4.1. On Legal Categorisation of People in the Education Setting

4.1.1. The Right to Recognition as a Human Rights Issue

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

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

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

---

2 See for example the case of Roma in Norway, mentioned in Chapter 3.5.2, above.
Compliant with the widespread legal definition, a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination. Substantiation of this definition, however, depends very much on the standpoint from which it is observed. Equality proponents might suggest that direct reference to certain groups in education law should be understood as de jure discrimination, due to the unnecessary invocation of distinct categories. Difference proponents, for their part, might put forward that law should more effectively reflect social diversity and help preserve certain selected status markers.

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

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

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

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