

**AN UNEQUAL START: THE RIGHT TO EDUCATION AND THE  
EDUCATION GAP FOR STUDENTS WITH A MIGRANT BACKGROUND IN  
FRANCE AND GERMANY**

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MA Human Rights LONG THESIS  
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## **Abstract**

Students with a migrant background are marginalized in education systems in European societies. Destination countries face the challenge of integrating an increasing number of migrant students and students with a migrant background into national education systems. This thesis discusses the education gap between students with a migrant background and non-immigrant students in the public education systems of France and Germany. The education gap is discussed as a persistent infringement on the right to education and draws on regional and international human rights instruments to discuss the scope of the right to education. The current status quo of the structured systems of France and Germany are conducive to the experienced indirect and direct institutionalized discrimination faced by students with a migrant background. An adaptable, inclusive, and integrative perspective is offered as an alternative to the deficit-oriented approach which emphasizes the cultural and social deficits of migrant communities in France and Germany as the root problem of the education gap.

## Introduction

### 1. Statement of the Research Problem

Inequalities in education systems throughout Europe have increased along ethnic origin lines<sup>1</sup>. Minority children and youth experience the education system differently than their cultural majority peers. Increased migration is creating more culturally and linguistically diverse classrooms throughout European cities. In response to the most recent “migrant wave” in 2015, destination countries continue to face the challenge of culturally and linguistically integrating migrant children into classrooms and education systems. This challenge and question of integrating migrant students into classrooms, however, is not a new task in European societies, many of which have a long history of receiving EU as well as non-EU migrants to address domestic labor shortages or offer refuge from conflict abroad.

A recent UNICEF report sheds light on inequalities faced in the education system in wealthy countries, a report that reinforces “migrant background” as a variable that affects inequality in the education system<sup>2</sup>. The report highlights the fact that each country perpetuates inequality in its education system at different levels but that the effect at any level is marginalization and a threat to children’s full enjoyment of their right to an education and the rights that are closely tied to education.

There is growing awareness that although the international framework provides an explicit and equal right to education for migrants, the practical reality that migrants and individuals who are

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<sup>1</sup> Mechthild Gomolla, “Tackling Underachievement of Learners from Ethnic Minorities: A Comparison of Recent Policies of School Improvement in Germany, England, and Switzerland,” *Current Issues in Comparative Education* 9, no.1 (2006): 46.

<sup>2</sup> United Nations Children’s Fund (UNICEF), Office of Research-Innocenti, *An unfair start in children’s education in rich countries* (October 2018).

categorized as students with a migrant background face often does not match the standards of international education provisions. The experience of migrants in education is disproportionately characterized by marginalization and is defined by more numerous barriers to accessing their right to education in a way that their non-immigrant peers experience on a much lower scale.

Inequality between students with a migrant background and non-immigrant students is reflected in the disproportionately high representation of students with a migrant background in the lowest levels of secondary education in both the German and French education system. Students with a migrant background in France and Germany are more likely to leave school without completing qualifications and are more likely to be required to repeat grades when compared to non-immigrant peers. Additionally, students with a migrant background in both jurisdictions are more likely to be represented in the lower levels of the socioeconomic strata.

This thesis investigates the systemic inequalities of the education system that disproportionately pose challenges to the full realization of the right to education of students with a migrant background. Are these systemic inequalities justifiable as crucial components of national education systems that are culturally inherent to the nation? Does the State have an obligation to create equal circumstances between students with a migrant background and non-immigrant students?

In analyzing the goals of education according to the UNESCO guidelines to implementation, Former Special Rapporteur Vernor Muñoz observes that the resolution of marginalization of underprivileged groups is a central goal of successful and quality education<sup>3</sup>. He emphasizes that

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<sup>3</sup> Vernor Munoz, introduction in *Bildung fuer junge Fluechtlinge---ein Menschenrecht: Erfahrungen, Grundlagen und Perspektiven*, eds Lothar Krappmann, Andreas Lob-Huedepohl, Axel Bohmeyer, Stefan Kurzke-Maasmeier, (Bielefeld: W. Bertelsmann Verlag GmbH & Co.KG, 2009), 11-16.

education systems have a responsibility to provide education that is inclusive and addresses the needs of each individual student “regardless of their cultural and social background” in the classroom<sup>4</sup>. Inclusive education, according to Former Special Rapporteur Vernor Muñoz further means that the opportunities to exercise the right to education must be effective in addition to being inclusive. This will be discussed in terms of the obligation to implement an adaptable education system as foreseen by Article 13 of the International Covenant on Economic and Social Rights.

Children and young people with a migrant background belong to some of the most stereotyped groups in France and Germany. This group is often symbolic of problematic, underachieving students. There is a disparity between the assurance of merit-based academic success and the persistence of systemic disadvantages that defines the academic paths of young people with a migrant background on the basis of ethnic origin and social status. The international provisions that enshrine the right to education frame this right as a right that is defined by the transfer of knowledge on an equal basis.

This thesis posits that the education gap between students with a migrant background and non-immigrant students in France and Germany presents an inequality in the full enjoyment of the right to education. This thesis takes a critical view of the construct of the categorization of individuals as “people with a migrant background” in light of the consideration that this term is politically loaded, closely aligned with harmful stereotypes, and does not include all individuals who may benefit from or be harmed by “falling” into this category.

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<sup>4</sup> Ibid.



## 2. Jurisdictions and their Justification

France and Germany will serve as jurisdictions of interest for this thesis for several reasons. These two countries have a significant population of people with a migrant background and maintain stratified education systems that systemically reproduce significant inequality in academic achievement between students with a migrant background and non-immigrant students<sup>5</sup>. In both jurisdictions, this inequality is linked to both socioeconomic status and ethnic origin and is at the center of political debate concerning immigration and the realization of successful integration.

The disparity between migrant students in Germany is greater than in the French education system, perhaps owing to a longer history and presence of migration and migrants in France<sup>6</sup>. France's history with migration is much more complex due to its colonial past which continues to result in conflict between minority youth and French authorities, as was evident in the riots of 2005<sup>7</sup>. Conversely, Germany's relationship with migration is rooted in the country's *Gastarbeiter* policies of the 1960s and 1970s, policies that stemmed from an economic need for low-skilled labor.

The discussions surrounding the conflicts in education and in terms of an identity crisis are similar in France and Germany<sup>8</sup>. France and Germany constitutionally recognize a right to education for all. France and Germany have made legislative efforts at ameliorating access to

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<sup>5</sup> United Nations Children's Fund (UNICEF), Office of Research-Innocenti, An unfair start in children's education in rich countries (October 2018), 38-47.

<sup>6</sup> Claire Schiff, "Chapter 1: Understanding the Salience of Ethnicity in the Educational Experiences of Minority Adolescents across Europe," in *Migrant, Roma and Post-Colonial Youth in Education Across Europe. Being Visibly Different*, Eds. Julia Szalai, Claire Schiff (Palgrave Macmillan, 2014), p.1.

<sup>7</sup> Ibid, 6.

<sup>8</sup> Marielle Reyhn and Kirsten Gaschler, "Bildungspolitik und Sprache in Frankreich," in *Schule mit Migrationshintergrund*, eds Ursula Neumann, Jens Schneider (Muenster: Waxmann, 2011), 90.

education issues as they are experienced by children who are irregular migrants. France's 2016 circular, for example, has extended the right to education to explicitly include children regardless of the children's "administrative situation."<sup>9</sup> Germany ensured in 2012 that the recognition of university degrees obtained outside of the European Union became more accessible and more transparent<sup>10</sup>.

Xenophobia and intolerance are on the rise and as France and Germany continue to struggle with the realization of 'successful integration.' This is crucial in considering the education gap because in both jurisdictions migrant youth are increasingly stereotyped as "problem students."<sup>11</sup> Education systems in both nations support an assimilationist policy that directly contributes to marginalization of students with a migrant background as this perspective fails to address the obstacles that deny migrant students with equal access to education.

France and Germany support legal frameworks that categorize individuals as having a 'foreign' or a 'migrant' background even if these individuals were born in the jurisdiction and have very little connection to their families' country of origin<sup>12</sup>. This speaks against France's color-blind assertions and is indicative of the continued struggle of both France and Germany to maintain a homogenous cultural identity. This framework of labelling individuals as having a migrant background despite very weak ties to their parents' country of origin results in a legal framework of "othering" in both jurisdictions.

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<sup>9</sup> Circular concerning minors deprived temporarily or permanently of the protection of their family and persons presenting themselves as such, 25 January 2016, n° 2016-01.

<sup>10</sup> Vera Hanewinkel and Jochen Oltmer, "Immigration and Integration Policies in Germany," *Bundeszentrale fuer politische Bildung* (2018).

<sup>11</sup> Claire Schiff, *Understanding the Saliency of Ethnicity*, 1.

<sup>12</sup> Anna Terzian and Anissa Ben Hamouda, "Von der Immigration zur Integration: die franzoesische Perspektive," *in Lebensgeschichten junger Frauen und Maenner mit Migrationshintergrund in Deutschland und Frankreich/Life stories of young woman and men with a migration background in Germany and France*, eds. Vera King, Burkhard Mueller (Waxmann: 2013), 29.

### 3. Hypothesis

France and Germany have well-established public-school systems that are in compliance with the human rights treaties that each jurisdiction has ratified. This thesis posits that despite the general provision of quality education within France and Germany, school policies such as early selection mechanisms serve to marginalize students from migrant communities and create unequal starting chances between migrant students and non-immigrant peers. The right to education is fundamental. The full realization of the right to education is interconnected with the realization of further rights and the sustainability of a free and democratic society. The education gap between non-immigrant and immigrant students is indicative of persistent inequality that represents institutional discrimination<sup>13</sup>. The education systems in these two jurisdictions leads to the establishment of a “parallel society” which stands in opposition to international, regional, and national formulations of the right to education as a right that carries the responsibility of providing a safeguard against social exclusion.

### 4. Methodology

The thesis relies on multiple methodologies to reach conclusions about the state of human rights to education of migrant students. The discussion of the education gap between students with a migrant background and their non-immigrant peers occurs within the context of the international, regional, and constitutional provisions and is approached as an implied equality right. This thesis incorporates General Comments by human rights bodies, most prominently the CESCR’s General

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<sup>13</sup> Mechtild Gomolla, “Tackling Underachievement of Learners from Ethnic Minorities: A Comparison of Recent Policies of School Improvement in Germany, England, and Switzerland,” *Current Issues in Comparative Education*, Columbia University, Vol. 9, no.1 (2006): 46.

Comment no. 13 which lays the foundation for the international expectations and State obligations of national education systems.

Secondary sources are used to provide insight into the effective realization of the right to education of children with a migrant background. This includes commentaries and scholarly publications in the field of education in addition to human rights reports from national and international human rights monitoring bodies to investigate the experience of institutional discrimination in the realization of the right to education for disadvantaged first and second-generation migrant students. Lastly, the illustration of the education gap relies on the results of the international PISA study.

The PISA study, conducted every three years, provides comparative insight into the academic performance of fifteen-year-old students across the 34 OECD countries. The study examines variables that correlate with academic underperformance and have consistently shown inequality in both the French and German education system both along class lines and ethnic origin. The PISA results have been significant in igniting public and political discourse and educational reform. The PISA results highlight the marginalization that students with a migrant background in France and Germany face.

## **5. Contents of the Thesis**

France and Germany are bound to the same international and regional conventions that guarantee an equal right to education for all. Chapter 1 of this thesis provides a definition of the right to education as it is framed in international and regional human rights treaties, including: Article 26 of the Universal Declaration for Human Rights, Article 13 of The International Covenant on Economic, Social, and Cultural Rights (ICESCR) and The International Covenant on

Civil and Political Rights, as well as the right to education as a children's right under Articles 28 and 29 of the Convention on the Rights of the Child. The scope of the right to education as it is guaranteed under Europe's regional provisions will focus on education as it is framed under the European Convention on Human Rights, the European Social Charter, the EU Charter on Fundamental Rights, and the European Social Pillar.

Chapter 2 will address the scope of the right to education in each jurisdictions' constitutional education provisions. France and Germany provide a universal right to education. France frames the right to education as first and foremost a right to French culture and as a children's right that acknowledges the disadvantages in the education system due to socioeconomic status. Germany's federal education right is much more concerned with the supervisory role of the federal government and emphasizes the cultural sovereignty of the individual *Laender*. The right to education is framed as a right that is first and foremost built on the principle of *Begabung* or meritocracy rather than establishing a right to education that is equally accessible to all. This chapter will also address the concept of "student with a migrant background".

Chapter 2 will further analyze of the concept of who is a migrant student in each jurisdiction and why this is significant in addressing the education gap, as well as an investigation into the state obligations to resolve the education gap in an effort to move towards a progressive society that allows equal access to education regardless of migrant status or socioeconomic background. as it is framed in France and Germany respectively. A critical approach to the categorization of students as "having a migrant background" will be adopted in discussing the explanations for the existence of the education gap. Chapter 3 presents the main institutional attributes of the German and the French educational systems. It focusses on the disadvantages that accumulate and amount to indirect discrimination in the apparently neutral systems for those in vulnerable social and

economic status. This illustration of the systemic disadvantages will be analyzed as institutional discrimination that affects students with a migrant background along both class lines and ethnic origin.

## **Chapter I: The Right to Education**

### **1. The International Framework of the Right to Education**

This Chapter will address the international and regional provisions of the right to education. The international right to education is rooted Article 26 of the Universal Declaration of Human Rights as a universal right. Article 13 of the International Covenant on Economic, Social, and Cultural Rights. The education provisions established in the International Covenant on Economic, Social, and Cultural Rights are central to the international framework of the right to education. Article 13 establishes the 4-A Framework and provides an expansive right to education that requires positive state obligations beyond providing a right to a seat in the classroom. This framework represents a guideline to the right to education and establishes two aspects of the right to education: “rights-in” education and “rights-to education.” The “rights-in” and “rights-to” education will be discussed as a children’s right under Articles 28 and 29 of the Convention on the Rights of the Child and in relation to regional instruments: The European Convention on Human Rights, the European Social Charter, the EU Charter on Fundamental Rights as well as the European Pillar of Social Rights.

#### **1.1 Article 13 of the ICESCR and Article 18(1) of the ICCPR**

The ICESCR right to education provision, Article 13, incorporates crucial elements of the guarantees outlined in Article 26 of the UDHR. The right to education enshrined in Article 26

guarantees a right to education that is universal<sup>14</sup> and is defined by a right to full development of personality and is expressed as an empowerment right. The goal of education is to ensure awareness of and access to human rights<sup>15</sup>.

Article 13 ICESCR builds on Article 26 UDHR guarantees. The right to education is an empowerment right that necessarily includes a right to dignity<sup>16</sup>. Article 13 establishes a quality standard as the “4-Framework”.<sup>17</sup> The right to education and provides that education must be accessible, available, acceptable and adaptable. The 4-A Framework. Education must ensure that individuals are able to “effectively participate” in their communities. Lastly, Article 13 provides recognition for the requirement that education must serve to create tolerance between “ethnic groups” in addition to promoting tolerance between countries as well as racial and religious groups<sup>18</sup>.

The right to education under the ICCPR<sup>19</sup> is framed as freedom of conscience right and is concerned with strengthening the religious and freedom of conscience rights in education, particularly the parental right to access religious education for their children. Distinguishing features between the right to education as a social right and the right to education as a civil right lie in the supervisory mechanism available to each category of rights. ICCPR protections are under the supervision of The Human Rights Committee whereas the ICESCR remains under the supervision of the Committee. The right to education as a social right under the Covenant

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<sup>14</sup> *The Universal Declaration of Human Rights*, 10 December 1948, Art.26(1) [*UDHR*].

<sup>15</sup> *UDHR*, Art.26(2)

<sup>16</sup> *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, Art.13(1) (entered into force 3 January 1976) [*ICESCR*].

<sup>17</sup> *ICESCR*, Art. 13(2).

<sup>18</sup> United Nations, Committee on Economic, Social, and Cultural Rights (CESCR), *General Comment No. 13: The right to education (article 13 of the Covenant)*, E/C.12/1999/10 (8 December 1999), paragraph 4.

<sup>19</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, Art.18(1) (entered into force 23 March 1976) [*ICCPR*].

protections lacks recourse through an individual complaint mechanism and is paired down to direct State reports. The right to education as a social right<sup>20</sup> is awarded a lower standard than the right to education as a civil and political right because of the view that the latter category of rights is judicially stronger.

Tomasevski<sup>21</sup> warns against seeing the right to education as a right that is first and foremost a freedom of thought and religious right, emphasizing that the right to education must also be child-centric and must also have importance as a social right. The right to education as a social right carries positive State obligations in the form of financial investment of the education system by the State. Education is first and foremost a social right that must act as a safeguard against marginalization through adequate funding on the part of the State as established by Article 13 of the ICESCR.

## 1.2 The European Framework of the Right to Education

In comparison to international provisions, the regional European protection to the right to education is more limited in formulation. Neither the European Convention on Human Rights nor Charter of Fundamental Rights of the European Union provide a framework that determines the goals and aims of education as extensively as Article 13 of the ICSECR. The European Social Charter provides a socioeconomic context for the protection of the right to education that is not explicitly found in the formulations of the education provisions in Article 2 Protocol 1 of the ECHR and Article 14 of the Charter of Fundamental Rights of the European Union (“the Charter”)

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<sup>20</sup> Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: including a systematic analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights* (Martinus Nijhoff Publishers: 2006), p.53.

<sup>21</sup> Katarina Tomasevski, *Right to education primers no.3: human rights obligations: making education available, accessible, acceptable and adaptable*, (Gothenburg: Novum Grafiska AB, 2001), 8.



respectively. The latter are concerned with the principle of non-discrimination as a central requirement for the full enjoyment of the right in addition to the protection of personal freedom. The most recent addition to the protection of the right to education in the European realm is the European Pillar of Social Rights which represents a soft-law instrument that foresees a right to education that is inseparable from a right to social mobility and economic freedoms in Principles 1 and 3 of the EPSR.

### 1.2.1 Article 2 Protocol 1 ECHR

The right to education under the ECHR is the only right to education provision that is framed as a negative provision and there is a strong expression of the connection between discrimination and education. The first sentence of Article 2 Protocol no.1 guarantees an individual right to education that is simultaneously framed as a right to non-discrimination. The second sentence is a parental right to seek education for children that falls in line with their philosophical beliefs<sup>22</sup>. The negative and minimalist formulation of the education provision of the ECHR suggests that the drafters meant to ensure that member States maintain a significant margin of appreciation in matters concerning the national education system<sup>23</sup>. Unlike international provisions such as Article 13 of the ICESCR, the ECHR is not explicitly concerned with education that encourages full development of personality or education that promotes multiculturalism.

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<sup>22</sup> Klaus Dieter Beiter, *The Protection of the Right to Education by International Law* 93.

<sup>23</sup> Sheeba Pillai, "Right to Education under European Convention for the Protection of Human Rights and Fundamental Freedoms," *Christ University Law Journal*, 1, no.1(2012), p.102.

### 1.2.2 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union enshrines the right to education in Article 14 and is based on Article 2 of Protocol 1 of the European Convention on Human Rights<sup>24</sup>. The education provision in Article 14 is more expansive than Article 2 of Protocol 1 and is deeply entrenched in economic rights<sup>25</sup>. The application of the provisions of the European Charter of Fundamental Rights is limited in instances where Member States are implementing Union Law. <sup>26</sup> Member States maintain full control of the establishment, implementation, and monitoring of their respective education system “provided that they apply the principle of equality and prohibit discrimination.”<sup>27</sup>

### 1.2.3 The (Revised) European Social Charter

The right to education is a cornerstone to the social right guarantees under The European Social Charter and the Social Charter Revised. The Social Charter incorporates civil and political protections of the education provisions formulated in Article 2 Protocol 1 of the ECHR and Article 14 of the EU Charter of Fundamental Rights into its framing of the right to education as a social right. The Charter’s formulation of the right to education carries significant positive obligations by the State and draws on the ICESCR Article 13 framework of goals and aims of education as accessible and inclusive<sup>28</sup>.

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<sup>24</sup> European Union Agency for Fundamental Rights, *Article 14—Right to education*, *Official Journal of the European Union C 303/17-14.12.2007*.

<sup>25</sup> Chloe Wallace and Jo Shaw, *Education, Multiculturalism and the EU Charter of Rights* (The Constitutionalism Web-Papers, 2002), 11.

<sup>26</sup> *European Union Charter of Fundamental Rights*, 2 October 2000, Art. 51, (entered into force 2009).

<sup>27</sup> Theresa Papademetriou, *European Union Education of Non-Native Language Speaking Children*, (The Law Library of Congress, 2009), 1.

<sup>28</sup> *The Right to Education Under the European Social Charter*, 2006, page 2.

The 1961 Charter did not provide an explicit right to education. The right to education under the European Social Charter provides an understanding of the right to education as crucial in realizing rights connected to social mobility. The positive obligation of the State to ensure the fulfilment of the right to education is enshrined in Article 17 of the Social Charter Revised. Like the CRC<sup>29</sup>, places a duty on the State to actively resolve issues of irregular school attendance<sup>3</sup> and frames the right to education as a right that requires the full development of personality as central for the ‘effective exercise’ of Article 17. Like the CRC<sup>29</sup>, places a duty on the State to actively resolve issues of irregular school attendance<sup>30</sup> and frames the right to education as a right that requires the full development of personality as central for the ‘effective exercise’ of Article 17.

The right to education in the Charter is interconnected to the protection of vulnerable groups, including children with disabilities<sup>31</sup> and ensures access to social and economic protections. The education provisions of the Charter highlight groups that are vulnerable and at-risk for social exclusion and emphasize the right of each young person to receive support in attaining academic access that is inclusive, accessible, and adaptable to the needs of children and young people in a spirit that provides space for the full development of personality free from discrimination<sup>32</sup>.

#### 1.2.4 The European Pillar of Social Rights

The protection of the right to education in the European Union is central to The European Pillar of Social Rights (EPSR or “the Pillar”). The Pillar builds upon previous legal instruments including the European Social Charter and the Charter of Fundamental Rights of the European

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<sup>29</sup> *Convention on the Rights of the Child*, 20 November 1989, Art. 28(e) (entered into force 2 September 1990) [CRC].

<sup>30</sup> *The European Social Charter (Revised)*, Art. 17(2).

<sup>31</sup> *The European Social Charter (Revised)*, Art. 15.

<sup>32</sup> *The European Social Charter (Revised)*, Art. E.

Union<sup>33</sup>. The 20 Principles of the Pillar are explained in three broad categories: equal opportunities and access to the labor market, fair working conditions, and social protection and inclusion. The EPSR provides a peripheral framework for the EU-level and international instruments already in place and foresees implementation of the 20 Principles at the national and local level, subject to subsidiarity and proportionality.

The first Principle of the Pillar which calls for the right and implementation of the right to education<sup>34</sup>, explaining that the right to education as seen from the perspective of the European Social Pillar encompasses a universal right to quality and inclusive education that extends beyond age-compulsory education and results in the attainment of skills that “enable them to participate fully in society and manage successfully transitions in the labor market.”<sup>35</sup> Principle 3 foresees the right to equal opportunity in all social and economic spheres, including in education, and requires Member States to support the “equal opportunities of under-represented groups.”<sup>36</sup>

## 2. The Content on the Right to Education

The right to education is traditionally viewed as strictly a social right. However, as the international and regional rights provisions illustrate, an understanding of the right to education as strictly a social right misses the civil and political implications of the realization of the right. The full realization of the right to education must serve to create opportunities for students to effectively participate in their communities through building and builds greater awareness of human rights.

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<sup>33</sup> European Commission, *Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights*, C(2017) 2600 Final, paragraph 5.

<sup>34</sup> European Commission, *Recommendation of 26.4.2017 on the European Pillar of Social Rights*, paragraph 2.

<sup>35</sup> *EPSR* Section I: Equal Opportunities and Access to the Labour Market, Principle I.

<sup>36</sup> *Ibid*, Principle 3.

The right to education as an empowerment right establishes two categories of guarantees in the full realization of the right, “rights to education” as well as “rights in education”. These categories correspond to the 4-A Framework enshrined in Article 13 of the ICESCR foresees four goals that are necessary for the full realization of the right to education which make up the “4-A Framework”: availability, accessibility, acceptability, and adaptability<sup>37</sup>. The four aspects of the framework are interconnected and incorporates elements of both social rights and civil rights.

## 2.1 The ‘Right-to’ Education

At its core, the right to education is a universal right to compulsory education that is free and financially and geographically accessible<sup>38</sup>. The State must ensure that academic institutions are accessible in addition being available. The State is required to ensure that children and parents have access to institutions that exist in parallel to the public-school system. This includes ensuring the availability of private and religious schools. Universal, compulsory education that is free at the elementary level is a core aspect of the right to education<sup>39</sup>. The has discretion in determining the age of compulsory education.

The language of instruction must be accessible to each student and the State must ensure that the students’ religious freedoms are protected in the implementation of education. The Belgian Linguistics Case framed a right to education that includes the right to be educated in one of the national languages but does not include a right to an education in any specific language<sup>40</sup>. The implications of this decision further relate to the contested issue of the language of instruction in deciding that the State has the right to determine both official languages which are de facto the

<sup>37</sup> Katarina Tomasevksi, *Right to Education Primers No.3*, 15.

<sup>38</sup> UDHR, Art. 26(1) and ICESCR, Art. 13(2)(a).

<sup>39</sup> UDHR, Art. 26(1).

<sup>40</sup> European Court of Human Rights, *Guide on Article 2 of Protocol No.1 to the European Convention on Human Rights*, (2018), paragraph 17.

languages of instruction in schools and that neither parents nor their children possess "a right to education in a language of one's choice."<sup>82</sup>

The right to education under Article 2 of Protocol 1 is not an absolute right<sup>41</sup> and is limited to a right to access a given type of education available at the given time<sup>42</sup>. As a consequence of the *Belgian Linguistics* judgement, the European Court of Human Rights highlights that there is no positive obligation on the part of the State to establish an education system at its own cost or to fund any particular kind of education, whether public, private or religious<sup>43</sup> which speaks to the importance of a wide margin of appreciation in matters concerning the national education system in the eyes of the Court. States are, however, obligated to ensure accessibility to the education systems they have either set up or "chosen to authorize" and therefore carry a positive obligation to ensure accessibility to the classroom in a manner that is free from discrimination<sup>44</sup>.

## 2.2 The "Rights-In" Education

Education must be acceptable. Acceptability demands a right to education that is an effective right. An effective right to education is an education that speaks to a certain standard of quality in education. The State must provide this minimum standard of education and ensure that the minimum standard is met in practice in all academic institutions whether public or private. The right to an effective education is the fundamental aspect of the right to education through which "rights-in" and "rights-to" education are established. The 'acceptability' aspect of the 4-A framework requires States to provide an education to each student that equips students with the

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<sup>41</sup> Ibid, paragraph 5.

<sup>42</sup> *Belgian Linguistics Case*, (Application no 1474/62), paragraph 4.

<sup>43</sup> European Court of Human Rights, *Guide on Article 2 of Protocol No.1 to the European Convention on Human Rights*, (2018), paragraph 3.

<sup>44</sup> European Court of Human Rights, *Guide on Article 2 of Protocol No.1 to the European Convention on Human Rights*, (2018), paragraph 4.

skills and knowledge necessary to access their human rights at all stages of life. Education must serve as a safeguard against poverty<sup>45</sup> and discrimination and fulfils the UDHR's Article 26 State obligation of giving students the equal opportunity to the development of personality in an environment that fosters tolerance and understanding between groups that are inherently different in terms of culture, ethnicity, race, or religion<sup>46</sup>.

The State's duty to control the minimum standard of education and to ensure an acceptable education is reflected in ECHR case law. The State's responsibility and interest in regulating the quality of education and therefore ensuring the acceptability of instruction that students receive is expressed in the decision of the *Belgian Linguistics Case*. The State has the duty to control the minimum standard of education through legislation<sup>47</sup> at institutions that are established by the State as well as non-state actors<sup>48</sup>. Although there are international guidelines that create a framework for the quality of education the establishment and maintenance of what exactly constitutes a "quality" education is left to the discretion of the State. The European Court for Human Rights, like the Committee on Economic, Social, and Cultural Rights in its General Comment no. 13, views an effective education as central to the full realization and requires that any limitations imposed by the State must be foreseeable and pursue a legitimate aim<sup>49</sup> at all levels of the education system.

The Social Charter Revised views the acceptability aspect of the right to education as interconnected with the adaptability piece. The State must ensure that the same quality of education is available to everyone including, and especially for, children and young people with disabilities.

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<sup>45</sup> CESCR, *General Comment No.13*, paragraph 1.

<sup>46</sup> UDHR, Article 26(2).

<sup>47</sup> Katarina Tomasevksi, *Right to Education Primers No.3*, 18.

<sup>48</sup> *Belgian Linguistics Case*, (Application no 1474/62), paragraph 5.

<sup>49</sup> European Court of Human Rights, *Guide on Article 2 of Protocol No.1 to the European Convention on Human Rights*, (2018), paragraph 3.

Acceptable education is education that takes measures to implement inclusive education at all levels of the education system and ensures the inclusion of vulnerable groups of students including minorities and migrant children.<sup>50</sup>

### 2.3 Adaptability and Inclusivity in the 4-As Framework

The adaptability aspect of the 4-As Framework is the most difficult goal of education to achieve. The concept of adaptability is ambiguous in its practical expression. The State must establish and maintain an education system that is responsive to students' diversity and individual needs and must incorporate the principle of the child's best interest<sup>51</sup> in every aspect of implementation. Adaptability envisions an education system that is child-centric and facilitates the integration of difficult to reach populations and students who have historically been and unjustly continue to experience marginalization in the education system. This includes students with disabilities, minority students, and students who live in poverty. The education system is required to change to ensure that each students' needs are met within a common classroom.

The State is obligated to achieve this through changes in policy, which is codified in international and regional instruments as the obligation to address and resolve the issue of irregular school attendance. This obligation of the State is a part of the right to education under the CRC as well as the European Social Charter Revised and establishes an education system that must change according to the needs of its students rather than placing sole responsibility on students to adapt to the existing system. Adaptability acts as a safeguard against policies that challenge the

<sup>50</sup> OSCE Human Dimension Implementation Meeting 2008, *Working session 10 Tolerance and non-discrimination, Council of Europe, Non-discrimination as guaranteed by the European Social Charter*, p.4.

<sup>51</sup> Klees and Thapliyal, "The right to education: the work of Katarina Tomasevski," *Comparative Education Review* 51, no.4 (2007), 507/CRC, Art.3.



effectiveness of education. The State must fulfil its obligation to ensure effective exercise of the right to education according to the resources the State has available<sup>52</sup>.

From the perspective of this thesis, the right to adaptable education is a right to multicultural education. The adaptability aspect of the framework is closely connected to Article 26 of the CRC which constitutes the children's right to respecting their respective cultures of origin. Adaptability concerns the cultural affiliations of students and students' cultural preferences and posits that the education system must reflect these aspects of students' identities and lives. In my own interpretation of adaptability, Article 13 asks education systems to progressively incorporate children's changing identities and enact policies that are identity affirming rather than promoting a culture that alienates students because of their perceived differences, either in terms of culture or intellectual or physical ability.

The right to education as an adaptable right is linked the right to education as a right that must be inclusive under the CRPD<sup>53</sup> and a right that must be culturally affirming under the CRC<sup>54</sup>. An adaptable education must occur in an environment that is child-centric above all else and reflects the students' individual needs and cultural identities are affirmed. The adaptability requirement touches on children's right to enjoy culture and freedom of expression rights and is also inseparable from the right to the development of full personality. Cultural identity, in the form of language and other traditions, is a central part of children's developmental trajectory and development of personality rights<sup>55</sup>.

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<sup>52</sup> ICESCR, Art. 2(1).

<sup>53</sup> *Convention on the Rights of Persons with Disabilities*, 39 March 2007 Art. 24, (entered into force 3 May 2008) [CRPD].

<sup>54</sup> CRC, Art. 29(1)(c).

<sup>55</sup> Shulamit Almog and Lotem Perry-Hazan, "Conceptualizing the Right of Children to Adaptable Education," *International Journal of Children's Rights* (2012) 5.

The adaptability aspect is central to the right to an effective right to education because it aims to establish an inclusive, integrative education system that actively works against segregation on the basis of protected grounds such as disability, socioeconomic status, and ethnic origin. Indeed, it seems that the adaptability of national education systems is the fundamental aspect of the ‘vision of the future’ for education systems by international formulations of the right as well as ‘visions for the future’ in soft-law instruments at the EU level as seen in Principle 3 of the European Social Pillar in section 1.2.1.

### 3. The Personal Scope of the Right to Education

There are three distinct holders of the right to education: children, their parents, and non-state actors. The right is first and foremost seen as a children’s right as children are direct bearers of the right within the education system. School-age children have a right to access academic institutions which are in existence at a given time<sup>56</sup> and have a duty to attend and participate in the education system<sup>57</sup>. The ECtHR has established that the regulation of education pertains to elementary, secondary, and higher-level education and thus establishes a right to education for adults pursuing continued education<sup>58</sup>.

The right to education is defined by the civil and political right to freedom of conscience<sup>59</sup>. This is guaranteed through the formulation of international and regional instruments which protect the parental right to choose an education that conforms to their own philosophical and religious beliefs. A strong parental right to the right of education and the choice of the type of

<sup>56</sup> European Court of Human Rights, *Guide on Article 2 of Protocol No.1 to the European Convention on Human Rights*, (2018) citing *Campbell and Cosans v. the United Kingdom*, no. 7511/76, 1982, paragraph 40.

<sup>57</sup> *Nielsen v. Denmark*, no. 10929/84, 1987, European Commission of Human Rights, paragraph 4.

<sup>58</sup> European Court of Human Rights, *Guide on Article 2 of Protocol No.1 to the European Convention on Human Rights*, (2018), paragraph 12.

<sup>59</sup> ICCPR, Art. 18.

education is outlined in Article 13 of the ICESCR and Article 2 of Protocol 1 of the ECHR. The latter views the right of parents to choose as an integral aspect of the education right. The ECHR emphasizes that the parental freedom to choose an education is secondary to the child's right to an education and is limited to the type of education that is in existence at a given time<sup>60</sup>.

The right to education extends to non-state actors and the right to establish institutions that are separate from the state-run public-school system<sup>61</sup>. This includes the right to establish private and religious schools and serves as a safeguard to the maintenance of a State monopoly on the education system<sup>62</sup>. The right of state actors to establish schools is, however, limited by State monitoring as the State maintains the duty to establish a minimum academic standard and ensures that each academic institution operates in compliance with national laws and regulations concerning education<sup>63</sup>.

### 3.1 State Obligations and Implementation

The State has the responsibility to invest resources that ensure eventual fulfilment of the State's commitment to all aspects of the right to education<sup>64</sup>. The ICESCR Committee views the State as the principal authority that must invest and maintain an education system<sup>65</sup>. The State must financially support the physical institutions, salaries and training for teachers and administrative staff, and learning materials that are adequate in quality at all levels of the education

<sup>60</sup> European Court of Human Rights, *Guide on Article 2 of Protocol No.1 to the European Convention on Human Rights*, (2018) citing *Campbell and Cosans v. the United Kingdom*, no. 7511/76, 1982, paragraph 40.

<sup>61</sup> ICESCR, Art. 13(3).

<sup>62</sup> Fons Coomans, "Exploring the normative content of the right to education as a human right: recent approaches," *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerp, Intersentia, (2002), 70.

<sup>63</sup> ICESCR, Art. 13(4).

<sup>64</sup> Office of the High Commissioner for Human Rights, *CESCR General Comment No.3: the nature of State Parties' obligations (Art.2, Para.1 of the Covenant)*, E/1991/23 (14 December 1990), paragraph 1.

<sup>65</sup> CESCR, *General Comment No.13*, paragraph 48.

system<sup>66</sup>. States are required to monitor the implementation of the right to education and must invest in research that uncovers and provides solutions for mechanisms in education that result in de facto discrimination<sup>67</sup>.

The “core essence” concerns the most basic standard of education that the State is obligated to universally provide. The State may not act in a manner that robs any given right of its ‘natural meaning’<sup>68</sup> in carrying out its international obligations. The ‘core essence’ of the right to education is the right to an effective education. The right to full and effective participation requires access to rights including the right to non-discrimination, freedom of religion and conscience, freedom of association and the right of non-state actors to establish schools separate from the State school system and the right to privacy<sup>69</sup>.

A narrow understanding of the ‘core essence’ of the right to education is that this right must be provided on a free and on a compulsory basis. The core minimum standard that requires States to provide an effective education is necessarily an education that is regulated by the State, is delivered in an environment that places non-discrimination and equal opportunity as a guiding principle at all levels of implementation, and ensures the transmission of values and access to human rights as laid down in Article 26 of the UDHR.

The specific measures that the State undertakes to ensure adequate fulfilment of the right to education is left up to each State. The *results* in the education system are central to the ‘core essence’ of the right. The means to achieve an education system that fulfils the necessary principles inherent to the right to education is secondary to the results as long as the State ensures non-discrimination and equality of opportunity in the measures and policies aimed at effective exercise.

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<sup>66</sup> Fons Coomans, *Exploring the normative content of the right to education*, 96.

<sup>67</sup> CESCR, *General Comment No.13*, paragraph 37.

<sup>68</sup> Fons Coomans, *Exploring the normative content of the right to education*, 76.

<sup>69</sup> *Ibid*, 79.

## Conclusion

The 4As-Framework established by the Article 13 ICESCR sets the standard for the core elements of the international right to education. States are obligated to implement education that is acceptable, adaptable, accessible, and available. These four requirements illustrate the right to education as a right as a social right and as a civil and political right. There is a universal right to access schools and the experience of this right must be defined by the realization of personal liberties. The 4As-Framework establishes two categories of rights that must be protected for the full enjoyment of the right to education, the “rights-to” education which establish positive State responsibilities and the “rights-in” education which limit the power of State involvement in the education system.

The international provisions of the right to education formulated by the ICESCR, the ICCPR, the UNESCO Convention Against Discrimination in Education, and the Convention on the Rights of the Child establish key minimum standards in the State obligation to the realization of the right to education. Education must be free and compulsory, the principle of non-discrimination must apply to every aspect of education, and the State must not interfere with the parental right to choose a school or the desire of non-state actors to establish schools separate from the public-education system<sup>70</sup>.

The State obligations of the 4-As Framework are interconnected. Regional European instruments provide a much narrower protection of the right to education. These provisions, such as Article 2 of Protocol 1 of the ECHR, are concerned with the right to education as a right that

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<sup>70</sup> Katarina Tomasevski, *Education Denied: Costs and Remedies* (Zed Books, 2003), 53.

must encompass the principles of non-discrimination. The right to education is very much framed as a parental right to exercise control over the type of education their children receive according to their religious and philosophical beliefs.

International and regional instruments view the right to education as inherently linked with the responsibility to actively work against social marginalization and exclusion. The right to education in its full realization is an empowerment right. The experience and completion of an education that is defined by the 4As-Framework provides citizens “with control over the course of his or her life, and in particular, control over (not merely protection against) the state.”<sup>71</sup> Education as an empowerment right must be expressed as an equality right that requires the State to reasonably address inequalities between students’ starting points in the education system to ensure full and effective realization of this fundamental right.

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<sup>71</sup> Klaus Dieter Beiter, *The Protection of the Right to Education by International Law*, 53.

## **Chapter II: The national right to education in France and Germany and the Concept of a Migrant Background in each jurisdiction**

Chapter 1 addressed the principles of equality and non-discrimination as central in the State's obligations towards the right to education. This Chapter seeks to address what exactly constitutes a right to education as an implied equality right. The right to education as an implied equality right is applied to the “effective exercise” of this right in the education trajectory of students with a migrant background in the respective jurisdictions within the context of the jurisdiction's specific history with migration.

The comparison of the constitutional education provisions is paired with a discussion of the categorization of “students with a migrant background.” This thesis takes a critical view of the categorization of individuals as “people with a migrant background” in light of the consideration that this term is politically loaded, closely aligned with harmful stereotypes, and does not include all individuals who may benefit from or be harmed by “falling” into this category.

Chapter 2 discusses the right to education of migrants under EU law and the national education provisions of France and Germany. The education system in France is centralized and is therefore characterized by a level of standardization<sup>72</sup> that is not found in the decentralized German education system. France's school system is assimilationist and the framing of the right to education necessitates a color-blind approach to the student population as the principle of equality is a founding principle of French legal tradition and society<sup>73</sup>.

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<sup>72</sup> Marielle Reyhn and Kirsten Gaschler, “Bildungspolitik und Sprache in Frankreich,” 91.

<sup>73</sup> Yaël Brinbaum and Amy Lutz, “Examining educational inequalities in two national systems: a comparison of the North African second generation in France and the Mexican second generation in the United States,” *Journal of Ethnic and Migration Studies* 43, no.15 (2017) 2.

The right to education in Germany encompasses an individual right to attend school on a non-discriminatory basis while simultaneously placing a duty on both parents and children to attend and participate in school. The sixteen *Laender* maintain the principle of *Kulturhoheit*,<sup>74</sup> which can be understood as the primary responsibility to act ‘on’ “cultural sovereignty.” The principle of ‘cultural sovereignty’ applies to regulations concerning art and education and places the duty to implement the right to education on each individual *Land*.

## 1. The Right to Education as an Implied Equality Right

Chapter 1 section 2.3 discussed the “core essence” hint at the true meaning of the right to education as an implied equality right. The formulation of the right to education is strongly defined by the principles of equality and non-discrimination. The UNESCO Convention against Discrimination in Education<sup>75</sup> recognizes that any form of discrimination in education robs this right of its effectiveness and this is reflected in consequent right to education provisions discussed in Chapter 1. The right to education is established as a right to non-discrimination but in order for this right to be expressed in a non-discriminatory way this right must be an *effective* right.

The right to education as an implied equality right is a right to an effective education. The underlying goal of the full enjoyment of the right to education is the ability of each child to access further human rights. As the CESCR emphasizes in General Comment No. 13, education carries the purpose of ensuring that students have access to upward social mobility. The right to education is at once a safeguard against poverty and carries the expectation for a way out of poverty. The role of education as a safeguard against poverty inherently means that students must have a right

<sup>74</sup> Pia Debuschwitz and Martin Bujard, “Migrationshintergrund, soziale Ungleichheit oder Bildungspolitik: Wodurch lassen sich Bildungsdifferenzen erklären?” *Bundesinstitut fuer Bevoelkerungsforschung* (2014), 11.

<sup>75</sup> UNESCO Convention against Discrimination in Education, Art. 4.



to an education that is effective in accessing the labor market and reinforces. I also think that the right to education as an implied equality right means that the right to education is a children's right that must exist in tandem with the full realization of children's right to participation. The purpose of education is to access human rights as is enshrined in the earliest international formulation of this right under Article 26 of the UDHR.

The right to education, as was discussed in Chapter 1, carries the goal of creating social equality beyond the classroom. The right to education is inseparable from the right to systemic equality and must exist as a way for children to access their rights as they develop and progress and to have the opportunity to social upward mobility within their communities regardless of their social circumstances.

In *Autism-Europe v. France*<sup>76</sup>, The European Committee of Social Rights established that a State's failure to take practical action to the fullest of the State's reasonable resources to ensure access to education robs the right to education of its effectiveness. Progressive realization must correspond to the maximum reasonable efforts and investment by the State. This infringement of the right to "equal effective enjoyment" represented indirect discrimination in this case and resulted in a violation of the right to education. An effective right to education hinges on the 4-A Framework, particularly the adaptability aspect that was discussed in Chapter 1 section 2.3, to facilitate the most expansive realization of an effective right to education possible. Students must be empowered through education to full and effective participation in their societies independent of their social or cultural circumstances. The full and effective enjoyment of the right to education is a right to social mobility as well as social integration independent of social or cultural

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<sup>76</sup> European Committee of Social Rights, *Autism-Europe v. France* 13/2002

circumstances. The right to education as an empowerment right is the right to education as an effective right.

## 1.1 The right to Education of Migrants Under EU Law

The right to education as it affects migrant children under the umbrella of regional European instruments is the focus of concern in Directive 77/486/EEC is concerned primarily with the freedom of movement as it must be accessible to migrant children and young people from other Member states. The Directive states that Member States have the responsibility to support migrant children academically, including “appropriate measures to promote the teaching of the mother tongue and of the culture of the country of origin” with the limitation or maybe unrealistic expectation that these measures are undertaken “with a view principally to facilitating their possible reintegration into the Member State of origin.”<sup>77</sup> The definition of the legal understanding of a migrant student in this case is inextricably linked to the fact of parental employment and is limited to migrant children who are from other EU member states. Education of third country migrant children is guaranteed by the Convention on the Rights of the Child which has binding force on all members of the European Union<sup>78</sup>.

The right to education applies to all children regardless of legal status or length of stay as foreseen in Art.28 of the CRC and in the 1951 Refugee Convention<sup>79</sup>. EU law, recommendations, and policies must adhere to the principles held in the CRC, especially the right to education which is formative in children’s lives and their right to develop their full potential. The CRC protects children from discrimination based on a non-exhaustive list of protected grounds (including social

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<sup>77</sup> Council Directive 77/486/EEC, Preamble, recital 7, 1977.

<sup>78</sup> European Commission, *Commission Recommendation of 20 February 2013 Investing in children: breaking the cycle of disadvantage* (2013/112/EU), recital 13.

<sup>79</sup> European Union Agency for Fundamental Rights, *Current migration situation in the EU: Education*, (May 2017), p.3.

and ethnic origin)<sup>80</sup> in the exercise of all rights guaranteed in the Convention, including in the exercise of the right to education. The State must provide the same opportunities for and in education for migrant students<sup>81</sup> on the same level as children who are nationals, albeit this does not protect children in precarious legal situations. First-generation students must have access to the school system no later than three months upon entering the host country<sup>82</sup>. The right to education may not be connected to the prospect of the students' length of stay in the host country or the students' status as an asylum seeker<sup>83</sup>.

As mentioned in Chapter 1 on the right to education, Article 14 of the Charter for Fundamental Rights and Freedoms, the right to education is protected for every person legally present in the European Union. A cornerstone of third country migrant education in the EU is the 2004 Common Basic Principles for Immigration Integration Policy (Zarazoga indicators)<sup>84</sup>. The European Union lays out a right to integration that is a 'two-way' process<sup>85</sup> and places duties and responsibilities on migrants and their families to engage with the destination country's culture and language<sup>86</sup>. The European Union's concern with the right to education emphasizes the goal of education as facilitating integration for first generation immigrants and beyond<sup>87</sup>. There's a push and pull between new-comers and the host country and the expectation of a certain degree of

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<sup>80</sup> CRC, Art. 2.

<sup>81</sup> Ralf Poscher, Johannes Rux, and Thomas Langer, *Das Recht auf Bildung: Voelkerrechtliche Grundlagen und innerstaatliche Umsetzung*, (Nomos, Baden-Baden, 2009), 34.

<sup>82</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection*.

<sup>83</sup> Mareike Niendorf und Sandra Reitz, "Das Menschenrecht auf Bildung im deutschen Schulsystem: was zum Abbau von Diskriminierung notwendig ist," *Deutsches Institut für Menschenrechte* (2016), p.33.

<sup>84</sup> Council of the European Union, *Common Basic Principles for Immigration Integration Policy in the EU*, 14615/04, 19-25.

<sup>85</sup> Ibid, Principle 1.

<sup>86</sup> Ibid, Principle 12.

<sup>87</sup> Ibid, Principle 13.

cultural assimilation. These principles are applicable to migrants who are legally present in the destination country.

From the EU perspective, access to education of third country national students is supported through soft-law instruments such as The Commission's Action Plan on the integration of third country nationals. This Action Plan establishes three main goals for the education of third country national students. Migrant children must be a part of mainstream classrooms as early as possible and most importantly to this thesis education must serve to safeguard against underachievement, support migrant children and young people in their effort to 'fulfil their potential and to prevent social exclusion'<sup>88</sup>. The Action Plan emphasizes that the process of integration is a challenge that must be carried by both the State and migrants and places the responsibility of learning the language and culture of the destination state on migrant learners.

Further soft-law instruments establish the State's responsibility to address the connection between poverty and underachievement. The Commission Recommendation on Investing in Children: Breaking the Cycle of Disadvantage (2013/112/EU) highlights migrant students and students whose families are at risk of poverty as a vulnerable population<sup>89</sup> that requires increased funding and support in the education system. The Recommendation emphasizes the need for "access to adequate resources" and to "improve education system's impact on equal opportunities" which requires member States to ensure that education systems are inclusive, resolve obstacles that cause students to drop-out of school, and invest in quality, early-childhood education.

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<sup>88</sup> European Union Agency for Fundamental Rights, *Current migration situation in the EU: Education*, (May 2017), p.3.

<sup>89</sup> Recommendation (2013/112/EU), Principle 1, paragraph 5.

These soft-law instruments are illustrative of the EU's expectation that education must be an implied equality right. As is evident in Article 13 of the ICESCR, education serves the purpose of preparing students beyond the classroom and strengthening social cohesion in European communities. This is done primarily through resolving disadvantages associated with social origin in addition to migrant and minority status. The soft-law instruments indicate a regional awareness of the correlation between socioeconomic status and ethnic origin as obstacles in the education system<sup>90</sup>. Member States and migrants share a duty in the resolution of the perpetuation of the cycle of poverty in marginalized migrant societies. States must implement measures to “improve [the] education system's impact on equal opportunities.” The education system must adapt to students' needs and must be inclusive, and as reflected in the RESCR and the CRC education systems must resolve obstacles that promote early school drop-out. Migrants, and presumably first-generation students, have the duty to actively participate in their societies and share a responsibility in the effort of linguistic and cultural integration.

## 2. The right to education in Germany

Germany has a strong education system and is generally in compliance with international and regional provisions. Equal opportunity and non-discrimination are defining principles of the right to education in the German context<sup>91</sup>. The German right to education is subject to international and regional treaties that strengthen the right to education. UN Conventions and regional instruments are binding on German law<sup>92</sup>. Article 26 of the Universal Declaration of Human Rights, Article 13 of the International Covenant on Economic, Social, and Cultural Rights, and the education

<sup>90</sup> Recommendation (2013/112/EU), Principle 1, paragraph 5.

<sup>91</sup> Viola Hartmann, *Wenn Bildungsungleichheit zur Bildungsungerechtigkeit wird: Einflussfaktoren auf die Bildungsentscheidung an der Schwelle Schule/Hochschule in Deutschland*, (Ergon Verlag: Baden-Baden, 2018), 113.

<sup>92</sup> *German Basic Law*, Art. 59(2), 1949.

provisions of the Convention on the Rights of the Child are binding on German law. Education is further protected by the application of Article 14 of the EU Charter of Fundamental Rights, Protocol no.1 Article 2 of the European Convention on Human Rights, and the education provisions of the European Social Charter.

Germany has signed but not yet ratified the RESC and is bound to the 1961 Social Charter<sup>93</sup>. The right to education provisions between the 1961 Social Charter and the Social Charter Revised diverge. The Article 17(2) provision of the Revised Charter that enshrines the State's duty to "take all appropriate and necessary measures designed to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools" does not yet have binding effect in Germany and Germany does not allow collective complaints under the Charter. The 1961 draft of the Charter establishes Article 17 as a "right of the mother and child to social and economic protection" and represents a different right. Under the Charter, Germany has an obligation to ensure a right to education and vocational training for children with disabilities. Germany ratified the CRPD in 2008 and is now under the obligation to implement inclusive education<sup>94</sup>.

The constitutional right to education is established through several provisions in the German Basic Law. There is no explicit individual right to education. The material scope of the right to education is established through several provisions in the German Basic Law: Article 6, 7, and Article 2(2). Parents have the primary duty to oversee their children's development while the State maintains authority to supervise this parental right<sup>95</sup>. It is the duty of the State to ensure that each child that is within the age range of compulsory education between the ages of six and sixteen

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<sup>93</sup> Department of the European Social Charter, *Germany and the Social Charter*, (2019), 1.

<sup>94</sup> CRPD, Art. 24.

<sup>95</sup> *German Basic Law*, Art. 6(2).

receives the knowledge and skills necessary to fully participate in all aspects of society. Parental rights are limited by the State's authority of supervision which ensures a universal right to education that cannot be impaired by parental control<sup>96</sup>.

The State has an expansive supervisory role in the establishment of the education system. The State has the duty to oversee all aspects of the education system<sup>97</sup>. Article 7(1) of Germany's Basic Law establishes a public-school system at the primary and secondary level<sup>98</sup> as a public good that must be delivered by the State. Article 7(3) gives the State authority to include religious education in mainstream curricula. The State's implementation in religious education is limited by the parental right to allow their children to opt-out of from instruction in the public education system<sup>99</sup>.

The Federal Government carries the obligation of supervising the education system, the duty and right to implementation lies with the states. The German education system is established as a decentralized system, unlike France's strongly centralized education system. The states maintain the principle of *Kulturhoheit*,<sup>100</sup> the right to implement instruction in a manner that manifests their culture and values and control the age of compulsory schooling (this provides States with a wide margin of appreciation in the implementation of the right to education). Individual right to education provisions are enshrined in each state's respective constitution. Education provisions across the German states provide for slightly varying ages of compulsory education. However, generally students have a duty to attend school at the age of six and are required to attend and participate in at least nine years of full-time schooling (*Schulpflicht* or "duty to attend school").

<sup>96</sup> the right to education in Germany, for example does not include a right for parents to home school their children for religious reasons: *BVerfG, Beschluss vom 29. 4. 2003 – 1 BvR 436/03*.

<sup>97</sup> *German Basic Law*, Art. 7(1).

<sup>98</sup> Viola Hartmann, *Wenn Bildungsungleichheit zur Bildungsungerechtigkeit wird*, 115.

<sup>99</sup> *German Basic Law*, Art. 17(2).

<sup>100</sup> the "cultural sovereignty principle" as discussed in the introduction of Chapter 2/ *German Basic Law*, Art. 30.

Compulsory full-time school attendance ends between the ages of sixteen and eighteen. After the completion of nine years of full-time education, students who have completed the vocational school track are required to complete two to three years of part-

States establish varying aspects of the right to education in their regional constitutions. Baden-Wuerttemberg, Brandenburg, Bremen, and Mecklenburg-Vorpommern establish the right to education as an equality right that may not be negatively impacted by socioeconomic status. Hessen and Rheinland-Pfalz view the right to education as strictly a duty of children to attend and participate in school, while other states frame the right to education based on merit and capacity<sup>101</sup>. The duty to attend school and the compulsory school age is established by individual state constitutions. The individual right to education in Germany does not encompass a right to attend any particular type of education.

## **2.1. The right to education in Germany as a right to non-discrimination and equal opportunity**

The binding power of the CRC on German federal and state law remains disputed as per Article 51(2) of the Convention. The federal implementation of the children's rights framework, including the right to education, stands in direct conflict with the state's "cultural sovereignty principle discussed in the introduction of Chapter 2"<sup>102</sup>. The Basic Law establishes the individual students' right to education in direct connection with equal treatment provisions<sup>103</sup>. Children have an individual right to education that must be defined by the principles of equality and the right to

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<sup>101</sup> Viola Hartmann, *Wenn Bildungsungleichheit zur Bildungsungerechtigkeit wird*, 115.

<sup>102</sup> Susanne Baer, *Schutz vor Diskriminierung im Bildungsbereich in Berlin aus juristischer Sicht* (LADS Berlin, 2010), 24.

<sup>103</sup> Viola Hartmann, *Wenn Bildungsungleichheit zur Bildungsungerechtigkeit wird*, 114.



full development of personality. Each child has a right to an education and may not be prevented from enjoying the fulfilment of this right based on the following protected grounds:

“No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.”<sup>104</sup>

Schools carry the authority of the State and are expressly forbidden to discriminate on any of the protected grounds in Article 3 of the Basic Law<sup>105</sup>. This list is exhaustive and does not include specific protections for equality based on social origin. However, the right to social equality within accessing the right to education is derived from Article 7 of the German basic law.

The right to education is an equality right that must also be defined by social equality and equal opportunity<sup>106</sup>. The State is not allowed to discriminate based on socioeconomic status in the distribution of possible ‘spots’ available at any particular school<sup>107</sup>. Article 7 provides non-state actors with the right to establish private schools at the secondary level, but this includes a safeguard against social exclusion along socioeconomic lines. Private schools may be established with certain limitations. The establishment of private schools may not result in the segregation of students along socioeconomic lines as is enshrined in Article 7(4) of German Basic Law<sup>108</sup>. It follows that the public-school system is also prohibited from discrimination along socioeconomic lines<sup>109</sup> as mandated by Article 26 of the Universal Declaration of Human Rights.

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<sup>104</sup> *German Basic Law*, Art. 3(3).

<sup>105</sup> Susanne Baer, *Schutz vor Diskriminierung im Bildungsbereich*, 18.

<sup>106</sup> *German Basic Law*, Art. 28(1).

<sup>107</sup> Ralf Poscher, Johannes Rux, and Thomas Langer, *Das Recht auf Bildung*, 91.

<sup>108</sup> *German Basic Law*, Art. 7(4).

<sup>109</sup> Susanne Baer, *Schutz vor Diskriminierung im Bildungsbereich in Berlin*, 18.

### 3. France and the Right to Education

France has ratified the European Social Charter (Revised) and is subject to Article 17 as an education provision that is framed as a children's right to "appropriate social, legal and economic protection. Article 17(2) is of interest to as it requires States to "take all appropriate and necessary measures designed to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools."<sup>110</sup> This mirrors the Convention on the Rights of the Child and the education provision that requires the States to address high drop-out rates.

The right to education in France is defined by Republican values, particularly by laicism and egalitarianism. Schools are mandated to be strictly secular and obligated to treat each student equally independent of race or ethnicity. The constitutional right to education stems from the 1946 constitution and is enshrined in the preamble of France's 1958 constitution<sup>111</sup>. The enforcement of the right to education lies entirely with the State and establishes the State's authority as central in the transmission of knowledge as well as "French Culture". Provision 13 of the 1946 Constitution ensures equal access for children and adults alike, guarantees vocational training and cultural training, and provides for "the provision of free, public and secular education at all levels is a duty of the State."

The right to education in France is constitutionally protected for every person in France and is compulsory between the ages of six and sixteen<sup>112</sup> and is guaranteed to be free until the age of eighteen. The French right to education is a right that is enjoyed by children as well as adults, an

<sup>110</sup> European Social Charter *Revised*, Art. 17(2).

<sup>111</sup> Nicole Atwill, "France—Children's Rights," *The Law Library of Congress* (2007), 86.

<sup>112</sup> Nicolas Boring, "France: Constitutional Right to Education" in *Constitutional Right to an Education*, The Law Library of Congress (2016), 12-14.

expansive constitutional protection of the right to education and encompasses access to pre-school education on a non-discriminatory basis throughout France. The French provision lacks the explicit parental rights and rights of non-State actors to establish academic institutions and control religious education.

### 3.1 The right to education in France as a right to non-discrimination and equal opportunity

The universal right to education is defined by the French Republican principle of *égalité* or equality and defines all aspects of France's public institutions. The constitution of the Republic lays out its color-blind approach and emphasizes the "equality of all citizens before the law, without distinction of origin, race or religion."<sup>113</sup> *Égalité* also assumes meritocracy and denies the existence of disadvantages due to stereotypes based on ethnicity, language, or social class. This represents a disadvantage for students with a migrant background who require extra support for equal access to education and for access to an effective education. The French effort to establish equality in French classrooms through the color-blind approach has the practical effect of entrenching inequalities as will be discussed in Chapter 3 Section 1.4.

The fulfilment of the right to education is framed as the 'top national priority' of France and the education system is increasingly decentralized<sup>114</sup>. The implementation of the right to education is regulated by the Education Code (*code de l'éducation*) which incorporates all laws and decrees concerning education policies throughout France<sup>115</sup>. The Education Code places spending power in the hands of the municipalities and has increased local control over public schools. French education law prohibits discrimination on the basis of gender and explicitly states

<sup>113</sup> France's Constitution of 1958, Art. 1.

<sup>114</sup> Loi n°89-486 du 10 juillet 1989 d'orientation sur l'éducation.

<sup>115</sup> France Education Code: Version consolidée au 3 Mai 2019.

that schools may not encourage policies of “discrimination regarding the acceptance of foreign children”<sup>116</sup>.

The French education system supports extensive integration measures with the target goal of ensuring linguistic integration. The French Education Code provides for intensive French language education for children who have newly arrived and who do not possess adequate levels of the French language to attend mainstream schools at both the primary and secondary school level as per Circular 2002-100 of April 25, 2002<sup>117</sup>. Schools must enrol at least fifteen migrant students who struggle with French language in order to receive funding to provide intensive French instruction. Students who number fewer than fifteen have access to after school tutoring.

Students with a migrant background have access to language instruction in the language of their origin. These classes, from the French perspective, serve to further integrate students with a migrant background into the French system<sup>118</sup> and to support students in their French language acquisition<sup>119</sup>. These classes exist separately from the national curriculum and are held outside of school hours and are funded by respective foreign embassies and are not financially supported by the French State. Inviting origin language instruction within the daily curriculum clashes with the equality principle and would require the State to acknowledge the presence of minorities. Further, the construction of the French right to education frames the right to education as a right to the French language specifically.

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<sup>116</sup> Article L. 131-1 of the French code of education in UNESCO, *The status of the right to education of migrants: international legal framework, remaining barriers at national level and good examples of states' implementation* (2018), 50.

<sup>117</sup> Nicole Atwill, “The Law Library of Congress: France, Education of Non-Native Language Speaking Children,” *The Law Library of Congress* (2009)1.

<sup>118</sup> Circulaire n°78-238, 1978, Marielle Reyhn and Kirsten Gaschler, “Bildungspolitik und Sprache in Frankreich,” 95.

<sup>119</sup> Ibid, Circulaire n° 77-447, 1977.

#### 4. The Concept of “Students with a Migrant Background”

This section elaborates on the characteristics of the group “students with a migrant background” from the perspective of the government. A precise definition of the term student with a migrant background is difficult to attain in the French and German literature because of the way these jurisdictions establish citizenship and, principally, because of France’s overarching equality principle. There is no international consensus on the interpretation of this term but the PISA definition is the most widely applied in the international comparison of student achievement across education systems. This thesis takes a critical view of the construct of the categorization of students as “people with a migrant background”. The term “students with a migrant background” serves to “other” students who are culturally, ethnically, and socially different from the cultural majority ‘norm.’ The categorization serves as a way to assess successful integration but does not address the diversity of the group.

The PISA assessment applies this term to students who are first-generation migrants, students who have one or more parent who was born abroad who are second-generation students, and combines these two groups under the categorization of “students with an immigrant background.” The PISA definition does not include third-generation students, although these students also experience disproportional underachievement. For the purpose of this thesis, students with a migrant background are students whose families have origins in countries outside of the EU and who are members of an even more intangible group, the ‘visible minorities.’ The interest of this thesis is the discussion surrounding the stereotyping and institutional processes that disproportionately affect visible minorities which is discussed in further detail in Chapter 3 section 2.

The term ‘migrants’ as it is regarded in the context of the European Union refers to non-EU citizens, third country nationals. The experiences between third country nationals and migrants from the EU exercising their freedom of movement are qualitatively different in the experiences of direct and indirect institutional discrimination as will be discussed in Chapter 3 sections 1.3 and 1.4. The cultural and linguistic hurdles of integration for students who are (or whose families are) third country nationals are unquestionably greater than students from the EU realm. Further, this thesis excludes students in precarious legal situations such as children seeking asylum as this too represents a more vulnerable legal space and lies beyond the scope of this thesis.

For the purpose of this thesis, students with a migrant background are students whose families have origins in countries outside of the EU and who are members of an even more intangible group, the ‘visible minorities.’ The interest of this thesis is the discussion surrounding the stereotyping and institutional processes that disproportionately affect ‘visible minorities.’ From the perspective of this thesis, students with a migrant background include first generation students and spans into the third generation. The category of “students with a migrant background” necessitates a broad understanding of the students that are implicated in the disadvantages that students with a migrant background face. Students with a migrant background are, to a large extent, citizens of the respective jurisdiction and in many cases have not attended education systems outside of the respective country.

The group of students who constitute ‘students with a migrant background’ are incredibly diverse and share the sole characteristic of difference in ethnic origin in comparison to the ‘mainstream,’ non-immigrant students. Unlike Roma and Sinti, they are not a recognized national

minority and do not have access to language and cultural rights<sup>120</sup>. The heterogeneous characteristics of ‘students with a migrant background’ speaks to Kymlicka’s definition of an ‘ethnic group.’ These students do not share a common language or culture but share a common need to integrate into the mainstream culture and require majority culture to make accommodations in the education system<sup>121</sup>.

French Republicanism prohibits the recognition of minorities while German protections reflect Kymlicka’s definition of minorities. To receive official recognition as a national minority, the German state sets out five criteria: minorities must have relatives that are (or were) citizens of the German Republic, they are differentiated from the mainstream culture through their language, culture, and history and have their own identity and have an interest in preserving this identity, they are traditionally at home in German territory and are live in these communities.<sup>122</sup> The German discourse surrounding the education gap and students with a migrant background, however, does assume that students with a migrant background are an at-risk group of students who are more likely than non-immigrant students to face disadvantages in the education system although this is largely explained as an obstacle caused by social rather than ethnic origin.

Students with a migrant background who are members of the ‘visible’ minority of France and Germany, however, occupy a comparable vulnerable position in society due to the undeniable experiences of marginalization and discrimination in comparison to the mainstream majority both

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<sup>120</sup> Der Spiegel, “Official Minority: Northern German State votes to protect Roma and Sinti,” November/14/2012 via <https://www.spiegel.de/international/germany/unanimous-vote-in-schleswig-holstein-for-roma-and-sinti-protection-a-867152.html>

<sup>121</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, *Oxford Scholarship Online*, (2013), 2.

<sup>122</sup> Ibid, BT-Drs. 13/6912 vom 11.2.1997, 28.

in the employment and education sector. Neither France nor Germany recognize persons (and by extension students) with a migrant background as minorities.

#### 4.1 Students with a Migrant Background in Germany

Germany's relationship with migration is recent in comparison to France. Unlike France, Germany does not have an expansive colonial past and did not begin receiving migrants until after the second world war. Germany established the "Guestworker" immigration policies (*Gastarbeiter*) to address labor shortages which allowed for temporary economic migration into West Germany<sup>123</sup>. A significant amount of the migrant population that currently lives in Germany are members of the generations of the former *Gastarbeiter* countries and have been a part of German society for several generations<sup>124</sup>. This includes the Turkish migrant population which constitutes the primary group of students with a migrant background who experience marginalization in the education system<sup>125</sup>.

The public and political discourse surrounding migrant students and students with a migrant background has increased in anxiety on the heels of the "refugee crisis" in 2015. Germany experienced the largest population growth in its history and saw a total number of 2.1 million people migrate into the country<sup>126</sup>. Approximately 20 percent of the total German population is classified as having a "migrant background" and this percentage continues to increase each year<sup>127</sup>. This is especially true in the nation's children five and under. In 2016, approximately 35 percent

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<sup>123</sup> Jenny Gesley, "Germany: The Development of Migration and Citizenship Law in Postwar Germany," *The Law Library of Congress* (2017), 3.

<sup>124</sup> Gayle Christensen and Petra Stanat. "Bildungsforschungs Band 19: Schulerfolg Von Jugendlichen Mit Migrationshintergrund Im Internationalen Vergleich." *Bundesministerium Fuer Bildung Und Forschung*, 2006.

<sup>125</sup> Statistisches Bundesamt, "Pressemitteilung vom 16. September 2016-327/16,"2.

<sup>126</sup> Jenny Gesley, *Development of Migration and Citizenship Law in Postwar Germany*, 1.

<sup>127</sup> Claudia Diehl Christian Hunkler, Cornelia Kristen, *Ethnische Ungleichheiten im Bildungsverlauf: Mechanismen, Befunde, Debatten*, (Wiesbaden: Springer VS, 2016).



of all children five and under in Germany had a migrant background<sup>128</sup>. A significant percentage of students with a migrant background in Germany are second-generation migrants and make up approximately 32 percent of the total student body<sup>129</sup>.

Students with an immigrant background from the perspective of the international PISA application of the term include students who were born outside of the country in which they take the PISA evaluation. A distinction is made between first and second-generation students with an immigrant background and the evaluation also includes the category “language spoken at home,”<sup>130</sup> which is notably absent in the German census on “persons with a migrant background” but is considered a prominent indicator in the collection of school statistics in several states.

There is no consensus on the term “student with a migrant background” in Germany as there are diverging federal and state-level assessments of the characteristics that define this category of students. Federal assessments, which occur for the purpose of the census in addition to establishing a statistical comparison between the sixteen states, reduce “migrant background” to a comparison between academic success to citizenship. The nationwide assessment does not distinguish between third country nationals and students from EU countries outside of Germany. Completed high school qualifications are assessed according to citizenship status in national statistic which results in the exclusion second-generation students who face significant disadvantages in the education system<sup>131</sup>.

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<sup>128</sup> Ibid.

<sup>129</sup> Statistisches Bundesamt, “Pressemitteilung vom 16. September 2016-327/16,”2.

<sup>130</sup> OECD: How do the performance and well-being of students with an immigrant background compare across countries? (2018).

<sup>131</sup> Niendorf, M., & Reitz, *Das Menschenrecht auf Bildung im deutschen Schulsystem*, 36.

This federal statistical assessment, however, does not influence school statistics which remain in the domain of state responsibility<sup>132</sup>. A standardized definition of the statistical concept in school statistics is beneficial in allocating resources to support student need to accurately address the root problems that result in the education gap<sup>133</sup> however the categorization of students with a migrant background varies greatly across states. Berlin, for example, bases its statistics on the number of students with a migrant background solely on the “language spoken at home” variable and disregards nationality and place of birth<sup>134</sup>.

Efforts to estimate the number of students with a migrant background are crucial in determining funding and policies geared towards integration into the German education system. The measurement of the academic success or failures of students according to risk factors, determined by the individual states, serves to appropriately draft policies to address obstacles in the education system and serves as an indicator as to the success of the integration process and the prospect of social cohesion. Special Rapporteur Vernor *Muñoz* states that success in the education system is directly connected to the realization of human rights within a given society<sup>135</sup>. Assessing access to the education system as it is experienced by a vulnerable segment of society provides insight into the realization of further rights, including but not limited to labor rights and citizenship rights.

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<sup>132</sup> Another expression of the state’s Kulturhoheit/’cultural sovereignty’ as per Article 30 of the German Basic Law.

<sup>133</sup> Thomas Kemper, “Migrationshintergrund--eine Frage der Definition,” *Die Deutsche Schule* 102 no.4 (2010), 6.

<sup>134</sup> Ibid.

<sup>135</sup> Vernor Munoz Villalobos, introduction in *Bildung fuer junge Fluechtlinge---ein Menschenrecht: Erfahrungen, Grundlagen und Perspektiven*, eds Lothar Krappmann, Andreas Lob-Huedepohl, Axel Bohmeyer, Stefan Kurzke-Maasmeier, (Bielefeld: W. Bertelsmann Verlag GmbH & Co.KG, 2009), 11.

## 4.2 Students with a Migrant Background in France

The French concept of a student with a migrant background is limited to new arrivals and, unlike in Germany, does not encompass second-generation students<sup>136</sup>. French legal tradition is defined by a color-blind perspective and is required to remain race-neutral. Dividing the population along ethnic lines is in direct conflict with the French principle of *egalite*<sup>137</sup>. There is no national census or collection of data of the French population or of students in classrooms in France that accounts for ethnic differences<sup>138</sup> and no equivalent to the German categorization of “people with a migrant background.”

The French legal construction of a person or a student with a migrant background does not encompass second or third generation of migrant families who are French citizens<sup>139</sup>. Students with a migrant background who were born and raised in France but experience marginalization in the education system are not officially visible and are regarded as French students<sup>140</sup>.

The migrant community in France, as in Germany, is highly stereotyped and marginalized. Cultural conflicts between the French majority population and the Muslim community increasingly dominate public discourse on French values and the French Republican model of integration which requires a high degree of cultural assimilation<sup>141</sup>. Migrants who belong to the Maghrebi population live in disproportionately undereducated sections of French society<sup>142</sup>. France’s largest migrant

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<sup>136</sup> Kirszbaum, Thomas, Yaël Brinbaum and Patrick Simon, “The Children of Immigrants in France: The Emergence of a Second Generation,” *Innocenti Working Paper, no. 2009-13, Florence, UNICEF Innocenti Research Centre*, (2009), 13.

<sup>137</sup> Yael Brinbaum, Hector Ceballa-Boado and Yael Brinbaum, “The school careers of ethnic minority youth in France: success or disillusion,” *Ethnicities* 7, no.3 (2007), 446.

<sup>138</sup> Leland Ware, “Color-blind Racism in France: Bias Against Ethnic Minority Immigrants,” *Washington University Journal of Law & Policy*, (2015), 186.

<sup>139</sup> *Ibid*, 201.

<sup>140</sup> Marielle Reyhn und Kirsten Gaschler, *Bildungspolitik und Sprache in Frankreich*, 97.

<sup>141</sup> Leland Ware, *Color-blind Racism in France*, 185.

<sup>142</sup> Marielle Reyhn und Kirsten Gaschler, *Bildungspolitik und Sprache in Frankreich*, 91.

population is the North African community and includes migrants from former French colonies in Tunisia, Morocco, and Algeria<sup>143</sup>.

France's colonial history distinguishes its relationship to its migrant population. The migrant communities' relationship with French authorities is defined by a high degree of mistrust as a result of France's long and far-reaching colonial history especially in the educational sphere. Colonialism was justified as an effort to 'educate' people the French viewed as inherently less human than white colonialists. The colonial history of 'educating' the less intelligent, less human races is still very much present in race-relations in France despite the French 'color-blind' agenda<sup>46</sup>. The *2005 law on colonialism*<sup>144</sup> required the French curriculum to place a positive spin of French influence in North Africa and resulted in an organized school walk out led by students of migrant descent.

The underachievement of visible minorities in France is viewed through the lens of stereotypes that have been internalized as a result of colonialism centuries continue to view visible ethnic minorities, especially the North African community, as lacking intelligence, untrustworthy, and racially and culturally inferior<sup>61</sup>.

These power dynamics between French authorities and its migrant community is deeply reflected in housing segregation. *Banlieus*, segregated suburban communities, are characterized by poverty, a lack of employment opportunities, and a high migrant population who on average make up 50% of the population, higher in areas outside of Paris. Young people with a migrant

<sup>143</sup> Ceballa-Boado and Brinbaum *The school careers of ethnic minority youth in France*, 447.

<sup>144</sup> Paragraph 4 of The 2005 law on colonialism, *loi n° 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés*. Paragraph 4 has since been repealed.

background in these areas between the ages of 15 and 24 are 2.7 times as likely to experience poverty than the national average<sup>145</sup>.

These communities are known for pervasive substandard education and have been the target of positive action programs aimed at resolving socioeconomic disparities in the education system. In 1981, the State placed neighborhoods deemed to struggle economically under the “ZEP” program or “zones d’éducation prioritaires”(ZEP)<sup>37</sup>. Schools in *ZEP* designated areas receive increased funding and identified socioeconomic status as the primary variable for academic underachievement in migrant communities.

*ZEP* legislation is widely perceived to have had little impact on creating greater equality and opportunities for students in low income, migrant neighborhoods. Inequalities along socioeconomic lines have become more ingrained in the education system<sup>146</sup>. *ZEP* zones were at the center of the riots of 2005 that demonstrated the continued mistrust of migration youth towards French authorities<sup>147</sup>. *ZEP* schools are widely seen as low-quality schools not because of the socioeconomic status of the children attending school but precisely *because* these schools are predominantly located in ethnically segregated, migrant communities. Schools in these communities provide substandard education and serve to segregate students with a migrant background from mainstream French schools<sup>148</sup>. Migrant youth are stereotyped as violent and, similar to Germany, both unwilling and unable to integrate into the French education system and society as a whole.

<sup>145</sup> Claire Demesmay, “Das Ringen um Gleichheit: Integration als Chance fuer Frankreich,” (*DGAP-Analyse*, 4). Berlin: Forschungsinstitut der Deutschen Gesellschaft für Auswärtige Politik e.V (2012), p.8.

<sup>146</sup> Marielle Reyhn and Kirsten Gaschler, *Bildungspolitik und Sprache in Frankreich*, 94.

<sup>147</sup> Fabien Jobard, “Rioting as a Political Tool: the 2005 Riots in France,” *The Howard Journal*, 48 no.3 (2009), 238.

<sup>148</sup> Kirszbaum, Thomas, Yaël Brinbaum and Patrick Simon, *The Children of Immigrants in France* (2009).

## Conclusion

France and Germany provide a constitutional right to education that is defined by a right to dignity and non-discrimination. The French Constitution envisions education as a fundamental right that transmits and protects the French Republican tradition. The German constitutional provision does not proscribe cultural or linguistic education but creates a framework primarily for duties of the State and the protection of parental rights in education. The French legal framework for education is centralized to a greater degree than the German equivalent and exists as a vehicle of French cultural and linguistic unity.

The German right to education is more concerned with the separation of powers between the federal government and the *Laender*. Education policies stand at the crux of the *Laender's* right to maintain cultural sovereignty<sup>149</sup> and the right to education under the German Basic Law is not explicitly universal or fundamental. The right to education is assembled through the interpretation of several rights<sup>150</sup> held in the German Basic Law which is demonstrative of the far-reaching aspects of the right to education itself. Further, the right to education in Germany is protected under the constitutions of the respective *Laender* and varies in substance and formulation.

France's decentralized Education Code is reflective of children's rights provisions to a much greater degree than the German right to education framework. The establishment of education as the top national priority under Article L111-1 of the Education Code envisions education as the expression of egalitarianism that provides students with the opportunity to access social mobility, the labor market, and carries the expectation of ensuring that all students are

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<sup>149</sup> "Kulturhoheit," *German Basic Law*, Art. 30

<sup>150</sup> *German Basic Law*, Arts. 3(1), 7.

provided an inclusive education that enables them to effectively exercise their rights to citizenship. The French Education Code emphasizes that this must occur independent of social origin.

The German education framework, on the other hand, presumes inequality between students as it pertains to intellectual capacity. Students have a right to access higher levels of education in the secondary track if they are deemed to possess a great “possibility of effectively achieving” a higher-level qualification. This is not problematic on its face as student drive, capacity, and motivation are inherently a piece of the academic trajectory. However, this legally established division of students according to intellectual capacity opens the door to stereotyping of students who are placed in lower level schools. Additionally, this ‘segregation’ of students on the basis of intellectual capacity (*Begabung*)<sup>151</sup> does not adequately address the negative impact of social origin, ethnic origin, and the intersection of these two variables which is the focus of Chapter 3. Alternately, the French Education Code places children first and foremost as individuals who are capable of learning and progress and are entitled to inclusive education.

The individual *Laender* do provide a legal right for students from socially disadvantaged backgrounds<sup>152</sup> which occurs in the form of individual student support from youth services while the French government provides assistance in the form of positive action programs that target low-income communities as a whole (*ZEP*, as discussed above in section 4.2). The success of the practical and realized approach of either education system, highly individualistic German approach which differentiates between students and the French egalitarian approach, is questionable in the continued evidence of the education gap between minority students (students with a migrant background) and non-immigrant students.

<sup>151</sup> Brandenburg Constitution, Article 3 (Right to Education), paragraph 2.

<sup>152</sup> Brandenburg Constitution, Article 3 (Right to Education), paragraph 3.

The effect that the construction and respective goals of education in each jurisdiction have a direct impact on the experience of students with a migrant background in the education system. The French egalitarian system places the inherent capacity to learn of each child as first and foremost in the right to education under education as a national priority. The simple fact that the education system is the national priority is illustrative of a collective awareness to address social inequalities within the education system as is reflected in the phrasing of Article L111-11 which states that education serves to “fight social inequality.” French education law must serve to address students who are hardest to reach and who are at the highest risk of academic underachievement through individual support.

This unified effort and codified awareness of a societal imbalance remains in the hands of German political discourse and is seen as the responsibility of the individual *Laender* to address rather than as a national goal. This is partially explained by the conflict that arises between the federal government and the *Laender* in the realm of education due to the high regard for *Kulturhoheit* (cultural sovereignty). This is also due to the fraught and historically violent relationship between young, migrant people in poor neighborhoods and French authorities which do not have a German equivalent.

France and Germany face the challenge of integrating an increasing number of migrant students and students with a migrant background into the public education system. Education in both jurisdictions has non-discrimination and equality laws in place. The right to work is tied to the right to education in both jurisdictions<sup>153</sup>. France and Germany are bound to international and regional instruments outlined in Chapter 1 that protect against marginalization and segregation in

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<sup>153</sup> *German Basic Law*, Art. 12 and Article L111-1 of the French Education Code



the education sphere. However, as Chapter 3 discusses, the public education systems of France and Germany have not yet succeeded in ensuring that academic achievement is not negatively influenced on the basis of social or ethnic origin and exhibit a great degree of inequality between students with a migrant background and non-immigrant students. This persistent inequality does not speak to the right of education as an implied equality right that foresees effective exercise of the right to education at all levels.

### **Chapter III: The Education System and Indirect Discrimination in France and Germany as Experienced by Students with a Migrant Background**

Chapter 3 offers a comparison of the education systems of France and Germany and an illustration of the disadvantages that students with a migrant background face in each jurisdiction. The inequalities between students with a migrant background and non-immigrant students is defined as an expression of indirect institutional discrimination although it is difficult to separate instances of direct institutional discrimination from the practical reality of these students' marginalization.

The French discourse on the variables that result in the education gap reflects aspects of the German perspective on the root causes of inequality in the education system. France and Germany point to socioeconomic status as the only relevant obstacle and dismiss ethnic origin as a variable that directly contributes to the marginalization of migrant groups in education. In France, as in Germany, students with a migrant background experience intersectionality. They are 'doubly' disadvantaged by obstacles that are rooted in both socioeconomic status and ethnic origin as variables.

This thesis adopts an intersectional perspective<sup>154</sup> towards the disadvantages that migrant students and students with a migrant background face in their respective education systems. Students with a migrant background are more likely than their non-immigrant peers to experience inequalities due to socioeconomic status. Inclusive education is discussed as an alternative to the status quo of the education system in the French and German education systems which result in de facto discrimination against students with a migrant background.

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<sup>154</sup> Marie Niendorf and Sandra Reitz, *Das Menschenrecht auf Bildung im deutschen Schulsystem*, 13.

## 1. School Systems Compared

France and Germany have well-established public-school systems that speak to the international and regional framework of the right to education. School is free and compulsory at both the primary and secondary level and efforts are continually made in both jurisdictions to work towards inclusive education systems. The French and German education systems, however, are characterized by institutional mechanisms, such as early selection processes, that significantly disadvantage students with a migrant background. The history with migration varies in each jurisdiction and students with a migrant background interaction with the public education system is defined by ingrained stereotypes through France's colonial history and Germany's official refusal against identifying itself as country that has a significant migrant population. In both systems, students with a migrant background experience disadvantageous effects of the intersection of marginalization linked to both ethnic origin and socioeconomic status.

### 1.1 The German School System

The German education system is a decentralized, three-tiered system. Public and private schools are under supervision by the federal state however the responsibility for implementing education law and policies lie with the individual sixteen States. Compulsory school attendance varies between the *Laender* and generally begins between the ages of five and seven and ends at the age of eighteen<sup>155</sup>. The early-selection process places students into separate secondary tracks around the age of 10 according to grades, teacher recommendations, and parental choice. Students continue their mandatory education in either the *Realschule*, the *Hauptschule*, or the *Gymnasium*.

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<sup>155</sup> Bundeszentrale fuer Politische Bildung (BpB), *Schulpflicht*, 2015 via <http://www.bpb.de/nachschlagen/lexika/recht-a-z/22855/schulpflicht>

The latter track results in qualifications that enable higher education while the *Realschule* and *Hauptschule* tracks result in qualifications for further career-oriented education. Students reach *Realschule* and *Hauptschule* at age fifteen and are then required to complete part-time, three-year vocational training. The German school system rarely allows opportunities for students to move upward in the secondary track. In fact, a larger number of students is required to leave the upper levels of secondary education and placed into lower levels than the number of students who are given opportunities to move into higher levels<sup>156</sup>. The rigidity of movement between levels of education varies between *Laender* but no *Land* stands out for best practice in allowing for transitions between education levels.

## 1.2 The French School System

Children in the French school system attend elementary schools until age eleven and then attend the *college* until the age of sixteen. There is no entrance exam required to enter the *college* and it is mandatory for students to attend. The end of the college results in France's equivalent of the selection process (*process d'orientation*) which, like the German system, separates students into separate secondary-level tracks according to grades, teacher assessments, and parental discretion. The *lycee general* and *lycee technologique* result in the completion of the *baccalaureat* and represent the highest level of education and allows for entry into university. The *lycee professionnel* is a general career-oriented alternative in the secondary-track which results in qualification (*brevet d'etudes proffesionels* or BEP) after two years of full-time school attendance<sup>157</sup>. The lowest-tier of qualification is achieved is the *certificat d'aptitude professionnelle* which trains students in a specific career<sup>158</sup>. The vocational track in France

<sup>156</sup> Ralf Poscher, Johannes Rux, and Thomas Langer, *Das Recht auf Bildung*, 116.

<sup>157</sup> Leland Ware, *Color-blind Racism in France*, 184.

<sup>158</sup> Yaël Brinbaum and Amy Lutz, *Examining educational inequalities in two national systems*, 4.

represents a much lower qualification than the German equivalent and is reserved for students who are marked as drop-outs or substantially underachieve<sup>159</sup>.

### 1.3 Disadvantages in the German Education System.

The German literature that discusses the production and persistence of the education gap points to the “2000-PISA Schock,” the first international comparative study that tracked academic results and their relationship to variables linked to underachievement of 15-year old immigrant students in the 34 OECD countries. This initial 2000 study brought the education gap between “students with a migrant background” and non-immigrant students to the forefront of discussions concerning education reform and exposed the high level of inequality that is characteristic of Germany’s education system.

Consequent PISA studies reveal that students with a migrant background have an education gap of approximately one year in comparison to German students<sup>160</sup>. Inequalities and the education gap persist when the socioeconomic status is accounted for<sup>161</sup>. This suggests that ethnic origin has a non-negligible impact on the education gap experienced by students with a migrant background.

Students with a migrant background in Germany are overrepresented in the population of students that leaves school without qualifications, is required to repeat classes, or placed in lower level classes. Students with a migrant background are disproportionately overrepresented in these “risk categories” and are overrepresented at the *Hauptschule*, the lowest-tier of secondary education<sup>162</sup>

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<sup>159</sup> Ingrid Tucci, Arianne Jossin, Carsten Keller, Olaf Groh-Samberg, “Success despite starting out at a disadvantage: What helps second-generation migrants in France and Germany?” *DIW Economic Bulletin, Deutsches Institut für Wirtschaftsforschung (DIW)* 1 no.5 (2011), 2.

<sup>160</sup> Irene Leser, *Die Grundschule aus der Sicht von Kindern mit Migrationshintergrund: Eine Mehrebenenanalyse*, (Weinheim: Beltz Juventa, 2017), 9.

<sup>161</sup> Ibid.

<sup>162</sup> Gaby Strassburger, “Chapter 12: The Interplay of School and Family and Its Impact on the Educational Career of Ethnic Minority Youth in Germany” in *Migrant, Roma and Post-Colonial Youth in Education Across Europe. Being Visibly Different*, Eds. Julia Szalai, Claire Schiff (Pallgrave Macmillan, 2014), 194.

and is synonymous with “school for foreigners” and low-quality education<sup>163</sup>. The existence of underperformance and academic struggle is therefore doubly present in the country’s increasing student body of students with a migrant background<sup>164</sup>.

Berlin has taken steps to address the institutional disadvantages students with a migrant background face by establishing a two-track secondary level education system, the higher level *Gymnasium* level which remains the track for university level attendance and the lower-level *Sekundarschule*. The city’s efforts to increase equal opportunity between students by replacing the early selection process has highlighted the persistence of inequality between students along ethnic and socioeconomic lines. *Gymnasium* schools have control over 60% of their seats while the remaining 30% are assigned through a lottery system, and 10% are designated for “hardship cases.” The result of the implementation of the two-track secondary system was that students with a migrant background who had been in *Gymnasium* level education were relegated into *Sekundarschule*-level education and that students with a migrant background are twice as likely to attend the *Sekundarschule* as their non-immigrant peers<sup>165</sup>.

The selection process and the disparity in academic standards between the different secondary tracks in education are equally problematic features of the German education system in terms of producing social inequality<sup>166</sup>. A comparison of the secondary education schools across Germany according to Auernheimer shows that the number of students that successfully transitioned from the highest secondary level into university education varies between Laender by

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<sup>163</sup> Georg Auernheimer, *Schieflagen im Bildungssystem: Die Benachteiligung der Migrantenkinder*, (Wiesbaden: Springer VS, 2013), p.13.

<sup>164</sup> Stephan Ertner, Ralf Fuecks, introduction in *Schule mit Migrationshintergrund*, eds Ursula Neumann, Jens Schneider (Muenster: Waxmann, 2011), 9.

<sup>165</sup> Open Society Justice Initiative, *Standing Up for Equality in Germany’s Schools* (2013), 31.

<sup>166</sup> Georg Auernheimer, “Bildung als Medium der Anerkennung—Migrations und Bildungsgerechtigkeit,” in *Bildung fuer junge Fluechtlinge—ein Menschenrecht: Erfahrungen, Grundlagen und Perspektiven*, (Bielefeld: W.Bertelsmann Verlag GmbH u. Co. KG, 2009), 100.

up to 32% of students<sup>167</sup>. The three-tiered system, in addition to a highly decentralized system, results in an unequal application of the right to education. The State's mandate is to ensure that students can attend schools that offer education that corresponds to students' motivation and aspiration. However, this is not an opportunity if the opportunity to enter a challenging education is hindered by social and cultural circumstances outside of the students' control.

Lastly, the lowest tier of the secondary education system, *Hauptschulen*, are perceived as providing substandard education in comparison to all other academic tracks. The lowest level of the secondary education system is widely seen to be schools for students who don't fit anywhere else and to harbour cultures that are "a playground" for negative stereotypes and negative expectations about the prospect of poor and migrant students' achievements and futures<sup>168</sup>. Instead of providing a standard of education that corresponds to the expectation that education provides students with qualifications and skills to access consequent human rights and opportunities beyond school, such establishments limit the right to education as an implied equality right. The lowest level of the secondary education system is widely seen to be schools for students who don't fit anywhere else and to harbour cultures that are "a playground" for negative stereotypes and negative expectations about the prospect of poor and migrant students' achievements and futures<sup>169</sup>.

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<sup>167</sup> Ibid.

<sup>168</sup> Yasemin Karakasoglu and Ursula Neumann, "Anforderungen an die Bildungsinstitutionen in der Einwanderungsgesellschaft: Integration durch Bildung, Schaffung von Bildungsgerechtigkeit und interkulturelle Oeffnung," in *Bildungsgerechtigkeit als politische Aufgabe*, eds. Thomas Meyer, Udo Vorholt (Freiburg: projekt verlag, 2011), 66.

<sup>169</sup> Ibid.

## 1.4 Disadvantages in the French Education System

The inequalities present in the French education system mirror the disadvantages present in the German education system. In France, as in Germany, students from poorer socioeconomic backgrounds face greater obstacles in the education system<sup>170</sup>. Students with a migrant background are more likely than their non-immigrant peers to experience obstacles associated with socioeconomic status than their non-immigrant peers. The presence of inequalities along class lines intersect with the student population that has a migrant background although these are more pronounced in France<sup>171</sup> largely due to discriminatory housing policies and the geographic segregation of a large proportion of the migrant population into low income suburban areas (*banlieus*, as discussed in Chapter 2, section 2.4).

The French expression of systemic disadvantages is illustrative of intersectionality between ethnic origin and socioeconomic status. Students with a North African or Sub-Saharan background are overrepresented in the lower levels of the secondary education system<sup>172</sup> and disproportionately experience marginalization in the French education system. One fifth of students with a migrant background complete the highest level of secondary education, compared to nearly 50% of their non-immigrant peers<sup>173</sup>. Students from the North African community are more likely than their French peers to have parents who are unemployed and experience poverty<sup>174</sup>. Nearly half of all North-African students are held back a grade during their secondary school career

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<sup>170</sup> OECD, *Country Report: France, Results of PISA 2015*, (2016), 2.

<sup>171</sup> United Nations Children's Fund (UNICEF), Office of Research-Innocenti, *An unfair start in children's education in rich countries* (October 2018).

<sup>172</sup> Ingrid Tucci, Arianne Jossin, Carsten Keller, Olaf Groh-Samberg, *Success despite starting out at a disadvantage*, 3.

<sup>173</sup> Ibid.

<sup>174</sup> Yaël Brinbaum and Amy Lutz, *Examining educational inequalities in two national systems*, 4.



compared to 28% of their French peers<sup>22</sup> and are twice as likely as their French peers to drop out of school<sup>175</sup>.

The official resistance to recognizing students with a migrant background as a vulnerable, stereotyped group and pursuing measures to counter this stereotyping is similar in both Germany and France. The difference between the two education systems, as evident in the 2015 PISA study, lies in the French education systems seeming ability to narrow the education gap in later generations while the German education system appears to widen this gap<sup>176</sup>. Students who begin their academic career at an early age in the French school system experience fewer academic disadvantages. Reyhn and Gaschler conclude that this narrowing of the performance gap in language competency is largely the result of French language instruction than is provided in the German system as a comparison<sup>177</sup>.

The French right to education is phrased as a right to learn the French language and this is done in intensive French classes that combine both migrant students and non-migrant students who struggle linguistically. Students with a migrant background, first and second-generation students, are given the skills necessary to narrow the gap with ‘mainstream’ students to a larger extent in comparison to German counterparts<sup>178</sup>. The Republican model encompasses linguistic support both on an individual and group level and through this early language learning creates a greater sense of unity and cohesion between students despite cultural differences. The absence of this

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<sup>175</sup> Ibid, 12.

<sup>176</sup> Ingrid Tucci, Arianne Jossin, Carsten Keller, Olaf Groh-Samberg, *Success despite starting out at a disadvantage*, 3.

<sup>177</sup> Marielle Reyhn and Kirsten Gaschler, *Bildungspolitik und Sprache in Frankreich*, 91.

<sup>178</sup> Ibid.

linguistic cohesion in the German education system seems to strengthen the stereotyping of future generations of students with a migrant background.

## 2. Indirect Discrimination

The right to education incorporates protection against both direct and indirect discrimination and requires the State to take actions to counter and resolve any experience of discrimination on any of the protected grounds through all necessary means<sup>179</sup>. The list of protective grounds remains non-exhaustive. The international human rights provisions on the right to education establish a blanket ban on discrimination on the basis of ethnic or social origin<sup>180</sup>, language, or “other status.”<sup>181</sup> Schools may not give preferential treatment to any individuals on the basis of belonging to a particular group<sup>182</sup>. However, legislation and policies that are targeted at elevating equality between groups in the State’s institutions do not constitute discrimination in education in international law<sup>183</sup>.

Under EU law, indirect discrimination is established as the application of a facially neutral law or treatment that has a disproportionately negative effect on individuals on the basis of protected grounds. The Racial Equality Directive (Directive 2000/43/EC) represents a blanket ban on direct and indirect discrimination on the basis of race and ethnicity and extends this protection into social protection and protection in the field of education<sup>184</sup>. Under the Racial Equality Directive, indirect

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<sup>179</sup> *UNESCO Convention against Discrimination in Education*, Art. 1, 1960.

<sup>180</sup> Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights (art. 2, para.2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20 (2 July 2009), paragraph 35.

<sup>181</sup> *ICESCR*, Art. 2(2).

<sup>182</sup> *UNESCO Convention against Discrimination in Education*, Art. 3(d), 1960.

<sup>183</sup> CESCR, *General Comment No.20*, paragraph 35.

<sup>184</sup> Christa Tobler, “Limits and potential of the concept of indirect discrimination”, European network of legal experts in the non-discrimination field published by European Commission, Directorate-General for Employment, Social Affairs, and Equal Opportunities, (2008) 5.

discrimination requires differential treatment of a certain group and the presence of ‘normal’ treatment of a comparison group. Discriminatory intent is not a factor<sup>185</sup> in instances of indirect discrimination unlike in instances of direct discrimination but rather the effect of a certain policy, piece of legislation, or criteria<sup>186</sup>. Unlike the standards established in *D.H. and Others v The Czech Republic*<sup>187</sup>, indirect discrimination in the Directive must not necessarily be statistically traceable<sup>188</sup>.

The effects of indirect discrimination are permissible in instances where the legislation pursues an objectively permissible aim and the means to achieve this aim are predictable and proportional. The Equality Directives are, however, primarily concerned with employment and occupation and do not explicitly extend into the realm of education. However, the case law of the ECtHR has applied indirect discrimination to the implementation of education at the national level which is particularly applicable to this thesis and will be discussed further in section 2.1.1 of Chapter 3.

Germany’s General Treatment Act<sup>189</sup>, the *Allgemeine Gleichbehandlungsgesetz* (AGG) protects against indirect discrimination based on an exhaustive list of protected grounds. The AGG is limited in application to private institutions and protection does not apply to public authorities including schools. Discrimination is prohibited by Germany’s Basic Law<sup>190</sup> but Courts rarely address issues of discrimination outside of the context of the AGG<sup>191</sup>. Discrimination whether

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<sup>185</sup> 2000/43/EC

<sup>186</sup> Council Directive 2000/43/EC, Article 2(b).

<sup>187</sup> *D.H. and Others v The Czech Republic*, Application no.5735/00

<sup>188</sup> Christa Tobler, Limits and potential of the concept of indirect discrimination, 6.

<sup>189</sup> In force since 2006.

<sup>190</sup> *German Basic Law*, Arts. 1, 3.

<sup>191</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined nineteenth and twenty-second periods reports of Germany*, CERD/C/DEU/CO/19-22 (30 June 2015) paragraph 8.

direct or indirect in the education system is regulated by and addressed by the School Codes of each of the sixteen states.

France has a blanket ban on discrimination and, as mentioned in previous sections discussing disadvantages in its school system, France maintains a color-blind policy and does not distinguish individuals according to race or ethnicity on the basis of its theory of equality. France's *Law no.2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination* assumes the definition of indirect discrimination found in the Racial Equality Directive and includes protection against direct and indirect discrimination in the realm of education and include only the basis of race and ethnic origin as protected grounds<sup>192</sup>.

Germany and France do not directly discriminate against students with a migrant background in their respective school systems. Each jurisdiction is largely in compliance with the international human rights obligations regarding the right to education. France and Germany maintain a constitutional right to equal treatment and have a blanket ban on all forms of discrimination. However, immigrant children belong to some of the most stereotyped groups in France and Germany and are often the poster children of problematic, underachieving students. As the illustration of the education gap by PISA studies as well as internal education and legal scholars demonstrates, there is a disparity between the prohibition on discrimination and the daily experience of students with a migrant background in the education system.

This disparity is the result of indirect institutional discrimination. Stereotyping and indirect discrimination in schools is systemic and institutionally held in place. The interaction between students with a migrant background and the public school occurs in a manner that negatively

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<sup>192</sup> Sophie Latraverse, "Executive Summary: Country Report France 2013 on measures to combat discrimination," *European network of legal experts in the non-discrimination field* (2013), 5.

impacts students' success. These interactions are established through normalized interactions within the school, or the institution. Institutional discrimination is part of the cultural fabric of institutions, in this instance in school policies, mechanisms, and teacher perspectives on their students' abilities that have a marginalizing effect on a vulnerable segment of the student population.

Institutional discrimination supports the stereotypes that are used to 'explain away' the academic underachievement of students with a migrant background. These students are simply unable to compete in the established system and too far removed from the cultural norms that rule the everyday interaction between staff and students. The experience of institutional discrimination has elements of both indirect and direct discrimination. The early selection process in the German and French education systems are a facially neutral, nationally accepted school policy that has a statistically traceable negative effect on ethnic minorities in the school system.

Institutional discrimination is not limited to individual interactions and is experienced on a global level. The culture and facially neutral policies of the institution sanctions the continued difference in treatment between groups based on cultural characteristics and internalized, unspoken negative stereotyping of groups based on a person's membership to a particular social class, race, or ethnic group. Institutions, including schools at all levels of the education system, fail to properly address the internalization of stereotypes and are unwilling to establish policies that counter the negative effects of the normalization of the difference in treatment based on students' origins, whether social or ethnic.

Ratdke and Gomolla correctly state that the failure to address the presence of stereotypes and the role of stereotypes in inequality, institutions creates a culture of indirect discrimination and racism "through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which

disadvantage minority ethnic people.”<sup>193</sup> It is also important to mention that an unequal difference in treatment between students with and without a migrant background is expected<sup>194</sup> by the people who have the ability to reform the culture of discrimination that is entrenched in the bureaucratic functioning of institutions.

## 2.1 The Role of Teachers in Perpetuating Stereotypes?

As Ratdke and Gomolla elaborate in their definition of institutional discrimination,<sup>195</sup> institutional discrimination has elements of both direct and indirect discrimination. In the experience of students with a migrant background, institutional discrimination has elements of direct discrimination that occurs directly through the interaction with teachers during the early selection process<sup>196</sup>. Institutional discrimination is experienced as normalized<sup>197</sup> institutional mechanisms of the education system that have the effect of marginalizing and excluding a disproportionate number of students with a migrant background by relegating this group to the lowest level of secondary education (ex: Germany’s *Hauptschule*). Stereotyping of students with a migrant background results in the experience of direct discrimination. Students with a migrant background routinely receive lower grades than their dominant culture classmates for the same amount of work—and are less likely to be recommended to attend higher levels of secondary education in both the French and German education system<sup>198</sup>.

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<sup>193</sup> Mechthild Gomolla, “Foerdern und Fordern allein genuegt nicht! Mechanismen institutioneller Diskriminierung von Migrantenkindern und-jugendlichen im deutschen Schulsystem,” in *Schieflagen im Bildungssystem. Die Benachteiligung der Migrantenkinder*, eds. Georg Auernheimer, (2013), 88.

<sup>194</sup> Sven Jennessen, Nicole Kastirke, and Jochem Kotthaus, “Diskriminierung im vorschulischen und schulischen Bereich. Eine sozial-und erziehungswissenschaftliche Bestandsaufnahme,” *Antidiskriminierungsstelle des Bundes* (2013), 17.

<sup>195</sup> Mechthild Gomolla, Frank-Olaf Radtke, *Die Herstellung von ethnischer Differenz in der Schule/The production of ethnic differences in schools*, Springer VS (2009), 15-22.

<sup>196</sup> Sven Jennessen, Nicole Kastirke, and Jochem Kotthaus, *Diskriminierung im vorschulischen und schulischen Bereich*, 17.

<sup>197</sup> Mechthild Gomolla, Frank-Olaf Radtke, *Die Herstellung von ethnischer Differenz*, 51.

<sup>198</sup> Pia Debuschwitz and Martin Bujard, *Migrationshintergrund, soziale Ungleichheit oder Bildungspolitik*, 11.

A 2016 report of the German Education Ministry and Research focused on the issue of education and migration in 2016 and emphasized that the inequality in education as it is rooted in socioeconomic status is a perpetuated problem<sup>199</sup>. Upper class students were more than two times as likely to be recommended for further higher-level education, and there is evidence to suggest that migrant background is also taken into consideration and results in lower level secondary education<sup>200</sup>. Auernheimer finds students with a migrant background who are placed into the Gymnasium level education are at a disproportionately higher risk of dropping out in comparison to their “German” peers.

Three students with a migrant background filed a complaint against the Berlin Education Authority in the Berlin Administrative Court in 2012 but the case was dismissed. So far, no litigation concerning the persistence of the disadvantages experienced by students with a migrant background as indirect discrimination have been addressed by a court in Germany. In *Y, T, & A v. Berlin Education Authority* three students with a migrant background accused the Berlin Education Authority of deliberately placing them into classrooms that were designated as “migrant classrooms.” There, the students claim teachers treated the students as students with little to no prospects for the future on account of their status as students with a migrant background<sup>201</sup>. The Court dismissed the students’ claim based on school performance and insufficient evidence demonstrating difference in treatment despite the school’s insistence that “insufficient resources” served as a justification for failing to provide students in need with extra assistance.

<sup>199</sup> Petra Stanat and Gayle Christensen, “Bildungsforschungsband 19: Schulerfolg von Jugendlichen mit Migrationshintergrund im internationalen Vergleich,” Bundesministerium fuer Bildung und Forschung (2016).

<sup>200</sup> Pia Debuschwitz, Martin Bujard, Migrationshintergrund, *Migrationshintergrund, soziale Ungleichheit oder Bildungspolitik*, 11.

<sup>201</sup> Open Society Foundations, *Y, T, & A v. Berlin Education Authority* (2015).

## 2.2 Intersectionality

The early-selection processes in both education systems have the unintended effect of producing social selection along class and ethnic lines<sup>202</sup>. Students with a migrant background experience the consequences of intersectionality, the presence of several disadvantageous variable that mutually reinforce one another and lead to further marginalization and perpetuate the education gap.

Students with a migrant background experience disadvantages both along lines of ethnic origin and socioeconomic status<sup>203</sup>. Intersectionality describes the cyclical expression of marginalization and the blurred line between socioeconomic status and migrant background that affects a large segment of the migrant population, especially in France as the discussion of the segregation of poor, migrant communities in suburban neighborhoods that results in a concentrating effect of academic underachievement and high levels of unemployment in comparison to mainstream French society. This is particularly true in the experience of ‘visible minorities’ (Chapter 2, section 4) as Students who are members of a stereotyped group encounter disadvantageous treatment on the basis of both their perceived (or real) ethnic origin as well as the obstacles that are attributable to low socioeconomic background.

There is conflicting evidence as to what extent socioeconomic status alone, and by extension ethnic origin alone, as a variable negatively impacts student achievement in disadvantaged minority communities. Certainly, low socioeconomic status negatively impacts student achievement in non-immigrant groups as well as migrant groups or students with a migrant background. The illustration of the education gap (Chapter 3, sections 1.3 and 1.4), however,

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<sup>202</sup> Georg Auernheimer, *Schief lagen im Bildungssystem*, 13.

<sup>203</sup> Mechtild Gomolla, *Tackling underachievement of learners from ethnic minorities*, 46.



suggest that students with a migrant background are significantly more likely to experience disadvantages because of low socioeconomic status and additionally experience disadvantages due to their ethnic origins. Policies and legislation aimed to resolve the education gap, such as France's much criticized *ZEP*<sup>204</sup> program, must address issues of both institutionalized discrimination and the negative effect of poverty on students from a migrant background. Students with a migrant background are "doubly disadvantaged."

### 2.2.1 Marginalization in the Education System: Roma Comparison Piece

Some similarities can be drawn between the experience of systemic discrimination that is shared by both Roma students and students with a migrant background as both are "visible minorities" in their respective European societies despite a long, multigenerational presence in these societies. These members of the visible minority are both effectively 'othered' and consequently experience marginalization and obstacles in the national education systems that their majority culture peers do not experience to the same degree.

While the Roma community faces a deeper level of marginalization and has a history of persecution, the migrant community and migrant students occupy a comparatively vulnerable position in society. These students are at heightened risk for social marginalization and marginalization in the school system while Roma and Sinti communities are much more isolated from the mainstream education system. The qualitative difference in experience between immigrant groups and Roma communities can be grouped as "voluntary immigrant communities" and 'involuntary caste-like minorities'"<sup>205</sup> in which the immigrant community has a greater degree of control over their social circumstances in the destination country.

<sup>204</sup> Zones d'éducation prioritaires, Chapter 2, section 2.4

<sup>205</sup> Claire Schiff, *Chapter 1: Introduction: Understanding the Salience of Ethnicity*, p.3.

In both instances, the education gap between the minority group and the majority group is explained away through deficiencies of the minority group, as an unwillingness or inability to meet the demands of integrating into the majority education system. Roma and Sinti students have not been included in the international studies such as the PISA study that is conducted every three years by the OECD member states. Roma students occupy a much more invisible space in terms of the research that addresses the inequalities produced and reproduced in education systems<sup>206</sup>. Marginalization of Roma students occurs to a greater extent than migrant groups. For example, participation of Roma children in mainstream public schools in Germany is even lower than that of students with a migrant background.

The German Human Rights Institute observed in 2011 that segregation in the education system is a defining feature of the experience of Roma and Sinti students in the German education system. A high percentage of students belonging to this minority group did not attend any form of schooling and 47% did not have a high school qualification from any level of the secondary school system. Roma and Sinti students that entered the public-school system school were more likely than German children to be placed into schools for students with disabilities<sup>207</sup>. The overrepresentation of Roma and Sinti in schools for students with disabilities share disparities in education faced by students with a migrant background.

In both instances, students belonging to a vulnerable population are deemed unable to attend mainstream classes that may not speak to their actual cognitive abilities<sup>208</sup>. Students experience segregation in society and the education system and are alienated from their right to fully realize their right to education. Students who are ‘othered’ are viewed as inherently less

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<sup>206</sup> Ibid.

<sup>207</sup> Marie Niendorf and Sandra Reitz, *Das Menschenrecht auf Bildung im deutschen Schulsystem*, 36.

<sup>208</sup> Mechthild Gomolla, *Foerdern und Fordern allein genuegt nicht!*, 91,

cognitively capable because of their perceived characteristics as members of minorities or ethnic groups. In both circumstances, majority language acquisition seems to play a role in ‘demoting’ students to lower-level education. In Germany, Students with a migrant background who struggle linguistically are placed in lower-level secondary education levels in either the *Real Schule* or the *Hauptschule* regardless of the students’ grades<sup>209</sup>. Students with a migrant background are often not given exams in their language of origin when determining their placement into special education programs<sup>210</sup>.

This phenomenon of placing students with a migrant background into schools for students with disabilities was a matter of concern for Special Rapporteur Munoz’ 2006 evaluation of Germany’s implementation of the right to education. His criticism highlighted the existence of a disproportionately high representation of ethnic minorities in Germany’s schools for students with disabilities, or “*Sonderschulen*,”<sup>211</sup> in addition to a correlation between underachievement and ethnic origin as evidence of inequalities in the German education system. Roma and Sinti students face similar experiences in their interaction with the public-school system.

The relegation of a disproportionate number of students with a migrant background into schools for students with disabilities mirrors some factual aspects of landmark *D.H. and Others v The Czech Republic*<sup>212</sup> case. Roma students were disproportionately represented in schools for disabilities in Czech classrooms. The Court found a violation of Article 14 in conjunction with Article 2 Protocol no. 1 and established a prohibition on indirect discrimination in the education

<sup>209</sup> Irene Leser, *Die Grundschule aus der Sicht von Kindern mit Migrationshintergrund*, 69.

<sup>210</sup> Mechthild Gomolla, *Foerdern und Fordern allein genuegt nicht!*, 89.

<sup>211</sup> Human Rights Council, *Report of the Special Rapporteur on the Right to Education, Vernor Munoz: Mission to Germany 2006*, paragraphs 63-74.

<sup>212</sup> *D.H. and Others v The Czech Republic*, Application no.5735/00

system on the basis of social origin and ethnic origin<sup>213</sup>. The ECtHR determined that the Roma and Sinti minority requires special protection<sup>214</sup> and that this protection extends into the realm of education. To minor children, the right to education is “of paramount importance.”<sup>215</sup> The Court finds that the statistical evidence of de facto discrimination of Roma students in the education system establishes a “dominant trend”<sup>216</sup> of persistent systemic indirect discrimination and finds a violation of both Articles 14 and Article 2 Protocol no. 1 because of this “dominant trend.”

The statistical establishment of the undereducation of students with a migrant background in both France and Germany express similar findings that led the Court to establish a violation of education in addition to indirect discrimination. In *D.H. and Others v The Czech Republic*, Roma students were 27 times more likely to be placed into special education institutions than non-Roma students. The 2003 PISA study showed that students who have a migrant background are 25 times less likely to attend a higher-level track in secondary education than non-immigrant students<sup>217</sup>. The type of disadvantages experienced by these two groups of students vary significantly, but the risk of marginalization is statistically similar. The most recent PISA publications available suggest that the disparities for students with a migrant background have not narrowed since the 2003 PISA study<sup>218</sup>. Poscher questions whether or not Germany, if asked to defend this “dominant trend” visible in the PISA study results could argue that the selection processes in the education system are defined by no other variables other than intellectual capacity and ability and that the selection

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<sup>213</sup> Ralf Poscher, Johannes Rux, and Thomas Langer, *Das Recht auf Bildung*, 74.

<sup>214</sup> *D.H. and Others v The Czech Republic*, paragraph 182.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*, paragraph 191.

<sup>217</sup> Ralf Poscher, Johannes Rux, and Thomas Langer, *Das Recht auf Bildung*, 75.

<sup>218</sup> OECD, “Germany Country Report, PISA Results 2015,” (2016), p.4.

system employs safeguards to ensure that students are not disadvantaged because of their ethnic or social origins<sup>219</sup>.

### 3. The Deficit-Oriented Approach v. Inclusive Model of the 4-A Framework

The disadvantages in the education system are ‘explained away’ through the deficit-oriented approach. From the ‘deficit-oriented’ perspective, students with a migrant background do not experience disadvantages due to any particular ‘type’ of discrimination within the education system. Students simply cannot keep up with the academic demand that is required in higher levels of the secondary track. French Sociologist Bourdieu attributes underachievement between social groups to a difference in ‘social capital’ and ‘cultural capital.’ The latter category describes the values that families directly and indirectly transmit to their children and the familial support children receive at home that constitute academic support<sup>220</sup>. Children from families who have access to resources (social capital) and an innate understanding of the functioning of the education system as well as command of the language of instruction (cultural capital) possess a stronger foundation for academic success in the national school system.

It is important to view these criteria and explanations of the education gap through the lens of the ‘deficit-oriented’ approach critically. Bourdieu seems to understand ‘social capital’ and ‘cultural capital’ as criteria that academic institutions utilize to determine students’ academic paths along accepted social and cultural norms rather than purely meritocracy. The possession of social capital and cultural capital establishes an education system in which the behaviors of higher-class students are rewarded to a great extent while behaviors that are deemed to be characteristic of the

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<sup>219</sup> Ibid, 76.

<sup>220</sup> Pierre Bourdieu, “Die konservative Schule: Soziale Ungleichheit gegenüber Schule und Kultur,” in *Pierre Bourdieu Bildung: Schriften zur Kulturosozologie 2*, (Suhrkamp: Berlin, 2018) p.8.

lower class are excluded from upper segments of the education system. Again, the disadvantages that students with a migrant background face as a consequence of the intersection of both ethnic origin and social class, namely the overrepresentation in ‘migrant schools’ or notoriously low performing schools, suggest that Bourdieu’s analysis of the education system as a social selection mechanism remains relevant in both the French and German education systems.

The deficit-oriented approach stereotypes migrant communities as indifferent to the importance of education and lacking in academic motivation<sup>221</sup>. The deficit-oriented perspective assumes that students who have diverse characteristics, such as differences in language and culture, must assimilate into the social and cultural norms of the majority culture in order to succeed academically. The deficit-oriented approach further views students who require greater investment on the part of the State to ensure integration in the form of language support as too costly and threatening to the “homogeneity of the ‘effective’ school.”<sup>222</sup>

This view is assimilationist and is reflected in the French model of Republican integration. The deficit-oriented explanation for the education gap encourages the type of indirect as well as direct institutional discrimination that has been discussed through placing the sole responsibility of adequate ‘social capital’ and ‘cultural capital’ on students with migrant background and their families and results in the perpetuation of stereotyping of this segment of society as inherently unable to successfully integrate into French or German society.

The deficit-oriented approach could otherwise be critically called the “mythology of meritocracy.” Education systems globally are defined by the ideal that individual ability alone is

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<sup>221</sup> Juergen Baumert, Kaiz Maaz, *Migration und Bildung in Deutschland, Die Deutsche Schule*, Waxmann (2012), p.295.

<sup>222</sup> Mechtild Gomolla, “Institutionelle Diskriminierung: Rechtliche und politische Hintergruende, Forschungsergebnisse und Interventionsmoeglichkeiten im Praxisfeld Schule,” in *Schule mit Migrationshintergrund*, eds. Ursula Neumann, Jens Schneider (Muenster: Waxmann, 2011), 191.

sufficient to pave the way above and beyond social or cultural obstacles, an ideal that is reflected in Article 26 of the UDHR<sup>223</sup>. It is this ideology of meritocracy that legitimizes the deficit-oriented approach and keeps the rigid selection process and the lower-quality culture in lower level schools in place<sup>224</sup>. Auernheimer describes the presence of a “secret racist curriculum”<sup>225</sup> in the German education system that internalizes the negative stereotypes of underachieving migrant students as a direct result of their ethnicity and cultural differences. As discussed in Chapter 2 section 4 on the concept of students with a migrant background, a similar “hidden” racist approach is evident in the French education system although the nature of the internalized stereotypes in the French system differs greatly from the German system.

French legal tradition requires the state to ignore racial and ethnic differences while in Germany this occurs in the absence of such a strict egalitarian principle. Students with a migrant background viewed as inherently different and “non-German” and as inherently underachieving. Auernheimer’s “secret racist curriculum” describes the unquestioned presence of indirect institutional discrimination in the education system and describes the crux of the deficit-oriented explanation for the achievement gap that students with a migrant background are simply less academically capable than their German-majority peers.

The deficit-oriented approach limits the introduction of intercultural and inclusive education that is envisioned by human rights instruments such as the CRPD and the CRC. The inclusive perspective, alternatively, embraces multiculturalism and social plurality and dismisses the deficit-oriented approach as an explanation for the pattern of systemic discrimination that

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<sup>223</sup> UDHR, Art. 26(1).

<sup>224</sup> Georg Auernheimer, *Bildung als Medium der Anerkennung*, 104.

<sup>225</sup> Ibid, p.108.

favours the dominant group over the migrant group and serves to additionally favour higher-income individuals from the dominant group.

The adaptability aspect of the 4-As Framework incorporates social inclusion. Individuals have the right to full participation in society based solely on their individual capacities and must not be limited in the full exercise of their rights by their social or economic circumstances<sup>226</sup>. The inclusive approach to education is founded on the principle of equality between all students. This approach represents an as yet unrealized ideal that states are obligated to strive towards, especially in instances such as students with disabilities and students with a migrant background who experience a high degree of marginalization in the education system. The assumption of equality requires public-schools as an actor in the role of the state to treat students equally despite differences to ensure equal and effective participation in school and society as a whole. Solving inequalities requires a difference in treatment and as aforementioned this is possible as long as the difference in treatment is justified, proportional, and carries the aim of achieving equality.

Integrated and inclusive education can be applied to Germany and France as incentive to change the education system and remove mechanisms within the education system that impede students' upward mobility. Inclusive and integrative school systems keep students from being "trapped" in a certain socioeconomic segment of society and allow for upward social mobility through removing barriers<sup>227</sup>. An integrated system at the secondary level allows students from all sections of society who experience established disadvantages the opportunity to 'catch up' with their peers in terms of knowledge and general gaps in knowledge<sup>228</sup>. These efforts must also occur

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<sup>226</sup> Markus Dederich, "Bildungsgerechtigkeit und Inklusion-Ein Problemaufriss," in *Bildungsgerechtigkeit als politische Aufgabe*, eds. Thomas Meyer, Udo Vorholt. (Freiburg: projet verlag, 2011) 44.

<sup>227</sup> Georg Auernheimer, *Schieflagen im Bildungssystem*, 13.

<sup>228</sup> Ibid. 12.



within the context of further availability of resources to provide students with the academic support that speaks to each student's need. Integrated and inclusive schools represent a solution to the mechanisms that result in indirect institutional discrimination disproportionately experienced by students with a migrant background in both France and Germany.

## Conclusion

The early selection system disadvantages ethnic minority students in France much like the German system disadvantages students with a migrant background through the continuation of its early selection policy. Bourdieu's theory has a significant bearing on the tracking system and the decisions teachers make when it comes to recommending students for secondary level education. The perception that ethnic differences are a sign of substandard academic ability leads teachers to disproportionately segregate students with a visible migrant background into lower levels of the education system<sup>68</sup>. Teachers internalize the stereotypes of migrant students or students who are not ethnically French and assumes that they are somehow less academically motivated than their wealthier, ethnically French peers<sup>69</sup>.

The French education system, however, seems to establish greater equality for students with a migrant background in second generation migrant students and therefore a more effective right to education than the German framework. The French right to education is framed first and foremost as a children's right that recognizes the equality between students regardless of their origins in addition to representing a right to language education. This is underpinned by the expectation that education must serve to allow students social mobility and access to the labor market.

The "dominant trend" of disadvantage speaks directly to the challenge of maintaining an education system that is adaptable especially during a period of demographic change that is often

met by social resistance. Schools carry the national goal of transmitting knowledge and culture, and as Bourdieu's theory states, social power. These power relations between classes are a relic of the origins of the education systems in both France and Germany. France's "Declaration of the Rights of Man," however, demonstrate an earlier change in perception of education as a public service that must be accessible to all. The German education system, argues Kornmann, was created as a class selection system through the standardization of the German language, a language that was disproportionately available to members of the higher classes and thus served to exclude the poor. The adaptability aspect of the right to education necessitates a fundamental change in the homogenous ideology that has defined instruction in schools in France and Germany since the 19<sup>th</sup> century<sup>229</sup>.

Auernheimer correctly argues that as long as there are options such as the German *Hauptschule* or the French *CAP*<sup>230</sup> or special education schools, students from families that are socially and historically marginalized, i.e. migrant families and Roma families, will be disproportionately represented in the student body<sup>231</sup>. Inclusive and integrated education, rather than a three-tiered system, is the counter to this continually reinforced inequality. True integration requires a greater degree of reasonable accommodation for students who encounter obstacles in schools because of their social and/or ethnic origins. These accommodations create opportunities for integration rather than assimilation and encourages policies of individual support for students to succeed regardless of social and ethnic circumstances beyond the students' control.

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<sup>229</sup> Gunther Dietz, "Interkulturelle Dimensionen der Bildungspraxis: Institutionelle Strukturen und Modelle im internationalen Vergleich," in *Schule mit Migrationshintergrund*, eds. Ursula Neumann, Jens Schneider, 102.

<sup>230</sup> Chapter 3, section 1.2

<sup>231</sup> Georg Auernheimer, *Bildung als Medium der Anerkennung*, 108.

## Conclusion

Chapter 1 discussed the right to education and the international and regional framework which included human rights conventions and soft-law instruments of the European Union. General Comment no.13 of the Committee on Economic, Social, and Cultural rights was utilized in the interpretation of the scope and substantive issues of the right to education. Chapter 1 considered that the right to education is at once a social right and a civil right and that no clear-cut distinction can be made between this right's occupation of these two categories.

The social and civil aspects of the right to education encompass rights to and rights in education which establish that children within the compulsory school-age range have a right to a classroom and that their daily experiences at academic institutions at all levels must be defined by their civil rights. These aspects are essential to ensuring that children have an education is acceptable, available, accessible, and adaptable. This thesis stated that adaptability was of interest to this thesis. The State obligation to construct an adaptable education system touches on the issues of students with a migrant background and the disadvantages in the education systems discussed in Chapter 3.

Chapter 2 offered insight into the right to education as an implied equality right that must serve as an *effective* right to education. This was found through the comprehensive analysis of human rights education provisions such as Article 17(2)(c) of the Revised European Social Charter and Article 28 of the CRC. States have the responsibility to establish access to education but must ensure that this education is effective as discussed in Chapter 2, section 1 on the right to education as an implied equality right.

The comparison of the national constitutional education provisions established that the constitutional right to education of France was more child-centric and encompassed certain aspects of adaptability while simultaneously constructing cultural barriers. The French Education Code is conscious of the right of children to access an education system that reflects their specific needs especially as these needs require positive discrimination to counteract negative effects of social origin. On the other hand, the French education system is first and foremost the arbiter of French culture and language which excludes the possibility of a multicultural education on the basis of the omnipresent principle of egalitarianism.

The German construction of the right to education is first and foremost seen as a duty by the State to provide a public service to children within the compulsory school age and is largely missing outright child-centric aspects of this right. An individual right to education is delineated through several Basic Law provisions and the decentralized German system preserves *Kulturhoheit* and places the majority of responsibilities surrounding education into the hands of the *Laender*. Education provisions and accompanying anti-discrimination laws that prohibit indirect discrimination vary throughout the country but the French Education Code provides a more succinct education provision that is inseparable from protection against school discrimination on the grounds of social origin though it does not officially address instances of ethnic segregation which also plays a prominent role in the segregation of students with a migrant background in the French education system.

Chapter 2 also defined the category of students with a migrant background and examined the differences in the migrant population and the conception of “migrant background” in the two jurisdictions. The federal government defines people and students as having a “migrant background” along a 1949 law while students are categorized also as having a migrant background

at the Land level though the definition of who is and who is not a student with a migrant background varies greatly among the *Laender*. This leads to an uneven application of academic support across the country and results in the exclusion of second and third generation students who may still require academic support as is evident in research from the field of education. Chapter 2 discusses students with a migrant background as a student population that is a ‘visible’ and stereotyped minority and is often ‘far removed from’ social power in its interactions with public institutions.

Chapter 3 addressed the aspects of the education systems that result directly in the academic underachievement and analyses the issue of intersectionality between socioeconomic status and ethnic origin. There is debate as to what degree ethnic origin and racism play a role in the academic underachievement of students with a migrant background. Chapter 3 discussed the presence of institutional discrimination in its direct and indirect forms and draws on *D.H. and Others v the Czech Republic* in the discussion of a ‘dominant trend’ of systemic disadvantages in the French and German education systems. Chapter 3 drew on the stereotyping discussion from Chapter 2 to discuss the ‘acceptance’ of the academic underachievement of a large segment of the education system as the status quo.

States have an obligation to provide an education that strengthens human rights protections. Education must serve first and foremost as an empowerment right that paves the way for accessing consequent rights protected by the human rights landscape. These rights include but are not limited to freedom of association, the right to participate fully in a free, pluralistic, democratic society, and above all students must have access to an education system that does not internalize stereotypes and truly places meritocracy as the primary factor that influences student achievement

to ensure that students don't exist in "inner-exile" because of their ethnic origins or social circumstances<sup>232</sup>.

Chief Justice Warren stated in his 1954 majority opinion of *Brown v Board of Education* that education was "the very foundation of good citizenship" and that a life in which education is denied at any level would prevent children from being "reasonably expected to succeed in life." The right to education according to the majority opinion must be "an opportunity...made available to all on equal terms."<sup>233</sup> The education gap constitutes social and ethnic segregation in French and European societies and stands in opposition to the progressive vision of the right to education as an empowerment right.

The challenge of integration is immense. The increasing migration into Europe demands increased investment in measures that ensure that meritocracy is the leading principle in determining academic success and not the intersecting circumstances of ethnicity and social origin. States are obligated to take every step that is reasonably attainable within their means to ensure children have access to an effective right to education. This is inseparable from taking measures that target discrimination in other aspects of society that are beyond the scope of this thesis, including discriminatory housing practices and discrimination in the transition into the labor market.

The level of inequality in schools has far reaching societal consequences that threaten the social cohesion of pluralistic and democratic societies. The increase in migration into both France and Germany requires greater accommodations for students in the form of increased investment on the part of the State. Education must be seen as a national priority in the fight against

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<sup>232</sup> Marielle Reyhns and Kirsten Gaschler, *Bildungspolitik und Sprache in Frankreich*, 99.

<sup>233</sup> *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483 (1954).

segregation in the school system for both ethnic and economic reasons and must be accompanied by increased teacher training, strengthening anti-discrimination laws against indirect discrimination in the field of education, and enacting educational reform that moves away from three-tiered, stratified education systems. Education systems must adapt to the inclusive, integrated classrooms envisioned by the international human rights doctrine on the right to education. Social and cultural integration also require an expansion of early-childhood education. France has taken the lead in recognizing the need for early intervention and is taking positive steps to lowering the compulsory age for education to three<sup>234</sup> and promises an expansion of early-childhood education in an effort to increase chances of social integration and upward social mobility of migrant students.

The education gap along ethnic and social origins is a reminder that the presence of indirect discrimination challenged in the 1954 landmark U.S. Supreme Court case *Brown v Board of Education*<sup>235</sup> continues to be relevant in modern societies and education systems globally. Black teenagers in New York City are still grossly underrepresented in prestigious high schools, mirroring migrant students in French and German classrooms. A recent New York Times investigation found that only 7 students out of the 895 students admitted to the most prestigious public high school in New York City were black students<sup>236</sup>. The “dominant trend” in the academic trajectory of minority students continues to be an education that is “separate and unequal,” if not solely on the basis of race then, additionally, on the basis of social class.

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<sup>234</sup> Ingrid Melander, “No Kid Left Behind: Macron Tries to Fix France’s Education System,” Reuters. July/5/2018 <https://www.reuters.com/article/us-france-reforms-education/no-kid-left-behind-macron-tries-to-fix-frances-education-system-idUSKBN1JV0MM>

<sup>235</sup> *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483 (1954).

<sup>236</sup> Shapiro, Elizabeth. “Only 7 Black Students Got into Stuyvesant, N.Y.’s Most Selective High School, Out of 895 Spots.” The New York Times. April/18/2019. <https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html>

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