



*Between Identity Transmission and Equal Opportunities.
The Two Dimensions of Minorities' Right to Education*

Julie Ringelheim

CRIDHO Working Paper 2013/4



La Cellule de recherche interdisciplinaire en droits de l'homme (CRIDHO) a été constituée au sein du Centre de philosophie du droit, Institut extra-facultaire de l'Université catholique de Louvain, par des chercheurs soucieux de réfléchir le développement contemporain des droits fondamentaux à l'aide d'outils d'autres disciplines, notamment l'économie et la philosophie politique. La CRIDHO travaille sur les rapports entre les mécanismes de marché et les droits fondamentaux, aussi bien au niveau des rapports interindividuels qu'au niveau des rapports noués entre Etats dans le cadre européen ou international.

CRIDHO Working Papers

Tous droits réservés.

Aucune partie de ce document ne peut être
publiée, sous quelque forme que ce soit,
sans le consentement de l'auteur.

The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), an extra-department Institute of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

CRIDHO Working Papers

All rights reserved

No part of this paper may be reproduced
in any form
without consent of the author

This paper appeared in a slightly amended form in K. Henrard (ed.), *The Interrelation between the Rights to Identity of Minorities and their Socio-Economic Participation* (Leiden, Boston, Martinus Nijhoff, 2013), pp. 91-114.

Between Identity Transmission and Equal Opportunities. The Two Dimensions of Minorities' Right to Education

Julie Ringelheim*

Abstract

Implementing the right of minorities to education raises a fundamental problem for international human rights law: how to ensure equal opportunities for minorities in education while attending to their special needs, whether cultural or socio-economic needs? While the objective of equal opportunities seems to be best served by promoting identical and integrated education for all children, this entails a risk of eroding minorities' specificities and furthering assimilation. Conversely, whereas separate schooling in the minority language or religion may appear as the best way to protect minorities' distinct identity, it jeopardizes their integration in the broader society. But integrated education may also reveal ambivalent from the viewpoint of equal opportunities: Where a minority is especially disadvantaged, children may experience difficulties in competing with other children in a common education system. This may compromise the actual benefit they draw from education and eventually their integration in society. This paper explores how international human rights law deals with this double difficulty. Examining in particular the work of the Advisory Committee on the Council of Europe's Framework Convention on the Protection of National Minorities and the case law of the European Court of Human Rights, it argues that while international human rights law favours integrated over separate education, at the same time it calls for a transformation of the content and modalities of the instruction provided in common educational establishments: first, the development of multicultural and intercultural forms of education is seen as a means to allow the minority to be taught, and obtain recognition of, its own culture within common schools; second, special measures may be required to compensate the social disadvantage experienced by certain minorities and achieve effective equality.

* Senior Researcher, Belgian National Fund for Scientific Research (F.R.S-FNRS), Lecturer in Human Rights Law at Louvain University (Belgium). This paper was drafted while the author was a visiting fellow at the Paris Institute for Advanced Studies (IEA-Paris) and the *Centre d'études européennes* of Sciences-Po Paris.

Introduction

Education has always held a special place in minority protection. On the one hand, being able to transmit their culture, language or religion to their children through instruction is essential for the survival of minorities as a distinct community. On the other hand, accessing an education of equal value as that received by the majority is crucial in enabling minority members, once grown-up, to enjoy equal social and professional opportunities. Accordingly, education can both be a means of identity preservation and of social inclusion; a vehicle for maintaining their distinctiveness and an instrument of integration into the mainstream society. As argued by Holly Cullen, minorities' right to education precisely includes these two dimensions: equality of opportunity, on the one side, pluralism or identity transmission on the other.¹ These two concerns, however, are not without tension: while the objective of socio-economic inclusion seems to be best served by promoting identical and integrated instruction for all children, this model entails a risk of eroding minorities' specificities and furthering assimilation. Conversely, whereas separate schooling in the minority language or religion may appear as the best way to protect minorities' distinct identity, it may isolate them and jeopardize their integration within the broader society.² This dilemma epitomises a query that is at the core of the minority protection project: how to guarantee minorities' right to equality while enabling them to maintain their own identity? How to protect their distinct language, religion or culture while promoting their participation in the social, economic, political and cultural life of the general society?³

But there is more. Even from the sole viewpoint of equal opportunities, integrated education may, in practice, reveal ambivalent. Where a minority is especially disadvantaged, children may experience difficulties in competing with other children in a common education system. This may result in higher drop out and failure rates, thus compromising the actual benefit they draw from education as well as their actual integration in society. Hence, an additional quandary arises: how to ensure that integrated education actually promotes equal opportunities for minority children, rather than reinforces previous disadvantage?

In essence, both matters point to a common problem, namely how to promote equal education while attending to minorities' special needs, whether cultural or socio-economic

¹ H. Cullen, 'Education Rights or Minority Rights?', 7(2) *Int. J. Law Policy Family* (1993) pp. 143-177. See also D. Beiter, *The Protection of the Right to Education by International Law* (Leiden: Martinus Nijhoff, 2005).

² See T. Hadden, 'Integration and Separation: Legal and Political Choices in Implementing Minority Rights', in N. Ghanea and A. Xanthaki (eds), *Minorities, Peoples and Self-Determination. Essays in Honour of Patrick Thornberry* (Leiden, Boston: Martinus Nijhoff, 2004), 173-191 and P. Thornberry, 'Article 13', in M. Weller (ed.), *The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press, 2005), pp. 395-406, at 404-405.

³ Comp. with Kristin Henrard who emphasises that minority protection rests on 'two pillars', namely the prohibition of discrimination and measures designed to protect and promote the separate identity of the minority groups. See K. Henrard, *Devising an Adequate System of Minority Protection – Individual Human Rights, Minority Rights and the Right to Self-Determination* (The Hague: Martinus Nijhoff, 2000), p. 8.

needs. This paper seeks to explore how international human rights law deals with this issue. It looks at the dialectic between separate and integrated education from the perspective of both aspects of minorities' right to education: identity transmission and equal opportunities. The inquiry takes into account relevant United Nations and European human rights instruments. Particular attention is devoted to the work of the Advisory Committee on the Council of Europe's Framework Convention on the Protection of National Minorities (FCNM) and the case law of the European Court of Human Rights (ECtHR). The right to education of minorities has indeed been the subject of significant developments in both institutions. In the case of the Advisory Committee, the importance attached to this question is reflected in the text of the FCNM itself, which contains no less than three provisions relating to educational right, namely articles 12 to 14. As for the European Court, in the years 2000, it had to examine a series of cases where certain educational policies, which allegedly had exclusionary effects on the Roma minority, were challenged based on Article 14 of the European Convention on Human Rights (ECHR), which prohibits discrimination, read in conjunction with Article 2 of the first Protocol to the Convention, which lays down the right to instruction. It will be argued that a common lesson emerges from the practice of these two bodies: while international human rights law does not impose a unique educational model, it does favour integrated over separate education. Yet, at the same time it points towards a transformation of the content and modalities of the education provided in common institutions, and this, in order to respond to three types of concerns: in addition to fostering mutual knowledge and understanding between the various communities, the objective is to give effect to both minorities' right to identity transmission and to equal opportunities.

1. Minorities' Right to Education and Identity Transmission

Various international human rights instruments suggest, at least implicitly, that minorities' right to education includes an entitlement to transmit one's culture to one's children. Provisions on minority education already figured prominently in minority treaties concluded after the First World War in the framework of the League of Nations.⁴ In the contemporary era, the United Nations Convention on the Rights of the Child (CRC) mentions among the objectives of education the development of respect for the child's own cultural identity, language and values,⁵ besides instrumental aims such as the 'development of the child's personality, talents and mental and physical abilities to their fullest potential'.⁶ Article 14(1)

⁴ See D. Beiter, *op. cit.*, pp. 431-439 and P. Thornberry, *International Law and the Rights of Minorities*, Oxford University Press, 1993, ch. 3.

⁵ Article 29(1)(c) CRC.

⁶ Article 29(1)(a). The other objectives mentioned in this provision are the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; the development of respect for the child's parents, 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 preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance,

FCNM lays down the right of persons belonging to national minorities to learn his or her minority language while Article 14(2) requires states, in areas inhabited traditionally or in substantial number by minorities and if there is sufficient demand, to provide members of minorities with adequate opportunities for being taught or receiving instruction in the minority language. Comparable obligations are established in Article 8 of the European Charter for Regional and Minority Languages. Likewise, the 1992 United Nations Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities calls upon states to endeavour to ensure that persons belonging to minorities have the opportunity to learn their mother tongue or to have instruction in it.⁷ Moreover, both the FCNM (Article 12(1)) and the UN Declaration (Article 4(4)) obliges states to take appropriate measures in the field of education to foster knowledge not only of the language but also of the culture, history and religion of minorities existing in their territory. These provisions concern the instruction provided to *all* children; part of their aim is thus to promote awareness and understanding of minority cultures among the *general* population. But they also entail that initiatives must be taken to allow minorities themselves to learn about their cultural heritage through education.⁸

Yet none of these instruments specify how this right to identity transmission is to be implemented, and, in particular, whether this implies the creation of special schools directed at minorities. To be sure, Article 13(1) FCNM guarantees minorities the right to set up and manage their own private educational establishments,⁹ but this is no more than a restatement of the general liberty to establish private educational institutions, recognised to any individual by the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰ Article 13(1), moreover, specifies that this right does not entail any financial obligation for states, although it does not exclude the possibility of such contribution. It thus fell on international monitoring bodies to clarify the practical implications of minorities' right to transmit their language or culture through education. The work of the Advisory

equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; and the development of respect for the natural environment.

⁷ Article 4(3), Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly Resolution 47/135 of 18 December 1992. In the same vein, the Recommendations on the education rights of national minorities, elaborated by the High Commissioner on National Minorities of the Organisation for Security and Cooperation in Europe (OSCE), lay down 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.' (OSCE High Commissioner on National Minorities, *The Hague Recommendations Regarding the Education Rights of National Minorities*, October 1996, para. 1)).

⁸ P. Thornberry, 'Article 12', in M. Weller (ed.), *The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press, 2005), pp. 365-393, esp. at 373-374.

⁹ This right is also provided for in Article 5(c) of the 1960 UNESCO Convention against Discrimination in Education.

¹⁰ Article 13(4). This right is subject to the requirement that the education given in such institutions conforms to the conditions set forth in the Covenant and to minimum standards as may be laid down by the State. See also P. Thornberry, 'Article 13', *op. cit.*, pp. 397-400.

Committee on the FCNM, the sole international institution to date tasked with supervising respect for a multilateral convention on the rights of ethnic, linguistic and religious minorities, is of special relevance here. Through the examination of state's reports on the measures taken to give effect to the FCNM, the Committee is confronted very concretely with the problem, identified above, of reconciling the right to cultural transmission with the right to equal opportunities in education. In addition, the Committee must also take into account Article 12(2), which requires states to 'facilitate contacts among students and teachers of different communities'. The special interest of the Committee's work is that it suggests a way out of the apparent dilemma between separate education in the minority culture (which raises a risk of isolation) and integrated education reflecting the culture of the majority (which may become a means of assimilation). It demonstrates that available options are not limited to these two alternatives. The Committee indeed strongly supports a third approach: the promotion of *multicultural* and *intercultural* forms of education for both minority and majority children (1.1). That said, it does not object in principle to the existence of separate minority schools, where attendance of these establishments is left to the choice of the parents or the children. In some circumstances, however, it has expressed concern that such arrangements conflicted with certain provisions of the FCNM (1.2).

1.1. *The Promotion of Intercultural Education*

The obligation set in Article 12(2) FCNM to 'facilitate contacts among students and teachers of different communities' tends to entail a preference for arrangements where minority children are educated in the same institutions as the majority: as a matter of fact, pupils from different communities are most likely to interact and intermingle if they attend the same schools. Yet, such framework must be made compatible with minorities' right to transmit their language and cultural heritage through education. In addition, Article 12(1), as noted, requires states to foster knowledge of minorities' culture, history, language and religion among the whole population, echoing Article 6's obligation to encourage intercultural dialogue, mutual respect and understanding among all persons living in the country, in particular through measures in the field of education.¹¹ The combination of these various obligations has led the Advisory Committee to decidedly promote, from the start, one specific model of education, namely intercultural and multicultural educational schemes.

¹¹ The importance of Article 6 for the interpretation of the education provisions of the FCNM has been underlined by the Advisory Committee itself. See Advisory Committee on the FCNM, Commentary on Education under the Framework Convention for the Protection of National Minorities, 2 March 2006, ACFC/25DOC(2006)002, p. 9. See also K. Henrard, 'Tracing Visions on Integration and/of Minorities: An Analysis of the Supervisory Practice of the FCNM', 13 *International Community Law Review* (2011) pp. 333-360, at 357 and A. Korkeakivi, 'In Defense of Speaking Out: The European Human Rights Regime and the Protection of Minority Languages', 3 *Intercultural Human Rights Law Review* (2008) pp. 137-149, at 147.

As highlighted in the Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, multicultural education refers to educational policies and practices aimed at meeting the distinct educational needs of groups belonging to different cultural traditions, whereas intercultural education is concerned with ensuring that persons belonging to different cultural communities learn to interact constructively with each other.¹² Both concerns are present in the Advisory Committee opinions. Significantly, the latter increasingly include a section dedicated to the ‘multicultural content of education’ or the ‘intercultural dimension of education’.¹³ The Committee consistently recommends states to disseminate knowledge of minorities’ culture through educational policies, to ensure that school curricula and textbooks pay adequate attention to the identities and perspectives of minority communities as well as to increase attention to minority culture in teacher training.¹⁴ Significantly, as clarified in its Commentary on Education, the Committee’s core preoccupation is to ensure that the education system is organised in a way ‘which allows for interaction between persons from various groups in order to encourage mutual understanding and tolerance, while at the same time ensuring the successful maintenance and development of the elements of the identities of members belonging to various groups.’ Hence, the structures and content of education must ensure a balance between these two aims ‘in order to achieve ‘integration in diversity’’.¹⁵

The influence of the multicultural education model is especially discernible in the interpretation developed by the Advisory Committee of the requirements of Article 14 FCNM, which establishes the right to be provided with adequate opportunities for being taught or receiving instruction in the minority language, at least in areas inhabited traditionally or by a substantial number of minority members and where there is sufficient demand. While acknowledging that this provision can be implemented through various

¹² A. Eide, Commentary to the U N Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, E/CN.4/sub.2/AC.5/2001/2 (2001), para. 66. See also P. Thornberry, “Education”, in M. Weller (ed.), *Universal Minority Rights – A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, Oxford University Press, 2007, pp. 325-362.

¹³ See, e.g., Third Opinion on Cyprus, 19 March 2010, ACFC/OP/III(2010)002; Second Opinion on Kosovo; Second Opinion on Austria, 8 June 2007, ACFC/OP/II(2007)005; Second Opinion on Poland, 20 March 2009, ACFC/OP/II(2009)002.

¹⁴ See, e.g., Third Opinion on Finland, 14 October 2010, ACFC/OP/III(2010)007, para. 126; Third Opinion on Estonia, 1 April 2011, ACFC/OP/III(2011)004, para. 132 and 135; Second Opinion on Austria, 8 June 2007, ACFC/OP/II(2007)005, para. 140; Second Opinion on Poland, 20 March 2009, ACFC/OP/II(2009)002, para. 158; Second Opinion on Kosovo, 5 November 2009, ACFC/OP/II(2009)004, para. 202.

¹⁵ Commentary on Education, *op. cit.*, p. 16. Similarly, Article 4(4) of the UN Declaration is also said to call for ‘intercultural education, by encouraging knowledge in the society as a whole of the history, tradition and culture of the minorities living there.’ Its overall purpose is ‘to ensure egalitarian integration based on non-discrimination and respect for each of the cultural, linguistic or religious groups which together form the national society.’ (A. Eide, *Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, *op. cit.*, para. 67 and 69).

modalities,¹⁶ one measure especially favoured by the Advisory Committee is the incorporation of the teaching *of or in* the minority language in the public education system. The Committee frequently urges states to create or increase effective possibilities for pupils belonging to minority communities to learn the minority language in state schools.¹⁷ It considers that a low numerical threshold is sufficient for the creation of minority language classes.¹⁸ In its opinions on the United Kingdom, it invites the authorities to encourage schools to also expand the provision of languages spoken by ethnic (immigrant) communities.¹⁹ More generally, it puts particular emphasis on the development of the teaching of and in the Romani language, seen as a means to improving integration of Roma pupils on an equal footing in the education system.²⁰ Conversely, the Committee also attaches importance to the learning of the majority language by the minority.²¹ This reflects Article 14(3)'s requirement that the teaching of the minority language does not prejudice the learning of the official language. For instance, in its second opinion on Kosovo, it insists on the need to provide the Serbian community with the opportunity to learn Albanian, as well as for Albanian pupils to learn Serbian.²² This concern is consistent with the intercultural approach to education, which presupposes that each community learns about the language and culture of other groups. But as a matter of evidence, allowing the minority to acquire proficiency in the majority language also responds to another objective: it is often essential for its socio-economic integration. In the case of Azerbaijan, in particular, the Committee deplores the absence of a policy aimed at enabling minority adults who do not have a full command of the state language to learn it, noting that as a result 'many persons belonging to national minorities have, reportedly, faced difficulties upon access to the labour market, in particular public service jobs, where strict language requirements have been introduced'.²³

¹⁶ For a summary of the most common methods and structures of integration of minority languages in primary schools reported by state parties, see *Commentary on Education, op. cit.*, p. 16. See also the measures recommended in this relation by the OSCE High Commissioner on National Minorities in its The Hague Recommendations.

¹⁷ See e.g. Third Opinion on Armenia, 14 October 2010, ACFC/OP/III(2010)006, para. 106; Third Opinion on the Slovak Republic, 28 May 2010, ACFC/OP/III(2010)004, para. 169; Third Opinion on Estonia, 1 April 2011, ACFC/OP/III(2011)004, para. 148 and 159.

¹⁸ F. De Varennes and P. Thornberry, 'Article 14', in M. Weller (ed.), *The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: Oxford University Press, 2005), pp. 407-428, at 421.

¹⁹ Third Opinion on the United Kingdom, 30 June 2011, ACFC/OP/III(2011)006, para. 186; Second Opinion on the United Kingdom, 6 June 2007, ACFC/OP/II(2007)003, para. 220; First Opinion on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006, para. 91.

²⁰ See, in particular, Third Opinion on Slovenia, 31 March 2011, ACFC/OP/III(2011)003, para. 118 ; Third Opinion on Finland, 14 October 2010, ACFC/OP/III(2010)007, para. 140 ; Third Opinion on Croatia, 27 May 2010, ACFC/OP/III(2010)005, para. 166 and 169 ; Third Opinion on the Slovak Republic, 28 May 2010, ACFC/OP/III(2010)004, para. 161 and 171 ; Second Opinion on Kosovo, 5 November 2009, ACFC/OP/II(2009)004, para. 209. See also *Commentary on Education, op. cit.*, p. 25.

²¹ *Commentary on Education, op. cit.*, p. 15. Note that Article 14(3) FCNM lays down that the obligation to ensure that minorities have adequate opportunities for being taught the minority language or receiving instruction in this language, shall be implemented without prejudice to the learning of the official language or the teaching in this language.

²² Second Opinion on Kosovo, 5 November 2009, ACFC/OP/II(2009)004, para. 195 and 225.

²³ Second Opinion on Azerbaijan, 9 November 2007, ACFC/OP/II(2007)007, para. 148.

This approach has led the Committee to strongly support the development of bilingual education, that is schools where both minority and majority languages are at a similar level of importance, spread across curricula and teaching, and where classes are to the extent possible composed of pupils and teachers from different groups.²⁴ Its Commentary on Education observes that a ‘spirit of bilingualism and plurilingualism’ permeates the whole Framework Convention.²⁵ For, Fernand De Varennes and Patrick Thornberry, the Committee manifests a preference for bilingual approaches to education, although it has not articulated a clear normative perspective on this.²⁶ Such solution indeed allows to meet at the same time the demands of Articles 12(1), 12(2) and 14: it helps promoting interactions and dialogue between the different communities, while enabling the minority to preserve its own language and permitting the majority to learn about minorities’ culture.²⁷ Thus, in its opinion on Croatia, the Committee invites the authorities to ‘consider encouraging bilingual and dual medium education models, *which would attract children from majority and minority backgrounds.*’²⁸ In the same vein, it strongly recommends the Estonian authorities to envisage the creation of bi-lingual classes and schools for Estonian as well as for Russian-speaking pupils.²⁹ In a context where the school environment is still divided between Estonian and Russian language schools, bilingual classes are viewed as a way to ‘bring together pupils from different language backgrounds and enable them to learn both languages while promoting inter-ethnic contacts and networks and thereby contributing to the aim of the Estonian Government to create a more cohesive society.’³⁰ The Committee, however, has not elaborated on the factual conditions that need to be met to make bilingual education possible, if not mandatory. Its Commentary on education contents itself with highlighting that a number of factors can influence the determination of what constitutes the most appropriate solution in a given country, such as the degree of concentration of minorities in certain areas, the cultural and political context, the level of language proficiency of children in the minority language, the availability of textbooks, and financial resources.³¹

²⁴ *Commentary on Education, op. cit.*, p. 16. The explanatory report of the FCNM indicates that bilingual education ‘may be one of the means of achieving the objective’ of Article 14(2) (Explanatory Report, para. 77).

²⁵ *Commentary on Education, op. cit.*, p. 16.

²⁶ F. De Varennes and P. Thornberry, *op. cit.*, at 423 and 427.

²⁷ *Commentary on Education, op. cit.*, p. 25.

²⁸ Third Opinion on Croatia, 27 May 2010, ACFC/OP/III(2010)005, para. 169 (our emphasis).

²⁹ Third Opinion on Estonia, 1 April 2011, ACFC/OP/III(2011)004, para. 140.

³⁰ *Id.*, para. 138. For other examples of recommendation of bilingual education, see, in particular, Third Opinion on Finland, 14 October 2010, ACFC/OP/III(2010)007, para. 136 and Third Opinion on Hungary, 18 March 2010, ACFC/OP/III(2010)001, para. 118.

³¹ *Commentary on Education, op. cit.*, p. 18.

1.2. *The Question of Separate Minority Schools*

Despite the preference it expresses in a number of opinions for the inclusion of the teaching of minority culture and language in mainstream schools, the Committee does not necessarily oppose the institution of separate minority schools, whether public or private, provided attendance of such establishments is voluntary.³² In view of specific circumstances, it sometimes admits that this can be the most adequate option to enable minority pupils to learn their language. In the case of Cyprus, it ‘welcomes the fact that the authorities have continued to subsidise access to private schools by Armenian, Latin and Maronite children as an alternative for those among them who find the educational provision of the public system inadequate to their needs.’³³ In its opinions on Germany, noting that ‘private Danish language schools are the only option open to children belonging to the Danish minority wishing to receive education in their own language’, it encourages the authorities to fund transport costs to these schools to the same extent as they do for pupils attending public schools.³⁴ But even where this solution is preferred, the state is still under an obligation to encourage intercultural dialogue and contact, within and outside educational environments, as prescribed in the FCNM.³⁵ Yet, the Committee remains vague on the ways in which this requirement is to be implemented in such a context. Commenting on the programmes developed by one private catholic school established in Nicosia, in Cyprus, the Committee stresses with approval that it ‘offers a curriculum with a multi-ethnic and multicultural approach and, in addition to Latins, takes Greek Orthodox Cypriots, Maronites, Armenians and young people from other religious and ethnic communities. The teaching staff includes teachers from the various communities.’³⁶ But it is unclear whether this implies that as a general matter states should take action to ensure that this sort of conditions is respected by private minority schools.

While the Committee does not, as a rule, object to the existence of distinct minority schools, in some circumstances it has expressed deep concern that such arrangements conflicted with Article 12(1)’s requirement to facilitate contacts among students and teachers of different communities. In its two opinions on Kosovo, in particular, the Committee deplores the continuous operation of ‘parallel schools’, financed by the Serbian Ministry of Education and following the Serbian curriculum, which ‘means the *de facto* existence of a separate school system.’³⁷ It highlights that the ‘possibility for Serb and Albanian pupils to interact in the context of the school system is often non-existent and their mere co-existence in the

³² The right of minorities to set up and manage their own private educational establishment is, as noted above, protected under Article 13 FCNM. On this provision, see P. Thornberry, ‘Article 13’, *op. cit.*

³³ Third Opinion on Cyprus, 19 March 2010, ACFC/OP/III(2010)002, para. 147. Article 13(2) lays down that the right of minorities to set up their own private educational establishments shall not entail any financial obligation for the Parties.

³⁴ Third Opinion on Germany, 27 May 2010, ACFC/OP/III(2010)003, para. 151-154.

³⁵ *Commentary on Education, op. cit.*, p. 18.

³⁶ Third Opinion on Cyprus, 19 March 2010, ACFC/OP/III(2010)002, para. 147.

³⁷ First Opinion on Kosovo, 25 November 2005, ACFC/OP/I(2005)004, para. 85.

same school is also difficult to achieve.³⁸ Accordingly, it urges the authorities to increase their efforts to promote interaction between pupils from different communities, in particular the Serbian and Albanian ones.³⁹ Similarly, commenting on the situation in Bosnia and Herzegovina, the Committee declares itself deeply concerned about the development of mono-ethnic schools, 'which institutes *de facto* segregation of pupils by ethnic origin from the very beginning of their schooling.'⁴⁰ It calls upon the authorities 'to take far more determined measures to end segregation of pupils according to their national or ethnic origin, to promote multi-ethnic education and to impose more widespread application of the common core curricula.'⁴¹ Yet, the Committee's observations in this regard remain context-specific. As stressed by Kristin Henrard, it stops short of providing a general reflection on the impact of separate minority education on the integration of minorities within society and on the conditions to be met for such system to be compatible with the Framework Convention.⁴²

To sum up, while different schooling arrangements may be compatible with the Framework Convention, the solution most favoured by the Advisory Committee is the inclusion of minorities in mainstream education establishments attended by majority children. Yet, such model is promoted under the condition that the instruction provided in common institutions is widened and transformed to also reflect the perspectives and identities of minorities. The promotion of multicultural and intercultural education precisely allows to meet minorities' right to transmit their culture and identity in such a framework. In addition, by promoting interactions between pupils from different ethnic, religious or linguistic backgrounds and fostering knowledge of minority cultures among *majority* children, it also contributes to a better integration of minorities in society. But its effects are not limited to minorities: it is the content and nature of the education delivered to all children that is eventually widened and diversified.

2. Minorities' Right to Education and Equal Opportunities

The norm of non-discrimination, as established in various international human rights instruments, entails that minorities must have the opportunity to access, and benefit from,

³⁸ Id., para. 86.

³⁹ Id., para. 86 and Second Opinion on Kosovo, 5 November 2009, ACFC/OP/II(2009)004, para. 195.

⁴⁰ Second Opinion on Bosnia and Herzegovina, 9 October 2008, ACFC/OP/II(2008)005, para. 170.

⁴¹ Id., para. 173. Comp. with the Commentary to the UN Declaration, which states that the 'formation of more or less involuntary ghettos where the different groups live in their own world without knowledge of, or tolerance for, persons belonging to the other parts of the national society would be a violation of the purpose and spirit of the Declaration.' (A. Eide, *Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, *op. cit.*, para. 69).

⁴² K. Henrard, 'Tracing visions on Integration and/of Minorities', *op. cit.*, at 358.

the state education system on an equal footing with the rest of the population.⁴³ Blatant exclusion of certain pupils from schools based on their ethnic origin, religion or language, would undoubtedly constitute discrimination. But beyond such non-contentious statements, the actualization of equal opportunities in education, and its relation to the issue of separate v. integrated schooling, may raise thorny questions. First of all, educational policies include a myriad of selection and distinction practices, allegedly based on criteria such as pupils' achievements, results to ability test, language proficiency or psychological assessments, which may result in certain children being assigned to different schools or different classes and not receiving the same instruction as others. When such measures appear to especially impact on one specific minority, can they be considered as amounting to discrimination? And if so, under what circumstances? (2.1) Secondly, where an ethnic community is especially disadvantaged or speak a language different from the language of education, children may encounter difficulties in following the same curriculum as other pupils. This may translate in significantly higher drop out or failure rates. Hence, the question may be raised whether integrated schooling, without more, is sufficient to promote effective equal opportunities for minorities in such situation. (2.2).

2.1. Separation as Discrimination

The question of what constitutes discrimination in education has been at the centre of a series of cases brought before the European Court of Human Rights in the years 2007-2010, namely *D.H. and others v. the Czech Republic* (13 November 2007), *Sampanis and others v. Greece* (2 June 2008) and *Orsus and others v. Croatia* (16 March 2010). They all concerned the situation in the education system of the Roma community – a group largely considered as the most deprived minority in Europe.⁴⁴ The practices complained of by the applicants were different. But they all represented policies which, on their face, were not based on race or ethnic origin, and yet in fact disproportionately or exclusively affected Roma children, resulting in their isolation from other pupils in the educational sphere. The problem for the Court was thus to determine to what extent and on what basis such measures could be deemed discriminatory.

⁴³ The prohibition of discrimination in education is laid down, in particular, in the 1960 UNESCO Convention on Discrimination in Education; Art. 2, combined with Art. 13, ICESCR; Art. 2, combined with Art. 28 and 29, CRC; Art. 14 ECHR combined with Art. 2 of its first Protocol; Articles 4 and 12(3) FCNM. See also the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L 180, 19/07/2000, p. 22 (hereinafter the EU Race Equality Directive), which prohibits race and ethnic discrimination *inter alia* in the field of education.

⁴⁴ See *inter alia* T. Ahmed, *The Impact of EU Law on Minority Rights* (Hart: Oxford, 2011), pp. 173-193; D. Ringold, M.A. Orenstein and E. Wilkens, *Roma in an Expanding Europe. Breaking the Poverty Cycle* (World Bank, Washington DC, 2005), European Commission, *The Situation of the Roma in an Enlarged European Union* (European Communities: Brussels, 2004); OSCE High Commissioner on National Minorities, *Report on the Situation of Roma and Sinti in the OSCE Area* (2000).

In *D.H. and others*,⁴⁵ at stake was the impact on Roma of the Czech Republic's practice of placing children considered as presenting 'mental deficiencies' in 'special schools', where instruction was significantly inferior to that delivered in ordinary schools. The applicants were 18 Roma pupils who claimed that their assignment to such schools amounted to ethnic discrimination. The Government, however, submitted that it was as a result of their low intellectual capacity, measured through psychological tests, that they had been assigned to these institutions.⁴⁶ Yet the applicants highlighted that, as attested by various international reports, including opinions of the Advisory Committee on the FCNM,⁴⁷ the number of Roma children placed in these schools was disproportionately high. Crucially, the Court accepted to examine the facts of the case in the light of this broader context. From this perspective, it admitted that as a general matter the school assignment policy in place in the Czech Republic had a disparate impact on Roma children compared to non-Roma.⁴⁸ This permitted to establish a presumption that the measure complained of by the applicants was discriminatory – which the government could try to rebut.⁴⁹ Discussing the relevance of the psychological tests adduced by the government to justify the contested decisions, the Court observes that various independent bodies have put into question their adequacy and reliability. There were reasons to suspect that they were biased against Roma and that the results were not analysed in the light of the specific characteristics of this minority. Accordingly, they could not provide an objective and reasonable justification for the impugned measure. The applicants, therefore, had been discriminated against in the enjoyment of their right to instruction.⁵⁰

This represents a landmark judgment in several respects. In particular, the Court, taking inspiration from EU antidiscrimination law, recognises the notion of 'indirect discrimination':⁵¹ discrimination may result from a general policy or measure which,

⁴⁵ Eur. Ct. H.R. (Grand Chamber), *D.H. and others v. The Czech Republic*, Judgment of 13 November 2007. The case was first decided by a chamber which held, by six votes to one, that the facts did not disclose any discrimination: Eur. Ct. H. R. (2d Section), *D.H. and others v. The Czech Republic*, Judgment of 6 February 2006. Following the request for referral of the applicants, this decision was reversed by the Grand Chamber which, by a majority of thirteen votes to four, ruled that there had been a violation of Article 14 read in conjunction with Article 2 of Protocol 1.

⁴⁶ *D.H. and others*, 13 November 2007, § 197.

⁴⁷ Advisory Committee on the FCNM, First Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, para. 61.

⁴⁸ *Id.*, § 193. This is one of the crucial points on which the Grand Chamber's analysis differed from that of the second chamber. See *inter alia* M. Goodwin, 'Taking on racial segregation: the European Court of Human Rights at a *Brown v. Board of Education* moment?', 3 *Rechtsgeleerd Magazijn THEMIS* (2009) pp. 114-126, esp. at 118-119; R. Medda-Windischer, 'Dismantling Segregating Education and the European Court of Human Rights. *D.H. and Others vs. Czech Republic: Towards an Inclusive Education?*', *European Yearbook of Minority Issues*, Vol. 7, 2007/8 (Leiden: Martinus Nijhoff, 2010), pp. 19-55, esp. at 22-25; E. Dubout, 'Vers une protection de l'égalité "collective" par la Cour européenne des droits de l'homme (En marge de l'arrêt D.H. et autres c. République tchèque du 7 février 2006)', 68 *Revue trimestrielle des droits de l'homme* (2006) pp. 851-883.

⁴⁹ *D.H. and others*, 13 November 2007, § 195.

⁵⁰ *Id.*, § 207.

⁵¹ See R. Medda-Windischer, 'Dismantling Segregating Education...', *op. cit.*, at 31-33 and E. Dubout, 'L'interdiction des discriminations indirectes par la Cour européenne des droits de l'homme : rénovation ou

although it does not explicitly distinguish based on a prohibited ground, in practice has a disproportionate prejudicial effect on a particular group compared to other groups.⁵² The Court, moreover, makes clear that no intention to discriminate is required for the discrimination to exist: the sole fact that a measure has a disparate impact on a minority is sufficient to establish the existence of differential treatment – whatever the intent behind the policy.⁵³ This opens the possibility of addressing structural or systemic forms of discrimination.⁵⁴ But curiously enough, although the judgment has been widely perceived in the literature as condemning segregating practices in education,⁵⁵ the Court does not use the term ‘segregation’. This has been criticised by Morag Goodwin: by avoiding this concept, the Court fails to clearly identify the harm done to misplaced children and to declare segregation *per se* as invidiously evil.⁵⁶ In this regard, the ECtHR’s judgment compares unfavourably with the United States Supreme Court decision *Brown v. Board of Education of Topeka*,⁵⁷ which stated that ‘[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone’.⁵⁸ Nonetheless, the European Court in *D.H.* does acknowledge that the prejudice experienced by the applicants resulted not only from the lower level of education they received in special schools, but also from the fact that ‘they were *isolated* from pupils from the wider population.’ For both these reasons, the schooling arrangements for Roma children ‘compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools

révolution? Epilogue dans l’affaire *D.H. et autres c. République tchèque*, 75 *Revue trimestrielle des droits de l’homme* (2008) pp. 821-856.

⁵² *D.H. and others*, 13 November 2007, § 184. On the notion of indirect discrimination, see *inter alia* D. Schiek, L. Waddington and M. Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007); K. Henrard, *The Impact of International Non-Discrimination Norms in Combination with General Human Rights for the Protection of National Minorities: the European Convention on Human Rights*, Report prepared for the Committee of Experts on Issues Relating to the Protection of National Minorities (Strasbourg, 25 October 2006), DH-MIN(2006)020; and Ch. Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, European Network of Legal Experts in the Non-Discrimination field (European Commission, DG Employment Social Affairs and Equal Opportunities, September 2008).

⁵³ *D.H. and others*, 13 November 2007, § 184. On the significance of this judgment in the evolution of the European Court’s case-law in relation to Roma, see *inter alia* R. Sandland, ‘Developing a Jurisprudence of Difference: The Protection of Human Rights of Travelling Peoples by the European Court of Human Rights’, 8(3) *H.R.L.R.* (2008) 475-516, at 511-513.

⁵⁴ R. Medda-Windischer, ‘Dismantling Segregating Education and the European Court of Human Rights...’, *op. cit.*, at 40. On the notion of systemic discrimination, see *inter alia* R. Craig, *Systemic Discrimination in Employment and the Promotion of Ethnic Equality* (Leiden, Boston: Martinus Nijhoff, 2007) and Ph. Bataille, *Le racisme au travail* (Paris: La Découverte, 1997) pp. 114-119.

⁵⁵ See for instance the title of the aforementioned article by R. Medda-Windischer: ‘Dismantling Segregating Education and the European Court of Human Rights. *D.H. and Others vs. Czech Republic*: Towards an Inclusive Education?’ (*op. cit.*).

⁵⁶ M. Goodwin, ‘Taking on racial segregation...’, *op. cit.*, pp. 122-123.

⁵⁷ 347 U.S. 483 (1954).

⁵⁸ Chief Justice Warren, delivering the opinion of the Court, quoted by M. Goodwin in ‘Taking on racial segregation...’, *op. cit.*, p. 115.

and develop the skills that would facilitate life among the majority population.⁵⁹ The Court implicitly recognises that schooling is not only aimed at the acquisition of knowledge and skills, but also serves to integrate children into society and that this is especially important in the case of minorities. In subsequent case law, it will observe that education is ‘a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions’ and that ‘in order to achieve pluralism and thus democracy, society has an interest to integrate minorities’.⁶⁰

While *D.H.* concerned the problem of special schools, *Sampanis and others v. Greece*⁶¹ raised the issue of special classes created in common education institutions. The applicants complained that, after having first being denied enrolment in a primary school, they were placed in distinct classes, located in an annex to the main building of the school, allegedly because of their reading and writing deficiencies. Various elements however suggested that the measure was in fact aimed at separating them from other children because of their ethnic origin: only Roma were assigned to these so-called ‘preparatory’ classes, this decision was not based on an objective assessment of their abilities nor were their progress periodically reviewed. Moreover, these classes had been created in a context marked by racist incidents, with non-Roma parents violently protesting against the admission of Roma children to the school.⁶² And the government could not provide any example of pupil who had been integrated in a regular class after having attended a special class.⁶³ In view of all these circumstances, the Court rules that the assignment of children to these special, separate, classes amounted to discrimination.⁶⁴ Noticeably, the Court does not examine the quality of instruction delivered to these children: it considers that the mere fact that school authorities separated pupils based on their race or ethnicity was *in itself* discriminatory.⁶⁵

The facts at issue in *Orsus and others v. Croatia*⁶⁶ were less straightforward than in *D.H.* and *Sampanis*. Here too, the Court was confronted with the practice of creating special Roma-

⁵⁹ *D.H. and others*, 13 November 2007, § 207 (our emphasis).

⁶⁰ Eur. Ct. H.R. (4th section), *Anatoliy Ponomaryov and Vitaliy Ponomaryov v. Bulgaria*, Judgment of 21 June 2011, para. 55. See also *Konrad and others v. Germany*, where the Court deemed that, in view of the importance of integrating minorities through education, German authorities could legitimately refuse to accede to the demand of parents belonging to a minority Christian denomination to educate their children at home in conformity with their religious beliefs (Eur. Ct. H.R. (5th section), *Konrad and others v. Germany*, decision of 11 September 2006 (Appl. No. 35504/030)).

⁶¹ Eur. Ct. H.R. (1st section), *Sampanis and others v. Greece*, 5 June 2008 (in French only).

⁶² *Id.*, § 82.

⁶³ *Id.*, § 90.

⁶⁴ *Id.*, § 96. See the analysis of R. Medda-Windischer in ‘Dismantling Segregating Education...’, *op. cit.*, at 50-51.

⁶⁵ Here too, however, Morag Goodwin deplors that ‘the Court avoided making a comprehensive statement condemning segregation.’ (‘Taking on racial segregation...’, *op. cit.*, p. 124).

⁶⁶ Eur. Ct. H.R. (Grand Chamber), *Orsus and others v. Croatia*, Judgment of 16 March 2010. Like in *D.H. and others*, the case was first decided by a chamber which ruled unanimously that the applicants had failed to prove that they had been the victim of discrimination: Eur. Ct. H.R. (1st section), *Orsus and others v. Croatia*, Judgment of 17 July 2008. Here too, the decision was reversed by the Grand Chamber but this time with a short majority of nine to eight. On the chamber’s decision, see *inter alia* the criticisms of R. Medda-Windischer,

only classes in mainstream schools. The government justified this measure on the ground that they lacked adequate command of the Croatian language. It argued that this policy was aimed at addressing Roma's specific needs and that those assigned to these classes could re-integrate standard classes once they had reached an adequate level of Croatian. The applicants, by contrast, claimed that their placement in separate classes was due solely to their ethnic origin.⁶⁷ In other words, they alleged direct discrimination. Various international human rights bodies had criticised the practice complained of.⁶⁸ The Advisory Committee on the FCNM, in particular, had expressed concern 'about reports that in certain schools, Roma children are placed in separate classes and school facilities are organised and operated in a manner that appears to stigmatise Roma pupils.'⁶⁹ The ECtHR, however, accepts the explanation of the government that the measure was primarily motivated by the children's lack of language skills rather than their ethnic origin. Determining in its view as the fact that, unlike in the *Sampanis* case, not all Roma pupils were placed in these classes: it was not a general policy to automatically place them in such classes.⁷⁰ At the same time, only Roma were affected by this treatment: the measure therefore had a disproportionate impact on this minority. Hence it was necessary to assess whether it had a legitimate aim and whether the means used were necessary and proportionate⁷¹. The Court thus sees the issue as one of potential *indirect* rather than direct discrimination.⁷² From this perspective, the central problem for the Court was to determine how to distinguish what constitutes acceptable special measures designed to respond to a minority's particular educational needs from

'Dismantling Segregating Education...', *op. cit.*, at 51-52 and L. Cariolou, 'Recent Case Law of the European Court of Human Rights Concerning the Protection of Minorities', *European Yearbook of Minority Issues*, Vol. 7, 2007/8 (Leiden: Martinus Nijhoff, 2010), pp. 513-544, at 539-540.

⁶⁷ See the arguments of the applicants as summarised in the chamber decision: *Orsus and others* (1st section), Judgment of 17 July 2008, § 55. See also the explanations provided by the European Roma Rights Centre lawyer responsible for the case: A. Danka, 'The European Court of Human Rights Missed the Opportunity to Recognise that Segregation in Education can also take place in Mainstream Education', 1 *Roma Rights Journal* (2008) pp. 75-80. The applicants also initially claimed that their placement in Roma-only classes constituted degrading treatment prohibited under Article 3 of the Convention. The chamber's judgment held that they had failed to establish that they had been subject to ill treatment within the meaning of this provision (*Orsus and others* (1st section), Judgment of 17 July 2008, § 39). See the comments of M. Goodwin in 'Taking on racial segregation...', *op. cit.*, p. 125.

⁶⁸ See the reports quoted in *Orsus and others* (Grand Chamber), 16 March 2010, §§ 65-72.

⁶⁹ Advisory Committee on the FCNM, First Opinion on Croatia, ACFC/INF/OP/I(2002)003, 6 April 2001, para. 49. See also Advisory Committee on the FCNM, Second opinion on Croatia, ACFC/OP/II(2007)004, 1 October 2004, para. 129 and 131 ; the European Commission against Racism and Intolerance, Third Report on Croatia, published on 17 December 2004, para. 143; Commissioner for Human Rights, Report on his visit to the Republic of Croatia, 14-16-June 2004, para. 30-32.

⁷⁰ *Orsus and others* (Grand Chamber), 16 March 2010, § 152.

⁷¹ *Id.*, § 155.

⁷² *Id.*, § 153. The Court's reasoning is somewhat ambiguous as it underlines that international reports indicated the existence of a context of hostility towards Roma in various schools in Croatia, with non-Roma parents opposing the introduction of mixed classes instead of separate classes (§ 154). This could have been taken as an element suggesting that the contested measure, although allegedly based on language skills, in fact dissimulated *direct* ethnic discrimination. But the Court chose not to delve into this question. It preferred to start from the premise that there was no discriminatory intent on the part of the State (§ 155) and to concentrate on examining the modalities of the contested policy in order to assess whether there was a reasonable relationship of proportionality between the means used and the aim 'said to be pursued' (§ 184).

policies amounting to *de facto* segregation. The Court acknowledges that ‘temporary placement of children in a separate class on the grounds that they lack an adequate command of the language of education is not, as such, automatically contrary to Article 14 of the Convention.’ In some circumstances, such placement can be deemed as pursuing ‘the legitimate aim of adapting the education system to the specific needs of the children.’⁷³ However, where such a measure affects exclusively or disproportionately the members of one ethnic group, appropriate safeguards need to be put in place to ensure that it does not result in discrimination.⁷⁴ Three criteria are put forward by the Court in this regard: the initial placement of children in special classes must be based on a clear legal basis and on objective testing of the children’s skills;⁷⁵ the curriculum must be effectively designed to address their needs and enable them to be integrated into mixed classes in the shortest time possible;⁷⁶ a procedure must be in place to monitor their progress and ensure their eventual transfer to mixed classes.⁷⁷ None of these conditions were met in *Orsus*. There were no adequate safeguards in place capable of ensuring that the contested policy was not discriminatory. ‘It follows that the placement of the applicants in Roma-only classes at times during their primary education had no objective and reasonable justification.’⁷⁸ Importantly, in reaching this conclusion, the Court was also sensitive to the special position of the Roma, which it describes as an especially disadvantaged and vulnerable minority, requiring special protection.⁷⁹

Taken together, these three judgments entail that state practices which result in separation of a disproportionate number of minority children from other pupils in the education system, are, if not necessarily discriminatory, at least inherently suspect of constituting discrimination, especially when they affect a particularly vulnerable and disadvantaged community. This applies whether or not the actual intention of policy-makers is to exclude or segregate: a practice which, on its face, is based on neutral criteria, such as language skills or learning abilities, may, nonetheless, be deemed discriminatory if it has a disproportionate detrimental impact on children belonging to a specific minority. The Court’s concern is not only to ensure that all children receive an education of the same quality, it is also that isolation of minorities in the educational sphere compromises their integration in society. Integrated education is not only seen as instrumental in guaranteeing that different groups in society have access to an education of equal value, it is also viewed as a good in itself.

The fact remains that not all forms of separation in education will be considered as discrimination. Firstly, minorities may voluntarily opt for specific education institutions

⁷³ *Id.*, § 157.

⁷⁴ *Id.*, § 157.

⁷⁵ *Id.*, §§ 158-162.

⁷⁶ *Id.*, § 165.

⁷⁷ *Id.*, §§ 172-175.

⁷⁸ *Id.*, § 184.

⁷⁹ *Id.*, § 147. See also *D.H. and others*, § 182 and *Sampanis and others*, § 72.

which correspond to their linguistic or cultural aspirations. As noted above, minority instruments acknowledge the right to set up their own private educational institutions. A state could also decide to create or fund public schools in a minority language or religion. Yet, as recognised in the UNESCO Convention against Discrimination in Education, certain safeguards must be in place in order to ensure that such arrangements remain compatible with the non-discrimination norm. The Convention thus lays down that the establishment, for religious or linguistic reasons, of 'separate educational systems or institutions', do not constitute discrimination provided that two conditions are met: attendance at such institutions is optional and the education provided conforms to general standards formulated by competent authorities.⁸⁰

Secondly, states may legitimately adopt 'temporary special measures' to compensate the particular disadvantage experienced by certain groups and bring about *de facto* equality. As stressed by the UN Committee on Economic, Social and Cultural Rights, such measures do not violate the right to non-discrimination in education 'so long as they do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.'⁸¹ But as the facts in *Orsus* suggest, in some situations, there may be a fine line between special measures aimed at addressing a minority's specific needs and *de facto* discriminatory practices. The 'special needs' arguments may be used as a pretext to implement a policy which in truth aims at excluding minority pupils from mainstream education. Even well-intended measures may produce discriminatory results where they lead to permanent isolation of certain groups in education, thereby hampering their social integration. The risk is especially high where the allegedly remedial policy involves the creation of separate classes composed predominantly or exclusively of children belonging to a minority. Hence, the thrust of the safeguards required by the Court in *Orsus* is precisely to guarantee that the assignment of minority children to separate classes remains temporary and that they are eventually re-integrated into mainstream classes.

2.2. *Beyond Integration: the Necessity of Remedial Measures*

As the ECtHR's case law makes clear, minorities are entitled to be protected against state policies which isolate them from other pupils and exclude them from mainstream education. In other words, they have a right to integrated education, that is a right to be included in the same education structures as all other children. Yet, providing equal access to common educational facilities is not necessarily sufficient to ensure that minorities actually enjoy equal opportunities in education. Children belonging to especially disadvantaged

⁸⁰ Article 2, b). See also Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para. 33.

⁸¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The Right to Education (Art. 13 of the Covenant)*, para. 32. See also Article 2(2) of the Convention on the Elimination of All Forms of Racial Discrimination.

communities often experience all sorts of barriers which hinder their ability to draw a real benefit from the instruction provided in such institutions, especially when they have to compete with classmates from a more privileged background. Absent any remedial measure designed to redress their initial disadvantage, such as additional tuition or the intervention of educational assistants (see *infra*), this may translate in higher failure rates and significant gaps in educational attainment. Lower levels of education in turn contribute to perpetuate the minority's disadvantaged position in society. This phenomenon is well illustrated by the observations of the Advisory Committee on the FCNM. Many of its country opinions highlight the difficulties and failure faced by certain minorities, in particular the Roma, in the mainstream education system. Recurrently, the Committee expresses concern at the problem of low level of attendance of Roma in educational establishments and drop out ratio that are notably higher than average.⁸² Commenting on *D.H. and others*, Morag Goodwin observes that 'segregation is one, very visible, reason why Romani children do not receive the education that they are entitled to, but it is not the only one, and perhaps it is not even the most important one.'⁸³ Indeed, integrated education, if not accompanied by appropriate supportive measures for minorities who need it, may result in very unequal educational outcomes, which seriously undermine the objective of societal integration. To put it differently, integrated education, without more, may guarantee formal equality but not necessarily substantive equality.⁸⁴

In view of these facts, the question may be raised whether the failure by state authorities to introduce remedial measures in order to tackle the difficulties experienced by a particularly vulnerable minority in education, could amount in some cases to discrimination. The European Court of Human Rights has hinted at this possibility when asserting that 'in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of' Article 14 of the Convention, which forbids discrimination.⁸⁵ In *Thlimmenos v. Greece*, it stated that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention could be violated 'when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'⁸⁶ Nonetheless, the Court so far has never found a state

⁸² See e.g. Third Opinion on Finland, 14 October 2010, ACFC/OP/III(2010)007, para. 129; Third Opinion on Hungary, 18 March 2010, ACFC/OP/III(2010)001, para. 104; Second Opinion on Kosovo, 5 November 2009, ACFC/OP/II(2009)004, para. 206. See also L. Farkas, *Segregation of Roma children in Education. Addressing Structural Discrimination through the Race Equality Directive* (European Commission, DG for Employment, Social Affairs and Equal Opportunities, 2007), esp. pp. 10-13.

⁸³ M.E.A. Goodwin, 'Multi-dimensional exclusion: Viewing Romani poverty through the nexus of race and poverty', in D. Schiek & V. Chege (Eds.), *European Union discrimination law: Comparative perspectives on multidimensional equality law* (London: Routledge, 2008), 39-62, p. 149.

⁸⁴ On these notions, see *inter alia* Henrard, 2006, pp. 5-6; S. Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002); C. Barnard and B. Hepple, 'Substantive Equality', 59 *Cambridge Law Journal* (2000); 562-585.

⁸⁵ *D.H. and others*, § 175.

⁸⁶ Eur. Ct. H. R. (GC), Judgment of 6 April 2000.

to be in breach of its non-discrimination obligations for failing to adopt positive action measures to address a minority's special socio-economic needs.

However, some international provisions do contain more explicit requirements in this regard. Under Article 12(3) FCNM, states must 'promote equal opportunities for access to education at all levels for persons belonging to national minorities.' More generally, Article 4(2) establishes the obligation 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.' This echoes the requirement set by Article 2(2) of the Convention on the Elimination of All Forms of Racial Discrimination to take 'special and concrete measures', when the circumstances warrant, to guarantee full and equal enjoyment of their human rights by certain racial groups.⁸⁷ Moreover, the UN Human Rights Committee, when interpreting the general non-discrimination clause of Article 26 of the International Covenant on Civil and Political Rights, established that the principle of equality sometimes *requires* State parties to take affirmative action 'in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.'⁸⁸

Country opinions of the Advisory Committee to the FCNM provide a wide range of concrete examples of special measures that can be adopted by states to promote equal opportunities in education for minorities.⁸⁹ The Committee especially encourages states to offer school support measures and educational assistance;⁹⁰ to increase the use of Roma mediators and assistants in schools⁹¹; to give special training to teachers working in establishment attended by a high percentage of persons belonging to minority communities;⁹² as well as to promote contacts between minority parents and school officials in order to develop an atmosphere of mutual trust and understanding.⁹³ But it also stresses, from the viewpoint of equal

⁸⁷ See also Article 4 of the UNESCO Convention against Discrimination in Education.

⁸⁸ UN Human Rights Committee, *General Comment No. 18: Non-discrimination*, 10/11/1989, para. 10. For a discussion of the Human Rights Committee's position in this regard, see O. De Schutter, 'Interdiction de discriminer envers les étrangers et obligation d'intégration par le droit', in J. Ringelheim (ed.), *Le droit et la diversité culturelle* (Brussels: Bruylant, 2011) 367-394, at 386-389. More generally, on the position of UN Committees on positive or affirmative action, see W. Vandenhole, *UN Human Rights Treaty Bodies* (Antwerp: Intersentia, 2005).

⁸⁹ See also P. Thornberry, 'Article 12', *op. cit.*, pp. 384-388.

⁹⁰ Third Opinion on Norway, 30 June 2011, ACFC/OP/III(2011)007, para. 101; Third Opinion on the Slovak Republic, 28 May 2010, ACFC/OP/III(2010)004, para. 151; Second Opinion on Austria, 8 June 2007, ACFC/OP/II(2007)005, para. 147.

⁹¹ Third Opinion on Hungary, 18 March 2010, ACFC/OP/III(2010)001, para. 117; Second Opinion on Austria, 8 June 2007, ACFC/OP/II(2007)005, para. 147.

⁹² Second Opinion on Kosovo; Second Opinion on Austria, 8 June 2007, ACFC/OP/II(2007)005, para. 207 and 209; Third Opinion on Hungary, 18 March 2010, ACFC/OP/III(2010)001, para. 117. See also the Committee on the Elimination of Racial Discrimination, *General Recommendation No. 27: Discrimination against Roma*, 16/08/2000, para. 23.

⁹³ Third Opinion on Finland, 14 October 2010, ACFC/OP/III(2010)007, para. 128; Third Opinion on Hungary, 18 March 2010, ACFC/OP/III(2010)001, para. 117; Third Opinion on Norway, 30 June 2011, ACFC/OP/III(2011)007,

opportunities, the importance of offering the minority the possibility to learn or receive instruction in its language at school and of promoting the knowledge of its culture and history in general education.⁹⁴For the Committee, combating social exclusion and providing cultural recognition appear closely linked: the inclusion of minorities in the education system indeed requires both types of action.⁹⁵

Conclusion

Minorities' educational rights comport two fundamental dimensions: the right to equal opportunities and the right to transmit their identity through education. These concerns can be implemented through various schooling arrangements. While recognising the right of minorities to establish their own educational institutions, international human rights law generally favours integrated over separate education. The Framework Convention on the Protection of National Minorities, in particular, attaches special importance to the fostering of contacts and interactions between the different communities through education. The European Court of Human Rights looks with increasing suspicion at states' practices which result in fact in isolating minority pupils from other children in the education system. Yet, simply guaranteeing equal access to existing institutions may not be enough to meet the requirements of minority educational rights: arguably, the instruction provided in mainstream establishments must itself be transformed in order to address minorities' needs and aspirations. Two crucial changes are increasingly called for by international human rights bodies: on the one hand, the development of multicultural and intercultural forms of education would allow the minority to be taught, and obtain recognition of, its own culture within common schools; on the other, the introduction of special measures may be necessary to compensate the social disadvantage experienced by certain minorities and achieve effective equality.

para. 101. See also the Committee on the Elimination of Racial Discrimination, *General Recommendation No. 27: Discrimination against Roma*, para. 24.

⁹⁴ See the opinions cited above, in section 1.1.

⁹⁵ See also Cullen, 1993, 156.

