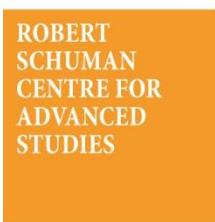




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## Comparative Analysis of Educational Rights of National Minorities and Migrants in Europe

Iryna Ulasiuk



European University Institute  
**Robert Schuman Centre for Advanced Studies**  
Global Governance Programme

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## **Abstract**

The working paper provides an up-to-date overview of the fundamental and human rights in education applicable to national minorities and migrants in Europe. It summarises the basic educational rights guaranteed within three different legal frameworks: the international human rights treaties, the Council of Europe and the European Union. The working paper is a reflection on the adequacy of the protection afforded in the field of educational rights to national minorities and migrants in Europe and the need for convergence or distinction between the regimes safeguarding educational rights of migrants and national minorities.

## **Keywords**

Educational rights, national minorities, migrants, Europe





## Introduction

*Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values ..., including respect for differences, and challenges all aspects of discrimination and prejudice. Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena.<sup>1</sup>*

Every nation has a right to self-determination in accordance with the 1919 Versailles Peace treaties. Whenever forming its own state proved to be impossible for a nation, the peace treaties foresaw that these national minorities were entitled to a system of minority rights which would guard their interests in the territory of the state they lived in. Interestingly, minorities originating from migration were explicitly excluded from the minority protection system<sup>2</sup> giving rise to a difference between on the one hand, a framework protecting national minorities, and on the other hand, a framework protecting migrants. The 1948 Universal Declaration of Human Rights, blurred this difference by adopting an all-inclusive approach to human rights. It guaranteed to ‘all members of the human family’,<sup>3</sup> the right to enjoy their human rights ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’;<sup>4</sup> hence, irrespective of the category (‘national minorities’, ‘migrants’) to which they belong.

The present working paper is an attempt to research (a) what exactly the differences between the instruments protecting national minorities and the instruments protecting migrants are in one specific area, education, and (b) to what extent the general inclusiveness of human rights instruments has influenced or should influence the specific instruments pertaining to the protection of educational rights of migrants and national minorities. Education has been chosen because it is indeed an important human right in itself, but it is also instrumental as a precondition for the full enjoyment of many other rights, such as the right to participation, expression, association, etc. As the UN Committee on Economic, Social and Cultural Rights has stressed in their general comment on the right to education, as ‘an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities’.<sup>5</sup>

Evidence gathered in recent empirical studies shows that the educational accomplishments of migrants and minorities, for the most part, lag behind those of the majority groups; they continue to experience different forms of disadvantages and unequal treatment in education across Europe. Migrants and minorities tend to enrol in schools with lower academic demands. They are over-represented in vocationally oriented tracks. They finish school earlier and have higher dropout rates. In

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<sup>1</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 13 *The right to education*. E/C.12/1999/10, 8 December 1999.

<sup>2</sup> Hammar, T. (1990). ‘The Civil Rights of Aliens’, in Z. Layton-Henry (ed.), *The Political Rights of Migrant Workers in Western Europe*, London, p.91.

<sup>3</sup> Preamble.

<sup>4</sup> Article 2.

<sup>5</sup> UN, ESCOR, ESC Committee, 21st Session, *General Comment No. 13, The right to education (Art. 13)*, UN Doc. E/C.12/1999/10 (1999), para.1

particular, migrants from non-EU countries and some national minority groups (the Roma minority, for example) are faced with high rates of underachievement. An over-representation of migrant and ethnic minority pupils in schools for special education is also common in different European countries.<sup>6</sup>

This working paper thus provides an up-to-date overview of the fundamental and human rights in education applicable to national minorities and migrants in Europe. It summarises the basic educational rights guaranteed within three different legal frameworks: the international human rights treaties, the Council of Europe (CoE) and the European Union (EU).

Section one starts with the clarification of terminology used in the present paper.

Section two sets out the framework of protection accorded to national minorities and migrants with respect to their educational rights at the international level. It presents the most relevant provisions of the universal human rights instruments which have been the basis for the development of the regional, European, instruments in the area of educational rights.

Section three focuses on the legal framework pertaining to the educational rights of national minorities and migrants developed at the regional level within the system of the Council of Europe. It examines three primary instruments of this protection regime – the European Convention on Human Rights (ECHR), the European Social Charter (ESC) to which every EU member state is a contracting party; and the Framework Convention for the Protection of the Rights of National Minorities (FCNM), the only binding legal document dealing exclusively with the rights of national minorities. Special attention is given to a new approach that the European Court of Human Rights has adopted in the case law concerning educational rights of the Roma children.

Section four analyses the set of educational rights granted by the EU level legal framework. It focuses particularly on the protection in the field of education accorded to national minorities and migrants by the EU Charter of Fundamental Rights, which since acquiring a legally binding status with the entry into force of the Treaty of Lisbon in December 2009, has become the key instrument for the protection of fundamental rights for migrants within the EU legal order. Attention is also paid to several secondary pieces of legislation which can play an important role in safeguarding educational rights of national minorities and migrants.

Finally, in the concluding remarks the author reflects on the adequacy of the protection afforded in the field of educational rights to national minorities and migrants in Europe, need for convergence or distinction between the regimes safeguarding educational rights of migrants and national minorities.

## ***1. Definitions***

This paper refers to ‘migrants’ and ‘national minorities’ (‘new’ and ‘old’ minorities accordingly). For reasons of clarity, I start by explaining the definitions I use.

### ***Migrants***

Where this working paper refers to migrants, it refers primarily to migrant workers. According to the definition provided by the 1990 International Convention on the protection of the Rights of All Migrant Workers and Members of their Families, a migrant worker is ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a

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<sup>6</sup> See among others, *Migrants, Minorities and Education. Documenting Discrimination and Integration in 15 Member States of the European Union*. European Monitoring Centre on Racism and Xenophobia, 2004 Luxembourg: Office for Official Publications of the European Communities; Brind, T., Harper, C. and K. Moore *Education for Migrant, Minority and Marginalised Children in Europe*, a report commissioned by the Open Society Institute’s Education Support Programme, 2008.

national'.<sup>7</sup> From this a broader definition of migrants follows: "The term 'migrant' in article 1.1 (a) should be understood as covering all cases where the decision to migrate is taken freely by the individual concerned, for reasons of 'personal convenience' and without intervention of an external compelling factor."<sup>8</sup>

### *National minorities*

In the international instruments there is no uniform agreement on how to define the term 'minority'. Definition of 'minority' by the UN was formulated by F.Capotorti, the former Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1979. He defined minorities as: *A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*<sup>9</sup> The adoption of a citizenship criterion in the definition of national minorities is problematic in light of the Commentary on the 1992 UN Declaration on the Right of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, further referred to as UN Minorities Declaration, which importantly clarifies that citizenship as such should not be a distinguishing criterion that excludes some persons or groups from enjoying minority rights under the minority framework. The former OSCE High Commissioner on National Minorities, Mr. Max van der Stoel, provided useful points of reference with regard to who can be classified as a national minority::

The existence of a minority is a question of fact and not of definition. [...] First of all, a minority is a group with linguistic, ethnic or cultural characteristics, which distinguish it from the majority. Secondly, a minority is a group which usually not only seeks to maintain its identity but also tries to give stronger expression to that identity.<sup>10</sup>

In view of the absence of the definition, each state is left with a margin of appreciation to assess who is meant under minority. This decision must be made, however, in good faith and in accordance with general principles of international law. Each person has the right to decide whether he or she wants to be treated as national minorities or not. However, the person's decision must be based on objective criteria connected with his or her identity, such as religion, language, traditions and cultural heritage. While the lack of definition of the term 'national minority' remains subject to debate, what becomes clear from this debate and a more recent international monitoring practice, a sharp distinction can no longer be made between national (sometimes referred to as 'traditional' or 'old' minorities) and other minorities, referred to as 'new' or 'modern' minorities, such as migrants. It would indeed seem difficult, for example, to distinguish in practice between national minorities and migrants speaking the same language so as to deny the latter and not the former the right to make use of their language in certain contexts.<sup>11</sup> A similar approach at the EU levels has been summed by the EU Network of

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<sup>7</sup> Article 2(1)

<sup>8</sup> *Measure to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers*. 1998. Report of the working group of intergovernmental experts on the human rights of migrants submitted in accordance with Commission on Human Rights resolution 1997/15. COMMISSION ON HUMAN RIGHTS Fifty-fourth session, Intergovernmental working group of experts on the human rights of migrants.  
<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/e696166bf66373f3c12566180046b9c6?>

<sup>9</sup> Capotorti, F. (1979) *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York: United Nations, E/CN.4/Sub.2/384/Rev.1, para.568

<sup>10</sup> Keynote Address of Mr Max van der Stoel CSCE High Commissioner on National Minorities at the CSCE Human Dimension Seminar on "Case Studies on National Minority Issues: Positive Results" Warsaw, 24 May 1993, available at: <http://www.osce.org/hcnm/38038>

<sup>11</sup> See more generally on the discussion of the dichotomy of 'old' and 'new' minorities in A. Eide 'Rights of 'New' Minorities: Scope and Restrictions', R. Medda-Windischer 'Changing Paradigms in the Traditional Dichotomy of Old and New Minorities', Yu. Arai-Takahashi 'Rationalizing the Differentiation between 'New' and 'Old' Minorities? The

Independent Experts on Fundamental Rights in the following way: “minority rights” should be understood, rather than a set of rights recognized to certain groups recognized as “(national) minorities”, as a list of guarantees which are recognized to individuals as members of certain groups, or to these groups themselves, but whose beneficiaries will vary according to the identity of the right which is at stake.”<sup>12</sup>

## **2. Educational Rights of National Minorities and Migrants in International Law**

The Universal Declaration of Human Rights of 1948 broke new ground in that it was the first international instrument to declare education to be a human right. Article 26 provides that “Everyone has the right to education”. It refers to access to primary or elementary education as free to all children without any distinction whatsoever, be they children of national minorities or children of migrants. It engages States to make technical and professional education generally available and higher education accessible on the basis of merit. It also makes clear that the objective of education should be the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms. Article 26 goes on to stress that education should promote understanding, tolerance and friendship among nations, racial and religious groups. In this spirit, and with integration in mind, the intellectual and cultural development of majorities and minorities, be they ‘old’ or ‘new’, should not take place in isolation. Article 26 sets indeed the tone of openness and inclusiveness for the subsequent international instruments which have emerged over time and have confirmed and further elaborated the right to education both generally and with reference to national minorities and migrants specifically.

Thus, the provisions of Article 26 are reiterated with greater strength and in greater detail in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which stipulates that the right to education is to be enjoyed by “everyone”. This is also reflected in Article 28 of the UN Convention on the Rights of the Child (CRC) which has been almost universally ratified and which recognizes “the right of the child to education”. But at the same time, as implied by Article 13 of the ICESCR, the state has a right and duty to set standards for the content of the education which shall conform to the requirement set in Article 29 of the CRC. By ratifying the CRC, the state parties agree that the education of the child shall be directed to the development of respect for human rights and fundamental freedoms. Education shall further promote the development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own. The child shall be prepared for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin. Of interest is the requirement to education set in para.1 of Article 29, namely the states undertake to develop the child’s personality, talents and mental and physical abilities to their fullest potential. There is a need for a balance between receiving an education which places great emphasis on minority interests, and the need to be taught subjects which can be of use to them for later life. Educational policies shall promote therefore, on the one hand universal values, the practical needs of the child, and on the other hand, the respect for different cultural identities and traditions.

Under Article 4 of the UN Minorities Declaration of 1992 States should take appropriate measures in the field of education, so that to encourage to have the knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities

(Contd.) \_\_\_\_\_

Role of the Margin of Appreciation Doctrine in Determining the Scope of Protection of Minority rights’ and C. Baldwin ‘Do Vulnerable Groups within Ethnic, Religious or Linguistic Minorities Need Special Standards?’, all in K. Henrard (ed.) (2010) Double standards pertaining to minority protection, Leiden ; Boston : Martinus Nijhoff Publishers

<sup>12</sup> EU Network of Independent Experts on Fundamental Rights, Thematic Commentary no.3: The Protection of Minorities in the European Union (2005), pp.7-8

should have adequate opportunities to gain knowledge of the society as a whole, while the state has a role in ensuring that educational curriculum reflects the culture of both minorities and majorities. Educational policies must thus combine a focus on universal values, the practical needs of the child, and the respect for separate cultural traditions and identities. Migrants and their families, who have to get adapted to the school system of the host country, should nevertheless be able to maintain their characteristics. Education plays, from this point of view, a vital role in shaping their new identity while redefining the society from which the voluntary migrants migrated. Such minorities should therefore be entitled to education both about their culture of origin and that of the host society.

Specific articles in relation to the right to education for national minorities can be also found in Article 5 of the 1960 UNESCO Convention against Discrimination in Education. It states among other things that it is essential to recognize the right 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 (Article 5(1c)). The UN Minorities Declaration of 1992 stipulates, *inter alia*, that 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 4(3)).

Specific reference to educational rights of migrant children is made in Article 3(e) of the UNESCO Convention against Discrimination in Education, which explicitly requires state parties “[t]o give foreign nationals resident within their territory the same access to education as that given to their own nationals”. Furthermore, this Convention stipulates in Article 4 that the States Parties shall formulate, develop and apply a national policy which ‘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’. There are no qualifications preventing non-nationals from benefiting from this right. Remarkable is also Article 3(e) of the forenamed Convention, which explicitly requires state parties “[t]o give foreign nationals resident within their territory the same access to education as that given to their own nationals”. In its General Comment on the right to education, the Economic and Social Council confirms that “the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of legal status”.<sup>13</sup>

The UN Convention on the Protection of the Rights of All Migrant Workers and their Families is written in the same vein and makes reference to migrants and even those of them who find themselves in an irregular position. It reads in Article 30:

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

However, the Convention specifies that access to education for adult migrant workers and their family members shall only be enjoyed equally to nationals in case the migrant is documented.<sup>14</sup>

Article 6 of the ILO Convention No.97 on Migration for Employment grants immigrants, lawfully staying within the territory of a member state, treatment no less favourable than the treatment it applies to its nationals in respect to apprenticeship and training.<sup>15</sup> Given the context of the Convention,

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<sup>13</sup> UN, ESCOR, ESC Council, 21st Session, *General Comment No. 13, The right to education (Art. 13)*, UN Doc. E/C.12/1999/10 (1999), para. 34

<sup>14</sup> Articles 43(1a) and 45 (1a)

<sup>15</sup> Article 6(1a)

this provision is likely to be limited to education for the purpose of the improvement of the work done and not to extend the right to education to a general right.

A number of educational guarantees are also included in the ILO Convention No.143 on Migrant Workers. Thus, Article 8(2) envisages that a migrant worker who has resided legally in the territory of a state for the purpose of employment, shall enjoy equality of treatment with nationals in respect of guarantees of retraining, for example, even in case of loss of employment. Article 10 obliges each Member state for which the Convention is in force to pursue a national policy ‘designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory’. For this purpose the Convention requires in Article 12 that State parties shall design such educational programmes that can help guarantee the observance of the policy mentioned in Article 10.

## **European Approach to Educational Rights of National Minorities and Migrants**

### ***3. The Council of Europe framework for the protection of educational rights of national minorities and migrants***

In the field of European legal instruments, one should look in the first place at the European Convention of Human Rights (ECHR) and the European Social Charter which contain provisions referring to educational rights of national minorities and migrants, and the Framework Convention for the Protection of National Minorities, which is so far the only document exclusively dedicated to the rights of national minorities which devotes several of its articles to educational rights of national minorities, which, as the author will argue, can be meaningfully extended to migrants as well.

### **The European Convention of Human Rights.**

Although mainly concerned with civil and political rights, the ECHR also provides for a right to education.

Education is expressly dealt with in Article 2 of Protocol 1:

No one shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

This article mentions two aspects of the right to education: the actual right to receive education which is guaranteed to everybody,<sup>16</sup> and the right of parents to have their wishes respected with regard to the kind of education that their children shall receive.

Thus, the first sentence of Article 2 of the First Protocol to the ECHR stipulates unequivocally that no person shall be denied the right to education. The reading of this provision should be linked with Article 14 of the ECHR which enshrines the right to freedom of discrimination on the grounds of, inter alia, national origin or “other status”. This can result in a ban on differentiation on these grounds in the context of social security, and in the context of education in respect to both national minorities and migrants. As the European Court of Human Rights (ECtHR) has ruled in *Gaygusuz*,<sup>17</sup> a different

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<sup>16</sup> Albeit in a negative formulation, the Court held that Article 2 enshrined a right. See Williams, K., Rainey B. (2002) *Language, Education and the European Convention on Human Rights in the 21st Century*, Legal Studies, Vol.22, No.4, at p.632

<sup>17</sup> ECtHR, Decision of 16/09/1996 – No.39/1995/545/631 (*Gaygusuz vs. Austria*).

treatment of national citizens and foreigners violates the non-discrimination rule of Article 14 if it is not grounded on objective and reasonable justification. This is the case if not a legitimate aim is pursued or there is no reasonable relation between the interests of the persons affected on one hand and the aim of the measure on the other. The states enjoy a certain margin of discretion in deciding if and how far differences justify a different treatment. But they must show good cause if a difference in treatment based solely on the nationality shall be compatible with the ECHR. This approach was developed further in *Poirrez*,<sup>18</sup> where the Court held that a differentiation in the treatment with respect to social benefits between nationals of State Parties to the ECHR on one hand and nationals of other states on the other is not justifiable. This argumentation can, *mutatis mutandis*, be applied to schooling as well, as a more recent case before the Court clearly indicated. In *Anatoliy Ponomaryov and Vitaliy Ponomaryov v. Bulgaria*<sup>19</sup> the applicants were two Russian citizens who migrated to Bulgaria after their mother married a Bulgarian national. The applicants were entitled to reside in the country under their mother's permit until they reached the age of eighteen. From that age on, the applicants had to request a personal residence permit and were made to pay school fees which they could not afford. The discrimination ground was found to be the applicants' nationality and immigration status. As regards the test to be applied, the ECtHR specified that states may legitimately curtail the use of 'resource-hungry public services' by short-term and illegal immigrants, 'who, as a rule, do not contribute to their funding'. Ultimately, however, the Court applied strict scrutiny because of the importance it attached to access to secondary education "which is one of the most important public services in a modern State". The particular importance the Court accords to education finds its origin in two arguments. A first argument is that "unlike some other public services ... education is a right that enjoys direct protection under the Convention". Secondly, the Court sees education as a way to integrate minorities "in order to achieve pluralism and thus democracy" and in light of this, education "[i]s also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions". It is interesting to see how the Court does not only take the personal development of the applicants into account, but also the larger societal positive implication of education.

Hence, read in conjunction with the non-discrimination provision in Article 14, Article 2 of the First Protocol to the ECHR clearly applies on a non-discriminatory basis to both nationals, including national minorities, and non-nationals whether in a regular or irregular situation who are within the territory of a contracting party unless there is an objective and reasonable justification for the differential treatment. It may thus be argued that no children belonging to national minorities or those of non-nationals present within the jurisdiction of Council of Europe member states, which have ratified this protocol, may be denied their right to receive an education. This is particularly important for migrant children, even if their parents are unlawfully resident in the country. If a state stipulates school attendance to be compulsory for children being his nationals the state must also recognize the right of migrant children to education. As some authors rightly pointed out:

[Denying to] foreigners who, although not legally residing ... are likely to stay [in a Contracting State] for an indefinite period of time (for instance because they cannot be expelled for humanitarian reasons) the possibility to receive primary education has such far-reaching consequences, that the fact that they do not legally reside [in a Contracting State] is not a reasonable justification for this differential treatment, which therefore is contrary to Article 2 (independently or in conjunction with Article 14).<sup>20</sup>

Interestingly, although not unexpectedly, of course, Article 2 of the First Protocol, has also given rise to the question of the right to mother tongue education. Given the sensitiveness of language related

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<sup>18</sup> ECtHR, Decision of 30/09/2003 – No. 40892/98 (*Poirrez vs. France*). See also later decisions of 25/10/2005 (No. 58453/00 - *Niedzwiecki vs. Germany* and No. 59140/00 – *Okpiz vs. Germany*)

<sup>19</sup> ECtHR, Decision of 21/06/2011 *Anatoliy Ponomaryov and Vitaliy Ponomaryov v. Bulgaria*, Application no. 5335/05

<sup>20</sup> P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague: Kluwer, 1998), p. 654. 102. PICUM, *Book of Solidarity*, Vol. 1, p. 45.

issues, the answers to this question predictably have not been simple. The first case in which the ECtHR interpreted the scope of the right to mother-tongue education, under Article 2 of the First Protocol, in addition to considering the principle of non-discrimination under Article 14 of the Convention was the so-called *Belgian Linguistic* case<sup>21</sup> decided in 1968.<sup>22</sup> The case was brought before the Court by French-speaking persons who lived in a Dutch unilingual area of Belgium. They wanted their children to be educated in French in local schools, and contested the Belgian regulation regarding language in education, which was based on the division of the country into four linguistic regions and entailed that public education in the applicants' linguistic region could only be given in Dutch.

The issue of whether there was a right to education in one's mother tongue was answered in the negative by both the Commission and the ECtHR:

In particular, the first sentence of Article 2 does not specify the language in which education must be conducted in order that the right to education should be respected.<sup>23</sup>

Article 14, even when read in conjunction with Article 2 of the Protocol, does not have the effect of guaranteeing to a child or to his parent the right to obtain instruction in a language of his choice.<sup>24</sup>

The Court thus noted that Article 2 does not specify the language in which education must be conducted in order for the right to education to be respected.<sup>25</sup> In this way it 'averred that otherwise anyone would be free to claim any language of instruction in the territory of any of the State Parties'<sup>26</sup> and adopted 'a minimalist stance'.<sup>27</sup> The Court has ruled that Article 2 merely guarantees the right to use the means of instruction existing at a given time; the right to education is thus confined to the right of access to educational establishments existing at a given time and the right to obtain, in conformity with the rules in force in each State, the official recognition of studies which have been completed. Nevertheless, the Court considered that the right to education would lose its meaning if it did not imply the right to be educated in the national language or in one of the national languages.<sup>28</sup> The parents' claim that to refuse their children mother tongue state education violated their right to respect their 'philosophical convictions' was likewise rejected. The Court ruled that respect for the religious

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<sup>21</sup> Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (merits), Series A, No.6 (1968)

<sup>22</sup> Other cases in which language and education have been an issue, have failed at the admissibility stage. See, for example, *SM and GC v United Kingdom* Application No 23716/94 concerning the availability of Irish language education in Northern Ireland (the applicants failed the admissibility test and the case was not decided on its merits).

<sup>23</sup> Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (merits), Series A, No.6 (1968), at p.31

<sup>24</sup> Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (merits), Series A, No.6 (1968), at p.35

<sup>25</sup> In this case the Court specified that Article 2 did not contain precise provisions with regard to language like Articles 5(2) and 6(3)(a) and (e) of the Convention.

<sup>26</sup> Wilson, D.(2003). Report: A Critical Evaluation of the First Results of the Monitoring of the Framework Convention on the Issue of Minority Rights in, to and through Education 1998-2003 in Filling the Frame. Five years of Monitoring the Framework Convention for the Protection of National Minorities. Proceedings of the conference held in Strasbourg, 30-31 October 2003, at p.9

<sup>27</sup> Gilbert, G. (1992) *The Legal Protection Accorded to Minority Groups in Europe*, Netherlands Yearbook of International Law, Vol. XXIII, at p. 89

<sup>28</sup> The Court focuses on the need for the rights guaranteed by the Convention to be effective and interprets Article 2 broadly by reading in conditions which are not explicitly there. See Henrard, K. (2001) *The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and its Importance for the Adequate Protection of Linguistic Minorities*, The Global Review of Ethnopolitics, Vol. 1, No. 1, pp.41-61, at p.51. See also Williams, K., Rainey B. (2002) *Language, Education and the European Convention on Human Rights in the 21st Century*, Legal Studies, Vol.22, No.4, at p.633; Connelly, A. (1993) *The European Convention on Human Rights and the Protection of Linguistic Minorities*, Irish Journal of European Law, Vol.2, at p.287



and philosophical convictions of parents does not require a State to give effect to parents' linguistic preferences.<sup>29</sup> The Court found that there had been discrimination only on one ground: where the children did not have access to French-language schools in six communes on the periphery of Brussels because their parents lived in the Dutch unilingual area whereas Dutch-speaking children resident in both the Dutch and the French unilingual regions had access to Dutch-language schools in these communes.

Thus, *the Belgian Linguistic case* revealed the willingness of the Court to leave freedom to the state in determining the languages of instruction in public schools:

... the recognition that cultural diversity can pose acute constitutional problems led the Court to conclude that language arrangements are best left to the national authorities'.<sup>30</sup>

It comes as no surprise that the *Belgian Linguistic case* provoked varied reactions.<sup>31</sup> Most scholars concluded that Article 2 of the First Protocol did not 'meet the special needs of the members of a linguistic minority with respect to education',<sup>32</sup> and criticised the Court's ruling for its failure to provide for 'difference aware' equality<sup>33</sup> and prohibit the assimilation of minorities,<sup>34</sup> for 'downplaying the individual right to education',<sup>35</sup> etc. Others, however, argued that:

this interpretation is an incorrect reading of the decision, since what the European Court actually said was that, given the social and political context at the time in Belgium, the overall linguistic regime which mainly included mono-lingual Dutch (and French)-language territories for purposes of public schooling was not arbitrary, and therefore was not discriminatory.

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<sup>29</sup> See on the point Henrard, K. (2001) *The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and its Importance for the Adequate Protection of Linguistic Minorities*, *The Global Review of Ethnopolitics*, Vol. 1, No. 1, pp.41-61, at p.51. and Williams, K., Rainey B. (2002) *Language, Education and the European Convention on Human Rights in the 21st Century*, *Legal Studies*, Vol.22, No.4, at pp.640-641. The authors refer to the more recent jurisprudence of the Court regarding the interpretation of 'philosophical convictions' as 'such convictions as are worthy of respect in a democratic society ... and are not incompatible with human dignity'. (*Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 at 305). They argue that this definition allows for a more generous approach to the 'philosophical convictions'. Whereas Henrard argues that 'it would not be too far fetched to argue that 'the desire of parents, based on cultural and linguistic association with an ethnic group, to have their children educated in their mother tongue' should be accepted as such a conviction', Williams and Rainey caution that 'to hold that linguistic preferences of parents should be respected could involve substantial resource commitments' (p.639) and 'the Commission and the Court has traditionally been cautious where resources are at issue' (p.642; see also footnote 94, at page 642 where the authors refer to a number of cases seeking some particular kind of education which have either been very unsuccessful or more often inadmissible at all).

<sup>30</sup> Merrills, J. G., Robertson, A. H. (2001) *Human Rights in Europe: A Study of the European Convention on Human Rights*, Manchester: Manchester University Press, 4th edn., at p. 247 Similar explanations were given by contemporary reviewers of the case. See footnote 66 for references in Williams, K. and Rainey, B. (2002) *Language, Education and the European Convention on Human Rights in the 21st Century*, *Legal Studies*, Vol.22, No. 4, at p.637.

<sup>31</sup> Williams, K., Rainey B. (2002) *Language, Education and the European Convention on Human Rights in the 21st Century*, *Legal Studies*, Vol. 22, No.4, at p.637

<sup>32</sup> Connelly, A. (1993) *The European Convention on Human Rights and the Protection of Linguistic Minorities*, *Irish Journal of European Law*, Vol.2 at p.287

<sup>33</sup> Dunbar R. (2001) *Minority Language Rights in International Law*, *International and Comparative Law Quarterly*, Vol. 50, No. 1, pp.90-120, at p.101

<sup>34</sup> See, for example, Gilbert, G. (1992) *The Legal Protection Accorded to Minority Groups in Europe*, *Netherlands Yearbook of International Law*, Vol. XXIII, at pp.88-9; Cullen, H. (1993) *Education Rights or Minority Rights?* *International Journal of Law, Policy and the Family*, Vol. 7, No.2, pp.143-177, at pp. 157-58

<sup>35</sup> Expression borrowed from Williams, K., Rainey B. (2002) *Language, Education and the European Convention on Human Rights in the 21st Century*, *Legal Studies*, Vol.22, No.4, at p. 637

See on the point, for example, Cullen, H. (1993) *Education Rights or Minority Rights?* *International Journal of Law, Policy and the Family*, Vol. 7, No.2, pp.143-177, at p. 171

This meant that had some aspects been arbitrary, even if it involved an official language, then it would have constituted discrimination under Article 14 applied to Article 2 of the First Protocol.<sup>36</sup>

The latter argumentation seems quite plausible in light of the judgment in *Cyprus v. Turkey* of 2001.<sup>37</sup> In that case, the linguistic policies of the Northern Cypriot authorities in the area of public education were found to constitute 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’. The northern Cyprus government provided primary education in Greek language. However, children of Greek-Cypriot parents wishing to pursue a secondary education in the Greek language were obliged to transfer to schools in the south, though children could continue their education at a Turkish or English-language school in the north.<sup>38</sup>

On the one hand, the Court confirmed that Article 2 of Protocol No. 1 is devoid of a linguistic component:

In the strict sense, accordingly, there is no denial of the right to education, which is the primary obligation devolving on a Contracting Party under the first sentence of Article 2 of Protocol No. 1 .... Moreover, this provision does not specify the language in which education must be conducted in order that the right to education be respected ...<sup>39</sup>

On the other hand, it said that there is a linguistic component for secondary education because the government of Northern Cyprus provided primary education in Greek, and therefore to stop offering it after primary school “negated” the right to education.<sup>40</sup>

What this could mean from a practical point of view is that not only are the arguments of the Court applicable to the specific situation in Northern Cyprus, but may also be ‘of relevance wherever there exists a slow decline in inter-communal relations between the state and the minority, and pre-existing domestic rights are withdrawn’.<sup>41</sup>

It should also be remembered that the ECHR was drafted to set out the basis of the fundamental rights ‘below which no state should be permitted to fall, not an outline of the perfect position in relation to rights; states can, and possibly should, rise above the ECHR position and grant linguistic rights in education’<sup>42</sup> especially in the light of the other documents, in particular the FCNM, discussed below, which is directly related to the use of minority languages in education.

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<sup>36</sup> De Varennes, F. (2004) *The Right to Education and Minority Language*, available at: [http://www.eumap.org/journal/features/2004/minority\\_education/adminlang](http://www.eumap.org/journal/features/2004/minority_education/adminlang). Similarly, Gilbert says that these ‘principles are not necessarily as universally relevant’ because of a particular regional situation in Belgium. See Gilbert, G. (1992) *The Legal Protection Accorded to Minority Groups in Europe*, Netherlands Yearbook of International Law, Vol. XXIII, at p. 90

<sup>37</sup> *Cyprus v. Turkey*, Judgment of 10 May 2001 (Grand Chamber).

<sup>38</sup> *Cyprus v. Turkey*, Judgment of 10 May 2001 (Grand Chamber), at para.280

<sup>39</sup> *Cyprus v. Turkey*, Judgment of 10 May 2001 (Grand Chamber), at para.277

<sup>40</sup> De Varennes, F. (2004) *The Right to Education and Minority Language*, available at: [http://www.eumap.org/journal/features/2004/minority\\_education/adminlang](http://www.eumap.org/journal/features/2004/minority_education/adminlang)

<sup>41</sup> Gilbert, G. (2002) The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights, *Human Rights Quarterly*, Vol. 24, No.3, pp. 736-780, at pp. 761-2

<sup>42</sup> Williams, K., Rainey B. (2002) *Language, Education and the European Convention on Human Rights in the 21st Century*, *Legal Studies*, Vol.22, No.4, at p.650

## The European Convention of Human Rights and Educational Rights of the Roma Children

Discrimination in education with regard to a particular ethnic group can no longer be accepted or tolerated in Europe. A good illustration to this is a growing number of cases before the ECtHR in which discrimination in education and segregation of the Roma children in education is the issue.

In the case of *D.H. and others v. the Czech Republic*<sup>43</sup> the applicants alleged, *inter alia*, that Romani children had been discriminated against in the enjoyment of their right to education on account of their race or ethnic origin and argued that any randomly chosen Romani child is more than 27 times more likely to be placed in schools for children with learning difficulties than a similarly situated non-Romani child; tests used to assess children's mental ability were culturally biased against the Roma children, and placement procedures allowed for the influence of racial prejudice on the part of educational authorities. The case was brought by 18 Roma students who during 1996 and 1999 had been assigned to special schools for children with learning difficulties where they received inferior education based on a diluted curriculum. The Grand Chamber in a landmark decision ruled in favour of the applicants and found that the applicants had suffered discrimination when denied their right to education.

Similar concerns were expressed in *Sampanis and Others v. Greece*<sup>44</sup> by 11 applicants, Greek nationals of Roma origin who claimed that the authorities' failure to provide schooling for their children during the 2004-2005 school years and the subsequent placement of their children in special classes was directly related to their ethnic, Roma, origin. The applicants claimed that their children had been subjected, without any objective or reasonable justification, to treatment that was less favorable than that given to non-Roma children in a comparable situation and this constituted a violation of Article 14 (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education). The Court concluded that there was a strong presumption of discrimination against the applicants on account of the placement of Roma children in special classes in an annexe to the school's main building, coupled with a number of racist incidents provoked by the parents of non-Roma children which constituted a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1 in respect of each of the applicants.

The Court quite recently again had a chance to interpret the content and scope of the right to education, pursuant to Article 2 of Protocol 1 with respect to the obligations of State Parties in the provision of education to children of ethnic and/or linguistic minorities in *Oršuš v Croatia*.<sup>45</sup> This case concerned again, *inter alia*, the state-enforced segregation of Roma children within the education system on the basis of ethnic/ linguistic differences.<sup>46</sup> The applicants were 14 Croatian nationals of Roma origin who were placed in separate classes due to their inadequate knowledge of the Croatian language (the principle language of instruction). On 17 July 2008, the Court found unanimously that there had been no violation of Article 2 of Protocol No. 1 (right to education) taken alone or in conjunction with Article 14 of the Convention (ban of discrimination). The Court observed that any difference in treatment of the applicants had been based on their language skills and considered that in the sphere of education States could not be prohibited from setting up separate classes or different types of school for children with difficulties, or implementing special educational programmes to

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<sup>43</sup> *D.H. and others v. the Czech Republic*, Application no. 57325/00, Judgement of 13 November 2007

<sup>44</sup> *Sampanis and Others v. Greece*, Application No. 32526/05, Chamber Judgment of 5 June 2008

<sup>45</sup> *Oršuš and Others v. Croatia*, Application No. 15766/03, Judgment of 17 July 2008

<sup>46</sup> The importance of this case for the present discussion lies in understanding the line of reasoning adopted by the Court in order to be able to assess the relevant practices in Council of Europe's member states. It may well be recalled that segregation in education (also on language grounds) still remains a common feature in many of its members. As such this issue is also dealt with in the framework of the FCNM and the monitoring bodies seem to be following the approach taken by the Court in this case.

respond to special needs. The Court found it satisfying that the authorities had addressed that sensitive and important issue. The placement of the applicants in separate classes had therefore been a positive measure designed to assist them in acquiring knowledge necessary for them to follow the school curriculum. However, on 16 March 2010, the Grand Chamber judgment overruled this judgement and delivered the judgment, finding a violation Article 14 of ECHR read in conjunction with Article 2 of Protocol No. 1, by nine votes to eight. The majority has considered that *the schooling arrangements for Roma children were not sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group and as a result of the arrangements the applicants were placed in separate classes where an adapted curriculum was followed, though its exact content remains unclear. Owing to the lack of transparency and clear criteria as regards transfer to mixed classes, the applicants stayed in Roma-only classes for substantial periods of time, sometimes even during their entire primary schooling* (Para. 182).

Finally, in the most recent case *Horváth and Kiss v. Hungary* decided on 29 January 2013 the judgement was unanimous in favour of the complaints of two young men of Roma origin. Mr. Horváth and Mr. Kiss, two Hungarian Roma who were diagnosed to have a “mild mental disability” claimed that their education in a special school had amounted to direct and/or indirect discrimination in the enjoyment of their right to education, on the basis of their Roma origin, in that their schooling assessments had been culturally biased, they had been placed in schools designed for the mentally disabled whose curriculum had been limited, and they had been stigmatized in consequence”. In this case the Court went out of its way to stress that there was a long history of misplacement of Roma children in special schools in Hungary. It found that the applicants’ schooling arrangement indicated that the authorities had failed to take into account their special needs as members of a disadvantaged group. As a result, the applicants had been isolated and had received an education which made their integration into majority society difficult. Moreover, *Horváth and Kiss*, by far is the first case where the Court explicitly mentions positive obligations of the state to address and furthermore ‘to undo a history of racial segregation in special schools’ (para. 127). “[I]n light of the recognised bias in past placement procedures”, the Court says that “the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests.” (para. 116).

The judgments discussed above have indeed been path breaking in a number of respects. First, for the first time, the ECtHR has found a violation of Article 14 of the Convention in relation to a pattern of racial discrimination in a particular sphere of public life, in this case, public primary schools. As such, the Court has underscored that the Convention addresses not only specific acts of discrimination, but also systemic practices that deny the enjoyment of rights to racial or ethnic groups. Second, the Court clarified that racial segregation amounts to discrimination in breach of Article 14. Third, the Court repeatedly noted that *equal access to education for Roma children is a persistent problem throughout Europe*. Fourth, for the first time the Court clarified that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a racial or ethnic group. Hence, it may amount to “indirect discrimination” and is in breach of the ECHR. Fifth, the Court further clarified that a difference in treatment without objective and reasonable justification may violate Article 14 even absent discriminatory intent. Thus, where it has been shown that legislation produces an unjustified discriminatory effect, it is not necessary to prove any discriminatory intent on the part of the relevant authorities. Sixth, it becomes clear from the reasoning of the Court that even where the wording of particular statutory provisions is neutral, their application in a racially disproportionate manner without justification which places members of a particular racial or ethnic group at a significant disadvantage may amount to discrimination. Seventh, when it comes to assessing the impact of a measure or practice on an individual or group, the use of statistics may be relevant. In particular, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute prima facie evidence of indirect discrimination. Eighth, in order to guarantee the effective

protection of rights of non-discrimination, less strict evidential rules should apply in cases of alleged indirect discrimination. Where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which show that the difference in treatment is not discriminatory. Last but not least, the Court re-affirmed that the Roma have become a specific type of disadvantaged and vulnerable minority who require special protection.

## **European Social Charter**

The European Social Charter (ESC) is relevant for the present discussion of educational rights of national minorities and migrants as it supplements the ECHR in the field of economic and social rights and lays down various fundamental rights and freedoms which encompass among other things education and non-discrimination.

Article E of the Revised Charter, contains a non-discrimination clause which reads that the enjoyment of the rights set forth in the Charter ‘shall be secured without discrimination on any ground such as race, colour, sex, language, religion’ and also makes an explicit reference to prohibition of discrimination in the enjoyment of the rights under the ESC on the basis of the association with a national minority.

Article 17 paragraph 2 of the Revised ESC calls on States “to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools”. At the same time the Appendix to the Charter spelling out the scope of Article 17 states that it is limited to documented migrants (‘foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned’). It would thus mean that for the Charter (in as far as educational right is concerned) to apply to irregular migrants a dynamic interpretation of the provision would be required by the European Committee on Social Rights.

Furthermore the Revised Charter also addresses language rights of migrants in education.

On the one hand, the Charter stresses in Article 19 (para.11) the importance of learning the language of the host country as a way of facilitating migrants’ integration and that of their families<sup>47</sup> requiring the state parties ‘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’ with a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance’ in the territory of the host state. The European Committee on Social Rights has urged the Parties to facilitate teaching of the national language both to school age children and to migrant workers and members of their families who are no longer of school age. In the first case, although the receiving country’s language is taught automatically to primary and secondary school pupils throughout the school curriculum, this is not sufficient to satisfy the obligations laid down by Article 19§11. The Committee considers that states must make special effort to set up additional educational support to the children of immigrants who have not attended primary school right from the beginning and as a result have fallen behind their native-born fellow students. In the latter case, the Committee has considered that the Revised Charter requires states to encourage employers and voluntary organisations, or public bodies such as universities, to organise national language classes. It has been deemed essential by the Committee to make such services free of charge, to ensure that migrant workers are not placed at a further disadvantage in the labour market.<sup>48</sup>

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<sup>47</sup> Explanatory report to the Revised European Social Charter, para.79

<sup>48</sup> See among others, the conclusions of the European Committee on Social Rights with respect to France, Italy for example. European Social Charter revised - Conclusions 2002 - Articles 1, 2, 5, 6, 7, 12, 13, 16, 19, 20

On the other hand, under Article 19, para.12 the Charter entitles the State parties to promote and facilitate the teaching of the migrant workers' mother tongue to the children of the migrant worker. As the Explanatory report makes it clear an objective has, however, nothing to do with the cultural aspects but rather an objective of providing migrant children 'with a possibility of reintegration if and when the migrant worker returns home'.<sup>49</sup>

## **The Framework Convention for the Protection of National Minorities**

The provisions of the FCNM on minority education are of relevance to present discussion because they represent a fresh chapter in a complex history of instruments and principles in European and international law. Although dealing specifically with educational rights of national minorities, it may also be of relevance to new minorities, originating from migration. The Advisory Committee under the FCNM,<sup>50</sup> has consistently held that the FCNM contains no definition of the notion of national minorities and that the individual contracting parties enjoy a margin of appreciation in determining the groups to which the Convention shall apply. When examining some state reports, the Advisory Committee considered the possibility of enlarging the scope of the Framework Convention to new minority groups. Due to the significant proportion of non-citizens – including migrant workers – in the total population of the countries concerned, the Advisory Committee found that it would be possible to consider the inclusion of persons belonging to these groups in the application of the Framework Convention on an article-by-article basis, and noted that the authorities of the countries concerned should consider this issue in consultation with those concerned.<sup>51</sup> This means that a state party can extend the educational provisions of the FCNM to migrants as well, if need be.

Article 12.3 of the FCNM requires state parties to promote equal opportunities for education at all levels for persons belonging to national minorities. This is a confirmation, in relation to minorities, of obligations arising also from Article 13 of the ICESCR combined with the principle of non-discrimination enshrined in Article 2 of the ICESCR, and it should apply not only to 'old' but also 'new' minorities, including migrants from the time they have settled in the country concerned.

The FCNM is the only legally binding multilateral document with special reference to education in and of minority languages. Article 14 (1) refers explicitly to 'the right' of national minorities to learn their minority language as 'one of the principal means by which such individuals can assert and preserve their identity'. State Parties are expected to recognise this right in their legal and educational systems, 'even if this does not automatically entail an economic responsibility for the provision of such education in all circumstances'.<sup>52</sup>

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<sup>49</sup> Explanatory report to the Revised Charter, para.80

<sup>50</sup> It is a body of independent experts assisting in monitoring the compliance with the FCNM

<sup>51</sup> See among others, ACFC Opinion on Austria, adopted on 16 May 2001, ACFC/INF/OP/I/009, paras. 19-20, 34; ACFC Opinion on Germany, adopted on 1 March 2002, ACFC/INF/OP/I/008, paras. 17-18, 40; ACFC Opinion on Ukraine, adopted on 1 March 2002, ACFC/INF/OP/I/010, para. 18. It would be fair to say that ACFC's opinion is not shared by all the governments. It is worth reporting a passage from Germany's reply to the ACFC on this point: "... [T]he objective of the Framework Convention is to protect national minorities; it is not a general human rights instrument for all groups of the population that differ from the majority population in one or several respects (ancestry, race, language, culture, homeland, origin, nationality, creed, religious or political beliefs, sexual preferences, etc.). Members of these groups are protected by the general human rights and - insofar as they are nationals - by the guaranteed civil rights. ... The article-by-article approach would not just dilute the specific objective of the Framework Convention, i.e. the protection of national minorities; it would also entail the risk of creating first and second-class national minorities – that is, minorities that would benefit from the protection of all rights, and those who would be only granted selective rights.", GVT/COM/INF/OP/I(2002)008, no. 73.

<sup>52</sup> Commentary on Education under the Framework Convention for the Protection of National Minorities prepared by A. Spiliopoulou Åkermark, ACFC/25DOC(2006)002, at p.24.

Article 14 is sufficiently vague to be equally applicable both to old and new minorities. As it stands it does not require the state to fund or organise such learning, but only that states shall not hinder it. It is in Article 14.2 that the main difference arises. It provides that ‘in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language’. At the same time, Article 14(3) holds that the teaching of minority languages should be carried out without prejudice to the learning of the official language or teaching in this language.<sup>53</sup> This is important for both ‘old’ minorities and minorities originating from migration. It is indispensable that minorities learn the state language, otherwise lack of knowledge or insufficient knowledge of the official language could lead to their exclusion from educational opportunities at later stages and eventually to the isolation from the rest of the community.<sup>54</sup>

The obligation under Article 14 is limited to areas inhabited by minorities traditionally or in large numbers, and only if there is a sufficient demand. Even if these conditions are fulfilled, the obligations are set out in very vague terms. Therefore there are two different alternatives. The first alternative is to give persons belonging to minorities the opportunity to be taught the minority language as a subject within the broader curriculum which is taught in the state language of the country. This alternative is compatible with the overall process of integration in society. The other alternative is much more far reaching and presupposes the opportunity for minorities to be taught in their own language. As such this alternative reinforces the diversity in society.

The application of this provision can be costly and difficult because it requires substantial investment in terms of human resources, books, curricular development, etc. As it can be seen from the wording, the application of this provision is heavily dependent on the nature of minority settlement, and it can be assumed that in most cases it will not be applied to new minorities. Normally the new minorities live more dispersed, mostly in urban areas, and during their early years of residence in the host country they learn the state language, and hence there is no real need for the use of the minority language, unless in private settings. For practical reasons, however, it can be argued that the discussed provision is not exclusively available to traditional minorities, but can also be applied to other minorities if they live in substantial numbers.

Persons belonging to minorities, like others, have a right to establish private educational institutions safeguarded by Article 13 of the FCNM. This right is an important alternative, or sort of ‘defence mechanism’<sup>55</sup> which minorities, be they ‘old’ or ‘new’, can turn to if the public education system does not satisfy their needs:

[Private educational institutions] are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups ... would destroy this equality of treatment, for its effects would be to deprive the minority of the institutions appropriate to its

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<sup>53</sup> The same idea is advocated by a number of international and regional instruments, including the UN Declaration on the Rights of Persons Belonging to Linguistic Minorities, the UNESCO Convention against Discrimination in Education, Article 5; the Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Note, no.12,13; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, 2<sup>nd</sup> Conference, Copenhagen, 1990.

<sup>54</sup> Ammoun, Ch. (1957) *Study of Discrimination in Education*, United Nations, New York, at p. 90. See more on the point, De Varennes, F.(2001) *The Linguistic Rights of Minorities in Europe* in Trifunovska, S. and de Varennes, F. (eds.) *Minority Rights in Europe: European Minorities and Languages*, TMC Asser Press, at pp.21-22

<sup>55</sup> Thornberry, P. (2005) Article 13 in Weller, M. (ed.) *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford University Press, at p.395.

needs, whereas the majority would continue to have them supplied in the institutions created by the state.<sup>56</sup>

However, the realisation of the rights under Article 13 is heavily dependent on the availability of financial resources.<sup>57</sup> With regard to the latter, the Explanatory Report to the FCNM remains silent. In practice, the initiatives of the State parties to provide subsidies for private schools established by the representative of national minorities do exist, although they are not that common.<sup>58</sup>

The provisions of the FCNM are also useful in all planning and action in the area of intercultural education, which has the aim of facilitating mutual understanding, contact and interaction among different groups living within a given society, be they old or new minorities.

Article 12 addresses multicultural and intercultural education. It raises several issues that are of interest for the present discussion and can be meaningfully extended to new minorities originating from migration. One such point is that multicultural and intercultural education should be understood as including the education of both minorities and majorities. Second, 'the general population should be aware of minority presence, history, and culture; and equally ... minorities should not retreat into psychological ghettos where they take no interest in fellow citizens'.<sup>59</sup> Third, the diversity of cultures and languages should be reflected in educational curricula through a variety of possible school structures and teaching methods with full respect for human rights and without ideological manipulation or propaganda of racist and xenophobic ideas.<sup>60</sup> Finally, states should refrain from a uniform approach in addressing educational needs of minorities and instead be flexible in reacting adequately to the situation of particular communities and persons belonging to them.<sup>61</sup>

#### ***4. The European Union framework for the protection of educational rights of national minorities and migrants***

While the EU was originally founded for the purpose to promote trade and economic stability in its member states, it is not surprising that it has been active in legislating in the field of economic rights, and less engaged in legislating in the area dealing with cultural rights, generally, and minority issues, in particular. With time, however, the EU has come to pay more attention to the issue of cultural diversity, and more specifically to the issue of minority protection, developing new approaches to minority protection, which are, in de Witte and Horvath's words 'both innovative and complementary

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<sup>56</sup> Advisory Opinion on Minority Schools in Albania, (1935) Permanent Court of International Justice, series A/B, No.64,3, at pp.19-20.

<sup>57</sup> On the debate surrounding the issue of the state funding in the sphere of education see Holt, S. and Packer J. (2007) *Protecting Linguistic Minorities - the Role of the OSCE* in Koenig, M., Guchteneire, Paul F. A. (eds.) *Democracy and Human Rights in Multicultural Societies*, Ashgate / UNESCO Publishing, pp.127-166, at pp.147-9

<sup>58</sup> ACFC Second Opinion on Cyprus, para.125. Similar comments are given with regard to public subsidies in the following opinions: on Germany, paras.55-56, Estonia paras.49 (1<sup>st</sup> opinion) and 134 (2<sup>nd</sup> opinion), Austria paras.59-60 (1<sup>st</sup> opinion) and 151(2<sup>nd</sup> opinion)

<sup>59</sup> Thornberry, P. (2005) Article 12 in Weller, M. (ed.) *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities*, at p.373

<sup>60</sup> See Committee of Ministers, Recommendation Rec.(2001)15 *on History Teaching in Twenty-first-Century Europe*, CoE, 771<sup>st</sup> meeting. See also ACFC Opinion on Azerbaijan, para.61; ACFC Opinion on Albania, para.57; ACFC Second Opinion on Austria, para.137; ACFC Opinion on Bosnia and Herzegovina, para.88; ACFC Opinion on Croatia, para.47; ACFC Second Opinion on Denmark, para.145; ACFC Second Opinion on Estonia, para.111; ACFC Opinion on Montenegro, para.77; ACFC Opinion on Slovak Republic, para.38; ACFC Opinion on Ukraine, para.58

<sup>61</sup> ACFC Opinion on Kosovo, para.98



to what is done elsewhere<sup>62</sup>. The EU has made reference in different instruments to both traditional national minorities and more recently to new minorities originating from migration.

This is seen in the first place in the introduction of the Copenhagen Criteria which states that in order to join the European Union, accession countries have to satisfy the requirement of “respect for and protection of minority rights”. Any discrimination based on “membership to a national minority” or more generally, *on any ground such as race, colour, ethnic origin, language, religion or belief*, among others, is explicitly prohibited by Article 21 of the Charter of Fundamental Rights of the European Union of 14 December 2007, discussed in more detail below. After entering into force of the Lisbon Treaty the issue of minority protection has become more evident. Article 1a of the Treaty says: “*The Union is founded on the values of respect for ... human rights, including the rights of persons belonging to minorities.*” In this document the sentence “*the rights of persons belonging to minorities*” is seen for the first time. Protection of the rights of national minorities and migrants has also been given attention (albeit to a different extent) in several recent directives. To what extent this interest of the EU in the area of minority rights has been reflected in educational area will be discussed below.

### **5. The EU Charter of Fundamental Rights**

The Charter of Fundamental Rights of the EU (hereinafter ‘the Charter’) is the core instrument for the protection of fundamental rights in the EU.<sup>63</sup> It draws together in a single text a range of civil, political, economic and social rights applying to everyone, hence including persons belonging to national minorities, regular and irregular migrants, unless explicitly stated otherwise.

Article 14 of the Charter deals specifically with the right to education granted to European citizens and all persons resident in the EU. It provides in its first sentence (‘everyone has the right to education and to have access to vocational and continuing training’) for non-discriminatory access of everyone to education and vocational training. Everyone refers to national minorities and migrants, among other categories of people. The first sentence of Article 14 is phrased in positive terms, and guarantees a positive right to education. Such wording indicates Member States’ obligation to not only refrain from interfering with national minorities’ and migrants’ human right to obtain an education, but to facilitate it through positive action. This interpretation receives support from the second sentence of Article 14 which grants the possibility of free and equal access to compulsory education. Moreover, equal access to education as stipulated in the first sentence of Article 14 which, in accordance to the ECJ’s decision in *Casagrande*<sup>64</sup> entitles students, including those with a migrant background to attend school ‘under the best possible conditions’ including access to any ‘general measures intended to facilitate educational attendance.’<sup>65</sup> *Casagrande*, the son of a deceased migrant worker, was denied an allowance to attend school in Germany because of his Italian nationality. The ECJ referred to Article 12 of Regulation 1612/68, which stipulates that a worker’s child may receive education on the same conditions as nationals’ children,<sup>66</sup> including receiving financial support in the form of a grant.

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<sup>62</sup> De Witte, B. and E. Horvath (2008), ‘The many Faces of Minority Policies in the European Union’, in Henrard, K. and R. Dunbar (eds.) *Synergies in Minority Protection. European and International Law Perspectives*, Cambridge University Press, at p.365

<sup>63</sup> With the coming into force of the Treaty of Lisbon (Lisbon Treaty) in December 2009, the Charter has become directly enforceable by the EU and national courts. Art. 6(1) of the Treaty on the European Union (TEU) provides that “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights”. There is no direct incorporation of the Charter in the Lisbon Treaty but the Charter is given the same legal status.

<sup>64</sup> ECJ, Case 9/74, *Casagrande v. Landeshauptstadt München*, [1974] ECR 773 (judgment of 3 July 1974)

<sup>65</sup> ECJ, Case 9/74, *Casagrande v. Landeshauptstadt München*, [1974] ECR 773 (judgment of 3 July 1974), paras. 8-9

<sup>66</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

The third sentence of Article 14 also guarantees respect for the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions. The wording is framed on the basis of the second sentence of Article 2 of Protocol 1 to the ECHR, discussed in detail above.

Finally, the third sentence of Article 14 guarantees the freedom to found educational establishments ‘with due respect for democratic principles and ...in accordance with the national laws...’ It thus imparts the freedom on persons and entities other than the state to establish schools, while leaving it to the discretion of Member States to set minimum standards as to, for example, school curricula and methods of teaching, including discipline. Private schools may pursue religious, philosophical or pedagogical aims of their choice. However, it is imperative that both Member States and private educational institutions observe ‘democratic principles.’ This means that private schools must provide instruction in an objective, critical and pluralistic manner, on the same lines as public institutions.<sup>67</sup> For Member States, it involves a duty to regulate both public and private schools so that the fundamental rights and freedoms of all students are protected. While Article 14 grants a right to private education, it does not entail an obligation on the part of Member States to fund or subsidise private schooling. This follows from the fact that the regulation of education systems, including funding and the distribution of subsidies, falls entirely within the jurisdiction of Member States.

That said, one important reservation should be made. As the provisions of the Charter are addressed to the national authorities only when they are implementing EU law (for example, adopting or applying a national law implementing an EU directive or when the authorities apply an EU regulation directly) and since there is not much EU legislation on education, the importance of the Charter as regards the right to education remains limited. In cases where the Charter does not apply, the protection of fundamental rights, including educational rights, is guaranteed under the constitutions of EU countries and international conventions they have ratified. As such the role of the Charter in the field of educational rights is secondary to that of the ECHR and ESC.

## The EU Secondary Legislative Instruments

Several of the recently adopted EU directives have a bearing on the education of migrant children and children belonging to national minorities. While most EU legislative acts and proposals dealing with minorities, be they ‘old’ or ‘new’, adopt a largely instrumental approach, several directives discussed below pay attention to a rights-based perspective. Generally, discrimination on the grounds of race and ethnicity in education is prohibited by Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.<sup>68</sup> Article 3(1g) states that direct and indirect discrimination of all persons, as regards both the public and private sectors, including in relation to education is not permissible in the EU territory.

(Contd.) \_\_\_\_\_

Article 12 reads:

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 general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

<sup>67</sup> Eur. Ct. H.R., *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (Appl. No. 5095/71), judgment of 7 December 1976, Ser.A, No. 23, para. 53. In this case, a group of parents complained that sex education in Danish public schools violated their convictions as to how their children should be educated.

<sup>68</sup> Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000, O.J. (L180) 22.

Directive<sup>69</sup> on long-term resident status<sup>70</sup> lays down an ambitious set of rights of long-term resident third-country nationals, granting them in most areas equal treatment with EU citizens. In connection with education it states in Article 11 (1b) that long-term residents shall enjoy equal treatment with nationals as regards 'education and vocational training, including study grants in accordance with national law'. The same article does accord some leeway to Member States to restrict the application of non-discrimination by stipulating in part 3(b) the option of restricting access to their educational system by requiring proof of language proficiency.

Directive 2003/9/EC<sup>71</sup> refers to minors who have applied for asylum or who are children of *asylum seekers*, i.e. of third country nationals or stateless persons who have made applications for international protection in respect of which a final decision has not yet been taken. It provides through Article 10 for access to the education systems of the EU Members under conditions similar to those applicable to nationals of the EU Members for so long as an expulsion measure against their parents is not actually enforced.

Finally, the EU Return Directive<sup>72</sup> provides minimum common standards and procedures for member states' removing irregular third country nationals from their territory. The Directive does provide a number of safeguards for irregular persons pending removal, including among others, the right to access education. If a Member State decides, for whatever reason, to postpone a removal it shall be ensured that, inter alia, minors are granted access to the basic education system subject to the length of their stay (Article 14).

## **Concluding Remarks**

The discussion in the present paper has shown that the high aspirations of the first generation of general human rights documents have been taken into account in the specific international and regional legal instruments that have been developed over the years for migrants and for national minorities in the area of education.

As appears from the instruments examined the right to education for both national minorities and migrants' children is guaranteed full-heartedly under international and European law. Not only is the right to access to primary and secondary education safeguarded for migrants' children by many instruments, even their right to intercultural education and mother-tongue education is the object of certain instruments. As far as national minorities are concerned, the available instruments contain many similar notions, including non-discriminatory access to all kinds of education, the right to set up their own schools, the right to mother tongue education at various levels etc.

International law does not in general terms make distinctions between old and new minorities. And it becomes clear that the dividing line between the framework of educational rights applicable to national minorities and migrants is rather vague. Under international and European law, certain minority educational rights have been made applicable to recently arrived migrants who share an ethnic, religious or linguistic identity (the right to establish private schools, for example). Their treatment is to be rooted in the customary international law principle of non-discrimination, which is reflected in all human rights instruments and documents. This is not surprising because migrant

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<sup>69</sup> Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, 2004 O.J. (L 16) 44.

<sup>70</sup> Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, 2004 O.J. (L 16) 44.

<sup>71</sup> Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, 2003 O.J. (L 31) 18.

<sup>72</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

workers especially who leave their own country in order to earn a living in another country, be it for a short time or for the rest of their lives, as such might become a national minority. Thus, the problems they are confronted with often overlap with the problems national minorities are facing in the field of education (for example, discrimination or segregation in education). National minority instruments may be particularly useful for children from immigrant families especially when there are no alternative measures targeted at immigrant communities.

Although appreciable, this obvious convergence of the national minorities and migrants regimes should be applied with care. In order to develop adequate standard of legal protection in the field of educational rights ‘migrants’ and ‘persons belonging to national minorities’ should not be taken together in a way that does not reflect the differences of the problems they might be confronted with, whereas I also feel that their overlapping interests and problems are not clearly identified either. At times the challenges national minorities and migrants face might be different enough (language issues, for example) to the extent that they require different legal regimes. Hence, the legal regimes offered should be tailor made with a sharp focus on the problems that ask for the solution.

Moreover, some old or traditional minorities are in some contexts justifiably entitled to more enhanced or stronger minority rights than most (for example, education in mother tongue) ‘new’ minorities can claim, especially in cases where positive measures are required which constitute significant burdens on the state. But this depends on the particular context and is not a ground for making a general distinction between two main categories of minorities. While the distinctions between old and new minorities have some practical applicability, this applicability is not absolute – there may be conditions where the requirements under those provisions are fulfilled also for new minorities.

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