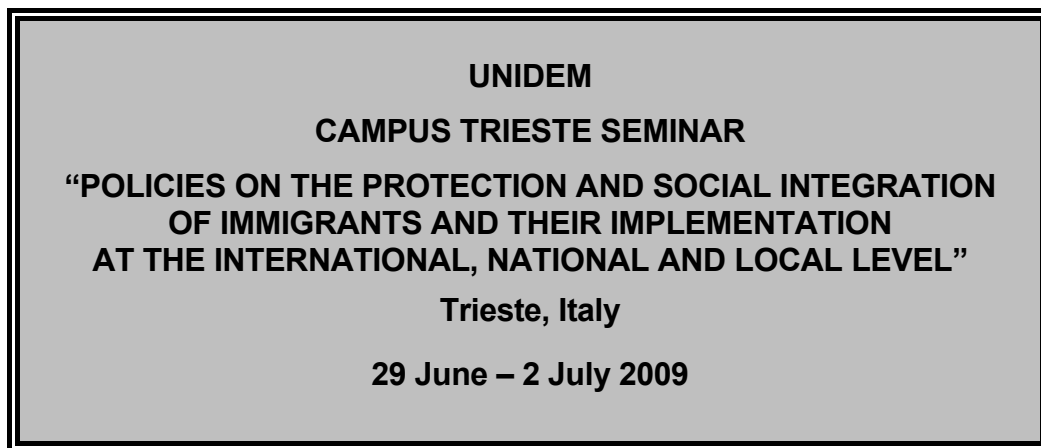




Strasbourg, 17 July 2009

CDL-UDT(2009)002  
Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**



**REPORT**

**THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION  
UNDER THE FRAMEWORK CONVENTION  
FOR THE PROTECTION OF NATIONAL MINORITIES:  
ALSO A TOOL FOSTERING THE INTEGRATION  
OF MIGRANTS' CHILDREN IN THE FIELD OF EDUCATION?**

by

**Mrs Lidija BASTA FLEINER**  
**(Permanent Guest Professor for Political Theory  
and Contemporary Political Doctrines, Faculty of Political Sciences,  
University of Belgrade, Serbia – former Professor,  
University of Fribourg, Switzerland)**

## Part I: Mapping the Issues

### I. 1. International Legal Standards for Minority Protection

- In General : Democracy, the Rule of Law and Human Rights
- Minorities in Particular -> Human Rights Approach
- *ius cogens* principles of minority protection;
- “a limited collective dimension to minority rights”: the problem of definition (Art. 27 ICCPR - “*via media* between rights of individual and full collective rights”);
- UN Minority Declaration - the four major requirements for minority protection that remain undisputable and non-negotiable guidelines for assessing national legislation on minorities and its compliance with the international standards of minority protection, notably the UN Minority Declaration:
  - existence protection
  - non-exclusion
  - **non-discrimination (migrants also), and**
  - non-assimilation.
- UN Indigenous Peoples Declaration – collective right dimension
- A new shift in the Framework Convention for the Protection of National Minorities: minority rights become *integral part of fundamental* human rights – the principle of indivisibility and universality of fundamental human rights

### I. 2. Constitutionalisation of international standards

- a/ the *constitutionalisation of international standards*, especially but not any more only in the human rights sphere - the role of the Council of Europe, as a “constitutional advisor”
- b/ the *internationalisation of constitution-making* through facilitation and mediation in post-conflict situations
- Constitutionally laid down, directly effective protection that incorporates international standards of minority protection → minority rights are fundamental rights, i.e., statutes cannot reduce constitutional scope of minority protection
- positive measures for full and effective equality/additional rights and/or affirmative action
- **NB: Statutory, policy-and-implementation-practice level must not reduce constitutionally guaranteed scope of protection!**

### I. 3. Shifting to migration aspects in citizenship policy

1. The reforms to citizenship became a highly politicized issue in France and Germany in the 1990s, and nationality law was reformed four times in the two countries. Political debate over concepts of nationality, belonging and integration shifted in both countries to a more focused sphere of migration. Contrary to Brubaker's prediction given in 1992<sup>1</sup>, that basic structural differences between French civic and assimilationist, and German cultural and exclusionist idioms of nationhood would continue to affect nationality policy until today, it was Germany that in 1993 adopted for the first time a law granting an entitlement of citizenship on the basis of birth and residence. Again it was France which in the same year pursued a restrictive citizenship policy and adopted for the first time a law ending the automatic acquisition, at the age of 18, of citizenship by aliens born in the country. As Nathan Glaser put it, we are all multiculturalists now.<sup>2</sup>

2. Shifting to migration aspects in citizenship policy in France and Germany in the 1990s can indeed be interpreted as a sign that citizenship discourse becomes foremost the issue of strongly politicized debates over nationality policies instead of a scholarship theorizing on nationhood. However, rather than to point to narrowing a policy debate, the four nationality law reforms in France and Germany demonstrate the depth of the issue behind the confrontation over nationality policy – the issue of nationhood/citizenship itself. It is the foundational principles of both nation-states, personified in respective concepts of nation as *pouvoir constituant* that call for re-consideration and revision.<sup>3</sup>

3. Migration policy is rightly analyzed within the relationship between migration, the state and the society. Citizenship models, modes of migrant incorporation, membership of the welfare state, socio-cultural exclusion, discrimination and ethnic minority formation, as well as ethnic mobilisation become major cross-cutting issues to address mature and emergent problems in migration policies.<sup>4</sup> As regards the normative elements in future EU policy aiming at “complex-equality” and “reasonable accommodation” of cultural diversity among migrants (inter-culturalism as equal access of migrants to social services in terms of identity-driven equal rights and equal results) these are the issues to be seriously taken into account. The link between inter-ethnic relations, changes in personal and group identity even without a further phase of incorporating migrants into citizenship must take into account this inherent relationship between migration, nation-state and society. A further significant step forward would be to focalize on the

---

<sup>1</sup> R.Brubaker, **Citizenship and nationhood in France and Germany**. Cambridge, MM: Harvard University Press

<sup>2</sup> Randall Hansen & Jobst Koehler, **Issue Definition, political discourse and the politics of nationality reform in France and Germany**, European Journal of Political research **44**: 623-644, 2005.

<sup>3</sup> Even the Swiss concept of composed nation, which builds on minority rights as group rights in order to guarantee collective liberty and identity, remains “hermetically” closed for “immigrated diversity”. Differential exclusion of migrants is immanent to Swiss migration policy, even more so than, say in French culturally-blind concept of nationhood. Swiss “Willensnation” is defined as much by those whom it includes (traditional linguistic and religious communities) as by whom it excludes. Territorial basis for minority rights goes against individual socio-economic mobility of migrants. Federal design minimizes the capacity of migrant powerless groups to act upon the full extent of their interests and direct democracy proved instrumental in fomenting anti-migration sentiments, including racism and discriminatory perception of some migrant groups in the population.

<sup>4</sup> **Intercultural Relations, Identity and Citizenship: A Comparative Study of Australia, France and Germany** in: M. Craanen und A. (Hgb.), Berichte aus Forschungsvorhaben im Rahmen der Förderungsinitiativen “Das Fremde und das Eigene” – 1999-2006, Transcript Verlag, Bielefeld, und VolkswagenStiftung, Hannover, 2006, S. 324-325

empirical aspects in the relationship between social disintegration, globalisation and intercultural and inter-ethnic conflicts at a micro level.<sup>5</sup>

#### **I.4. Education: a fundamental human right also for migrant children:**

4. "In several EU Member States migrant children without a residence permit may have a right to attend school but it is compromised by other regulations or policies. This is violating states' obligation under international as well as European law.

5. The importance of education for the development of the individual person as well as for societies is nowhere seriously disputed. (...). It is also rather commonplace that access to education is a fundamental human right.

6. Nevertheless, in many countries around the world children are still excluded by state policies from access to schools. (...) This is especially true in a number of Member States of the European Union with regard to children of asylum seekers, of migrants with "toleration" or undocumented migrant families. In most of these countries there is a gap between provisions in law on one hand and the reality on the other. (...)

7. These findings are in sharp contrast to the states' obligations under international law.

In the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>5</sup> State Parties have agreed to take steps "with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means" (Art. 2 para 1). Even if, therefore, the ICESCR does not contain individual, enforceable obligations, Art. 2 para 2 of the Covenant expressively commits State Parties to ensure that exercise of the rights enunciated in the covenant will be without discrimination "of any kind" such as, inter alia, colour, national origin "or other status."

8. This non-discrimination rule allows limitations of the enjoyment of social rights only in so far as they might be compatible with the nature of these rights (Art. 4). Even if a distinction could be justified with objective reasons it must not touch the core of the respective right. This must be respected in the interpretation and implementation of the relevant national law, especially with regard to the right of education including primary education, which, in accordance to Art. 13 (2) (a), "shall be compulsory and available free to all".

9. To discriminate a person in granting rights deriving from the ICESCR does also constitute a violation of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>8</sup> As the UN Committee for the Elimination of All Forms of Racial Discrimination has stated in their General Comment No. 30, the ICESCR sets forth human rights states must grant to everybody being subjected to their jurisdiction.<sup>9</sup> (...)

10. The International Convention on the Rights of the Child establishes in Art. 3 para 1 the duty of every state to give priority to the best interest of a child in the context of any action a child— being a person under the age of 18 years – is subjected to. This is expressively true for the right of the child to education (Art. 28-29). (...)

---

<sup>5</sup> How low-key political conflicts with ethnic bases can be de-escalated demonstrates a political anthropology on the micro-plane that examines how members of different groups live together on an everyday basis and are possibly constrained by networks involving cross-group ties. - **Das "Fremde" und das "Eigene": Interkulturelle Konflikte in Spanien, Grossbritannien und Deutschland**, 334-335.

11. Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>11</sup> enshrines the right to freedom of discrimination on the grounds of, inter alia, national origin or “other status”. This can result in a ban on differentiation on these grounds in the context of social security. (...)

12. The Twelfth Protocol to the ECHR (...) brought an expansion of the ban on discrimination because Art. 1 para 1 of the Protocol calls for every right guaranteed by law to be granted without discrimination on any of the grounds enumerated in Art. 14 ECHR. Hence, if a state stipulates school attendance to be compulsory for children being his nationals he must also recognize the right of migrant children to education.

13. (...) under international as well as regional European law a state violates obligations if non-citizens who are asylum-seekers, “tolerated” migrants or irregular migrants, are completely excluded from schooling and education for minors.”(Stefan Keßler)<sup>6</sup>

**Every migrant child whatever the status under immigration law must in fact be able to attend school.**

## **Part II: The Principle of Equality and Non-Discrimination under the FCNM<sup>7</sup>**

### **II. 1. In General:**

- MR are integral part of fundamental HR and should be implemented without discrimination
- MR are understood as individual and can be enjoyed in community with other individuals
- MR are complementary to the anti-discrimination principle – second level of non-discrimination legislation (positive measures)
- As a legal treaty, the FCNM is a document of legal principles, aimed at achieving full and effective (not only equal protection of laws) equality – differential treatment needed (arts. 4 to 6)
- a different level of protection for different rights
- the key aspect and a foundational right – participation rights coming out of the principle of effective participation in public and economic life (Art. 15 in relation with Art. 4)
- no rights to be directly claimed, exception: Art.3
- Political dimension in minority rights introduced by FCNM is a key challenge. The Recommendation 1492/2001 of the Parliamentary Assembly says, inter alia, that ‘the minority

---

<sup>6</sup> Full text here as an annex: 2 reading papers in pdf.

<sup>7</sup> The Framework Convention for the Protection of National Minorities of the Council of Europe entered into force February 1<sup>st</sup>, 1998. As of April 2009, it has 43 signatures and 39 ratifications out of 47 member-states. Belgium, Greece, Ireland and Luxembourg have not ratified, and Andorra, France, Turkey and Monaco have not yet signed the Convention.

has the responsibility to participate in political and public life of the country in which it lives and to contribute, along with the majority, to the democratic cohesion and pluralism of the states to which it has offered its allegiance”.

## II. 2. Full and Effective Equality Means: positive measures and the obligation of a result

14. By declaring full and effective equality a key standard for minority protection, the Convention introduces a second level of anti-discrimination standards that will in many cases imply additional rights for the persons belonging to minorities.

15. From the very beginning of the monitoring process, the ACFC understood the principles of full and effective equality and of second level of protection against discrimination (Art. 4) as cornerstones for the foundational nature and inclusive scope of participation under the FCNM. The ACFC particularly built upon para.2 of the Article 4 of the Framework Convention, which explicitly demands from State Parties to engage in “non-exclusion policy” prohibiting discrimination. It also called on State Parties to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social and political and cultural life “full and effective equality between persons belonging to a national minority and those belonging to the majority”. Compared to respect and protection in sequence, promotion is the third, highest level of accommodation.

16. The ACFC always underlined that it did not consider positive measures as discriminatory. For example, the ACFC saw that some discriminatory situations may be remedied by adopting special measures, such as quotas, to ensure full and effective participation of persons belonging to national minorities in terms of a more significant presence of these minorities in state administrative structures.

17. In particular, the ACFC often made in its opinions a cross-reference between the effective participation, equality and non-discrimination principles, in order to address the problem of differences in social and economic situations between certain minorities and the majority. The ACFC also concluded that unemployment appears to affect disproportionately persons belonging to national minorities, especially young women, stressing the need to eliminate both direct and indirect discrimination in the labour market, and enhance the recruitment of qualified persons belonging to national minorities in public service persisted. When coming to the dispute over minority land rights, the ACFC often pointed out that both socio-economic and cultural aspects of the problem are directly interrelated with the participation rights of the minority in question.

18. The ACFC understood the FCNM in the following manner: Although positive measures in promoting effective and full equality of persons belonging to national minorities also take place at an individual level (obligation of an action), the aim behind this second level of anti-discrimination standards goes beyond a given case, and implies that such measures should have additional positive impact on the situation of persons concerned/given community and on a society as a whole (obligation of results **also at a collective level**).