occupations. This can be promoted, *inter alia*, by legal measures designed to encourage the participation of members of marginalised minority groups in training schemes that prepare them for occupations where their communities are clearly under-represented.

As to the other main line of the pathway to progress, it may well be justified in some cases to create vocational programmes that are intentionally segregated by ethnicity, provided that these enrol students on a voluntary basis and that such programmes are as regularly and as carefully evaluated as any other programmes. Likewise, Roma may well choose a cultural specialisation that is in line with the tradition of their communities. The essential question is whether individual Roma have a true opportunity to voluntarily choose between training traditionally stereotyped as suitable for them and cultural professions as defined by the mainstream society.

The exclusionary aspect turns up when the education system establishes an essentialist and primordialist view of cultural skills. That is to say, a sentimental view of traditional communities brings along cultural training that focuses merely on ethnic peculiarities, whilst the right of minority individuals to actively contribute to the joint processes of cultural reconstruction and reinvention is trodden underfoot. Any arguments claiming that Roma would be inherently against 'our' style of vocational or cultural education, or against education that prepares for participation on modern technology- and information-based economies might nourish this view. Likewise, the assumption is marginalising in that it suggests that the only way Roma can retain their identity and tradition is by adhering to the same kinds of occupations their forefathers or foremothers pursued. A logical analogy would be that 'the Finns' should give up with the mobile phone industry and occupy themselves with the production of birch-bark shoes and pouches instead.

The point is, however, not whether there are differentiated training tracks offered for majority and minority students. Rather, the point is whether the variety of available options gives equal eligibility for further studies and/or employability. Any route that leads to an impasse, with no option for the student to reach next level of education, is suspect in this respect and should face a high level of legal scrutiny.

7.3. *The Challenge of Recognising Roma between the Cracks*

7.3.1. *Acknowledgement of Functionally Disadvantaged Individuals*

In Part II, some international human rights provisions were discussed that call for an objective recognition of right-bearers under the state's jurisdiction, and that disallow the leaving of anybody arbitrarily in the position of invisible outlaw. Accordingly, domestic law on education shall cover Roma as any other individuals under the state jurisdiction, and without arbitrary distinctions, say, between national and ethnic Roma, between compact and diaspora Roma, between settled and itinerant Roma, or between long-established and immigrant Roma. Likewise, any anti-discrimination provisions that make reference to ethnicity are considered to cover Roma, even though the notion of 'ethnic' is not legally defined. At the same time, international anti-discrimination standards operate with simplistic categorisations of difference that construct identity along lines of fixed characteristics, while leaving unportrayed such characteristics as poverty status or severity of condition.

The fact that none of the international documents mentioning Roma are a source of legal obligation in the purest sense does not prevent those instrumnets from being utilised as interpretative aids in evaluating the scope, *ratione personae*, of binding legal instruments concerned with minority rights.[17] Yet, the status afforded to Roma remains a matter of domestic politics in single states. Indeed the conception of Roma varies from one jurisdiction to another: some European countries recognise Roma as a minority in their constitutions,[18] whereas other countries mention Roma in national minority laws.[19] Still other countries, France for example, deny that they have any minorities at all or that Roma would constitute a minority.

International instruments that are framed to assist minorities may have several counterproductive effects for those Roma that are most remote from the standard. Minority rights approach may essentialise 'traditional' Roma and simultaneously disregard the ethnic identity of their more recently arrived kinsfolk. Likewise, it may foster an illusion of unity among diverse Roma communities even when only some of them benefit by rights from the

[17] See also how Kymlicka & Norman (2000, p. 18) list Roma as a *sui generis* group in their typology of minority rights, thus bypassing the fact that Roma may well comprise even national minorities or immigrant minorities.

[18] There are currently three European countries that specifically mention Roma in their constitutions, namely the Former Yugoslav Republic of Macedonia, Finland and Slovenia. See the Constitution of Former Yugoslav Republic of Macedonia (1992) Article 78.2; the Constitution of the Republic of Finland (1999) Section 17.3; the Constitution of the Republic of Slovenia (2000) Article 65.

[19] For example, the Austrian Ethnic Act (1993, amendments to the Act of 1976) and the Hungarian Act on the Rights of National and Ethnic Minorities (1993).

minority legislation. We face here a paradox: attempts to talk about all Roma in terms of what Roma have in common undermine attempts to assess the significance of differences between individuals and/or subgroups belonging to this category.[20] Persons are free to declare whether they want to be considered as members of an ethnic minority group or not, but this freedom puts no pressure on the state to recognise the basic educational needs of individuals that remain without minority status.

A person that easily falls between the cracks of both anti-discrimination law and minority rights law would be, for instance: aged 15–18, a semi-lingual, non-heterosexual refugee Roma in a country that supports overtly just heterosexual identity construction and applies different rules to 'national' and 'non-national' Roma. Ignoring ethnicity, gender, or age differences and refusing to accommodate them may indeed become a denial of equal access and opportunity. Surely, the principle of interdependency calls the state parties of the minority rights instruments to pay due attention, *inter alia*, to the universal right not to be discriminated against on any grounds.

However, an argument developed in Part II was that it is not the distinction between different binary pairs but rather ignoring fundamental educational disadvantage that most probably excludes one from any advancement in the so-called knowledge society. As a way out of endless re-categorisations, it was suggested that the fulfilment of the right to adequate education rather needs statistics concerning functional disability than statistics that reify essentialism. The main human rights concern should therefore be how legal categories act and interact to recognise the concrete needs of the educationally most disadvantaged individuals.

To suggest that difference emphasis should take second place is not to deny a potential correlation between certain categories and a disadvantaged position. Rather, it is to say that the recognition of difference between social groups may not lead to the ignoring, playing down or denial of features such as illiteracy, language deficit etc. This is in line with a generally accepted view in human rights discourse that the decisive factor in any analysis of social categorisations should be the principle to put the most vulnerable individuals first in line.[21]

Being a party of international human rights law as such obligates states to provide certain basic information on the fulfilment of the right to education

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[20] Among academic commentators, for instance, Martin Kovats has criticised certain trends in Europe that tend to simplify the conception of Roma and to essentialise Roma culture Kovats 2001, p. 100.

[21] For instance, Asbjorn Eide (2001, p. 549) phrases this order of importance in the following words: "Whenever there is a systematic difference in the enjoyment of economic, social and cultural rights on the grounds of race, colour, gender, national origin etc., measures should aim at redressing the situation of those who least enjoy these rights". Likewise, Matthew Craven (1995, p. 118) presses the point that the CESCR Committee has long held the position of the vulnerable and disadvantaged as the principal concern of the CESCR.

under their jurisdiction. Such information should naturally include data on the educationally most disadvantaged individuals with diverse group affiliations. What follows is an attempt to highlight how certain sub-categories of Roma may be at risk of systemic discrimination when rights-holders in education are categorised along simplistic lines of age, language, gender and ethnic affiliation respectively.

7.3.2. *Young Roma between a Rock and a Hard Place*

When estimating the coverage of rights-holders in education in Chapter 4, there appeared a need to draw attention to a category of concern that falls in between the established categories of 'children' and 'adults.' Record-keepers might classify an individual in the transitional age of adolescence neither as a child entitled to primary education nor as an adult entitled to unemployment training or any other forms of adult education. Therefore, it was suggested that young people easily get into a particularly difficult situation.

As to legal aspects, it has already been noted that the CRC shall apply to all individuals below the age of 18. Taking into account the interdependence between diverse provisions of the Convention, it is obvious that Articles 1 and 28 shall be read together. Thereby it also becomes undisputed that the CRC entitles the right to basic education to all persons below the age of 18, irrespective of whether such education is labelled primary, elementary, fundamental or, indeed, anything else. To be sure, the distinction made in Article 4 CRC provides that with regard to economic, social and cultural rights, state parties shall undertake positive measures "to the maximum extent of their available resources". The ideal standard for compliance with the CRC is that all the contracting parties strive to make basic education progressively a subjective right at least for everybody below the age of 18. Yet, Article 4 leaves the teenagers in a more unprotected position than those children that are covered by the concept of 'primary education' in Article 28(1) CRC.

European legislation is also somewhat inconsiderate for young people as subjects of basic educational rights. This becomes apparent from the so-called Employment Directive of 2000 and its Article 6 that justifies several differences of treatment, *inter alia*, on grounds of age.[22] Even if Article 6 initially allows positive measures to reach the aims of the Directive, it can also be misused and read as giving a right for the states to dictate over their youngsters, and a duty for individuals to obey. That is to say, acts may be committed against young people as means of social control, rather than as means of promoting

[22] Article 6 stipulates that certain actions shall not constitute discrimination, "if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary." For more discussion on this Article, see Chapter 4 above.

the educational rights of individuals in accordance with their needs. This is the case, for example, when the youngsters are forced to apply for secondary education if they want to get unemployment allowances.[23] The government may be motivated to require such compulsory applications by the aim of reducing youth unemployment. However, such objectives may place in a doubly difficult situation those teenagers that have deficiencies in basic and language skills.

Consider what was just said from the viewpoint of Roma with a refugee, immigrant or 'drop-out' background who are seen as 'too old' for ordinary classes and as 'too young' for unemployment training. Instead, they are expected to meet the standards endorsed for an average young person, and are possibly deemed 'irresponsible' when they cannot. In such cases, it becomes apparent how education statutes may have a disproportionately detrimental effect upon minority groups, and how a lacuna in law may function as systemic bias as regards the distribution of education. Recognition of rights-holders on the grounds of their functional deficiencies, instead of stratification of age categories, would possibly promote the availability of an adequate initial education at least for all children until the age of 18. The fact that statutory protection at international level of teenagers' right to basic education is not strong does not justify the failure to mandate such education in domestic legislation when equality guarantees are clearly violated.

7.3.3. *Simplifying Assumptions about Language: A Double-Bind*

When it comes to the language aspect of educational categorisation, it is difficult to make any clear-cut statements from something that could be called a Roma viewpoint. Every now and then it has been suggested that language acquires a position of primary significance amongst nations without a state. In the light of the present study it seems, however, that the most important point might be to keep in mind the complexity of the issue and to be on guard against narrow-minded solutions. The focus in what follows is how language classifications may have a marginalising effect on Roma.

First, it can be asked whether it is sufficient that the state keeps a record on the numbers of those language groups that it expressly determines to be conceded linguistic rights. The earlier cited case *Waldman* v. *Canada* is most interesting in this respect, even if not dealing with linguistic minority issues. In that case, the HRC rejects the state party's argument that the preferential treatment of certain group in the society is non-discriminatory because of its constitutional obligation. Instead, the author's argumentation is accepted

[23] For instance, Finnish legislation denies the right to unemployment benefits to youngsters unless they have applied for education, passed the vocational examination or participated in certain employment policy measures. See Gynther 2001a, p. 381.

that historical anomalies, in the constitution or elsewhere, cannot thwart the application of the equality provisions of the CCPR.[24] It holds true that liberty to use language of choice can be ensured without any official 'recognition'. However, as soon as the state decides to fund particular minority groups, it needs records on the existence of other groups that might have justified interests to similar public support.

Second, reliable knowledge about different language categories is needed when qualification requirements for certain public posts are settled. Consider situations where national legislation recognises the super-ordinate status of two selected languages, such as is the case of Finnish and Swedish as officially recognised languages in the Constitution of Finland. In such circumstances, the masters of both these two languages receive constantly superior opportunities to qualify to certain public posts, whilst individuals with another combination of linguistic capital are faced with burdensome requirements in the 'super-ordinate' languages. The articulation of language requirements of the kind may result in a continuing secondary status for all languages except for the superior ones.[25] As a consequence, Roma, for instance, may consistently be excluded from a number of occupational choices due to the devaluing of their mother tongue skills.

Assignment of roles in society on the basis of language as such does not necessarily constitute discrimination, due to the fact that language skills can very well be a crucial criterion for many posts. However, turning a blind eye to the factual language composition of the country may lead to more or less complete arbitrariness. From the viewpoint of disadvantage doctrine, it is disquieting if the official record-keepers ignore the fact that a person may know neither the official language nor the mother tongue in sufficient measure to come off decently in the so-called knowledge society. Just consider the situation of individuals who cannot find employment without first strengthening their basic language skills, but who will not find language training that suits to their needs when they turn to the formal education system either.

Roma as non-territorial minorities obviously face an added risk of falling between linguistic tracks whenever the legislation guarantees rights to minority language education 'where numbers warrant' and links this condition to geographical concentration of the language group concerned. This aspect calls for attention particularly since the entry into force of the FCNM, which made the provision of language services in its member states contingent on need. The FCNM provides, for one thing, that speakers for minority language shall

[24] See *Waldman* v. *Canada*, para. 10.4.

[25] De Varennes and Thornberry report that during the drafting of Article 14 FCNM, a difficulty arose over how to address the situation where a state had more than one official language. According to their analysis of the *travaux préparatoires*, it was left for states "to settle the particular questions which the implementation of this provision shall entail." See de Varennes & Thornberry 2005, p. 424.

themselves request the minority language service, but it also spells out that this request must "correspond to real need". According to the explanatory report it is up to the state to assess this need, but by applying objective criteria. The crucial question then becomes: When are restrictions to the linguistic rights of minorities truly based on a reasonable and objective justification? This question can hardly be properly answered without making all languages spoken on the state territory visible in official statistics.[26]

A peculiar type of linguistic double bind hit Roma living in countries that operate the territoriality principle with regard to language policy, such as, e.g., Switzerland and Belgium. This principle seems to leave little, if any, space for lesser-used languages, nor for individual choices.[27] Yet, even in these countries, the bottom-line should be that a reasonable relation of proportionality must exist between the aims sought to be realised and the means employed. One piece of information that is needed for such proportionality estimation is the size of diverse language communities in the society. In the light of international standards on minority rights and non-discrimination, it seems obvious that official mono-lingualism should not be accepted as the solution when all *de facto* minority languages existing within the state borders cannot receive constitutional status. Working in piecemeal fashion has been suggested as a way forward, starting with one group, towards improving the position of all minority languages. Indeed, it has been suggested that it does not serve the cause of protecting linguistic diversity if the rights of some language groups are restricted because all groups that should be protected are not.[28]

Finally, record-keeping that is based on linguistic grounds can be valuable for the safeguarding of dialects of Romanes that are in danger of disappear-

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[26] Article 10(2) of the FCNM, for example, refers expressly to areas inhabited by persons belonging to national minorities. The 'objective criteria' are not specified in the Explanatory Report. In his analysis of Article 10(2), de Varennes suggests that the Advisory Committee should give more unambiguous and precise direction for contracting parties regarding their obligations in relation to this provision. Nonetheless, he does not discuss the situation of non-territorial minorities. See de Varennes 2005, pp. 301–327. *See also* Dunbar 2001, p. 114.

[27] In fact, in the *Belgian Linguistics* case it was this standard that the applicants wanted to challenge. It was due to the division of Belgium into monolingual regions that the French speaking citizens living in Flanders were unable to get public education in French for their children. The principle of territorial uni-lingualism in the field of education was thus declared compatible with Article 2 of Protocol No. 1 of the ECHR. Bruno de Witte (1989) has later pointed out that the reasoning of the Court on this point seems rather weak and territorially unilingual regimes could be challenged as being discriminatory under Article 14 of the Convention.

[28] Here the ECJ case *Groener* v. *Minister of Education* is illustrative. As was discussed in Part II, the ECJ then accepted that a teacher could be required to speak the native language even though her pupils did not, she would not be working in it, and in fact it was a minority language in the country in question. All these facts might be considered as indicating that the language requirement was unnecessary, if not for the reason of revitalising a *de facto* minority language. The disallowance of the language requirement would hardly have promoted the position of any third languages of the country.

ing. In many European countries, entire generations of Roma are reported to have lost their mother tongue as a consequence of a long-lasting assimilation process. The efforts towards the retention of Romanes, or some of its dialects, may well take place even without counting how many active speakers of this language there factually are. Yet, record-keeping on the masters of the threatened language may serve as a valuable resource for revitalisation efforts. And *vice versa*, a blind eye turned to the existing linguistic capital may speed up the dying and disappearance of languages and dialects in danger.

Many contradictory aspects of linguistic record-keeping in education coincide in the case of Roma. A major challenge is then to secure that simplifying categorisations do not become a double bind for the linguistically most disadvantaged among them. As a summarising suggestion, it might be profitable for those Roma in the most disadvantaged situations if their language deficiency was recognised by using a combination of functional skills and self-identification. That is to say, all individuals should have a chance to develop their competence at least in the language they find most useful in their daily life and to have the freedom to choose whether they want to identify themselves with some other languages. In contrast, language as an externally posed identificator should have only a complementary role in the official record-keeping of education authorities. However, not much back-up for this summarising suggestion can be found in international instruments on linguistic rights.

7.3.4. *Neither Gender nor Ethnicity Are Handicaps to Be Alleviated*

In earlier parts of the present study, it was discussed that international anti-discrimination instruments do ask state parties to invest in data disaggregation, primarily in order to enable an evaluation of whether public services are provided in a non-discriminatory way to all segments of society. On the other hand, unreasoned emphasis on certain attributes may also serve to assure 'otherness' and to reinforce the status of individuals in these categories as outsiders. In the case of Roma, it seems particularly important to disprove the myth of sex/gender as exclusively a 'woman problem.' Likewise, a simplistic focus on ethnicity may also bring counterproductive effects for Roma. Let us substantiate both of these concerns.

The risks of a one-sided focus on gender were to the fore already in Part II. There is the lurking risk of essentialism whenever educational privilege is associated with the male category and educational disadvantage with the female. To essentialise illiteracy as a characteristic of minority women would be merely a form of negative stereotyping. Literacy skill deficits should rather be categorised as a group of its own, to be found not just among women, nor just among marginalised minority groups, but among large proportions of the entire population. At least findings in the studies of the present author

suggest that a more intensive effort is needed with minority males whose lag behind females in completion of compulsory education is significant.[29]

Thus, while action needs to be taken when a preponderance of students in a single ethnic or gender group are lagging behind students in other groups, it is perhaps even more important to assess the functional strengths and weaknesses of students individually. Adults with low literacy levels seldom get their deficiencies recognised or redressed as many states prefer to talk about abstract drop-out rates instead of making efforts to allow illiterate individuals to become literate. It holds true that illiterate women may face additional obstacles if, for instance, the male members of the family have control over the physical mobility of 'their women', but seen from the viewpoint of educational disadvantage, the main category of concern even in such cases should be illiteracy, not gender.

When the focus is placed upon the higher educational levels, it becomes apparent that the aspect of equality between men and women in the right to education is far from exhausted. The strong historic gender bias against women that has for long characterised vocational education policy and practice still remains in many parts of the world. However, once again it is noteworthy that the structural crisis in the labour market, the introduction of the new technologies, and the like, do not affect only women's employment prospects. These factors may also have a severe impact on the employability of minority men, whose skills may not be so easily attuned to the one-sided requirements of the mainstream labour market. In line with the disadvantage doctrine advocated here, the main question of concern should even at higher educational levels be whether the individual has severe skills deficiencies, rather than which gender category one falls into.

It is to be noted that none of the remarks above suggest that the standing of females could be justly restricted in the name of 'patriarchal cultures'. They merely charge that the strongly partial position taken by some equality advocates, inspired, *inter alia* by the CEDAW, may be just another instance of socially construed dualism being imposed on minority groups in a hegemonic manner. In actual fact, genderism often works both ways, even if holding women to traditional expectations based on gender is the more discussed so far.

As to ethnicity, there are both pros and cons for using it as the main identifier for Roma. There is a trend discernible among international monitoring bodies towards distinguishing a more or less coherent image of 'the Roma', along with reactions of the state parties either to support or to oppose this image of coherence. For instance, the HRC has in its concluding observations

[29] See Gynther 2000a, where it come out that especially migrant boys in the Turku region, Finland, are frequently clustered in special education that lead to restricted options *vis-á-vis* future studies, while minority girls more often continue in ordinary classes together with majority students.

during recent years repeatedly expressed its concern about the situation of 'the Roma minority', asked the state parties make efforts to provide opportunities for Roma to use 'their language' in official communications, and used other expressions that support the image of one homogeneous Roma community with merely one language, which seldom corresponds to the factual situation of the observed countries.[30]

In like manner, the CERD Committee has started to call upon the state parties to include in their reports data about Roma within their jurisdiction.[31] As far as data collection is concerned, the state parties are asked "to include in their periodic reports, in an appropriate form, data about the Roma communities within their jurisdiction, including statistical data about Roma participation in political life and about their economic, social and cultural situation, including from a gender perspective". What is more, the state parties are urged "to take all necessary measures in order to avoid any form of discrimination against immigrants or asylum-seekers of Roma origin". The last-mentioned recommendation is of fundamental importance in the light of the problems of selective recognition that were mentioned earlier: it indicates that state parties are in no case totally free to define who satisfies the definition of 'Roma' within the country borders.

The above-mentioned examples are illustrative of expert bodies on human rights that seem to take the existence of 'the Roma' as one particular, distinguishable ethnic group as given. Yet, such recognition gives special status for 'the Roma' only in a political sense, not in strictly legal respect.[32] In contrast to UN expert bodies, the European Court of Human Rights has consistently rejected essentialist comprehension of Roma and their education. In a number of cases against the United Kingdom, the Court held that there had been no discrimination of ethnic grounds when caravan-dwellers, identifying themselves as members of British Gypsy communities, had complained over decisions of planning authorities concerning their caravan sites.[33] Likewise,

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[30] See, for instance, references that the HRC made to Roma in the following Concluding Observations on the state party reports during the period 11.9.2001–12.08.2004: Lithuania 04/05/2004 (CCPR/CO/80/LTU), para. 8; Germany 04/05/2004 (CCPR/CO/80/DEU), para. 21; Slovakia 22/08/2003 (CCPR/CO/78/SVK), paras. 11, 12, 16–19; Portugal 05/07/2003 (CCPR/CO/78/PRT), para. 20; Hungary 19/04/2002 (CCPR/CO/74/HUN), paras. 6, 7.

[31] This has held true particularly since August 2000, when the Committee held a thematic discussion on racial discrimination against Roma and adopted its General Recommendation No. 27 on the issue.

[32] On the recognition of 'the Roma' as a minority in the texts of international organisations since the 1970s, see Gynther 2006, pp. 23–25 with references.

[33] *Beard* v. *the UK*, paras. 84, 130; *Chapman* v. *the UK*, paras. 73, 127; *Coster* v. *the UK*, paras. 87, 139; *Jane Smith* v. *the UK*, paras. 80, 136; *Lee* v. *the UK*, paras. 75, 127. See also *Buckley* v. *the UK*, (1996) and *Connors* v. *the UK* (2004), in which the Court held unanimously that there had been a violation of Article 8 (right to respect for private and family life) of the ECHR, but no separate issue arose under Article 14 (prohibition of discrimination). See the case of *Connors* v. *the UK*, paras. 84, 86, 93, 94, 95.

in cases concerning the educational rights of travelling Roma, the Court has found that the applicants had failed to substantiate their complaints of effective denial of the right to education. In the landmark case concerning sedentarised Roma of Central and Eastern Europe, the Court found that the applicants had not sustained their claims concerning discriminatory segregation in education on ethnic grounds.[34]

Indeed, the talk about 'the Roma' as a specific minority may be problematic from the universal human rights viewpoint. First, consider the clash with other existing categorisations. In many cases, Roma individuals are already divided in terms of legal status into diverse categories, such as citizens, national minority members, those with a residence permit, refugees, asylum-seekers, and 'illegals' or undocumented persons. Some of these categories have full educational rights in law, whereas some h ave conditional rights.[35] In the weakest position are the undocumented alien Roma, who are denied the benefits that the society makes available to lawful residents. The least educated, irrespective of age, are mostly found in this category. Seen from the perspective of these Roma, it does not matter so much who actually caused their disadvantage, but only who is available to help. The idea of educational rights as genuine human rights should not admit of situations where they hold just for some of these categories. Yet, to ask the governments to treat undocumented Roma with the same yardstick regarding their right to education as citizens or legal aliens is in most cases unrealistic.

Second comes the possibility of a clash between 'national' and 'non-national' Roma in those countries where the law aims at affirming rights and provisions for 'national' Roma whilst excluding the other Romani populations living in the country. As has been discussed, the FCNM renders it possible that only some Roma are acknowledged 'national minority' status.[36] Likewise, the ECRML recognises 'Romani' as a non-territorial language, yet it defines regional or minority languages as merely those traditionally used within a given territory of a state *by nationals* of the State who form a group numerically smaller that the rest of the State's population.[37] The implementation of standards like these may cause fragmentation and conflict among those Romani communities that, despite their sense of having common cultural characteristics, are subjected to different treatment. On the other hand, long-established Roma communities may well have different interests from the more recent migrants. In such cases, it appears unreasonable to expect that those

[34] See the case of *D.H. and Others* in the first part of the present study.

[35] For instance, when the educational rights terminate the moment the residence permit runs out.

[36] See Hofmann (2005, p. 16) on how the drafters of the FCNM failed to provide the monitoring bodies with a clear indication as to the scope of its application.

[37] ECRML Article 1.

newly arrived could overcome their skills deficiencies simply through some minority culture programmes.

The two different strands in international law discussed above are used in references to the Roma right to education. The first one of these, the universal human rights commitment to non-discrimination and equality before the law, proposes that each individual has a right to claim recognition first and foremost on the basis of their universal human potential, prior to claims based on a particularistic group identity. The second strand, the one that makes a commitment to recognise difference and to value Roma ethnicity as such, may generate contradictions and ambiguities if such acknowledgement takes place at the expense of the recognition that the universal right to education extends to all individuals. To make the advocacy for disadvantage doctrine convincing, it might be reasonable to disentangle these two debates from each other. Reframing the debate more clearly as an issue of disadvantage might hold the promise of generating greater assistance for those Roma that factually suffer from skills deficiency. This argument is further clarified below.

7.3.5. *Record-Keeping in the Service of Skills Proficiency for All*

When the core of the right to education is at stake, it might be best to focus on the recognition and abolishment of educational disadvantage. All things considered, it sounds most natural to prefer terms referring to literacy, numeracy, language proficiency and vocational competence when talking about improving methods for the collection and analysis of disaggregated data for social development. In contrast, data disaggregation on certain non-discrimination grounds have only a supplementary function.

There are several good arguments for steering educational record-keeping and data disaggregation increasingly towards recognition of functional skills. One of the most relevant aspects is that of the workload.[38] Why should low-paid clerks in municipality or state administration be burdened with the collection of data on nondescript grounds, to construct distinctions that factually do not exist, to be analysed by experts that themselves question the very reliability of the boundaries between different categories? To collect as much data as possible in such a situation of perplexity serves no constructive interests.

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[38] The workload aspect is most relevant, as the presentation of data in time series, for instance, for all UN treaty monitoring bodies has been criticised as being an unrealistic requirement. Audrey Chapman (2002, p. 5) describes the situation in the following words: "To determine whether a State is moving expeditiously and effectively towards the goal of full implementation, the disaggregated data for specific societal groups should be presented in time series, with the status of each group profiled in relationship to the data requested under each right and at five-years intervals following the State party's ratification of the Covenant. These data requirements are unrealistic and virtually impossible to handle." For a good practical paper on ethnic record-keeping and monitoring in service delivery, see Connelly 1988.

A call for clarification is therefore most justified regarding what data is to be collected and for what purpose. It should be axiomatic that data collection as such is not important, but the way it is analysed and utilised.[39]

Seen from the individual rights viewpoint, official data production should permit evaluation of each state's progress in achieving goals for the enjoyment of the right to education by those persons that are functionally most disadvantaged. General guidelines given by international monitoring bodies do not stipulate strictly on data disaggregation.[40] Yet, it is axiomatic that a state party that has succeeded in meeting the most elementary level of the implementation of economic, social and cultural rights shall shift the emphasis from aggregate figures towards more advanced disaggregated monitoring that will help to check whether anybody is still excluded or eventually falls between the cracks. Moreover, seen from the viewpoint of feasibility, data collection on illiteracy or other functional handicaps should be much less controversial than data collection, for instance, on grounds of ethnicity.

Another argument that speaks for record-keeping on the grounds of skills deficiency is that many traditional categorisations are heading for a deadlock. As has been discussed, there is no undifferentiated category of 'Roma' to be measured against an undifferentiated category of 'Gaje', as little as there is a homogeneous group of women to be measured against a homogeneous group of men. Even if the individuals concerned were favourably inclined towards simplistic categorisations, several problems remain due to the reason that binary dichotomies and clear boundaries between groups are more or less imaginary. Should, for instance, those persons who have one parent of one ethnic group and the other of a different ethnic group have a right to be listed in two categories? And should such persons—to avoid the risk of duplication in totals—be counted as two halves, adding accordingly to the counts of their respective parental categories?

In all probability, educational categories will to some degree always be formed too dichotomously. There are always persons who fall outside the standard norm. There are increasing numbers of those who live somehow mixed lives, neither like 'typical' majority individuals nor like members of traditional minorities, neither like male nor like female, proficient in neither this or that language, etc. In such situations, it is noteworthy that the right to reject the 'essentialising' membership may empower an individual to give priority to factors that s/he considers as having more subjective significance for the construction of a harmonious identity.

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[39] Non-sedentarised Roma as a particular concern for categorisation entail additional challenges, as it is far more complicated to provide up-to-date and reliable statistics on nomadic people who are not permanently registered in their current place of residence. However, as has been discussed already, a non-sedentiarised way of life is not exclusively a Roma phenomenon.

[40] These guidelines were discussed in Chapter 4, above.

An additional argument for record-keeping that focuses on progress in skills proficiency deals with the phenomenon of multiple discrimination. Surely, women from communities where early marriage and child-bearing is a norm may have difficulties in complying with age bars set by the mainstream society. An education system that is insensitive for such a reality may marginalise these individuals, not only because they are female and are perceived as having their children irresponsibly early, but also because of their belonging to an ethnic minority.[41] Using age limits for free basic education may, however, have a multiply disadvantaging effect even for other individuals than for child-mothers.

It is clear that several disadvantages may crowd in on one person, and that this person is not necessarily female, even if international instruments acknowledge solely the vulnerability of women as victims of multiple discrimination.[42] In the days of post-modernism, it can become complicated indeed to determine whether or not official recognition of individuals as falling into certain categories promotes an inclusive society whereby all students are eligible to achieve their full educational potential. Above all, data disaggregation that shows functional skills deficiency might be useful for tackling the multiply disadvantaged situations of those individuals of a mixed identity that possibly fall between several binary categories.[43]

What has been suggested above may sound frustrating for those human rights advocates that desire information, for instance, on the ethnic composition of a given state in order to pursue and obtain redress for 'racial' discrimination. It is in the name of Roma in Central and Eastern European countries that governments have been pushed to provide ethnic data. The basic argument behind this pressure is that the lack of ethnic statistics as such signals denial

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[41] On ageism and cultural insensitivity, see Chapter 4.2, above.

[42] For instance, the Racial Equality Directive (2000/43/EC) and the Employment Directive (2000/78/EC) both mention women in their preambles as potential victims of multiple discrimination.

[43] Students with disabilities are an illustrative example. Not only do the needs of motion-handicapped and blind students differ in various ways, but even the needs of individuals with bad eyesight are completely different from the needs of blind persons. Thus, just within one single sub-category, a simplistic categorisation of handicap may harm more than help. Another example is the category construction of male versus female, which may drive the person concerned to sex-role restrictions that uphold a selective denial of alternative sexual identities. As to groupings in the pluralistic societies of today that may suffer from unjustified expulsion from education but still remain uncategorised, also consider individuals with infectious diseases, with dependence on alcohol or drugs, with a record of criminal conviction, or those suffering from mental disability. Should the state perhaps expressly identify categories like these in order to eliminate the most severe forms of systemic discrimination in 15+ education? The same question goes for so-called illegal aliens. It is obvious that individuals without legal and/or administrative confirmation of their existence in the state concerned are, as a rule, not recorded in any statistics, simply because officially they do not exist. Yet, many of these individuals are without doubt multiply disadvantaged. The challenge to give recognition for their educational needs and rights is a question that has been demarcated outside the scope of this study. For instruments of international law that address the right to education of disabled persons, see Beiter 2006, pp. 136–138.

of the problem of ethnicity-based discrimination of Roma.[44] In contrast, ethnic monitoring wisely used could, according to its proponents, make visible a general discriminatory policy against Roma communities fostered and/or tolerated by the respective governments.[45]

To take these demands seriously is, however, not an easy task. The reasons in relation to mixed identities have been discussed above. Moreover, an often repeated matter of fact is that ethnic information deals with private data that may contain a fear factor concerning becoming stigmatised or persecuted. Therefore, a minimum requirement should be that whenever one suggests ethnicity as a category of prime concern, one should carefully explain why it is so relevant and how the maintenance of confidentiality will be guaranteed, however high-minded the motives may be. It should also be asked whether an emphasis on the alternative possibility to use functional disadvantage as a decisive criterion for classification might well encourage more forward-looking and goal-oriented actions.

7.4. *Diversity and Disadvantage: Rival Grounds for Resource Redistribution?*

7.4.1. *'Must Have' Resources for Roma Education of Good Quality*

In Part II, it became apparent that the state duty to redistribute resources for education is a two-dimensional endeavour. On the one hand, the universal human rights regime underlines the state duty to take measures that promote the fulfilment of the right to a certain minimum amount of quality education. The subjects of this right are educationally under-privileged individuals irrespective of their group affiliations. They may be members of majorities or minorities, refugees or asylum seekers; they may be living in rural or urban areas, in settled or nomadic communities; just to mention a few varieties of diverse affiliations that appear amongst Roma. The underprivileged position of any of these individuals is characterised by illiteracy and/or language deficiency along with lack of generally recognised qualifications.

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[44] As Goldston (2001, p. 28) puts it: "the absence of statistics provides merely a vacuum to be exploited by creative, or malign, invention."

[45] See, for instance, Krizsán, Andrea (ed.) 2001. *See also* Roma Rights 2/2004 with the special theme "Ethnic Statistics." Arguments that lack of ethnic statistics as such manifest the denial of the very existence of ethnic discrimination have been proposed also in other parts of Europe. For instance, Reza Banakar (1998, p. 13 ff) argues that reports regarding the situation of immigrants in the Swedish labour market have totally disregarded ethnic discrimination as one of the possible factors affecting the immigrants' chances in the labour market, and thereby denied the phenomenon itself. As far as intergovernmental bodies are concerned, the two organisations that have expressly called state governments to invest in the collection of data on Roma are the OSCE and the UNDP. See the OSCE Report on the situation of Roma and Sinti in the OSCE Area, 2000 p. 5; UNDP 2003, pp. 6 and 9.

On the other hand, both universal and European minority rights instruments stipulate on the state duty to pay due attention to claims for the recognition of difference between different groups. *Waldman* v. *Canada* was presented as an illustrative and most interesting interpretation of universal standards in this respect. In that case, the state party submitted as its opinion various arguments for a comprehensive public system of education, such as fostering social cohesion and respect for differences, providing a venue where people of diverse backgrounds interact and try to come to terms with one another's differences, etc. As has been discussed, the HRC did not give significance for these aspects prior to substantive promotion of equality between diverse religious groups of society.[46] Instead, the Government of Canada was left practically with two choices: either to give up with the government funding of any school system maintained by religious organisations, or to allow an abundance of publicly funded faith-based schools.

Both of these dimensions are interesting from an analytical point of view. As to the redistribution of resources, the disadvantage doctrine calls attention to the fact that those with least education seldom have the capacity to make particularistic claims of their own. Inequality in this respect is not a problem between majority and minority education, even if unavailability of adequate education may correlate with minority status.[47] Neither is the problem whether the support of private education providers from public funds would increase inequality, as publicly funded basic education can be provided by both public and private schools. In any of these spheres, the main challenge for resource redistribution is to ensure that functionally disabled individuals irrespective of their age, language, gender or ethnic affiliation, do not get marginalised due to the fact that formally available education does not respond to their factual starting level.

As to the recognition of difference between different ethnic or linguistic groups, the state duty to ensure non-discriminatory funding for Roma education has remained somewhat more neglected in international law. Roma education has very much been identified with literacy training, which, as such, may stigmatise the group as a whole as being 'uneducated'. Also, desegregation is commonly suggested as the most important redress against their inferior education, whereas separate institutions on the basis of ethnicity are considered as entrenching inequality and inhibiting integration.[48] That is to say, in

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[46] See the case *Waldman* v. *Canada*, para. 4.4.4.

[47] This was the claim, for instance, in *D.H. and Others* v. *Czech Republic*, where the applicants note in their submissions to the Court that their markedly inferior education relates expressly to their ethnicity. This case was presented in Chapter 2.3.2, above.

[48] For instance, the European Union Network of Experts in Fundamental Rights calls upon the European Union to adopt a specific Directive in order to encourage the integration of Roma and in particular to take measures aimed at their desegregation in education. See Report of the EU Network of Independent Experts on Fundamental Rights 2004, mentioned in Chapter 7, footnote 6, above. Similarly, Gil-Robles 2005, Chapter III.

the particular case of Roma, integration into the mainstream school system is seen as the optimal strategy to assure equality of opportunities. However, this reasoning, presenting a standard of equality according to which ethnicity-related differentiation as such is suspect, may enclose a hidden assumption that anything predominantly 'Roma' must be inferior.

The criticism against alleged desegregation has displaced the question of whether resources could and should be allocated to the funding of specific minority schools for Roma. It should be indisputable that Roma educational facilities could also have a positive function, such as the provision of examples of Roma leadership, success and achievement, and to promote the positive group identity similarly to educational establishments of more well-off minorities. Seen from this viewpoint, it is interesting to ask whether an analogy can be drawn from the case *Waldman* v. *Canada* that whenever the state chooses to subsidise education for one minority, it should fund education for other minorities in a comparable situation as well.

In any event, state parties to international instruments recognising everyone's right to education should estimate pragmatically what resources are required in order to leave no one below a commonly agreed identifiable level of quality education. This estimation should constantly be based on non-discrimination requirements in both of the two dimensions discussed above. Non-discriminatory redistribution of resources in the vertical dimension means that quality education shall be available to the most disadvantaged parts of the population. Such education may be provided either by the mainstream system or by minority subsystems, or by a combination of such systems. The argumentation developed in this study suggests that the adequacy of resources should be related to the fact that adequacy is not a matter of comparing spending on one group with spending on others. It is rather about providing what is needed to guarantee for everybody an identifiable quantum of good quality education as a prerequisite to an independent and responsible life.

Non-discriminatory resourcing in the horizontal dimension requires states to establish some basic criteria for public fund distribution. Especially in those areas of education where privatisation and decentralisation trends are strong, it should be ensured that the rule of non-discrimination is respected by all receivers of public funding, as the Waldman case illustrates. The question is more complex when private institutions, owned by business and industry, provide at their own expense learning environments that are unavailable in the public sector. However, when the education system at large is based on a combination of many contractors, it seems indispensable for the state to take a strong regulatory role so as to guarantee equality and non-discrimination in resource sharing.

7.4.2. *Peculiar Aspects on Resourcing in the Peculiar Case of Roma?*

a. *Increasing Fees and Unavailability of Grants*

Turning attention to different types of resources, there are several aspects worthy of consideration from the viewpoint of educationally marginalised Roma, whichever legal categories they fall into. First, it is most topical to discuss enrolment fees in adult basic education from the viewpoint of low-income Roma. It is obvious that this is in tension with universal human rights standards that call state parties to progressively abolish fees for secondary and tertiary education.[49] Another potential barrier may be the lack of access to study grants. A conversion of education from a free public service to a traded service is particularly problematic for those Roma whose educational needs are not covered by the funding system that their country of residence offers. Consider the availability of language training for refugees, or preparatory training for persons with immigrant background who wish to initiate vocational studies.

It is obvious that the requirement of fee payment, as well as the unavailability of low-interest government-guaranteed bank-loans, to be repaid within a reasonable time limit after completion of the studies, effect, relatively speaking, most students from the economically most deprived segments of society. In this respect, European standards and case law seem to be more inconsiderate than their universal counterparts. The ECJ case law in particular relates to the function of the internal market rather than to the enhancement of educational opportunities of the economically most disadvantaged individuals. It discusses only the situation of EU citizens, whereas students from outside the EU may still be obliged to pay special fees or higher fees than the ones payable by students from EU member states.[50]

Provision of study assistance to non-citizens on more restricted conditions is not automatically to be considered as a matter of discrimination. Yet, the lack of citizenship often correlates with poverty, and the extra fee or a lower interest-rate study-loan that are just minors detail for an economically well-off may be significant barriers for poorer ones to enter the education system. Therefore, it is reasonable to emphasise even in the European integration process that the universal standards encourage states to provide study assistance for students coming from the most disadvantaged groups.[51] Taking into

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[49] See discussion on Article 13(2)(b) of the CESCR, Article 4 of the CRC, and other related provisions in Chapter 5, above.

[50] ECJ case law at issue was depicted in Chapter 5.3.2, above. As to the standards of the Council of Europe, it has occasionally been underlined in the ESC monitoring documents that more restricted conditions for non-EU citizens in respect of access to training are not compatible with the ESC. See, for instance, Human Rights—Social Charter Monographs, no. 8, p. 114 over the Danish report to the ESC Committee.

[51] It holds true that the CDE by-passes the situation of non-nationals when it in Article 3(c)

consideration what was said above about the state duty to respond to diverse needs, even new forms of individual funding might be needed.

b. *Partial Teacher Qualifications*

As has been discussed, state parties to international human rights law are obliged to ensure that legislation on teacher preparation is sound and unbiased. Overt discrimination in access to teacher training on the basis of ethnicity or language violates expressly Article 4(d) of the CDE. The state has a duty as well to ensure that exaggerated language requirements are not used as bars that enable covert discrimination of candidates from lesser-used language groups in access to teacher posts. The requirement that teacher education shall be responsive to both difference and disadvantage becomes apparent when Articles 3(a) and 4(d) of the CDE are read in conjunction.

When these provisions are being contextualised for the conditions of the educationally most disadvantaged Roma, the availability of competent teachers for students suffering from illiteracy and language deficiency problems becomes a major issue. Training of teachers that are professionally prepared to face 'too old' or 'different' students, as compared to the average, should be part of the state duty in contemporary knowledge-based societies. A criterion for sound legal framework on education might then be that the pedagogical ability to work with adult illiteracy and cultural diversity is incorporated in teacher qualifications.

As far as linguistic competence is concerned, language requirements in relation to teacher qualifications may well be nationally protected in the EU. At the same time, a discriminatory element may be hidden in the fact that perfect command of the language(s) in which the education system operates is considered a must, whereas command of other languages spoken among students is devalued in the assessment of professional competence. Strict language requirements in access to teacher qualifications deny Roma the status of being treated on a par with those having the average language skills, and, moreover, stigmatise Roma teacher candidates by considering their mother tongue as inferior. Yet, it could be possible to consider competence in Romanes as a merit and a resource to the promotion of minority language skills.[52] When the opportunities of modern learning technologies are taken into account, the

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refers merely to non-discrimination "between nationals" in the matter of study assistance and in Article 5(1)(c) merely to "national minorities" instead of referring to racial, ethnic, religious or linguistic minorities as such. However, this fact does not release state parties from a duty to abolish any laws or practices in education with a discriminatory effect on individuals from diverse national or social backgrounds, inclusive of those relating to the financing of education.

[52] See the *Groener* case in Chapter 3.3.2, above. However, there are also traditions of legal arrangements that enable flexible acknowledgement of teacher competences across national borders. As an early example of Nordic agreements in this field, see Act 101/1988 in the Finnish legislation.

argument according to which the student population is insufficient for teachers that have fluency in Romanes as their specific merit loses ground.

A challenge that faces increasingly all levels of national education systems is diversity awareness. The importance of this aspect in the mainstream teacher training has been repeatedly underlined. Yet, even more important might be to strive to increase the number of professional staff with a minority background, and to safeguard that the entrance requirements to teaching professions, widely defined, are not biased in favour of any groups.[53]

What was just said is vital in the on-going change of learning environments from closed to open systems. Availability of teaching staff that has competence in open and distance learning (ODL) might have a positive effect, especially in the case of education provision for dispersed minorities. It is noteworthy that the ODL involves specialised competence not only in teaching but also in course development, educational technology and support systems. Moreover, these various elements must be put together in ways adapted to the local situations, cultures, and languages. The state duty to provide human resources for good quality education can also be considered to demand long-term investments for the professional education of ODL-personnel who then have the competence to provide high-quality study modules, to teach and to make use of the equipment, and all this with sensitivity for the cultural differences of the students.

The call for qualified teachers can be a thorn in the side of minority education due to the fact that if certification is required then the law may disallow an outstanding individual to teach. Yet, the approach advocated in the present study is that generally recognised certification as a teacher is a usable quality indicator in the monitoring of everybody's right to an adequate education. As has been discussed, international law stipulates on the state duty to ensure that all education personnel, including education providers for special groups, meet the competence requirements.[54] Also, what might at first seem to be integration of minority employees into the education system may actually become a matter of occupational segregation, where individuals from the mainstream take up better-paid permanent posts and individuals with a minority background are steered to paraprofessional occupations, such as school-aides and the like, with less autonomy, lower pay, short-term contracts, restricted access to career development and training, and the like.[55]

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[53] See, for instance, CERD Gen. Rec. No. 27, para. 18, which suggests that state parties take measures, *inter alia*, to recruit school personnel from among members of Roma communities.

[54] See Article 4(d) of the CDE, which was discussed in Chapter 5.4.3, above.

[55] It is worth noting that factual requirements for the paraprofessionals are often demanding. They are mostly employed to assist with instructional duties to support multiply disadvantaged students. In addition, they are frequently assigned, *inter alia*, to act as translators and to conduct parental involvement activities—often in the most complex inter-cultural situations. As any

Even in the absence of a discriminatory motive, the decision to implement more restricted teacher training options for candidates with a minority background is one which substantially affects many individuals. When such arrangements are found, the burden should rest on the educational authorities to demonstrate that they truly further a substantial state interest. Moreover, to bring the state duty on human resources to the ground, it is necessary to have a nationwide plan containing the number of professionals required for adult literacy education in relevant languages, as well as the actual deployment of personnel that have such competence. As soon as it appears that the distribution does not match needs, the generation of a plan indicating sufficient recruitment should be part of the state duty that can be derived from everybody's right to quality education.

c. *When Information Does Not Reach Its Intended Recipients*

In Chapter 5, the state duty to disclose information about education for severely disadvantaged individuals above compulsory school age was regarded as an extension of the right to education, as its necessary prerequisite. It was also put forward that, in line with a human rights principle according to which basic education provision shall have no profit-making purpose, any information on basic educational rights should be made available free of charge.[56] At the same time, it should be kept in mind that individuals suffering most from linguistic deficiency may be least able to reach information regarding education that is formally made available for them.

In actual fact, the state duty to inform becomes noticeably complicated where the people concerned are illiterate or language deficient or both. Those who cannot read and cannot speak the language officially used in their country of domicile easily remain in an information vacuum. Thinking about the multiple disadvantages of poverty, unemployment, illiteracy and language deficiency, one of the feasible sources of information might be the radio. This observation puts pressure on governments to licence and resource radio stations that are able to provide adequate information for the wide diversity of linguistic and cultural groups living under their jurisdiction. Television may naturally also serve as a feasible source of information in countries where it is not a luxury for those below poverty line.

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of these tasks might be a professional challenge of its own, it is most important to safeguard that inequality does not stem from authoritatively organised differences in the acquisition of teacher competence.

[56] It is reasonable to underline that the discussion in this study has focused only on the state duty to disclose information regarding educational rights. The right of access to public documents is another matter, where other rules apply. Particularly when availability of partly personal data for the public is at issue, measures may be needed to aggregate the provided information in order that it is not possible to go back to the source, or to anonymise the information, i.e. to remove personal information (e.g. suppressing the names of plaintiffs). Applicable methods may require technical and human resources that need to be priced accordingly.

Both literacy and sufficient language skills are necessary to have access to the larger existing body of information available in written form. As regards higher levels of education, the system should also be able to ensure the special guidance and counselling needs of Roma, so as not to steer them towards more restrictive career objectives than the majority population. Keeping in mind that study counselling is introduced in the ESC as a full-fledged right, the contracting parties at least should ensure that there are no barriers in the domestic legislation for individuals with a minority background to become qualified in this profession. In addition, not actually a legal but a noteworthy moral claim is the following: the greater difficulties people concerned have in obtaining information, the stricter should be the state duty to deal with information problems in such a way that clients are actively sought out rather than simply expected to approach education providers by themselves.

d. *Learning Technology in the Service of Itinerant and Dispersed Roma*

In the time of open and distance learning (ODL), it sounds unreasonable to argue that the state duty to provide minority education could be justified only where a sufficient number of students are concentrated territorially. Instead, the itinerant lifestyle of some Roma along with dispersed patterns of Roma settlements, should justify the wide use of technology to eradicate the educational deficiencies that they typically suffer from. The appearance of computers and electronic networks, in addition to more traditional technology tools such as radios and televisions, has the potential to become a major tool for learner-centred learning that is bound to the needs and aims of the individuals rather than to the categories used in the organisation of mainstream education.

In a knowledge-based society, technology resources can no longer be considered as belonging merely to the edge of the scope of the right to education. Earlier in this study several international provisions were identified that call for modern learning technology to be brought into the service of itinerant and dispersed Roma communities. Particularly the recognition of the educationally most disadvantaged individuals' access to an adequate education as a human right needs to be coupled with a state obligation to ensure the provision of such services as are necessary to safeguard that the 'digitally homeless' do not become increasingly disadvantaged because of the new form of educational deficiency, namely IT illiteracy. Incontestably, the resources needed in this respect are more than simply money, and the main characteristic of key resources is not their scarcity, but their unequal redistribution.

A large amount of established education providers in most Western European countries have the capacity for computer mediated learning, and new communication technologies indeed present themselves as realistic alternatives. The more society becomes dependent on information technology, the more severe the impact of the digital divide. Therefore, states that allow disparities in education policies that result in a growing digital divide may be engaging

in a new type of discrimination. Monitoring bodies of the fulfilment of the right to education should, yet more assiduously than before, draw attention to whether state parties invest in infrastructures that make electronic networks and IT literacy equally accessible to all.

7.4.3. *Education for a Pan-European Minority: A Pan-European Undertaking?*

In the case of Roma, a question of its own is whether there are legal possibilities, or even duties, for pan-European organisations to contribute to education provision that is responsive to the specific needs of this 'pan-European minority'.[57]

Apparently, the technological possibilities are there. The role of ODL as an equaliser for many dispersed and itinerant Roma is unambiguous, as education that is available locally may not guarantee substantive equality, while traditional education that is responsive to specific Roma needs requires travel over long distances, often with no right to free transport.[58] Nonetheless, the identification of stakeholders in the ODL provision can be a complex matter. Collaboration is needed between instances with sufficient technical and pedagogical know-how; knowledge of already existing programmes on which to build; and skills crucial for effective maintenance of network activities. When the sphere of activities exceeds the domain of the nation state, the matter becomes still more compounded. Europe presides over markedly different types of nation states from centralised to highly decentralised, from federal to national, and from technologically advanced to rudimentary systems. These factual differences are naturally replicated in the legislation and may create legal barriers for pan-European collaboration.

International instruments discussed in Part II open space for diverse responses. An argument against separate education provision for Roma only could be that such arrangements run contrary to the CDE, which permits the establishment or maintenance of separate educational systems or institutions "for pupils of the two sexes" as well as for religious or linguistic reasons, but not for ethnic groups.[59] One weighty argument against pan-European education provision for Roma might be that education is a sector that mostly falls within the jurisdiction of the member states. Neither the Council of Europe

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[57] Roma are commonly described as 'truly European people', 'a European minority', 'a real pan-European minority', or 'the largest ethnic minority group in Europe'. On the use of these notions since the beginning of the 1990s, see Gynther 2006, pp. 25–28.

[58] Although the notions of Roma/Gypsies in the Western European context 'have established connotations to nomadism and travelling, whereas in the Central and Eastern European context, the responding terms, 'Tsigani' or 'Cigany' imply socially subordinate, impoverished, sedentary groups, it is to be kept in mind that there are sedentarised Roma in the West as well as nomadic Roma in Eastern Europe. On nomadism as the denominator of Roma in Europe, see Gynther 2006, p. 27 with references.

[59] Article 2 of the CDE was discussed in Chapter 4.4, above.

nor the European Community can, by force of existing law, establish anything that could be considered as their own education systems.

Then again, there are international provisions that could be seen as a call for a pan-European response to the specific educational needs of Roma. Most important is Article 28(3) of the CRC, which obliges state parties to promote and encourage international cooperation in matters relating to education, "in particular with a view to contributing to the elimination of ignorance and illiteracy" and "facilitating access to . . . modern teaching methods". The stipulation that particular account shall be taken of the needs of developing countries relates to the educational deficiencies among their populations, which nonetheless is a characteristic even for many Roma communities of Europe. A European provision that might allow—even if not oblige—the EU institutions to become active in the ODL arrangements for Roma across the continent can be found in the TEC. At issue here is Article 151(1), which stipulates as follows: "The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore." This article apparently provides a legal basis for an active EU role in projects that effect, *inter alia*, the education of Roma in the member states.

Interestingly, there exist different types of regional arrangements, as examples of as a middle way between the extremes of narrow national and all-embracing pan-European ODL provision. One example is the joint Nordic establishment of Sami Institute in Kautokeino, which serves as teacher training institute and research centre for the indigenous Sami living in the Arctic area of the Nordic Countries. The three contracting states have agreed on credit transfer and comparability of professional qualifications that enables teacher mobility across the entire Sami region. Roma in large parts of Eastern and Central Europe might benefit from similar agreements between their governments and the Nordic countries with wide experience in technology-based education.

It can be concluded that, by and large, it remains a state duty to address educational exclusion or neglect of any group or individual under its jurisdiction. However, as has been discussed, there are a number of international provisions that can be used to require the legislature to address issues of co-operation across national borders in education provision for Roma. Irrespective of whether education particularly for Roma is provided by the state itself, by minority groups or by private entities; whether it is arranged provincially, nationally or cross-border; whether it makes use of ODL or not, it is to be borne in mind that international law poses two fundamental requirements. First, participation in programmes or attendance at institutions targeted only for Roma shall be optional. Second, the education provided in these programmes or institutions shall conform to commonly acknowledged quality standards. This brings us to the next question of Roma agency in the definition of standards for good quality education.

7.5. *'New Governance' and Representation of Roma*

7.5.1. *Promotion of Dialogue as a Guiding Standard*

Different forms of 'New Governance' that were discussed in Chapter 6 may entail both threats and opportunities for Roma in educationally disadvantaged positions. Even if a more 'open' and 'flexible' architecture for democracy may be necessary to meet the new challenges of increasingly complex societies, at the same time it is essential to keep the inviolability of human rights as the baseline by asking: 'open for whom?' and 'flexible in relation to what?' The approach advocated in the present study calls for a broad definition of educational actors. Simultaneously, it calls for special attention to the situation of individuals in multiply disadvantaged positions.[60]

Several soft law documents speak for a specific Roma representation. For instance, the CERD has given a Recommendation on Roma that presents a wide range of measures to promote Roma participation in public life, including the earliest stages in the development and implementation of policies and programmes affecting them, and ranging from local to central governmental bodies. Attention is also drawn to the importance of awareness-raising among members of Roma communities of the need for their more active participation in public and social life and in promoting their own interests, as well as to the importance of training programmes for Roma aimed at improving their political, policy-making and public administration skills. At the same time, this CERD avoids the trap of essentialisation by using plural forms such as 'Roma communities,' 'Roma minorities,' and 'Roma representatives'.[61]

Article 27 of the CCPR is also worth accentuating here. As has been discussed, a function of Article 27 of the CCPR is to ensure "the effective participation of members of minority communities in decisions which affect them". The HRC has stated that Article 27 emphasises the permanent and

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[60] Compare how Gisella Gori (2001) in Chapter 7.4 of her study on educational rights within the EU distinguishes the following five categories of educational actors: Community workers, workers' family, students, researchers and teachers. Tomaševski (2003, p. 55) suggests that the right to education involves four key actors, that is: "the government as the provider and/or funder of public schooling, the child as the bearer of the right to education and the duty to comply with compulsory-education requirements, and the child's parents who are the first educators, and professional educators, namely teachers." Yet, international human rights instruments put pressure upon state governments to co-operate in a deliberative mode also with other stakeholders—inclusive of those who may historically have been excluded from decision-making concerning their education. Soft-law documents confirming this approach are available both at universal and European levels. See, for instance, "Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", UN Document E/CN.4/Sub.2/AC.5/2000/WP.1, April 2000, Articles 4.5 and 5.1. See also the Lund Recommendations Nr. 6, 11, 12, 22 and 23.

[61] CERD Gen. Rec. No. 27, paras. 8–9, 41–45.

absolute nature of the right of minorities to develop their cultural identity.[62] However, this statement does not mean that minorities should not have representation in the cultural policy of the larger society. Quite on the contrary, a wide interpretation of the right to participation is crucial in order to avoid the risk that cultural 'specialisation' becomes 'marginalisation', and that minority concerns remain permanently on the sidelines.[63]

On the European level, the European Commission against Racism and Intolerance (ECRI) recommends governments of member states "to develop institutional arrangements to promote an active role and participation of Roma/Gypsy communities in the decision-making process". The ECRI calls for consultative mechanisms and for priority on the idea of partnership on an equal footing for these communities, without making any attempts to define the concept of Roma.[64] Also, the Advisory Committee of the FCNM has insisted on adequate representation for persons belonging to non-territorial minorities. This insistence naturally covers even Roma that are scattered widely over the country.[65]

A most important European provision in the present context is Article 6(1) FCNM, according to which the contracting parties: "shall encourage a spirit of tolerance and *intercultural dialogue* and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media". Intercultural dialogue is here emphasised in order to stress the importance of the mutual learning process that wide representation enables. As suggested long ago by Delgado (1987), it is not only that minorities shall have an opportunity to learn the codes needed to participate fully in the mainstream life, but also their representation may well enable open confrontation of prejudices established in the mainstream decision-making mechanisms.

7.5.2. *Disadvantage as a Commonality to Roma Representation*

From among many alternative ways to analyse the re-allocation of state power to diverse groups of a plural society, Will Kymlicka's well-known typology on group-differentiated rights is useful in rethinking the fairness of decision-making procedures by which rights are defined and interpreted. This typology consists of the following three categories: 1) self-government rights, 2) polyethnic rights that shall be seen as permanent; and 3) special representation

[62] See CCPR General Comment No. 23, paras. 7 and 9.
[63] Gallagher (1997) has given a similar warning in the case of women's concerns.
[64] See ECRI General Policy Recommendation No. 3.
[65] Weller 2003, p. 12; Weller 2005, pp. 443–444.

rights that shall be granted only on temporary basis.[66] The disadvantage doctrine calls us to distinguish between two types of 'Roma representation' in educational setting.

Regarding the first type, representation on the grounds of ethnicity might be of importance for the promotion of cultural diversity. Utilising the terms of Kymlicka, a right to representation in this respect is a permanent, polyethnic right, even if it may well be programmatic, to be achieved step by step. Also, descriptive representation can be considered a good way to encourage alienated Roma communities to come to identify with the larger society and to claim their ownership thereof. As has been discussed, tensions may arise between the attempts to strengthen minority cultures and the jeopardy of constructing backward minority reservations. Providentially, international human rights law also stipulates a state duty to genuinely interweave minority representation into decision-making in the nationwide educational and cultural policy.

The second type of 'Roma representation' is motivated by the goal of reinforcing the human capital of the educationally most disadvantaged individuals, which reportedly correlates strongly—but does not equate—with Roma ethnicity. In this case, it becomes obvious that even other segments of society than the most established social partners or minority groups can make justified claims upon representation as far as the definition of basic educational rights is being discussed. Illiteracy and language barriers, for instance, may be inadequately included on the social dialogue agenda if not enough representatives of individuals that face these barriers are parties to the dialogue. However, it is obvious that institutionalisation of representation in this respect is best kept fluid, due to the fact that educational disadvantage is not exclusively a characteristic for any single ethnic or linguistic group.

The struggle to enable participation of previously excluded groups to join the negotiation project is a common nominator for both the two types of Roma representation mentioned above. Simultaneously, it is obvious that the interests of the more established Roma and of those that arrived just recently are not automatically compatible. The question then arises as to whose voices are heard in Roma issues on different levels and different segments of official decision-making. From an individual human rights viewpoint, an unjustified distinction between 'old' and 'new' minorities is discriminatory. Thus, no arbitrary distinction between 'national', 'immigrant' or 'refugee' Roma is allowable. The Council of Europe's soft law also recognises the importance of immigrant participation in European societies.[67]

The disadvantage doctrine underlines that no group or sub-group may

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[66] Other alternative typologies that could be applied in an analysis on representation in education *see* Shachar 2001 with references.

[67] On the Council of Europe activities to promote immigrant participation since the mid 1980s, see Entzinger (1999); Final Report of the Community and ethnic relations in Europe project (MG-CR (91) 1). *See also* Convention on the Participation of Foreigners in Public Life at Local Level (1992).

be subordinated in the name of preserving another group's distinctiveness. A guiding principle for any decision-maker, with whatever group affiliation, should be the Rawlsian 'veil of ignorance' whereby a non-identification of those individuals that have multiple and overlapping memberships in disadvantaged groups would become a common concern. No group or sub-group (irrespective of their numerical size) could then claim for itself the right to participation without simultaneously taking responsibility to represent the most disadvantaged members of the group.

Most representation claims on behalf of Roma are based on their disadvantaged position. Corresponding to this, attention should be drawn to how substantive interests such as functional adult literacy and sufficient language skills must be prior to concerns regarding the colour of the skin or other externals. It is participatory identification of the most severe barriers to equal educational outcomes that the disadvantage doctrine calls for. Nonetheless, identification of the 'most severe barriers' is far from an easy task when the occurrence of multiple discrimination is kept in mind.[68]

The fact that illiteracy and language learning are curiously underappreciated as representation issues is not only explained by the traditional predominance of civil and political rights, but also by the emphasis put on secondary and higher education prior to post-primary basic educational rights. Is, then, too much asked from so-called Roma representatives to adequately represent the interests of the diversity of 'their' multiply disadvantaged communities? A down-to-earth answer is to be found in the Vienna Declaration of 1993, which not only stipulates that it is "essential for States to foster participation by the poorest people in the decision-making process by the community in which they live". What is more, concerning persons belonging to groups which have been rendered vulnerable, it declares that states have an obligation to "ensure the participation of those among them who are interested in finding a solution to their own problems".[69] European minority rights instruments, for their part, do not help to avoid struggle on national level between those who qualify as 'legitimate' members of a minority and those who are not entitled to these provisions because they are regarded as foreigners?[70]

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[68] *Cf.* how Jane Mansbridge (2000, p. 99) suggests that shared descriptive traits (e.g. gender, skin colour, distinct culture) should come into question in two specific contexts, namely 1) in the context of historical mistrust and 2) in the context of uncrystallised interests. First, one refers to situations when communication between representative and constituent would otherwise be undermined by mistrust. The second situation appears when the legislature must decide on issues that did not appear on the political agenda at the time of the representative's election. These two specific contexts notwithstanding, it should be carefully weighed whether non-descriptive representatives have a greater ability to represent the substantive interests of their constituents.

[69] The Vienna Declaration and Programme of Action 1993, paras. 24 and 25. It is to be noted that a declaration does not have binding effect on states, even though the Vienna Declaration expressly makes use of the expression "States have an obligation."

[70] For example on the contest between different groups of Roma in Austria and Germany, see ERRC 1996.

7.5.3. *Risks of New Governance for Roma*

There are three trends concerning 'new governance', which all may run on a collision course with Roma participation in educational decision-making. These trends—one based on decentralisation, another one on tripartism, and third on commersialisation of education—are all discernible in the international standards discussed in Chapter 6, but they may also incur harmful counter effects for the Roma issue.

Placing more decision-making authority at lower administrative levels has been a key aim in the systemic reform of the educational systems in many countries since the 1980s.[71] This is very much in line with the EU principle of subsidiarity, in the sense that local government should be in a better position than central authorities to respond to the diverse needs of multi-cultural communities, to negotiate with different local interest groups, and to foster a framework of shared local identity.[72] For Roma living dispersed among the rest of the society, it is apparent that the principle that education policy decisions are taken at a local level whenever possible may be even less profitable, because the very lack of geographical concentration prevents them from having a role in the decentralised system.

Tripartism may also be found unresponsive to the particular interests and needs of Roma. The ability and willingness of the nominated social partners to represent the educational interests of the most disadvantaged groups and individuals is not to be taken as granted. This is for the reason that tripartism guarantees principally the representation of those in employment, or of those that are at least in the labour reserve, and can turn out to be protectionist in favour of the skilled workers. In contrast, the most marginalised and disempowered minority individuals more often than not lack trade union membership. The continuously strong occupational segregation in education—men leading, women teaching, 'minority individuals' working as paraprofessionals—may well correlate with the fact that Roma do not constitute an effective pressure group themselves and are not represented sufficiently in the tripartite negotiations.

Second, specific attention on tripartism in the present study is closely argued for the reason that skills standardisation processes very much take place within this form of governance. A risk is that these arrangements are unable to promote substantive equality as an educational goal, and that those who promote the dominant claims of 'national qualifications' blind themselves to the potential exclusion of students who differ in ethnicity, language, or age. Even if qualifications are created to develop good educational standards,

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[71] Education at a Glance 2000, p. 206.

[72] The principle of subsidiarity is generally understood to mean that in a community of societal 'pluralism' the larger unit should assume responsibility for functions only insofar as the smaller social unit is unable to do so.

there is a constant tension between a market perspective and a more egalitarian approach to this process. Unconnected participation arrangements for 'social partners' and for 'minorities' may promote to a dual system with a two-level distribution of knowledge: one distributing competitive knowledge and the other one exoticising groups that already are marginalised from the mainstream labour market.

The trend of commersialisation may also turn out to have negative counter effects on Roma representation. In the present study, this aspect is worth particular attention because of the fact that business partnership seems to be gaining more and more ground in some parts of post-compulsory education. At an extreme, a combination of market dynamism and state regulation may lead to a situation where non-competitive groups and categories of people are implicitly or explicitly branded as irrelevant. The market and the economy view on educational needs is unquestionably one-dimensional.[73] The prospects for consolidating the representation of globalising business interests with that of marginalised minority interests is a case in point. There may even be a paradox evident in that over the period when the provisions on minority participation in public decision-making are increasing, the nation state is increasingly transformed towards contractual arrangements.

Although different forms of 'new governance' may contain elements with an exclusionary effect on Roma, it is noteworthy that 'old governance' is not necessarily more responsive. Issues that are relevant for educationally disadvantaged Roma are often cross-sectoral and therefore not easily addressed. Tensions, and even conflicts concerning education of persons aged 15+ arise between such departments as education, labour, social welfare, trade and commerce, and refugee, immigration and integration affairs. As a result of divided responsibility, representation may not either be aligned with the interests of Roma population concerned.

Summing up viewpoints that might be most relevant for dispersed and marginalised Roma communities, 'new' governance' should not be too simplistically praised as cornerstones of democracy and accountability. Instead, the representation issue should be examined from the viewpoints of disadvantage doctrine and basic skills enhancement. Not only the highly decentralised nature of decision-making that characterises education in many European states, but also the fragmentation at all levels and the contracting-out of the provision of education services, along with the raising of awareness of minority rights, raise a multitude of challenges to the state as a party to international human rights law and minority rights law. Essential aspects of the state duty to guarantee a sound legal framework on the issue of representation will be discussed in the following, concluding chapter.

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[73] This kind of criticism towards the hegemony of business and industry has been posed, for instance, by Mechthild Hart (1992).

CHAPTER EIGHT

CONCLUDING REMARKS ON JUSTIFICATION OF THE 4R SCHEME

8.1. *Why Is Legislation Necessary?*

8.1.1. *Turning a Blind Eye Becomes Harder*

It remains to be estimated whether we on the basis of what thus far has been said can delineate legislative deeds and inactions that noticeably constitute systemic discrimination in the field of education. International human rights law commonly refrains from defining in detail the scope and the substance of rights, but rather leaves the task of their contextualisation to state parties. That is, states do not need to legislate when they are asked to act positively: they may as well implement required standards by policy-driven rather than by legislation-driven means. Numerous interpretative documents hold that the manner in which state parties translate their human rights obligations into domestic legal orders may vary.[1]

Yet, it is also repeatedly acknowledged that legislative measures play a central role, particularly where the very core of the rights assumed under international human rights law remains unfulfilled. This becomes clear, for instance, from the formulation of Article 2(1) of the CESCR. Even though it respects the fundamental principle of state discretion in the choice of means to undertake its obligations under the Covenant, it does emphasise the adoption of legislative measures.[2] Furthermore, as recognised in General Comment No. 13, violations of the right to education may occur through acts of omission as well as through acts of commission.[3] Is it, then, possible to define when law is needed as a prerequisite for a non-discriminatory education system?

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[1] See, for instance, CERD Gen. Rec. No. 20, para. 1, which reads in part: "Article 5 of the Convention contains the obligation of States parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination…All States parties are therefore obliged to acknowledge and protect the enjoyment of human rights, but the manner in which these obligations are translated into the legal orders of States parties may differ.

[2] According to Craven (1995, p. 125) the original wording of article 2(1), which required that states take steps "by legislative as well as other means" was specifically amended on the understanding that the legislation would not be obligatory. However, when interpreting this provision, the CESCR Committee has recognised that in many instances legislation is highly desirable and "in some cases may even be indispensable". See CESCR General Comment No. 3, para. 3. A similar statement is made in Principle18 of the Limburg Principles.

[3] CESCR General Comment No. 13, para. 58. Paragraph 59 gives as examples of violations of Article 13, *inter alia*: the introduction of or failure to repeal legislation which discriminates

When trying to estimate the soundness of domestic education law by using international human rights standards as criteria, an interesting question as such is whether there are contradictions between the regimes of the United Nations, the Council of Europe and the European Union. Any member state of each of these regimes must take all these jurisdictions into account when developing domestic laws and policies. Hence, when international standards remain general and vague, it might be reasonable to estimate whether they pull in different directions and what the state margin of discretion in such situations is.[4] This question will be commented on sporadically, whereas the main focus in what follows is on the rule-of-law state and on its duty to have a hold over the field of education in its legislative processes.

The necessity of contextualising provisions on the universal right to education is unquestionably a state matter. As early as in the Belgian Linguistics case, the Court stated that the right to access to education "by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and individuals".[5] Furthermore, the formulation of the HRC in the case *J.H.* v. *Canada* is illustrative. It read: "It is not the task of the Human Rights Committee, acting under the Optional Protocol, to review *in abstracto* national legislation or practices as to their compliance with obligations imposed by the Covenant".[6] In other words, system development is expressly the responsibility of the legislature in member states.

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against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address *de facto* educational discrimination; . . . the failure to take "deliberate, concrete and targeted" measures towards the progressive realisation of secondary, higher and fundamental education; the failure to ensure that private educational institutions conform to the minimum educational standards.

[4] UN law on the whole seems to be cautious in providing legitimation for any doctrines that enable relativisation of universal standards. According to Arai-Takahashi (2002, p. 4) the HRC would have referred to the concept of the margin of discretion implicitly just in one case and explicitly in another. In *Aumeeruddy-Cziffra and 19 Other Mauritian Women* v. *Mauritius* the HRC expressed as its opinion that "the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions." In *Hertzberg and Others* v. *Finland* the HRC stated: "It has been noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities." Later, in the two cases of *Länsman* v. *Finland* (Communications no. 511/1992 and 671/1995) the HRC seemed to give mutually contradictory statements on this issue.

[5] The *Belgian Linguistics* case, para. 281. The Court also stated that a right expressed in negative terms can give rise to obligations to take action whenever the right at issue would become meaningless if it did not entail corresponding duties that are essential for its realisation. However, the obligation to take action may also be fulfilled by other means than legislation.

[6] *J.H.* v. *Canada.* Note also the case *Diergaardt et al.* v. *Namibia*, where the national legislation was reviewed even somewhat *in abstracto*. A significant dissenting minority argued that a sovereign state may choose its own official language that may be treated differently from non-official languages. However, the majority of the Committee did not consider that the use of one of the non-official languages for official purposes would discriminate against the other minority languages.

Rebecca J. Cook puts the same idea by noting that "treaties offer an architecture of rights, but the realization of treaty goals require further construction".[7] In the present research context, international provisions on the right to education are regarded as such an architecture, expressly requiring—and not merely proposing—further edifice. Their vagueness is seen rather as an opportunity than as a hindrance. The underlying argument is that many devices in international law in fact call for a further interactive search for substance at the national level. Thus, it is accepted here as a pragmatic fact that international law may decline to give detailed pronouncements on certain issues. In contrast, a lack of discourse on such negotiable issues at the domestic level is objectionable whenever the purpose of silence is to turn a blind eye to textually less-developed human rights provisions.[8]

Against this backdrop, the concern of what follows is when domestic legal framework is needed to guarantee an identifiable quantum of quality education for all. In the light of the classical Montesquian separation between the legislative, executive and judicial powers, it is the first type of power that is either misused or abused when systemic discrimination in the meaning of this study takes place. Since the legislature has both law, policy and politics as instruments of governance,[9] it is not necessarily a matter of systemic discrimination if the law remains silent on issues that are required in legally binding international norms. In many cases, it is sufficient when these issues are dealt with by other appropriate means. However, there appear to be some critical points where governance in education should shift from being merely a matter of politics to a matter of legally binding law. Four such points are discussed next in sequence.

8.1.2. *The Guarantee of the Right Not to Be Discriminated Against*

In earlier parts of the present study it was noted that several legally binding international provisions require the contracting parties of human rights treaties to ensure that domestic laws, regulations and administrative provisions contrary to the principles of equal treatment and non-discrimination be abolished. This requirement becomes a challenge indeed when it is recalled

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[7] Cook 1994, p. 251.

[8] An authoritative principle for this argument can be found in Article 31 of the 1969 Vienna Convention of the Law of Treaties, which obliges that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose."

[9] For a closer definition of the concepts of law, policy and politics see, for instance, Tardi 2004. According to Tardi, these are the three most fundamental concepts in democratic governance. Simply put, the concept of law includes the constitution, the statutes, and other statutory instruments and the decisions of courts. The concept of policy encompasses diverse written instruments of public administration that are less than legal in nature but intended to be binding on public institutions and officials. The concept of politics includes, for instance, the state budget among a number of other political instruments of governance.

that the modern comprehension of non-discrimination covers both formal and factual dimensions.[10] Roma being the category of concern here, it is noteworthy that the CERD Committee puts express focus both on the law as a system and on the right to education in its General Comment 27 (2000) concerning discrimination against Roma. Accordingly, the state parties to the CERD shall, *inter alia*, review and enact or amend legislation, as appropriate, in order to eliminate all forms of racial discrimination against Roma as against other persons or groups.[11]

A most important thing to be underlined in the statement above is that equality and non-discrimination are not static concepts. Instead, they are social constructs and the law on them shall be reflective of, and responsive to, the social reality of any given time. Therefore, it can be considered as a state duty to determine how the law of education should be developed from the viewpoint of substantive equality. In particular, when the official rhetoric of the country emphasises the importance of life-long learning, it is important that this policy rhetoric is acknowledged by the legislature. Otherwise, there is a risk that the society gives a hypocritical message by reinforcing a myth of learning society for everybody at the same time as some individuals find that their fundamental educational rights are withheld.[12]

The importance of existing law in European 'knowledge societies' becomes obvious in the light of Protocol No. 12 to the ECHR. Since its entry into force, it has been clear that the scope of protection against discrimination covers any substantive rights as soon as they are laid down in law, be it domestic or international.[13] This study has attempted to develop an argument that legislative inaction in 'knowledge-based' societies in the area of adult literacy, for instance, may indicate systemic discrimination, due to the fact that the everyday demands of such societies in general require an ability to read and write. The free-standing right to non-discrimination of Protocol

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[10] A suggestion made earlier in the present study serves as an example that a formal right to receive education in a language that you do not comprehend is, at most, illusory.

[11] Of relevance in the field of education are according to the CERD Committee, for instance, measures to prevent the segregation of the Roma students, to train teachers from among the Roma, and to ensure adequate forms of education for members of Roma communities beyond school age. CERD Gen. Rec. No. 27, para. 6.

[12] The concept of 'lifelong learning' is acknowledged in several international documents. See, for instance, Communication on Making a European Area of *Lifelong Learning a Reality*, adopted by the EU Commission on 21 November 2001. This communication makes a contribution to achieving the strategic goal set at Lisbon for Europe to become the most competitive and dynamic knowledge-based society in the world.

[13] See discussion over Protocol No. 12 to the ECHR and its Explanatory Report, in Chapter 4.3.2, above. The Explanatory Report does not expressly distinguish between 'formal law' and 'material law', nor does it discuss the potential tension between formal legal rationalisation and substantive rationality in law *per se*. In any case, the introduction of Protocol No. 12 into the ECHR signifies a shift towards substantive rationality in law, at the same time as its adaptation also can be instrumental to the increasing formal rationality of law.

No. 12 to the ECHR covers even these areas of education as soon as they are laid down in law.

On the other hand, counter-effects may be actualised in those jurisdictions where just a part of educational issues are covered by law. As has been discussed, a differentiation in treatment based on reasonable and objective criteria does not amount to prohibited discrimination.[14] It can be difficult indeed to define when justified differentiation ends and systemic discrimination begins, if there are no criteria for how states are allowed to justify 'objectively' their legislative actions or inactions. The present study suggests that state parties to international human rights law do not enjoy an unlimited width of the margin of discretion when choosing whether to legislate on post-primary education or not.[15] Instead, the legislature is responsible for the creation of a synchronised national framework which leaves nobody under its jurisdiction without the protection of law, even if the prohibition of ageism and linguicism is conspicuous by its absence in international instruments on education.

The call for a holistic approach requires the legislature to increase awareness on the tensions that exist between many different 'isms'. An argument for the existence of systemic discrimination is easy to make, for instance, where the law allows the maintenance of a gender-segregated education system without guaranteeing equal resources for the two types of schools. Likewise, when the law permits educational segregation on grounds of ethnicity against the consent of the rights-holders and/or their guardians, it is easy to contend that systemic discrimination is taking place. In terms of legal reform, what has been said above suggests additionally that language and age related issues should not be left to the unregulated margin areas of education either.[16]

8.1.3. *The Guarantee of the Inviolable Right to the Minimum*

Human rights scholars have repeatedly pointed out the insufficiency of mere normative regulation. That is to say, countries should not only acknowledge

[14] For the use of this argument in the HRC case-law, see, e.g., *Zwaan-de Vries* v. *the Netherlands*, para. 13; *Blom* v. *Sweden*, para. 5.1; *Gueye et al.* v. *France*, para. 9.4; *Waldman* v. *Canada*, para. 4.2.

[15] See how Oddný Mjöll Arnardóttir (2003) argues in her analysis of the ECHR case law that the width of the margin of appreciation is strongly influenced by what kinds of badges of differentiation are at issue. According to her, the ECHR case-law makes a call for strict scrutiny in distinctions based on: sex, race, nationality, illegitimacy and religion. Bayefsky (1990) suggests that the two distinctions which according to universal human rights law deserve the highest degree of scrutiny are race and sex.

[16] Attention has recently been drawn to the multiply disadvantaged situation of Roma women in Germany. It is noteworthy, however, that the report estimates that even if the effects of gender and ethnicity cumulate, the most disadvantaged situation is faced by foreign Romani women. The cause of their vulnerable situation is not so much any extraordinarily patriarchal community but rather the status of non-citizenship. See ERRC 2004. On the challenge that female Roma activists experience when balancing themselves between genderism and ethnicism, see for instance: Biþu 1999 and 2003, Ceneda 2002, Mihalache 2003, Schultz 2003.

rights in national legislation, but also in economic policies.[17] When the law of education is considered from the viewpoint of disadvantage doctrine, this observation may well be turned around. It is not just budgets and the allocation of money that can deliver on educational rights—so much depends on the existence of positive legislation. Continuing legislative inaction hurts most those minority adolescents and adults that remain outside the formal education system.[18] As has been discussed, it may take some time for the political process to implement educational rights in their full breadth. However, judicial action becomes crucial in circumstances in which the progressive realisation of the right to education is clearly neglected.[19]

As has been discussed, state parties to international human rights law are entitled to some latitude in balancing between individual rights and national interests. When educational rights are worded as subjective rights they indisputably are justiciable. In contrast, when the legislature has chosen to formulate them in only a programmatic manner, then the limits of the right concerned remain an issue of societal negotiations. The question is whether the very distinction between subjective and progressive rights is sufficiently sensitive for those individuals that do not fit into the seemingly neutral education system of the nation state. Individuals with a minority background—traditional as well as non-traditional—who may be harder hit by age-based restrictions on the subjective right to education than citizens on average have earlier been mentioned as an example.

It may be in the short-term national interest not to invest in the basic literacy or language training of those who seemingly have fallen behind. Yet, part of the balancing requirement advocated in this study is that priority shall be given to measures that combat the exclusion and marginalisation of functionally disadvantaged individuals, irrespective of their group affiliations. Another question of balancing between individual rights and national interest relates to the processes of technological advance, migration and globalisation. Just consider, with Roma in mind, those European societies that are said to be in the transition phase from totalitarian regimes to parliamentary democracies. Yet, if there is no concerted national approach to post-primary education underpinned by the statutory framework governing the roles, rights

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[17] See, for instance, Eide 2001, Chapter 3.

[18] Nicola Lacey (1992, p. 108) has expressed this concern in the following words: "Where law has the capacity to intervene, the decision not to do so is itself a political decision: omission calls for justification as much as does intervention, for it effectively legitimises the status quo."

[19] The question of restricted retroactivity and related discriminatory effects when new laws are enacted was discussed in the HRC case *Cecilia Derksen* v. *Netherlands*, where the Committee considered that the absence of retroactivity had a discriminatory effect on the applicant. A dissenting member was of the opinion that if all legislation granting a new benefit must be retroactive in order to avoid discrimination against those whose rights fall to be determined under the previous legislation, the situation becomes unbearable for any state that strives to reform its legislation progressively. See *Cecilia Derksen* v. *Netherlands*, particularly para. 9.3 and separate individual opinion by Sir Nigel Rodley.

and responsibilities of different parties, then these societies may rather be in transition to rights-blind market places where the cheap labour force is left uneducated and unaware of their rights, whilst the educated labour force is drained to serve those societies with more purchasing power.

The argumentation based on the disadvantage doctrine envisages ideally a corpus of positive educational legislation that facilitates the bringing of all rights-holders up to an adequate minimum level. Accordingly, the responsibility falls on the legislature to guarantee to all individuals under the state's jurisdiction a right to certain identifiable level of quality education that is responsive to their needs. As soon as basic education is acknowledged as the foundation for other forms of education, it deserves strong legal recognition. Thus, the measures to be taken in order to fulfill the right to education should include, in particular, measures directed at individuals that have been deprived of primary education, and especially when these individuals themselves are clearly not to be held to account for their disabling status. When the legislature disregards the right to basic education above primary school age, it should at least demonstrate in clear terms in which way such negligence serves a pressing and substantial public objective.

This study has constructed a conception of the right to education that reflects individual concerns as to what constitutes an appropriate education in so-called knowledge societies. Accordingly, an individual's interests regarding all four components of basic, language, vocational and cultural skills shall be recognised. The language component has above been suggested to contain two main aspects: the right to basic language training in the majority language, and the right to minority language education. The approach adopted in this study is that it is not a sufficient minimum when states refrain from frustrating the right of members of minorities to be taught in their mother tongue at institutions outside the official system of public education. This is due to the reason that the educationally most disadvantaged groups, such as Roma in many European countries, can hardly afford to establish and maintain educational institutions of their own. Instead, inclusion of the linguistic educational rights of Roma in the official system as well can be considered as part of the minimum.

A major hindrance for legislation in adult literacy and language training might be that vague formulations in international human rights law are interpreted in a restrictive, and even counterproductive, manner. One of such incorrect interpretations is that under the current human rights regime, the member states are devoid of the duty to guarantee to each permanently resident individual that s/he will receive a certain minimum quantum of quality education. Yet, the fact remains that although the right to education is variously described in diverse instruments, the interdependency and indivisibility approach speaks for a right to education for everybody with severe educational deficiencies. It is quite another matter that this right is then qualified with the acknowledgement that it may be achieved progressively, little by little.

Mere literacy and basic language skills are not enough to ensure for an individual an opening to become a functioning member of a knowledge-based society. It is to be noted that the progressive implementation clause was included primarily as recognition of the actuality that poor or underdeveloped nations might not be able to achieve the full-blown right immediately. Very few of the modern welfare states can realistically argue that they should fall within this classification. Instead, estimation of soundness of education law in post-industrial societies demands that attention be focused on vocational and cultural skills acquisition as well. In actual fact, it might appear impossible to substantiate systemic discrimination in education, if merely an unconditional 'progressive realisation' clause was acknowledged. Likewise, a narrow focus on the margin of discretion in determining the pace at which the promotion of educational rights takes place might ultimately give states an unqualified power to decide the extent of their own obligations.[20]

In sum, the fact that a right may be achieved progressively is merely supplementary. It does not abolish the main fact that international instruments posit a right to education which is meant to be mandatory, not discretionary. Non-regulation again can be seen as an implicit legitimisation of educational disadvantage and a circumvention of responsibility by the legislature before those whose basic educational rights are violated.[21]

8.1.4. *The Guarantee of Continuity*

One factor that puts pressure upon states to take positive normative action, instead of merely positive factual action, is associated with the principle of legal certainty. It should be clear that one purpose of established written norms and rulings as the basis for the administrative machinery of a constitutionally governed state is to prevent arbitrary or random exercise of power. This principle of legal certainty also demands that the fulfillment of state obligations towards the educationally most disadvantaged may not be sporadic, haphazard and merely 'a moralist utopia' as Koskenniemi forewarned already in 1989.[22]

Not all areas of politics need to be stabilised through legislation. The rights approach suggests, however, that legislation is needed as a guarantee against

[20] The statement of the CESCR Committee according to which a state party fails to discharge its obligations whenever a significant number of people under its jurisdiction are deprived of the most basic forms of education is noteworthy in this respect. The statement gives no extension of time for the fulfilment of the right. See CESCR General Comment No. 3, para. 10.

[21] A further question that demands contextual analysis is whether the entrenchment of educational rights should take place in the constitutional law or in ordinary legislation. One the one hand, the constitution gives a right a special status, but on the other hand, an ordinary act might be preferable insofar that it enables more concrete expressions than the country's supreme law.

[22] See Koskenniemi 2005.

the tendency that in particular the periods of economic recession affect hardest those in the margins of the society. State parties to international instruments therefore should differentiate between the need for long-term legislative measures and the need for temporary affirmative action. Special measures should not be activated in isolation from wider governmental policies because it easily follows that the biases and lacunae in the legislation of the society which maintain inequalities remain untouched.

Actually, a consistent requirement of international human rights monitoring bodies is that governments shall pay particular attention to the position of the most vulnerable and disadvantaged individuals. It seems, however, that the difference between special measures, protective legislation, and special minority rights has remained blurred in several reactions of the states concerned. The distinction between permanent minority rights and temporary special measures seems to be particularly unclear, even though international standards do distinguish between these concepts. Both of them attempt to achieve *de facto* equality in education, but their functions are dissimilar from each other.

As far as temporary special measures are concerned, the aim as a rule is the elimination of states of affairs which are considered backwards. A typical statement in most international provisions permitting them is that such measures shall neither be continued after the objectives for which they were taken have been achieved, nor lead to the maintenance of separate rights for different groups.[23] Therefore, some kind of progress with binding time targets should be required, but the claims for such measures as a response to oppression or disadvantage should end as soon as the set targets are reached. Even if international human rights law does allow, and indeed even call for, different types of special measures, the government shall in any case be able to justify such actions by establishing that the targeted group is a particularly disadvantaged one on identifiable grounds.

[23] See, for instance, CERD Article 1(4), which requires that special measures shall not "lead to the maintenance of separate rights for differential racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." Similarly, Article 4(1) of the CEDAW refers to temporary special measures aimed at accelerating *de facto* equality. Neither the CCPR nor the CESCR include a provision on temporary special measures aimed at accelerating *de facto* equality similar to the CEDAW. However, the HRC has responded to this omission in General Comment No. 18, para. 10, which includes a statement equivalent to CEDAW Article 4(1). *See also* CEDAW General Comment No. 5, which refers to Article 4(1) and recommends, *inter alia*, that state parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education. The requirement that special measures shall be clearly targeted and time-bound is congruent with Kymlicka's distinction between 'polyethnic rights' calling for forms of state support that are granted on a permanent basis on the one hand, and 'special representation rights' granting entitlement to temporary support that should end as soon as the set targets are reached. Kymlicka's typology focuses primarily on group representation in a plural society and was discussed in Chapter 6.

In contrast, the legislature should adopt laws as long-term measures for the elimination of those types of educational handicap that cannot be cured by mere temporary measures. Acknowledgement of the right to literacy, language proficiency and occupational skills must be granted for all individuals alike, whilst every individual, irrespective of minority or majority status, shall have the right to be raised beyond permanent disadvantage. That is to say, the causes of systemic disadvantage shall be removed instead of merely curing their symptoms. The legislative reform may take time, but once achieved, the basic right to education shall be there perpetually, guaranteed by law to educationally disadvantaged individuals for all time, as the educational disadvantage in no society is just a short-term phenomenon. As has been discussed, the law may provide unequal treatment in indirect forms, for instance by silently tolerating discriminatory education policies that the legislative lacunae enable.

A common denominator for special measures and permanent legislative measures is that they both shall be reflective of social evolution. On the one hand, the requirement that special measures shall be clearly targeted and time-bound supports the argument that there is a particular state duty to provide data on eligible categories. On the other hand, insofar that states are obliged to ensure minimum educational rights for all, nation-wide data disaggregation around vertical lines of educational disadvantage, such as the severity of illiteracy and language deficiency, becomes exclusively a state duty.[24]

The individual rights model has frequently been criticised for not being able to fully articulate the interests of disadvantaged communities, and specific rights to particular social groups have been suggested as solution. The argument of legal certainty suggests that at least as important as the distinction between individual and collective rights is the distinction between law as a long-term measure and affirmative action as a short-term measure. Basically, special measures are meant to be temporary and to apply to a specific group of addressees, whereas law is designed to remain, to apply to large numbers of addressees and for longer periods of time. It is the legislature above all that shall clarify which types of education provision may be incidental and for which types there is a need for a durable and predictable law.

8.1.5. *The Guarantee of Responsibilities*

State parties to international human rights law may employ different forms of new governance that were discussed in Chapter 7.5. Accordingly, it is up to the legislature to increase the role of non-state actors in the educational sector, if

[24] This, naturally, does not hinder *ad hoc* data collection concerning the situation of some selected groups to be done by individual researchers, research units, or NGOs. Relevant data from a delimited time period for the purposes of public interest litigation can be collected by diverse actors and by diverse means.

it so wishes. Yet, however fragmented the educational sector of a state may be, the very task that specifically falls upon the government as responsible party to human rights law is to protect the most vulnerable individuals, irrespective of their group affiliations, from remaining unrecognised outlaws. A part of this task is to clarify on whom the rights-generating duties are imposed.

Some forms of new governance in education can be seen as part of an ideological shift in a direction in which the market and its actors occupy a more central position in society. The narrow functionalistic outlook that considers education solely as a servant of trade and business has been considered as a weakness of this way of thinking. As a negative impact of such framework on education, it has been argued that the state may evade its responsibility to provide quality education to those people that do not have overtly recognisable 'market value'.

In the approach advocated here, development of education as part of quality promoting competitiveness is not necessarily contradictory to the carrying out of duties towards the educationally weakest members of the society. However, for the government as responsible party to international human rights law it shall not be only the economic role of education that is recognised but also its role in overcoming the gross inequalities between different segments of the society. The same goes for new forms of governance that are justified in the name of diversity protection and promotion. Minority education rights are there to maintain minority identity on all levels of education. In contrast, minimum standards for education exist to ensure that all individuals under the state jurisdiction—be they members of minorities or majorities—have access to a certain identifiable quantum of quality education. Entering into a legal commitment to the enhancement of diversity does not remove responsibility from the legislature to fulfill the minimum educational rights of all, irrespective of their distinctive cultural characteristics.

One factor that diminishes the significance of both the public/private distinction and the majority/minority distinction in education provision is the general move from input to output related funding. A trend towards shifting the educational governance to a system that is structured around public accountability for educational results is conspicuous all over Europe. Seen from the viewpoint of disadvantage doctrine, this type of funding encloses an inherent logic that training providers select trainees who are likely to meet the targets and thus ensure payment. In contrast, those who are educationally most disadvantaged fall into oblivion, due to their seemingly lower competitiveness. However, even when the education provision is broken into pieces as a result of output negotiations, the state as party to international human rights law remains charged with responsibility for certain amount of quality education even for those who cannot be selected as most likely to succeed.

What was just said puts in plain words why the state should clarify responsibilities regarding the provision of education for the most disadvantaged

individuals by means of appropriate legislation. The role of the state in new forms of governance is not merely to balance between the different justified interests that exist in society. It is also an active state role, as defined in international human rights law and anti-discrimination law, to affect the underlying system producing inequalities. When the legislature does not specify whose duty it is to provide those types of education that have seemingly least 'market value', then in the usual course of events the corresponding rights also remain empty phrases.

8.2. *Diagnosing the Soundness of the Legal Framework*

8.2.1. *Usability of the 4R Scheme in General*

In Part I, it was stipulated that systemic discrimination would be embodied in laws: in their partiality, inequality or uneven impact on individuals under their coverage. Criteria for a sound legal framework were then sought in binding international human rights and minority right standards. An analytical framework, named the 4R Scheme, was developed as a tool for critical reflection of the law of education. The hypothesis also proposed that genuine concern for systemic discrimination must involve an attempt to take into consideration all the four components of the scheme. It was put forward that the essence of educational inequality is anchored in, that it originates from, a sum of the 4Rs. If rights are not provided by law, right-holders are left invisible, resources are withdrawn arbitrarily, and decisions are made top-down without respect to democratic, participatory policy-making, then, more or less inevitably, systemic discrimination will occur.

What remains to be done is to discuss the usability of this scheme. During the course of the study it has become apparent that the four components are interconnected, and that the disregard of any of them will cumulatively create and maintain exclusion of individuals from education with proper functional value. The existence of systemic discrimination can be described as being defined by several concentric circles: at the centre are the persons whose rights, resources, recognition and representation are all well safeguarded. Surrounding these persons are the ones who are partly recognised by the legislature; while at the margins, in the outermost circle, are those individuals who do not enjoy the protection of education law in any of the aspects under consideration.

A noteworthy concurrence is that the European Commission just recently defined as the four core themes of its 'European Year of equal Opportunities for All 2007' the following: 1) Rights—raising awareness of the right to equality and non-discrimination; 2) Representation—stimulating a debate on ways to increase the participation of under-represented groups in society; 3) Recognition—celebrating and accommodating diversity; and 4) Respect and

tolerance—promoting a more cohesive society.[25] Three of these core themes match with the four R's of this study. In contrast, the fourth of the themes proposed by the Commission differs from it, in so far that the component of 'resource-sharing' is replaced by 'respect and tolerance'. In human rights language, we could say that the Commission thematisation calls the member states 'to respect' and maybe even 'to protect' but leaves the state duty 'to fulfill' out of its centrepiece of a strategy for equal opportunities.

Indeed, a case where the interconnection between the rights, the recognition of rights-holders, and the representation aspect are taken into account, but the question of sourcing for the fulfilment of these rights is disregarded can be compared to a classic case where the rich and the poor are equally forbidden to sleep under bridges. The 4R Scheme introduced in the present study suggests that rights-talk in education is inextricably bound up with the non-discriminatory resourcing of those individuals and communities in whose name and voice the rights are brought in. Therefore, it is most important to point out legislative deficits in relation to any of the four dimension of the 4R Scheme: in laws establishing educational rights, in laws stipulating on the recognition of rights-holders, in laws over resource distribution, and in laws concerning representation of the educationally most disadvantaged parts of the population.[26]

8.2.2. *Component by Component Discussion*

Rights. As to the rights-component, the main requirement for a sound legal framework is that a sufficient level of quality education is guaranteed for all. When the minimum core of any single human right is at issue, the legislature should write down its intentions in a precise manner. The fulfilment of the basic educational needs of individuals, whatever their age, shall not be regarded as a privilege bestowed by the state, as something granted at the good graces of a higher power that can be just as easily taken away. Rather, it is reasonable to question whether the national legal framework of a contemporary knowledge-based society is sound when literacy training above compulsory school age is absent from the law. One conclusion from the analysis carried out in Part II is that state parties to international human

[25] Source: www.nondiscrimination-eu.info 2 July 2005.

[26] Interestingly, Nancy Fraser has during recent years developed a theory on justice claims that is very much in line with 4R Scheme of the present study. As was discussed in Chapter 5, Fraser has in her previous studies distinguished between two major categories of justice claims: claims for socio-economic redistribution, and claims for legal or cultural recognition. In her most recent study (2005), she introduces a new claim of representation, referring to the economic, cultural, and political dimensions of justice. The way that Fraser uses the concepts of redistribution, recognition and representation is not identical to that employed in this monograph. Nonetheless, it is interesting how well the theory she has been developing co-exists with the analytical framework of this study.

rights law shall be able to demonstrate a commitment to fulfilling the basic educational rights of all individuals under their jurisdictions. An essential element of this commitment is the recognition of a legal right to quality basic education above compulsory school age.[27]

When legislation on linguistic educational rights is under examination, Part II highlighted two important dimensions to be kept in mind. A public education system should be sensitive both to the needs of individuals to be integrated into mainstream society and to their needs to maintain a distinct linguistic identity. Even in countries where language is not explicitly mentioned in the rules concerning the right to education, it would be absurd to argue that the state has no obligation whatsoever to provide for basic language skills. This is due to the fact that spoken language as the main medium of communication is most closely interwoven with education. The question, thus, is how the scope of state obligations with regard to linguistic educational rights is determined in such a way that nobody's right to substantive equality is violated. In countries where the linguistic educational rights of individuals are treated as outer elements whereas the state interests are drawn to the centre of attention, then, as a minimum requirement, it should be carefully examined by whom and how the so-called state interests are defined.

To consider vocational and cultural skills as key elements of the rights-component turned out to be a new approach to minimum standards of education. Nonetheless, this approach was not ill-founded. The discussion in Part II made it clear that it is necessary to pay more attention to the stages above basic education if ever we want to take seriously the right of everyone to make their own life plans, to be active subjects, not solely clients, victims, recipients, or consumers. With regard to vocational skills, the present study has underlined the role of skills-targeted vocational education as an equaliser. As regards cultural skills, it was suggested in Part II that when minority group members are at issue, they should have the right to maintain their specific customs, but also to receive decent education as a prerequisite for meaningful job opportunities. In respect of the non-segregation, Roma students should not be tracked to study only something called Roma culture. Instead, their right to become professionals in the field of culture in wider sense of the word should be acknowledged and promoted.

Recognition. The second key criterion for the soundness of education law is whether it accommodates the issues of difference and divergence as required in internationally binding standards. A government accountable for human rights shall show proactive concern in guaranteeing that its education policy is based on a sound legal framework that takes into account the right to education of

[27] Governments that recognise such a right are thus far not many, but some countries such as Norway, Sweden and South Africa have already prepared the way. See: Education Act of Norway (amended 30 June 2000), chapter 4A; Swedish School Act, Article 10; South African Constitution, section 29(1)(a).

those below the adequacy level, whilst not abandoning anybody's voluntarily chosen group affiliations. Any dichotomies or distinctions for which there does not appear to be justification may perpetuate isolation of some individuals from quality education, and thus indicate systemic discrimination.

An essential part of the recognition-component is that the state updates its legislation in accordance with demographic and other changes in society. When the legislature has put forth a notion of special group status, it is important to ask every now and then whether individuals belonging to officially unrecognised groups suffer because of the fact that the power holders are unwilling to grant them a recognised status. In any case, universal human rights law does not allow contracting states to uphold a system that violates the minimum rights of individuals who do not fall into clearly identified groups. To legislate is indeed to classify, and it is very much the law that produces meanings and creates social categories, or alternatively, leaves them uncreated.

A point that the present study has revealed as important to recall concerns recognition on the grounds of language. That is, that individual freedom of choice shall not only cover the right of an individual to learn her/his minority language, but also the right to assimilate. Many socio-linguists and minority rights advocates maintain the right to a mother tongue education as the most important linguistic right for anybody. Yet, a violation of the linguistic rights of an individual may take place not only when assimilation is coerced, but also when assimilation is denied.[28] Denial of assimilation by majorities tends in turn to reinforce the overall societal segregation of minorities. Therefore, it is also important to ask whether and how the domestic law prohibits discrimination on the basis of language.[29]

Resourcing. When tracing a strictly legal state obligation to provide for basic education above compulsory school age, it would be too far-reaching to argue that international law considers basic education subject to immediate and direct implementation in the vein of primary education. The situation changes as soon as domestic law recognises the right to basic education as a subjective right irrespective of the age of rights-holders. Such is the case in South-Africa, for example, where the right to basic education, including adult basic education, is considered a 'direct right' that obliges the state to act in order to make the content of the right available for each rights-holder.[30]

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[28] According to Bauböck (1996, p. 207), "assimilation is denied when people who want to change their cultural membership are prevented from doing so because their present group restricts their exit or because the group they wish to join denies them entry."

[29] It can be noted that international human rights law does not unconditionally oblige member states to prohibit linguicism in domestic law. In the case *J.H.* v. *Canada* the author of the communication pointed out that there is no legislation in Canada prohibiting discrimination on the basis of language. The HRC noted the author of a communication must himself claim, in a substantiated manner, that he is or has been a victim of a violation by the state party, whereby it rejected the author's *in abstracto* reference to linguicism.

[30] Constitution of the Republic of South Africa 1996, Article 29(1)(a). The distinction between 'direct rights' and 'access rights' was constructed by the South African Court in the

A moral claim that everybody should have a chance to receive good quality education is easy to make. Even a claim that the traditional focus on formal equity shall be replaced with adequate educational opportunities for all may be accepted without discordant voices. But as soon as one suggests that state is obliged to provide resources for the education of youngsters and adults suffering from functional skill deficiencies, the vagueness of international human rights law transpires. In these days of efficiency and competition, a suggestion that those students starting with least prior knowledge should be funded for the longest periods, in order to safeguard that they have enough time to absorb the knowledge their more advanced colleagues had already upon entry might well face fierce opposition. An interesting part of any country-specific analysis is then to check what view the legislature takes of the requirement to progressively introduce free secondary and higher education, as stipulated in Article 13(2) of the CESCR.

As for the estimation of the soundness of a legal framework on the duty-side, the present study suggests criteria that are simple but relevant to the most disadvantaged. First, when a state that relies on the rule of law chooses not to legislate on the international obligations that are binding upon it, then it is the state that bears responsibility to show that the non-legislative measures are sufficient to safeguard that nobody's minimum rights are violated. Second, when the legislature stipulates as the duty of third parties, for instance local municipalities to provide certain types of educational services, it also shall guarantee the resourcing of these services. The discussion over funding in Part II illustrated that domestic financial law is not to be read in isolation, but in the light of human rights law and obligations.

Likewise, this study suggests that attention should not only be put on the discriminatory share of financial resources. Instead, it is most important that revaluing the human resources is taken seriously. What individuals want to have is skills, and without proper instruction they most often will not receive decent skills. Therefore, unbiased legislation that ensures the availability of professional staff is at least as significant as parities in terms of financing. A quality guarantee should include a right for the people concerned to request and receive information on the professional qualifications of their teachers, both as to the level and to the subject area. What both students and un(der)qualified teachers at least should be able to do is to complain over a lack of training and preparedness for dealing with the specific needs of students in hardship positions.

In addition, the review of international human rights law has made clear that it justifies allocation of resources towards special programmes for educationally disadvantaged students. Accordingly, where educators taking

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famous *Grootboom* case. See Chapter 2, footnote 44, above. On the adaptability of this distinction to the field of educational rights, see Seleoane (undated).

responsibility for relatively more students with educational deficits need more money, professionals or equipment to educate them properly, they can make a discrimination claim for equally shared resources. In contrast, a similar right to unequal spending does not apply to resource allocation towards special programmes for distinct particularistic groups when there is no evidence that they are disadvantaged as a group. The disadvantage doctrine calls primary attention to the educationally most disadvantaged individuals in any groups, though not abandoning the fact that the right to minority education also contains justified resource claims.[31]

Representation. The soundness of law in the issue of representation requires a two-dimensional estimation. First, as far as international law encourages minority participation, it is necessary to ask whether legislation on segmental decision-making in actuality gives space for minority representation. The present study proposes that representation in the field of education does not need to be permanently guaranteed to certain nominated minority groups, as the composition of the population in many countries is under continuous evolution and the norms stipulating on segmental representation should be flexible enough to follow the changes that factually take place in the society.

Instead, it is suggested here that the selection process for substantive representation in education should start by asking questions. First: what features of the existing education system result in the proportionately lower outcomes of minority individuals at different levels of education? The next question should be: which bodies have expert knowledge on these disadvantaging features and how is it ensured that disadvantaged minority individuals are represented in these bodies? The third question to be solved (by these competent bodies including minority representatives) might be to distinguish which disadvantages can be cured by temporary targeted special measures and which ones are caused by systemic barriers that need to be eliminated by legislative reforms.

A specific dimension of concern in any group—be it dominant or minor—re the outcasts: former or would-be students who failed to meet minimum standards of requirements for entering the education system. It is these individuals that are most unable to make claims for their rights.[32] Moreover, it is the responsibility for education of these individuals that often is confined to a multitude of ministries, inter-ministerial bodies, non-governmental and

[31] As Craven (1995, p. 175) notes, if special measures for particularistic advantaged groups drew finances away from projects that are aimed at the relief of poverty and disadvantagement, then the state might be criticised for confusing its priorities.

[32] The variety of these individuals is wide, ranging from school drop-outs and street youths through literate immigrants who, in the new country of domicile, must learn a new alphabet, and on to illiterate immigrants who lack both basic learning skills and the ability to speak the language officially used in their new country of domicile. As has been discussed in earlier parts of the present study, Roma individuals may be found anywhere within this range.

community organisations etc.[33] Shared responsibility also brings along a risk that no single body has either enough power to support the claims of those most disadvantaged by itself or enough power to co-ordinate the activities of various actors.

As far as international monitoring is concerned, there is no specific procedure dedicated to the oversight of basic education provision for individuals above primary school age. Nonetheless, ideally, the domestic law of education defines which body within the state administration shall represent interests of the educationally most disadvantaged youngsters and adults. In the most advanced cases, this means that a special commissioner or ombudsman is appointed to serve as an advocate for those that cannot provide for themselves. In other cases, some governmental bodies may be mandated to serve as intermediaries in addition to their regular activities. Whatever the form of representation, the mandate should include the duty to increase the knowledge about the right to education; to safeguard the recognition of the most vulnerable rights-holders; to protect the resource allocation for the minimum quality education for all; and to encourage greater dialogue on adult basic education issues from the rights perspective.

Regulatory void of major concern? Part II revealed that international law itself as an interpretive source is far from watertight. There appear to be ambiguities and lacunae to be resolved even within and between diverse international human rights regimes. Yet, by and large, provisions that were identified during the operationalisation phase turned out to provide a minimum standard against which soundness of the national legal framework on education can be evaluated. As an exception, when the Summary Tables 1 to 8 of Part II were examined in retrospect, there appeared to be one single area that has remained unregulated on the European level. That is, in contrast to the universal human rights law, all the European standards under examination fail to address actions that deal with modern learning technologies.

This area may be most relevant for dispersed and/or non-sedentarised Roma. Lacking legislation on ODL may create barriers for the educationally disadvantaged individuals that might benefit from it more than from traditional forms of education. For the education providers, an essential question is to what degree they are mandated to operate across geographical borders. Moreover, regulatory lacunae may hinder them in creating an efficient infrastructure crossing the traditional borders between services providers. Collaboration of ODL providers and local education providers on different levels of education, or between public and private bodies may run into barriers due to incompatibility of legislation, for instance, on education, telecommunication and local self-government.

[33] The Hamburg Declaration on Adult Education (1997), for instance, draws attention to the multitude of stakeholders in this particular field of education. See para. 8.

Re-configuration of education law to accommodate the information age might provide positive effects for those whose education was previously denied due to their geographical remoteness or communication isolation. Explicit legislation on technology resources would have at least following important effects. First, it would make visible the instrumental value of ODL for the promotion of substantive equality in education. Second, it would clarify which authority should take the lead responsibility in ODL provision. Third, it would draw attention to the quality aspects, inclusive of possibilities for formally recognised certification, and fourth, it could show how resources shall be deployed. The international case law discussed in the present study has supported the view that the state has no duty to instigate all education single-handedly. Instead, it is crucial that government fulfills its facilitative role also when equal education provision by means of modern learning technologies is at stake.

8.3. *Back to Roma and Qualifications*

8.3.1. *Credentials as a Quality Guarantee*

It was suggested in the introductory part of the present study that a law of education that does not pay due attention to the quality dimension may isolate some parts of the population from the acquisition of economically and socially meaningful knowledge and thus contribute to their constant deprivation. This concern is most topical in the case of Roma, who in many parts of Europe irrespective of their varying legal statuses are considered part of the educational underclass.[34]

Hardly anyone questions the importance of measurable learning outcomes with regard to higher education—if one has the option to choose, who would like to go to a dentist whose competence to fill a tooth is not tested? But a right to strive towards generally recognised educational results is an important matter even at lower levels. The risk of providing quantities instead of qualities is significant at the most fundamental levels of education, where the students on average have the least ability to defend their rights. In times of financial competition among education providers, this helplessness may well

[34] The present study, as such, does not lean on the so-called class theory. Nonetheless, the reader is hereby called to pay attention to the fact that in the recent European discourse the term "underclass" has frequently been associated with Roma. See, for instance, Roma Rights 1/2002 which addressed the special theme of "Extreme Poverty." *See also* Kligman, Ladanyi & Szelény 2002. On the concept of underclass in relation to the concept of racism, see, for example, Shepherd & Penna 1991. On education as the instrument in the inculcation of members in the reproduction and maintenance of social hierarchies, see Bourdier & Passeron 1977. *See also* Neville Harris *et al.* 2000 on conflict theories who propose that education is used as a social tool to repress the working classes whilst advancing the position of the upper classes. On the function of education as an instrument to sustain and legitimise the status quo, see also McCarty & Crichlow 1993.

lead to temptations to provide training places without meaningful substance, resulting in merely ineffective and unvalued learning achievements. Therefore, it is of the utmost importance that those who missed a first chance to learn will not remain perpetually functional illiterates because of aimless low-quality education.

As a quality guarantee, it was already suggested in earlier parts of the present study that literacy and other basic educational skills should be incorporated into the framework of national educational qualifications. A characteristic of this framework is told to be that all learners can receive accreditation for their learning, irrespective of where such learning takes place. The breaking down of the competencies to be acquired into discrete units or modules is said to provide considerable choice for learners as to the path taken and the speed with which they negotiate their particular learning routes. Also, the proponents of NVQs say that setting clear, common standards will make the credential market more transparent, fair and open, and, consequently, candidates will understand what is expected of them to reach certain levels. In this sense, qualifications would ideally serve as good quality indicators for any stage of education.

Generally the NVQ reform has been identified in terms of the national economy and economic competitiveness. On the other side of the coin remain the educational rights of people with disabilities, with language deficiencies, or with cultural backgrounds that do not match with the 'commonly recognised' standards. It is axiomatic that human rights accountability is not the same as educational accountability for the competitive needs of the business world. From a human rights point of view the questions to be posed are: Whose accountability? Whose choice? Is there any headway made in the setting and monitoring of standards in the training of the educationally most disadvantaged? What if the assessment criteria are inherently flawed? Does not the very idea of standardisation itself contain a risk for increasing discrimination against those that are in some respect most different from the average?

The argument proposed in this study has been that it is the educational prospects of most disadvantaged students, in particular, which are in jeopardy without quality standards. Without standards that lead to official recognition of completed studies, anything goes under the title of Roma education. Yet, mere formal access to education is hardly profitable if standards are set too low or left completely undefined. Education providers that arrange special education programs for marginalised groups may, despite good intentions, do a disservice for their clients in this respect, and not only for the students concerned, but also for those persons that should take responsibility for their future education. The right to quality education is, indeed, not fulfilled when students are 'socially promoted', despite the fact that they may have learnt and been taught very little.

Also, it is to be noted that the state duty to provide an adequate education for all is not a matter of priority setting between different educational levels, as

state parties to international human rights law are obliged to pursue actively the "development of a system of schools at all levels".[35] In accordance with this requirement, states have a duty to determine how law should be developed to open up educational opportunities with clearly stated goals even for those who suffer from illiteracy, official language deficiency, and other educational handicaps. In particular, the law should secure that the fulfilment of rights is not flawed *vis-à-vis* those who have the least power and skills to negotiate over the distribution of resources in society.[36]

Indeed, the NVQ standard setting is a very typical mode of European 'new governance', relying on private actors and on the delegation of power to semi-public actors. From the human rights viewpoint, it is most important to ask whether such mode is able to tackle both of the two challenges: the one of competitiveness and the other one of social marginalisation. The answer very much depends on which actors are involved in decision-making, and which different forms of democratic legitimation are activated.

8.3.2. *Germs of Empowerment from Below: A Right to Individual Skills Development*

It remains to be considered whether the focus on individual skills development has proved to be tenable. This study has suggested that education law should be made a subject to scrutiny in the individual rights dimension. The introductory argument was that when the basic educational rights of Roma individuals are taken seriously, then skills development also leads to collective empowerment.

The rights talk as such is subject to a number of counter-claims. During the recent years, several alternative or complementary views have been launched, a common denominator for all of them being an effort towards a more relevant look at many forms of human suffering, as compared to the rights approach.[37] In addition, the individual rights approach has been criticised, even when the rights talk in more general terms is accepted. As defects of the individual rights approach, it has been argued, for instance, that it puts personal achievement over group loyalty and community interests, and that it is biased towards Western white middleclass and elite values. Indeed, also this study, though initially sympathetic to international human rights law, mapped out some paths towards a critique of the international regimes themselves. As an example, the conceptual framework on which the human rights discourse is based may well perpetrate and maintain ageism in access

[35] See Article 13(2)(e) of the CESCR and related General Comment No. 13, para. 53.

[36] Kallen (2004, p. 65) talks in the same way about the "discrimination of silence" as an important covert form of discrimination that is increasingly receiving the attention of human rights scholars and activists.

[37] For example, see 'needs-led' (Doyal & Gough 1991), 'social working' (Griffiths 1999) and 'dilemma-oriented' (Goldewijk & Fortman 1999) approaches. On the feminist critique against rights discourse, see, for example, McColgan 2000b.

to basic education, and enable the ignorance of the call for progressively free education for all.

Another challenge for the individual rights approach is the 'balancing of interests' doctrine, which in the context of the present study was revealed to have a particularly significant role in relation to language rights. Indeed, there is apparent justification for collective linguistic rights and for their recognition in documents such as the ECRML. Yet, any attempt to dilute and replace language rights as individual rights with any kind of abstraction is risky. It is often left unclear which individuals are covered by such rights. Does the community consist of those by whom the language in question is learned prior to other languages? Or of those who know the language in question better than any other language? Or of those who use the language concerned more than any other language? Is the identification of the language community made internally or externally? And so on and so forth.

It can be noted with delight that the collective linguistic rights of non-territorial minorities are mentioned in the leading international standards, even if they factually may receive less significant support than territorial language minorities.[38] Yet, the strengths of focusing on language rights expressly as the right of an individual to learn language skills are apparent. For one thing, the very idea that individuals are not objects but subjects of human rights is a fact that justifies a critical stance towards claims that 'balancing of interests' should be accepted as a given whenever linguistic rights in education are concerned. For another thing, the individual rights approach reminds us that the language skills acquisition is most crucial even for Roma individuals with refugee and immigrant status, even though the ECRML, for instance, excludes the languages of such populations.

Articulation of Roma rights as collective rights based on their ethnicity also evokes questions. How are Roma communities to be defined? Do they have a democratically expressed will on which this rights articulation is based? Who are in and who are out? As has been discussed, the essentialisation of minorities in education can be as risky as the universalisation of a dominant group's experience. Roma with national minority status may be marked out by 'Gypsy lore' stereotypes whilst immigrant/refugee Roma are at the same time rendered invisible. Surely, the normative ambition to bring the solutions of problems as close to the citizens as possible is acceptable also in case of Roma. However, it is also easy to realise that individuals from the most vulner-

[38] See Article 1(c) of the ECRML. Dunbar (2001, p. 98) points out the flaw of the ECRML in relation to non-territorial languages by noting that such languages may, objectively speaking, be more seriously threatened than many of the regional or minority languages which are designated by states for Part III protection, and yet receive less significant support under the Charter. Due to the *a la carte* character of the ECRML, such differential treatment is, however, not necessarily based on any objective assessment of the linguistic needs of the individuals belonging to threatened language groups.

able sub-groups, or with mixed background, may have the most difficulties in finding out the 'democratically expressed will' of 'their' community.

Nothing in the present study has suggested that the recognition of particular group rights for Roma would be a necessary precondition for the realisation of the universal human right to education of individuals that affiliate themselves with Roma communities. Especially with regard to language, it is reasonable to question whether Roma constitute a sufficiently unitary group for it to make sense to constitute them as a collective subject of special rights. Instead, the disadvantage doctrine as a starting point calls upon states to give primary consideration to the importance of the right for an individual, and to require objective and reasonable justification for any competing public or particularistic interests.

A number of considerations in the present study support the argument that the debate on the individual rights approach and the collective rights approach is factually framed as a false dichotomy. Both of these approaches may have liberating as well as repressive effects, progressive as well as conserving potential. Yet, it is reasonable to agree with Holly Cullen (1993) in her conclusion over tensions between the right to education as a universal right and the right to education as a minority right. Cullen suggests that both approaches are justified as such but concludes that whenever a conflict rises between the two, priority should be given to the universal human rights approach.[39]

A glance to the Summary Tables 1 to 8 in the appendix of this monograph also reveals the tenability of individual rights approach. Tables 1 and 2 confirm that rights under consideration indeed have the force of binding international law and that the educationally most disadvantaged individuals, therefore, should not be left to live with an undefined entitlement to a favour of some kind. Tables 3 and 4 illustrate that that subjects of the right to education shall be seen as social beings with multiple identities, not as faceless members of competing communities or mere numbers in statistics. Tables 5 and 6 point out that education policies and programmes shall not rest merely on short-term means tests, but also on binding human rights obligations. And finally, Tables 7 and 8 remind us about the need to continually ensure that the negotiating parties will not disrespect, attack, or neglect the very basic human rights of those individuals that have no part in the 'new governance'. Thus, it is reasonable to restate the requirement that basic educational rights shall be framed with individual interests as their primary objects.

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[39] It should be noted, however, that the reasoning of Cullen is for some parts prejudiced itself. When she, for example, examines whether minority education rights are a species of the right to education or of minority rights, she confronts two goals, the development of individual potential and the preservation of minority identity and respectively two types of rights: individual and collective. It can, however, be argued that such a confrontation is fundamentally incorrect, as minority students can reach their full individual potential even in the context of minority rights, and vice versa: a formal right to education may well hamper the minority students to reach their full individual potential, if substantive differences are not taken into account.

Likewise, it is reasonable to reaffirm that an analysis of systemic discrimination in education shall focus on outputs, encompassing an explicit right to achieve an identifiable quantum of quality education. In the common ground among human rights scholars the idea holds sway that any positive right should be given a sufficiently precise meaning as to make it possible to evaluate when the right is fulfilled and when not. However, to talk about a 'minimum right' or about a 'minimum amount' of education is risky, because in *realpolitik* the recommended minimum easily becomes the absolute maximum. Attempts to define the right to basic literacy or language training services merely in terms of hours is also risky, due to the fact that those who are worst off suffer most from such a mechanical manner of measurement. It is in relation to this problem that the present study has introduced the concept of a 'definable level of quality education' as a measure of the extent to which everybody's right to education should be honoured.

An advantage with the focus on outcomes—on the level of knowledge and skills acquired by students—is that the right to education is thereby made capable of measurement. Not only students at higher educational levels, but even participants in literacy and language training programmes should have a right to education that progresses towards clearly stated and generally recognised aims. The requirement that even the lowest ladder of knowledge should be included in the framework of national qualifications expressly rejects any entry on easier terms into the credential system. Rather, it contains reasoning for the development of more genuinely inclusive education and more attention to the situation of those who are on the lowest rungs of the knowledge-ladder.[40]

Indeed, it is the legislative power of the state that is called upon to establish and maintain a transparent and effective education system with generally recognised objectives and generally approved standards.[41] Even if courts can be drawn into the project of defining minimum standards of quality education and of compelling legislatures to address the issue adequately, judicial pronouncements are not called for prior to public policy debate.[42] Neither

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[40] This approach could be seen as contradictory to the main thesis of the theorists on critical pedagogy, such as John Dewey, John Childs, Paulo Freire and Antonio Gramsci. According to that school of thought, the purpose of schooling is empowerment of disadvantaged groups by education that raises consciousness rather than by education focusing on formal requirements. An argument developed throughout the present study is, however, that awareness-raising and achievement of generally recognised qualifications are not mutually exclusive considerations.

[41] See, for instance, CESCR General Comment No. 13, paras. 49 and 54.

[42] On the legitimacy of the (usually unelected) judicial branch to make policy decisions, see Paul Hunt 1996, p. 25. Klaus Dieter Beiter highlights this issue by distinguishing between two main questions: should the adjudicator act and can the adjudicator act? See Beiter 2006, pp. 79–83. On the institutional competence of courts to enforce economic and social rights involving complex policy choices with far-reaching socio-economic ramifications, see Sandra Liebenberg 2002, p. 60. Gerry Whyte evaluates in his monograph of 2001 the use of such litigation in the context of Ireland for the following four marginalised groups: social welfare claimants, children from dysfunctional families and children with mental handicap, Travellers,

do courts need to identify a specific comparator who has been more favourably treated when claims are based on disadvantage doctrine and standardised outcome criteria. Instead, when a differentiation in law disrespects the core of the right to education, for example by providing literacy training for some above compulsory school age but not for others, the government should expressly demonstrate what the important public interest that justifies the differential treatment is.

As far as monitoring bodies on educational rights are concerned, a focus on outcomes suggests that they should not merely settle for obligations of conduct, such as whether there are plans of action to increase access to educational institutions. Rather, gradually more attention should be drawn to the obligation of result, i.e. the state duty to guarantee that the education and training provided by public funding enables the opportunity to acquire generally recognised qualifications and thus also knowledge and skills actually needed in society. An outcome-oriented approach to monitoring also draws attention to situations where systemic discrimination against Roma operates within the realms that are not by the mainstream recognised as relevant.

8.4. *From Treating the Symptoms to Challenging the Underlying Disease*

8.4.1. *The Potential Cure: Legislative Reform, Court Action or Temporary Measures?*

This work has elaborated the basis for analysing the soundness of the legal framework in a particular sub-sector of education. The concept 'soundness of the legal framework' has been used so as to turn the focus from Roma marginalisation as a signpost of the problem to the law of education as the subject of cure. While diverse special measures may be justified to relieve the most painful symptoms, it is nonetheless the underlying disease itself which should be challenged.

Overtly or covertly biased legislation is only part of the problem of discrimination in education. The most important causes of discrimination may well be found in narrow-mindedness, malevolence, antagonism and other manifestations of our human shortcomings. Likewise, grounds for educational marginalisation may be found both in the minority cultures and in the mainstream system. Yet, the role of law should not be underestimated. Any country-specific diagnosis should lead to a conclusion as to whether there is a need to deconstruct the law of education, or provisions related to any of the 4Rs that may make it malfunction.

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and litigants seeking free legal aid. For questions on the difficulty of drawing the borderline between law and politics see also Syrett 2000 with references.

As a matter of course, any country study that aims at more than a superficial description demands contextualisation to particular circumstances. This study refrains from giving examples that might trivialise the issue or mislead the reader into flawed conclusions about the law of education in single countries. As international law analysed in this study was revealed to be vague in several critical aspects, and as key instruments such as the UNESCO Vocational Convention of 1989 remain unratified by most Western states, it is well-founded to suggest that a careful diagnosis of education law should come first and decisions about the cure only thereafter. Special measures can be justified to alleviate the symptoms, but in the long run, it is important not merely to relieve the symptoms.

When the law of education is revealed to be discriminatory, there are principally three main lines of action: self-correcting measures by the administration, self-correcting measures by the legislature and remedies ordered by courts. The question of what form of redress sufferers of systemic discrimination can expect to receive is an important research challenge in itself.

As far as the option of litigation is concerned, its role varies from one country to another. The US seems to be a country where educational adequacy is commonly dealt with by the courts. As far back as in *Serrano* v. *Priest* (1976), the California State Supreme Court provided an argument according to which substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities. Another illustrative US case is *Rose* v. *Council for Better Education* (1989), where the Supreme Court of Kentucky decided that the state had failed to comply with its constitutional mandate to provide an efficient system of common schools.[43] Also, it is in the US courts that the focus has reportedly been shifted to ensuring that all students have access to educational resources and opportunities adequate to achieve desired educational outcomes, instead of merely examining equal access to education in proportional terms.[44]

In European countries, it seems that education has not been an arena where the question of positive state obligation has been regularly tested in courtrooms.[45] The degree to which courts can be used to remedy educational disadvantage depends on how the separation of powers doctrine is applied in

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[43] In *Serrano* v. *Priest*, the Court stated: "Although an equal expenditure level per pupil in every district is not educationally sound or desirable because of differing educational needs, equality of educational opportunity requires that all school districts possess an equal ability in terms of revenue to provide students with substantially equal opportunities for learning." *Serrano* v. *Priest* (1976); *Rose* v. *Council for Better Education* (1989). For a summary description of the most significant US state court decisions that address equality in educational financing, see Enrich 1995, Appendix.

[44] See Minorini & Sugarman 1999, p. 176.

[45] See, for instance, country analyses on the right to education in 30 European states in De Groof & Lauwers (eds.) 2004, pp. 83–606.

the country under analysis, which again decides whether delegated legislation is immune from judicial review or not. Another issue of decisive importance is whether the self-executing nature of international treaty provisions is to be determined by the national judiciary or not.

As concerns special measures, it has already been mentioned that this complex area calls for a study of its own. A number of provisions in international law allow state parties to make use of temporary special measures, such as affirmative action, preferential treatment or quota systems, for the purpose of bringing about *de facto* equality for groups that are in a disadvantaged position. However, such measures shall not be continued after the objectives for which they were taken have been achieved, and they shall not lead to the maintenance of separate rights for differential groups.

8.4.2. *The Prime Cure: End of Ignorance*

Great effort in the present study has been devoted to pointing out that we are not talking merely about the moral rights of the educationally most disadvantaged individuals, but also about their legal rights. There is a set of legally binding international provisions on this issue, which are either valid or not; there is no compromise. In contrast, many of the notions used in discourses about the right to education are not legally binding norms but principles, which characteristically may be in conflict with each other. Consider, for instance, the principle of freedom and the principle of equality in the context of education. The conventional legal solution to conflicts that may arise between two principles is that both of them shall be optimised as far as possible.

It is the application of the Rawlsian difference principle—i.e. the principle that recommends maximising the positions of the least advantaged—that has called forth the disadvantage doctrine. This doctrine calls us to identify the educationally least advantaged individuals and to see that unsound legal frameworks do not solidify them in any kind of oppressive dependent relationship. By force of disadvantage doctrine, any state party to international regimes discussed in this study can also be urged to move from a substantive equality paradigm as an abstraction to concrete rights that upgrade functional skills for everybody.

Along with norms and principles, values and moral claims are the third important set of notions when talking about the right to education. In the introductory chapter, John Rawls and Tove Stang Dahl were mentioned as sources of inspiration for an effort undertaken in this study to translate moral claims for adequate education to legal ones. Simultaneously, it was noted that Rawls is considered a controversial theorist, particularly among so-called communitarians and some feminist scholars. A short final remark on the Rawlsian way of thinking may therefore be appropriate. Although a theoretical inspiration for this study, Rawls is to be understood here in very simple terms, as encouraging each and every one of us to imagine what it might be like to

be in the position of a person more disadvantaged than oneself. Martha C. Nussbaum discusses the same intellectual and moral challenge by using the concept of narrative imagination, of a sense of one's own vulnerability and of an ability to think: "That might have been me, and that is how I should want to be treated".[46] As a moral claim, this challenge appeals to some individuals, to some others it remains a claim without sufficient justification.

The study in hand has attempted to bring the Rawlsian value discussion into the world of norms. The means for this attempt was to collect binding international standards on the education of individuals and groups that are affiliated to the concept of Roma. This endeavour can be related to Rawls by recalling that there are two suggestions he makes very clearly when talking about the veil of ignorance. First, the parties in the original position "know the general facts about human society", and Second, they "possess all general information", by which Rawls means that no general facts are closed to them.[47] Thus, whenever a reader of this monograph enters the Rawlsian original position, guided by an ambition to maximise fairness in choice situations, s/he is reminded that the study in hand is part of 'general information' possessed by her/him. Likewise, s/he is reminded that behind the veil of ignorance are, among others, illiterate Roma with neither sufficient language skills nor vocational skills, with neither citizenship nor national minority status, in many cases even with no residence permit. Most likely, if anyone of us was facing the risks of being such a person behind the veil, we would from this position suggest that the minimum right to education for all must be guaranteed both in the constitution and in statutory law.

[46] Nussbaum 1997, p. 85. See also the latest monograph of Nussbaum (2006) where she develops the Rawlsian theory of justice towards a more responsive approach to social co-operation between unequal parties.

[47] Rawls 1999, pp. 119, 122.

SUMMARY

In the Europe of today, the realization of everybody's right to a certain minimum of education is commonly taken for granted. It appears irrelevant or marginal to question the coverage of our comprehensive education systems. In the present study, this presumptive view is problematised from the viewpoint of teenagers and adults having basic skills deficiencies. The study seeks from international standards the quintessence, the very core, of a sound, non-discriminatory and inclusive legal framework on education. The ultimate aim is to investigate the kinds of guidelines international law offers for domestic legislatures in their efforts to create education systems that are reflective of demographic changes in the population.

The monograph is made up of three parts and eight chapters. Part I presents the purpose and scope, the analytical starting points, and the methods of the study. Basing itself on the breakthrough of performance measurement systems in promoting good quality education, the study suggests that even in its initial stages, education should be provided that progresses towards clearly stated and generally recognised aims, and that is accredited as part of the national qualifications framework. It is argued that the trend of credentialling, discernible worldwide, can have severe exclusionary effects unless the state explicitly safeguards that its education system is not biased against some parts of the population.

Another introductory point concerns the Roma population of Europe, a population commonly described as suffering from educational marginalisation and therefore chosen as the prime case for the study. As the notion of Roma is undefined in legal terms, the study explores whether Roma are covered by international provisions that protect the separate existence of minorities with epithets such as 'national', 'ethnic' or 'linguistic'. People labelled as Roma fall to several legal categories, whereby more than a few international instruments become applicable in the search for their right to quality education. UN instruments on indigenous peoples are excluded from the analysis, in spite of their comprehensive provisions on education rights, due to the fact that Roma do not enjoy the status of indigenous peoples in any European state.

Diverging from earlier academic research that has focused mostly on education at primary and university levels, the study concentrates on the levels that can offer a pathway forward for those individuals that have experienced exclusion from the formal education system. The argument goes that the goal of education towards a self-sustainable life is invalidated if the first rungs of the ladder of knowledge from literacy and language proficiency up to generally qualified vocational training are not guaranteed for all. The problem statement reads: "What support does international human rights law provide

for arguments that domestic education law discriminates against Roma in access to vocational qualifications?"

The study perceives the law of education as a system of its own, as a functioning whole, though not necessarily consistent and well ordered. As both research and jurisprudence appears to be unsystematised in this respect, the study creates an analytical framework that enables the identification of biases and lacunae in seemingly neutral educational legislation. The analytical framework, called the 4R Scheme, developed by the author, emphasises the necessity to focus not only on the established dichotomy of rights and corresponding duties, but also on whose rights are taken into account and whose voices are heard when the substance of education is decided. The simultaneous analysis of rights, recognition, resources and representation aims to highlight how flawed legislation may have a cumulatively disadvantaging effect in addition to the fact that each aspect can contain discriminatory barriers on its own.

The research material consists of 26 contemporary standard-setting instruments of the United Nations, the Council of Europe and the European Community. These instruments are applicable either to all Roma in the name of their universality or to those Roma that fall into legal categories such as state citizens, national minority members, migrant workers, refugees, asylum-seekers etc. The analysis focuses on instruments that are considered legally binding, but when the hard-law remains silent, light will also be shed on legally non-binding instruments. The cross-examination of different international regimes is necessitated as states that have agreed to be bound by them need to take into account all of them.

Part II of the study thematises positive international law at the universal and European level in line with the four aspects of the analytical framework, i.e. 'rights', 'recognition', 'resources' and 'representation'. By outlining the outer limits of the liberty of action for state parties, an attempt is made to establish when, according to international law, a state fails to provide a sound legal framework in the educational sector under examination.

The exploration of the *rights aspect* reveals that international codification is low or non-existent when the achievement of a minimum level of skills, instead of mere access to education, is in focus. In order to make the lowest rungs of the knowledge ladder visible, the rights aspect is divided into the elements of basic skills, language skill, vocational and cultural skills, each relevant for educationally marginalised individuals.

The first controversy concerns whether the right to basic education is exclusively for children or whether it is for adults also. Some international standards distinguish between 'primary' and 'fundamental' education, while others make use of notions such as elementary or basic education. In contrast, for instance, to the Central American regional instruments, binding European law does not contain provisions on adult basic education. This, however, is considered not to allow for contracting states to overlook injustices faced by the

educationally most disadvantaged individuals, as generally worded provisions, such as "No person shall be denied the right to education", are interpreted as also including protection of adult basic education.

Concerning the question of whether some minimum language skills are acknowledged as belonging to all human beings, neither UN law nor the European standards contain any unqualified right to language acquisition. International binding instruments hardly pay any attention to situations where individuals do not speak or understand official language(s) of their country of residence, nor to the situation of individuals belonging to linguistic minorities that are not accorded national minority status. Instead, two approaches to linguistic rights are discernible, one emphasising language as part of national minority rights, the other one as an abstraction of linguistic diversity that should be promoted for its own sake. In both approaches, multi-lingualism is applauded in general terms, whereas semi-lingualism is overlooked as a cause of anxiety.

Vocational skills acquisition can be shown to be a relatively unregulated area in binding international law. Indeed, the examined instruments and their interpretative documents differ as to how the very concept of vocational education should be comprehended; some suggest that it should be seen as part of primary education, others that it extends even to university courses. An exception is the UNESCO Convention on Technical and Vocational Education, which defines the concept at issue pragmatically as including the acquisition of practical skills and know-how relating to various occupations, and also expressly covers individuals from diverse disadvantaged groups. However, 17 years after its adoption this instrument has only 15 state parties of which only two are from Europe. Concerning individuals in vulnerable situations, a recent EC directive requires that vocational education shall be offered to beneficiaries of refugee status under equivalent conditions to nationals, but nothing is stipulated about preparatory training as a prerequisite for successful integration to the mainstream vocational education.

Among many vocational clusters, the study draws particular attention to the right of an individual to acquire and develop the cultural skills of her or his choice. A suggestion is made that, in order to avoid traps of essentialism, the right to cultural skills should cover all the vocations that in the national educational classifications fall in the field of culture, ranging from minority culture and folklore expertise to museum and library professionals, photographers, journalists, and the like. Nevertheless, the international norms under examination predominantly either recognise culture as an abstraction or acknowledge the rights of members of national minorities to maintain and develop their culture, whereas nothing is stipulated about an individual right to skills acquisition that leads to professionalism in the cluster of culture.

The fact that a considerable number of international instruments recognise the right to education in generic terms—without making dis-tinctions between different types or levels of education, nor between different legal categories of

rights-holders—is interpreted in the study as giving recognition, as a minimum, to everybody's right to basic skills. All things considered, international law is argued to support a holistic conceptualisation of the core of the right to education that pays due respect to all the elements under consideration, that is: basic literacy along with linguistic, vocational and cultural proficiency.

The *recognition aspect* focuses on the question of how international law guides states to identify the subjects of educational rights under their jurisdictions. The power to name and define and correspondingly, the power not to name and define certain groups and categories of society is discussed first, in order to clarify how biases in this respect may establish multiple oppressive situations for some parts of the population. A number of provisions and landmark cases are identified as tools against non-recognition: binding UN standards that set forth an explicit right to recognition as a person before the law, and recent European case-law that acknowledges the right of individuals in significantly different situations to be treated differently, are both considered to put pressure on states to recognise in a sophisticated manner the legal subjectivity of individuals under their jurisdictions. Nonetheless, some parts of European law offer escapes for those states that prefer the policy of non-recognition in education.

The anti-discrimination clauses of international instruments are a specific set of provisions that principally should guide states not to sideline educationally disadvantaged individuals above compulsory school age as a category of concern. The instruments under analysis contain some 20 enumerated grounds for non-discrimination altogether, from among which the study picks the attributes of age, language, gender and ethnicity for closer examination. Discriminatory non-recognition or mal-recognition in terms of each attribute is first defined as ageism, linguicism, genderism and ethnism, whereafter follows an examination of what international law says about the right to be correctly identified in each respect.

With regard to age, the binding standards are shown to leave ageism in basic education without a separate reference. Quite the reverse, even the Convention on the Rights of the Child—although principally defining every human being below the age of eighteen years as a child—leaves a loophole that enables the non-recognition of teenagers above the minimum employment age as subjects of basic education. The European Social Charter also contains a clause according to which it does not imply an obligation to provide compulsory education up to the age of eighteen. The most recent European Community directives cover ageism in vocational education, whereas age-bound discrimination in respect of basic education remains unregulated.

As to language, recognition of linguistically deficient individuals is on the whole left to the discretion of states, which coincides with the very fact that international law is blurred as to who should be considered to be subjects of linguistic rights. Consequently, space is left for state legislatures to disregard the most elementary language deficiencies and the language learning needs

of individuals coming from the educationally disadvantaged segments of the society. Yet, seeing that universal anti-discrimination clauses recognise language relatively often as an unreasonable ground to justify discrimination, the study suggests the reading of the non-discrimination clauses and the substantive provisions together, and on that basis demands equal recognition of rights-holders from diverse language groups before the law of education.

In respect of the recognition of skills deficiency on grounds of gender, both universal and European instruments are there to stipulate on the equality between male and female as subjects of the right to education. The effect of these standards on the maintenance of gendered categorisation in education is apparent and justified as such. However, the fact that states are called to draw on the binary opposition leaves those individuals who consider themselves as falling between the male-female duality without a change to be accurately classified. Moreover, the fact that both the universal and the European instruments stipulating on gender equality are based on the idea of privileged male and disadvantaged female may contribute to the leaving illiterate, language deficient males in the shadow.

Ethnicity, the fourth and last attribute examined as ground for recognition, is a popular theme among advocates of the Roma right to education, and also frequently recognised as a ground for non-discrimination in international instruments. As drawbacks, some instruments and their interpretative documents not only tend to simplify the conception of Roma, but also to equate the Roma population, in all its diversity, with educational backwardness. Consequently, they may engage in the construction of difference as an end in itself and bolster polarisation and tension based on ethnicity. The study highlights discourses according to which the European minority rights regime as such is a system of rights in which some groups are privileged at the expense of other groups. Seen from the viewpoint an individual's right to be correctly recognised, binding international law makes clear that the collection of ethnic data is acceptable only insofar as the identification of ethnic origins is made on the basis of a voluntary declaration.

The exploration of the recognition aspect is concluded by arguing that enumerative anti-discrimination clauses of the international standards are partly responsible for the construction of categories that are recognised by domestic legislatures, and for the respective unconcern about those that do not fit in. As a way forward, the study suggests that states should move on to the recognition of the functional skills deficiency of educationally disadvantaged individuals irrespective of their particular group affiliations.

The *resourcing aspect*, dealing with duties imposed on states, is explored in two sub-aspects. First, a distinction is made between state duties to fulfill the right to education as a universal right and state duties vis-à-vis minority educational rights. The duty to fulfill the core content of the right to education for everybody arises from general human rights clauses, according to which state parties undertake "to achieve progressively the full realization"

of the right to education, and "to encourage or intensify as far as possible" fundamental education. As these provisions leave somewhat unclear what the state obligations with regard basic education above compulsory school age are, the study calls special attention to a key provision that prohibits limitation of any person or group of persons to education of an inferior standard, and to an interpretation according to which the distinction between the promotional approach on the one hand and the violations approach on the other as such is untenable, because of the fact that the failure to promote is a violation *per se*.

As regards state duties in respect of the provision of some minimum language skills, both universal and European case-law exist that clarify how vague provisions on linguistic rights and corresponding duties should be interpreted. Accordingly, no arbitrary or unreasonable preferences are considered as permissible in domestic language policies. The same should apply to the state duty to provide on equitable grounds vocational or cultural education that leads to generally recognised qualifications, even if there is no international case-law on these areas. On balance, state duties in terms of the provision of education should be defined with the doctrine of interdependency, interrelatedness and indivisibility of all human rights in mind.

Still concerning the redistributive power of the state, the study examines in detail what kinds of positive obligations lay dormant in the Convention against Discrimination in Education (1960). Three different sets of duties are identified, namely the state duty to establish a non-discriminatory educational infrastructure, the state duty to accommodate for differences, and the state duty to take action to eliminate conditions that cause or maintain educational deprivation. These duties are suggested to make the state responsible to continuously contest assumptions of the education law's neutrality, and to ask which differences are taken for granted that, given changed circumstances, may serve as a justification for laws that neglect those already in a most disadvantaged position.

The second sub-aspect on the topic of resourcing draws attention to the very conceptualisation of resources. The relevance of this dimension springs from vague provisions in UN law according to which a state shall demonstrate that it has used all resources at its disposal in an effort to satisfy those minimum obligations it has undertaken as party to international human rights law. As no answer can be found in the instruments under examination as to what is meant by 'all resources', the study defines this ambiguous notion as tentatively consisting of financial, human, information and technology resources, and investigates how these four types are acknowledged in the norms under consideration.

Beginning the investigation with financial resources, international law is found to provide instruction in two dimensions. The first concerns how the costs of education could be equitably distributed between the state and alternative education providers. In this dimension, a particularly important

binding provision is the one that calls upon states not to allow in any form of their assistance to educational institutions any restrictions or preference based solely on the ground that pupils belong to a particular group. The second dimension of financial resources concerns the cost-bearing capacity of individual students. According to UN standards, state parties undertake to establish an adequate fellowship system, and to progressively abolish fees or charges for any levels of education. European Community provisions contain no state duty to provide study assistance for individuals who move within the Community only for study purposes, whilst they shall receive equal treatment to the nationals of the host member state as far as enrolment fees are concerned. On this point, a tension is discernible between universal standards and European provisions, particularly as far non-European students in Europe are concerned.

Human resources are addressed as an important topic of its own by reasoning that what individuals want to have is skills, and what is needed to receive useful skills is good instruction by competent teachers. Thus, provision of sufficient and non-discriminatory teacher training is considered important for efforts aiming to halt the devaluation of marginalised individuals as subjects of education. A number of binding international provisions that concern state duties vis-à-vis human resourcing are identified. For instance, instruments concerning vocational education stipulate explicitly that teachers shall have appropriate teaching skills consistent with the type and level of the courses they are required to teach. In contrast, no legally binding international provisions oblige states to prepare teachers for teaching adults that suffer from basic skills deficiencies. Where international law remains silent, the study suggests that a sound legal framework should recognises the need for qualified teachers to work with diverse categories of students, and that teacher education should be reflective of the linguistic and cultural as well as age and gender aspects of this diversity.

Information resources as the third resource type are viewed as playing a crucial role in efforts to eliminate assignment of some students to segregated education from where they have limited or no access to further education or adequate employment options. The state duty to give qualified and unbiased help in the choice of education and training appears indeed in several international standards. Most important is the European Social Charter, where vocational guidance exists as a separate, fully fledged right. Accordingly, guiding assistance shall be placed free of charge at the disposal of all categories of individuals, both to young persons, including school children, and adults. A drawback of this provision is that it extends only to the nationals of the contracting parties to the European Social Charter.

Last, technology resources are seen as an important potential to help educationally disadvantaged individuals gain access to quality education. It is shown that state duties relating to technology resources appear in the universal standards on the right to education as early as the 1960s. For example, the

furnishing of technical cooperation and technical assistance are mentioned among the means of action for the achievement of economic, social and cultural rights. Likewise, state parties to the Convention of the Rights of the Child undertake to promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In contrast, European instruments, even the most recent ones, remain silent about open and distance learning or other technology-related resources as means for widening access to quality education for all, and about state duties in the provision of such resources.

The *representation aspect* examines who, according to international standards, is expected to speak for those educationally disadvantaged individuals that legally are not in the state of minority. As a rule, the right to education is considered to include a parental right to represent their children below the maturity age. On the other hand, the right to political participation is typically acknowledged for individuals that have reached the age of majority and that enjoy the status of citizenship. More often than not, illiterate and language deficient individuals above the primary school age fall outside any of these institutional arrangements. The study makes use of the 'right to representation' as a discursive concept against which it is explored whether states are called to officially impose any body to identify problems and formulate solutions relevant to these 'in-between' individuals.

International instruments reveal the strongly-fragmented character of decision-making in the area under consideration. One scheme of ruling, a legal framework for tripartism, with selected trade unions, employers' organisations and the state government as the three official parties, is acknowledged within the regimes of the International Labour Organisation and the European Community. Tripartite bodies participate, among other things, in the European-wide processes of standardisation of vocational education and training. A weakness of this scheme, seen from the viewpoint of multiply-marginalised young and adults, is the likelihood that strong negotiators pursue only the interests of their own group members and thereby may counteract the rights of the least competitive part of the population.

As another scheme of ruling, the right of minority communities to speak for themselves is acknowledged within the European minority rights regime. Even this scheme contains weaknesses when seen from the viewpoint of the educationally most disadvantaged individuals, as it concerns predominantly different degrees of cultural autonomy of well-established minority groups. Even if a number of interpretative instruments adopted by UN and European institutions state that the effective participation of any minority communities in public life shall not be at the expense of others' rights, wide latitude is left to individual states as regards estimation of which groupings among the

population shall have their representatives in decision-making that takes place outside the system of parliamentary representation.

The study identifies as a specific area of concern the lack of representation of those illiterate individuals above primary school age who cannot speak for themselves because of a lack of skills in (any of) the official language(s) of the state. In particular, European Community instruments permit member states to set special conditions for young people in order to promote their social integration, but stipulate nothing about the right of persons concerned to representation in educational decision-making. European minority instruments, for their part, call for the satisfaction of demands of national minorities, but young people from language groups that lack official minority status can scarcely base representation claims on these instruments.

Seeing that international provisions are inadequate in providing the educationally disadvantaged individuals and groups with a guarantee of representation, the study then introduces *parens patriae* authority, which implies that the state must care for those who cannot take care of themselves, and suggests that it is basically the disadvantaged situation of the individuals, rather than the specific attribute of childhood that gives rise to this type of representation. Even though international law puts no explicit pressure on the state to represent those teenagers and adults within its jurisdiction that lack the knowledge and the organisational power to make education rights claims of their own, an argument is developed according to which the *parens patriae* doctrine is justified by a holistic interpretation of international human rights law, at least in relation to the linguistically most disadvantaged persons below the age of 18 years.

In the concluding section, Part III, the two earlier parts are brought together. First, the points of concern within each of the four main aspects of the 4R Scheme are analysed from a particular Roma perspective. As to rights, the main issue of concern is whether the very distinction between subjective and progressive rights is sufficiently sensitive for those Roma aged 15+ that do not fit into the seemingly neutral education system of the nation state. As to recognition, international law appears particularly inconsiderate regarding young people facing ageism in access to basic education, for dispersed Roma facing dormant linguicism behind notions such as 'balancing of interests', and for allochthonous Roma facing exclusion from being a part of those Roma with legally institutionalised national minority status.

As to resources, a severe deficit in the international instruments examined is that they enable ignorance of the call for progressively free basic education above compulsory school age, whilst states are obliged to provide free primary education and to progressively abolish fees for secondary and tertiary education. Moreover, seen particularly from the viewpoint of itinerant and geographically dispersed Roma, it is considered as a deficit in European law that no single instrument addresses the use of modern learning technologies

in support of remaking basic education for all an attainable goal. Finally, as to representation, a deficit in international law is that none of the regimes examined is pressing for the necessity to include the needs of the educationally most backward individuals on the agenda of either the tripartite or the minority participation arrangements. The main task is not to create still new participation fora, but to open up ways to question the blindness of the dominant participation mechanisms to the issue of educationally most disadvantaged Roma in diverse legal categories.

On the basis of examples of regulatory flaws and voids that potentially have a marginalising effect on Roma, the study makes a call to disentangle clearly from each other two different strands in international law. When operationalising universal human rights provisions, the fulfilment of the right to adequate education is best promoted by drawing increasingly more attention to functional disability, and to corresponding data collection on illiteracy and other skills deficiencies that can be remedied. In contrast, the minority rights regime should consistently be operationalised in the service of minority educational arrangements maintained by Roma themselves, similarly to the educational arrangements of more well-established minority groups. The idea of educational rights as genuine human rights should not admit of situations where they hold just for some and merely reify essentialism. Likewise, the idea of minority rights should not admit of situations where it is not possible to clearly distinguish those with from those without special rights. The argument goes that intermingling of these two strands undermines the very possibility of legally ensuring everybody an acceptable minimum of basic education.

Finally, an answer is provided to the key question: When are state parties to international human rights law to be criticised for not having a sufficiently sound legal framework to guarantee the implementation of the basics of good quality education for all Roma under their jurisdictions? The initial ambition of the study was to distinguish criteria for evaluating the soundness of domestic systems of education law on grounds of binding international standards, yet it results in a critique of international standards themselves. Nonetheless, the vagueness of international law is seen as an opportunity rather than as a hindrance, seen from the viewpoint that ideal system development is a process of domestic dialogues rather than something imposed from top down by unelected international bodies.

In the face of the fact that binding international law is demonstrated to be silent on many critical points, the study suggests four responses to question why governance in adult basic education should shift from being merely a matter of politics to a matter of legally binding law. First, the guarantee of the right not to be discriminated against is particularly important in the issues of linguicism and ageism, which should not be left to the unregulated margin areas of education. Second, the guarantee of the inviolable right to a minimum education needs to be reflective of changes in time and place. It is particularly in so-called knowledge societies where non-regulation can

be seen as a circumvention of responsibility by the legislature before those whose basic educational rights are violated. Third, the guarantee of continuity calls for the law to be distinguished as a long-term measure from short-term affirmative actions that according to international law shall be clearly specified in terms of goals and terminate as soon as these goals are met. Fourth, the guarantee of responsibilities pertains particularly to those types of education that have seemingly least 'market value', as rights for the most marginalised people remain empty phrases without defining who is responsible for their fulfilment.

The 4R Scheme developed in the study is to be considered a useful tool for diagnosing the soundness of a legal framework, even if international law ultimately provided less guidance than was originally anticipated. The value of the 4R Scheme is highlighted by a comparison to the latest strategy for equal opportunities of the European Commission, which involves the aspects of rights, recognition and representation, but totally disregards the aspect of resources and, instead, applies the notion of respect. The argument goes that such a lack of concern towards resourcing apparently maintains the exclusion of the most marginalised individuals and communities from quality education with proper functional value. Likewise, the concluding discussion restates the introductory statement, according to which literacy and language training programmes for educationally marginalised young and adults should also progress resolutely towards clearly stated and generally recognised aims, rather than remain non-certified and of more or less suspect quality.

As its ultimate ambition, the study contributes to bringing John Rawls' theory of justice from the world of values to the world of legally binding norms. The reader is called to consider the position behind the Rawlsian veil of ignorance of an illiterate Roma with neither sufficient language skills nor vocational skills, with neither citizenship nor national minority status, and possibly even with no residence permit. The conclusion is that awareness of international standards, including ambiguities and lacunae within and between them, should call any responsible legislature to guarantee in law the minimum right to education for all.

CHAPTER-SPECIFIC SUMMARY TABLES

Explanatory notes for tables concerning Chapter 3 (Tables 1 and 2):

The first column on the left shows the following components: I. = Right to basic skills above compulsory school age, II. = Right to language skills, III. = Right to vocational skills, IV. = Right to cultural skills. Articles that are placed in parenthesis are somehow conditional, for example so that the right to education shall be guaranteed for the target group of the instrument as widely as the right concerned is accorded to the population at large.

Explanatory notes for tables concerning Chapter 4 (Tables 3 and 4):

The first column on the left shows the grounds for discrimination. The columns on the right show in chronological order the instruments that explicitly name the ground at issue. It is to be noted that the three concepts of birth, descent and country of origin are not synonymous with each other. They are grouped here in one single category only because the distinction between them is not in the focus of this study. Regarding 'sexual orientation', note that in the case of *Toonen* v. *Australia* the HRC took the view that it as a prohibited ground of discrimination falls under the notion of 'sex' in the CCPR. *Toonen* v. *Australia*, paras. 8.7 and 11. As regards Table 4, the following notes are needed. First, Article E of the revised ESC does not recognise an independent right to non-discrimination, but merely that the non-discrimination clause in the preamble applies to all the provisions of the Charter. Moreover, the scope *ratione personae* of the Revised ESC includes foreigners only in so far as they are nationals of other parties lawfully resident or working regularly within the territory of the party concerned. See Explanatory Report of the Revised ESC, part V. Second, brackets are used in column 12 due to the fact that the Refugee Directive contains no non-discrimination clause as such, but instead the following paraphrase in its Preamble: "With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination."

Explanatory notes for tables concerning Chapter 6 (Tables 7 and 8):

Provisions that are in brackets stipulate on resources only in a restricted manner.

Table 1: The four components of the right to education mentioned in selected instruments of the United Nations.

	1=UDHR (1948); 2=Stateless (1954); 3=Refugees (1954); 4=ILO 111 (1958); 5=CDE (1960); 6=CERD (1965); 7=CESCR (1966); 8=CCPR (1966); 9=CEDAW 1979; 10=ILO 168 (1988); 11=CRC (1989); 12=UNESCO Vocational (1989); 13=Migrant Workers (1990).												
Component	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**
I.	Art 26	(Art 22)	(Art 22)		Art 1.2	Art 5.e	Art. 13.2d		(Art 10)		Art 28.3		(Art 30)
II.					Art 5.1c			(Art 27)			Arts 29; 30		Art 45
III.	Art 26			Art 1.3	Art 1.2	Art. 5.e	Art 13.2b		(Art 10)	Art 7	Art 28.1b	Art 3	
IV.					(Art 5.1c		Arts 1.1; 6.2; 15	(Art 27)	Arts 3; 5; 13		Arts 29; 30	Art 3.1a	Art 31

Table 2: The four components of the right to education mentioned in selected European instruments.

	1=ECHR (1950); 2=Gender Dir. (1976); 3=Eur.Migrant Workers (1977); 4=ECRML (1992); 5=FCNM (1995); 6=ESC Rev. (1996); 7=TEC (1997/2002); 8=Race Dir. (2000); 9=Employment Dir. (2000); 10=CFREU (2000), 11=Asylum Dir. (2003); 12=Refugee Dir. (2004) 13= Protocol No. 12 of the ECHR (2005).												
Component	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**
I.			Art 14.1	Art 8f	Art 12	Art 10.4 (Art 30)		(Art 3.1 g)		Art 14		(Art 27.2)	(Art 1.1)
II.			Art 14.2 Art 15	Arts 7; 8	Art 14					(Art 22)		(Art 27.2)	(Art 1.1)
III.		Arts 1.1; 4	Art 14.1	Art 8d	Art 12	Art 10	(Art 150)	(Art 3.1 b)	(Art. 3.1 b)	(Art 14)	(Art 12)	(Art 27.2)	(Art 1.1)
IV.				Arts 8g; 12	Arts 5; 12; 15					(Art 22)			(Art 1.1)

Table 3: Prohibited grounds for discrimination in selected instruments of the United Nation.

	1=UDHR (1948); 2=Stateless (1954); 3=Refugees (1954); 4=ILO 111 (1958); 5=CDE (1960); 6=CERD (1965); 7=CESCR (1966); 8=CCPR (1966); 9=CEDAW 1979; 10=ILO 168 (1988); 11=CRC (1989);12=UNESCO Vocational (1989); 13=Migrant Workers (1990).													
Prohibited Ground	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**	Σ
distinction of any kind	x	–	–	–	–	–	x	x	–	–	–	–	x	4
race	x	x	x	x	x	x	x	x	-	x	x	x	x	12
colour	x	–	–	x	x	x	x	x	–	x	x	x	x	10
ethnic origin	–	–	–	–	–	x	–	–	–	x	x	–	x	4
sex	x	–	–	x	x	–	x	x	x	x	x	x	x	10
language	x	–	–		x	–	x	x	–	–	x	x	x	7
religion, belief, conviction	x	x	x	x	x	–	x	x	–	x	x	x	x	11
political / other opinion	x	–	–	x	x	–	x	x	–	x	x	x	x	9
national / social origin	x	–	–	x	x	x	x	x	–	x	x	x	x	10
property, economic condition	x	–	–	–	x	–	x	x	–	–	x	x	x	7
birth, descent, country of origin	x	x	x	–	x	x	x	x	–	–	x	x	x	10
disability	–	–	–	–	–	–	–	–	–	x	x	–	–	2
age	–	–	–	–	–	–	–	–	–	x	–	–	x	2
marital / family status	–	–	–	–	–	–	–	–	x	–	–	–	x	2
nationality	–	–	–	–	–	–	–	–	–	x	–	–	x	2
association with a nat. minority	–	–	–	–	–	–	–	–	–	–	–	–	–	0
health	–	–	–	–	–	–	–	–	–	–	–	–	–	0
sexual orientation	–	–	–	–	–	–	–	x	–	–	–	–	–	0
genetic features	–	–	–	–	–	–	–	–	–	–	–	–	–	0
other status	x	–	–	–	–	–	x	x	–	–	x	x	x	6

Table 4: Prohibited grounds for discrimination in selected European instruments.

	1=ECHR (1950); 2=Gender Dir. (1976); 3=Eur.Migrant Workers (1977); 4=ECRML (1992); 5=FCNM (1995); 6=ESC Rev. (1996); 7=TEC (1997/2002); 8=Race Dir. (2000); 9=Employment Dir. (2000); 10=CFREU (2000), 11=Asylum Dir. (2003); 12=Refugee Dir. (2004); 13=Protocol No. 12 of the ECHR (2005).													
Prohibited Ground	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**	∑
distinction of any kind	x	-	-	-	-	x	-	-	-	x	-	(x)	x	5
race	x	-	-	-	-	x	x	x	-	x	-	(x)	x	7
colour	x	-	-	-	-	x	-	-	-	x	-	(x)	x	5
ethnic origin	-	-	-	-	-	-	x	x	-	x	-	(x)	-	4
sex	x	x	-	-	-	x	x	-	-	x	-	(x)	x	7
language	x	-	-	-	-	x	-	-	-	x	-	(x)	x	5
religion, belief, conviction	x	-	-	-	-	x	x	-	x	x	-	(x)	x	7
political / other opinion	x	-	-	-	-	x	-	-	-	x	-	(x)	x	5
national / social origin	x	-	-	-	-	x	-	-	-	x	-	(x)	x	5
property, economic condition	x	-	-	-	-	-	-	-	-	x	-	(x)	x	4
birth, descent, country of origin	x	-	-	-	-	x	-	-	-	x	-	(x)	x	4
disability	-	-	-	(-)	-	-	x	-	x	x	-	(x)	-	4
age	-	-	-	(-)	-	-	x	-	x	x	-	(x)	-	4
marital / family status	-	-	-	-	-	-	-	-	-	-	-	-	-	0
nationality	-	-	-	-	-	-	x	-	-	x	-	(x)	-	3
association with a nat. minority	x	-	-	-	x	x	-	-	-	x	-	(x)	x	6
health	-	-	-	-	-	x	-	-	-	-	-	(x)	-	2
sexual orientation	-	-	-	-	-	-	x	-	x	x	-	(x)	-	4
genetic features	-	-	-	-	-	-	-	-	-	x	-	(x)	-	2
other status	x	-	-	-	-	x	-	-	-	x	-	(x)	x	5

Table 5: The state duty to provide educational resources in selected instruments of the United Nations.

	1=UDHR (1948); 2=Stateless (1954); 3=Refugees (1954); 4=ILO 111 (1958); 5=CDE (1960); 6=CERD (1965); 7=CESCR (1966); 8=CCPR (1966); 9=CEDAW 1979; 10=ILO 168 (1988); 11=CRC (1989); 12=UNESCO Vocational (1989); 13=Migrant Workers (1990).												
Type of resource	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**
Financial resources					Art 3.c, 3.d, 5.1c		13.2 a,b,e		Art 10.d		28.1 a,b		
Human resources					Art 2.a, 4.d				Art 10.b				
Information resources				Art. 3.e					Art 10.a	Art. 3.1	Art 28.1d		
Technology resources					Art 2.a		Art 2.1, 13.2, 23		Art 10.b		Art 28.3		
All-purpose					Art 1.1, 2b, 4	Art 2.1, 13, 14	Art 2, 13	Art 26, 27			Art 2.1, 4, 28		

Table 6: The state duty to provide educational resources in selected European instruments.

	1=ECHR (1950); 2=Gender Dir. (1976); 3=Eur.Migrant Workers (1977); 4=ECRML (1992); 5=FCNM (1995); 6=ESC Rev. (1996); 7='TEC (1997/2002); 8=Race Dir. (2000); 9=Employment Dir. (2000); 10=CFREU (2000), 11=Asylum Dir. (2003); 12=Refugee Dir. (2004) 13=Protocol No. 12 of the ECHR (2005).												
Type	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**
Financial resources					[Art 13.2]	Art 10, 17.2	[Art 7]			[Art 14.2]			
Human resources				Art 8.1 g-h	Art 14 (2)	Art 17.119							
Information resources				Art 6		Art 9							
Technology resources													
All-purpose	Art 1, 14 AP1 Art2				Art 4 [Art 14]		Art 149						

Table 7: Types of educational representation in selected instruments of the United Nations.

	1=UDHR (1948); 2=Stateless (1954); 3= Refugees (1954); 4=ILO 111 (1958); 5=CDE (1960); 6=CERD (1965); 7=CESCR (1966); 8=CCPR (1966); 9=CEDAW 1979; 10=ILO 168 (1988); 11=CRC (1989); 12=UNESCO Vocational (1989); 13=Migrant Workers (1990).												
Type	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**
Parental					Art 5.1b		Art 10.1 13.3	Art 18.4 23.1			Art 3.2, 5, 14.2 18.3		
Tripartite				Art 16						Art 3			
Other associations												Art 2.2d	Art 42, 43, 45
National minorities								Art 27			Art 30		
Other (incl. political)	Art 23.4						Art 8.1, 13.1	Art 25	Art 7, 8, 14.		Art 12, 16	Art 3.1a	

Table 8: Types of educational representation in selected European instruments.

	1=ECHR (1950); 2=Gender Dir. (1976); 3=Eur.Migrant Workers (1977); 4=ECRML (1992); 5=FCNM (1995); 6=ESC Rev. (1996); 7=TEC (1997/2002); 8=Race Dir. (2000); 9=Employment Dir. (2000); 10=CFREU (2000), 11=Asylum Dir. (2003); 12=Refugee Dir. (2004) 13=Protocol No. 12 of the ECHR (2005).												
Type	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**
Parental	AP1-Art 2												
Tripartite						Art 10.1 10.5d	Art 139	Art 11	Art 13				
Other associations			Art 28, 29					Art 12	Art 14				
National minorities					Art 5, 15								
Other (incl. political)	Art 11			Art 7.3 7.4	Art 5.1, 6.1		Art 5			Art 39, 40			

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