FROM MIGRANTS TO CITIZENS? EUROPEAN COMMUNITY POLICY ON INTERCULTURAL EDUCATION

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I. INTRODUCTION: AN OVERVIEW OF EC APPROACHES TO THE EDUCATION OF MIGRANT CHILDREN

POLICY-MAKING in the European Community in the area of education for migrants is driven by two conflicting pressures. On one side, the principle of effectiveness requires that the rights of free movement within the Community be supported by the best possible education for the children of migrants. However, on the other side is the importance of primary education to the member States as a political and cultural matter. This pressure is reinforced by the principle of subsidiarity. Member States have been relatively willing to support co-operative action by the Community in the area of higher education, such as in the ERASMUS exchange programmes. However, member States have been active in protecting their jurisdiction over education policy, particularly at the primary and secondary levels. As result, Community laws protecting the education rights of migrants have been most effective where two factors are present: first, that the rules are closely attached to the rights of free movement within the single market; and second, that the rules interfere as little as possible with substantive education policy. The first factor constitutes a significant weakness in Community education rights because it has created a distinction between Community migrants and those from third countries. The second factor has meant that the only Community policy on the education of migrants which could be described as an education right is the guarantee of equality of access to education within a member State.

Community policy on the education of migrants has seen three stages of development. This progression is not unique to Community law—it can be seen in the development of international standards on the rights of migrants as well. The first stage, in the immediate post-war period, simply sought to guarantee access of migrants' children to national educational facilities. This period saw large numbers of migrant workers entering the main industrialised States of North America and north-western Europe. In the second phase, which began in the 1970s, the policy focus moved

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toward recognising the right of migrants' children to receive some instruction in their mother tongue. This move was concerned less with the preservation of cultural identity than with facilitating the return of migrants to their States of origin, as even a cursory reading of the standard-setting instruments of that time reveals. At this time, countries of immigration were trying to stop, and even reverse, the flow of migrants into their countries. The final phase, which began only a few years ago, accompanied a realisation that most migrants would not return to their countries of origin. Some migrants' children had been born and grown to adulthood in the host State, and had known nothing else. Many of those now had their own children, who were still living primarily in the culture of their background and were only partly integrated into the society of the host State. As a result the education of migrants' children has taken on a new significance. If they were to remain in the host State, their education, according to more progressive views, would need to prepare them to participate fully in that State's society. Simple access to education had not prepared these children properly for full membership in the community.[1] Furthermore, the officially sanctioned idea that migrants were not permanent residents, and were therefore not citizens or were citizens of a different nature, had contributed to the failure to integrate.[2] This has led to the possibility of developing a right to intercultural education which would promote the values of both equality of opportunity and pluralism.[3]

Within European Community education policy, the first stage can be found in the development of Articles 7 and 12 of Regulation 1612/68/EEC, which provide guarantees of equal treatment for Community migrants who are exercising their single market rights of free movement. Article 12 in particular guarantees access to education at all levels. The Court of Justice has taken this guarantee further by ensuring equal access to educational funding. As a result, the basic access right under Community law is the most far-reaching example of its type at the international level. The goal of the access right is a form of integration of the migrant child into the society of the host State, through assimilation. No value is placed on the preservation of the cultural background of the migrant child and, furthermore, it is assumed that the child will achieve as well in the host State's educational system as he or she would have in the native country. The approach is one of formal equality, and what may be described as

1. Appel, "The Language Education of Immigrant Workers' Children in the Netherlands", in Skutnabb-Kangas and Cummins (Eds), *Minority Education: From Shame to Struggle* (1988), p.57.

2. Hinnenkamp, "The Refusal of Second-Language Learning in Interethnic Context", in Giles, Robinson and Smith (Eds), *Language: Social Psychological Perspectives* (1980), p.179.

3. See Cullen, "Education Rights or Minority Rights?" (1993) 7 Int.J. of Law and the Family 134 for a discussion of the implications of these values within education rights.

passive assimilation, through exposing the child only to the language and culture of the host State.

The second stage of Community policy on migrants' education is much less well known to Community lawyers. Directive 77/486/EEC demonstrates a fundamental policy ambivalence. The solutions advocated under the Regulation are, by this time, considered unacceptable, albeit in two conflicting ways. The passive integration approach, simply guaranteeing migrant children a place in a national school, had led to under-achievement by migrant children. By the mid-1970s a political consensus to stop immigration was emerging in EC member States. Some even advocated facilitating the return of immigrants to their countries of origin. The Directive therefore initiates two policy directions: greater pre-school teaching of the language of the host State and the teaching of migrants' mother tongues. It lacks a clear goal, but contains elements of several. The greater emphasis on extra reception teaching of host languages moves assimilation into a more active, positive stage, although it is still largely the benign assimilation of the Regulation, with an image of equality as its background. The teaching of migrants' mother tongues lies on even less secure ground. The preamble of the Directive explicitly endorses the view that migrants are expected to return, at some stage, to their countries of origin, but the substantive provision related to this policy appears to endorse the valuing of cultural diversity. A further complication is that the Council resolved that the Directive should apply to all migrants, not only those exercising Community rights. Not surprisingly, given the lack of focus within the Directive, it has never been adequately implemented, and the Court of Justice has never been asked to rule on the extent of the rights it guarantees.

Like the second stage, the current stage of Community policy on education is directed towards several goals. Probably due to the lack of success in implementing the Directive, the Commission has now integrated policy on educational rights for migrants into mainstream Community education policy, which emphasises co-operation rather than positive rights. As Action 2, Chapter II, of the Community Action Programme SOCRATES, on the European dimension of education, policy for the education of migrants' children is now directed toward the exchange of best practice and the funding of relatively small-scale projects, rather than the adoption of substantive rights. It comes at a time when the Community has become more interested in culture generally, and therefore speaks of intercultural education for all, not just for migrants. This is itself linked to the development of a common European citizenship, which would minimise, at least for Community migrants, the distinction between migrants and indigenous groups. In the background also are concerns with racism and xenophobia and with social exclusion, which have been suffered particularly by migrant groups.

II. EDUCATION RIGHTS OF MIGRANTS IN INTERNATIONAL LAW

THE problem facing migrants who wish to claim rights to a particular type of education is the failure of international law to recognise them as groups entitled to the protection of their collective identity, particularly with regard to cultural rights. While minority groups have been recognised as having the right to the preservation of their distinctive identity in Article 27 of the International Covenant on Civil and Political Rights, and to a greater extent in the 1993 United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities,[4] even long-established groups of migrants have been problematic participants in cultural rights. Attempts to define the concept of "minority" have usually started with the assumption that minority group members are nationals of the State.[5] The exclusion of nationality as a ground for right-claims by minority groups was intended to prevent claims for protection of cultural rights by migrants, since their assimilation by the host State was considered legitimate.[6] The result is that minorities and migrants are governed by separate regimes.

In terms of education rights, migrants have generally seen little more than limited access rights in the relevant international conventions. All instruments dealing with the education of migrants reflect first and second stage concerns only. The first convention to recognise education rights specifically was ILO Convention No.143, Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers 1975 (known as the Migrant Workers (Supplementary Provisions) Convention 1975).[7] There is an effort to protect those migrant workers who are established in the host country, but with a commitment to "facilitating" the eventual return of migrant workers to their countries of origin. As a result, we see discussion of the right to be taught the language and culture of origin, in Article 12(f), in addition to the general guarantee of equality of treatment contained in Article 10.

The United Nations came late to the issue of the human rights of migrants, with the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families in 1990, which is not yet in force.[8] The education rights of all migrants, including illegal immigrants, are set out in Article 30, which guarantees access to national educational institutions. The education rights of legally established migrant workers are set out in Article 45, which also guarantees

4. (1993) 32 I.L.M. 911.
5. Capotorti, *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979), p.96.
6. *Idem*, pp.6 and 10.
7. (1975) 1120 U.N.T.S. 323.
8. International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990) 30 I.L.M. 1517.

access. It also provides for, although does not guarantee, reception teaching and mother-tongue teaching.

In the Council of Europe the situation is similar. The European Convention on Human Rights (ECHR) sets out a general right to education in Article 2 of Protocol 1. The right to education as set out in the ECHR is intended to protect access to existing forms of education within a State, rather than the right to a certain type or quality of education.[9] In the *Belgian Linguistic Cases (No.2) (merits)*[10] the ECHR institutions allowed a claim of discrimination on the basis of language in educational matters by reading the right to education in conjunction with Article 14 of the ECHR, which prohibits discrimination. In keeping with the international human rights law approach of distinguishing indigenous and migrant minority groups, the Commission declared inadmissible an application from a Greek migrant to Belgium, who wanted the right to choose the official language in which his children would be educated.[11]

The first regional effort to regulate internationally the rights of migrant workers may be found in the European Convention on Establishment.[12] As a document from the first stage of standard-setting for migrants' rights, its emphasis is on access to education.

A more comprehensive effort to guarantee migrants' rights is the European Convention on the Legal Status of Migrant Workers.[13] Like the Establishment Convention, it applies only to migrant workers legally resident within a State party. Article 15, dealing with mother-tongue education of migrants' children, does not use the language of rights but, rather, that of intergovernmental co-operation, and explicitly mentions the possibility of repatriation. The only education right granted under this Convention is the right of access, set out in Article 14.

III. THE DEVELOPMENT OF MIGRANTS' EDUCATION RIGHTS IN EUROPEAN COMMUNITY LAW

ORIGINALLY, Article 128 of the EEC Treaty (replaced by Article 127 of the EC Treaty) provided the only explicit powers to regulate education, which were directed to the development of a common vocational training policy.[14] These powers have been extended by the Treaty on European

9. Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd edn, 1990), p.467.
10. (1968) 1 E.H.R.R. 252.
11. *X.* v. *Belgium*, Application No.4372/70, Collection 37, 101.
12. (1955) 529 U.N.T.S. 141.
13. E.T.S. 93 (1977).
14. Lenaerts, "Education in European Community Law after 'Maastricht' " (1994) 31 C.M.L.Rev. 7, 18–24.

Union (TEU), which introduced new Articles 126 and 127 of the EC Treaty, to include explicit powers to enact measures on co-operation in education and the European dimension of education, including primary and secondary education, and more specific powers in the area of vocational training.[15]

Since education in the broad sense was not initially an area of Community jurisdiction, it could be explained as a field in which "spill-over" (in the language of integration theory) has occurred.[16] This is true, however, much more in the expansion of competence under Article 128 of the EEC Treaty, and now Articles 126 and 127 of the EC Treaty, than for implied powers under Article 49 of the latter, which provided the legal basis for Regulation 1612/68/EEC. Effective programmes directed towards the education of migrants' children would require harmonisation of, or at least intervention into, primary and secondary education. Even before the language of subsidiarity and the TEU's pledges to preserve national identities, such moves would have been unacceptable to member States. The expenditure required to implement Directive 77/486 fully would certainly go beyond the commitments under the existing EC educational programmes. Perhaps more crucially, member States would be reluctant to allow Community influence over such a crucial site of socialisation of citizens.

IV. REGULATION 1612/68: ASSIMILATIVE INTEGRATION

REGULATION 1612/68/EEC deals with rights to free movement of workers, family reunification and equal treatment. Its purpose, as stated in the preamble, is to eliminate obstacles to integration of the worker and his or her family into the host country. However, the view of integration promoted by the Regulation is a very basic one, which leans towards assimilation of migrants. No rights are granted which would facilitate the maintenance of the migrant's original language and culture.

Two provisions have been used in developing the education rights of migrants' children. Article 12 explicitly gives the right of access to education. Also relevant is Article 7 of this Regulation, which provides for equal treatment in a wide range of areas including social and tax advantages (paragraph 2) and vocational training (paragraph 3).

The link between Articles 7 and 12, despite the fact that they are contained in separate Titles of the Regulation, arises out of the first case to consider education rights of migrants, *Michel S.* v. *Fonds national de reclassement social des handicapés*.[17] The applicant was the son of an Ital-

15. *Idem*, pp.24–40.
16. Beukel, "Reconstructing Integration Theory: The Case of Education Policy in the EC" (1994) 29 Co-operation and Conflict 33.
17. Case 76/72 [1973] E.C.R. 457.

ian worker in Belgium, who wished to claim benefits under a statute relating to rehabilitation services for the disabled. The statute did not apply to foreign nationals in all cases. His claim was made on the basis of Article 7. The Court of Justice of the European Communities rejected this claim, on the basis that Article 7 applied only to workers themselves, not to the children of workers. However, the Commission had raised the possibility, since the benefit related to rehabilitation, which could be seen as a form of training, of applying Article 12. The Court accepted this argument, taking an expansive view of the scope of educational activities covered by the Article.[18] The Court therefore decided that all forms of training should be covered by Article 12, and that the applicant was entitled to as favourable treatment under the statute as Belgian nationals.

The European Court has taken a broad view of rights of access to education. Most of the case law under this Regulation dealing with educational matters has been concerned with financial support for studies, rather than access in the sense of admission. The *Casagrande* case sets out the basic rule followed by the Court on this point.[19] This case involved access to educational grants for secondary education, which under Bavarian law were primarily restricted to German nationals. The applicant was the son of an Italian worker in Germany, and argued his entitlement on the basis of Article 12, arguing that "under the same conditions" meant that he was entitled to the same opportunities for financial assistance as German nationals. He argued that his rights of access to education would be only theoretical if such rights were restricted to the right to be admitted to educational courses in Germany. The Court accepted the applicant's view of access to education as including "general measures intended to facilitate educational attendance".[20] Some scepticism has been expressed over the inclusion of funding in the category of conditions of access to education.[21] However, since the Regulation includes post-secondary education, funding will be a more crucial condition of access even than academic merit. Nonetheless, the Court was careful to stipulate that it was not justifying Community competence over educational policy in accepting the wider view.[22] The Community's powers to make policy on the education of migrants' children are implied powers arising out of its powers to ensure free movement of persons for the purpose of establishing the common market.[23]

18. *Idem*, para.15.
19. Case 9/74 *Casagrande* v. *Landeshauptstadt München* [1974] E.C.R. 773.
20. *Idem*, para.9.
21. Gould, "Children's Education and the European Court of Justice", in Freestone (Ed.), *Children and the Law* (1990), p.172, at p.176.
22. *Casagrande*, *supra* n.19, at para.12; also, opinion of Advocate General Warner, p.783.
23. Lenaerts, *op. cit. supra* n.14, at p.11.

The rule in *Casagrande* has been developed since, primarily with reference to the funding of post-compulsory education, where funding is often the only bar to access. In *Echternach and Moritz*[24] the Court decided that education in Article 12 of the Regulation had a wider meaning than had been attributed to the phrase "vocational training" in Article 128 of the EEC Treaty, as interpreted in *Gravier* v. *University of Liège*.[25] It therefore included all forms of education, both general and vocational. A group of cases, many directed against Belgium, were brought in the period from 1986 to 1990, a time at which many migrants' children born in the host State would be entering higher and further education.

The European Court in *Matteucci* v. *Communauté Française of Belgium*[26] did not deal with Article 12, but the opinion of Advocate General Slynn did discuss the scope of Article 12 in detail. He was of the opinion that a migrant's child could rely on Article 12 in order to attend, at any age, any educational course which was open to nationals. "Child", in this sense, was not to be construed as meaning "minor" or even "dependant". Nor is "child" to be considered as a mutually exclusive concept with "worker", which would mean that once the child of a migrant worker becomes a worker himself or herself, he or she can no longer rely on Article 12. Slynn's interpretation would mean that the child of a migrant worker who becomes a worker, and subsequently wishes to pursue further study or training, could rely on Article 7 and Article 12 of the Regulation. The justification offered by Advocate General Slynn for this position is the goal of integrating migrants into the host society. The support offered by Community law to children of migrants, on this interpretation, would be broader than that offered to the migrant himself or herself. This makes a great deal of sense in that the links to the host country are likely to be stronger, and the links to the country of origin weaker, for migrants' children than for migrants themselves.

Integration was the main theme of the European Court in *Echternach and Moritz* v. *Netherlands Minister for Education and Science*.[27] This case, like *Brown* and *Matteucci*, dealt with maintenance grants. Moritz was the child of a Community worker who had returned to his country of origin but subsequently wished to return to the Netherlands to pursue further study. However, unlike Brown, Moritz had lived with his parents while they were working in the Netherlands. The Court decided that the fact that they had moved back to the country of origin did not extinguish Moritz's rights under Article 12. This approach confirms that the child of

24. Joined Cases 389 and 390/87 *Echternach and Moritz* v. *Netherlands Minister for Education and Science* [1989] E.C.R. 723, para.29.

25. Flynn, "Vocational Training in Community Law and Practice" (1988) 8 Y.E.L. 59, discussing Case 293/83 *Gravier* v. *University of Liège* [1985] E.C.R. 593.

26. Case 235/87 *Matteucci* v. *Communauté Française of Belgium* [1988] E.C.R. 5589.

27. *Supra* n.24.

migrants has an independent right to integrate into the host country.[28] The child is entitled to continuity of education.[29] Echternach still lived in the Netherlands—the preliminary issue, resolved in his favour, was whether his father was a Community worker for the purposes of Regulation 1612/68. Having decided that both applicants were within the scope of the Regulation, the question was whether the maintenance grants claimed were covered by Article 12. Since the Court had decided in an earlier case that educational maintenance grants could be considered social advantages, it decided that in order to make Article 12 effective, the grants should be considered conditions of access to education as well. The effectiveness of Article 12 was to be directed towards enabling children of migrants to integrate into the host society, particularly where they had been educated exclusively in the host country.[30] This may include the requirement to grant a right of residence independent of the migrant parent.[31] Rights to maintenance grants were extended again in *di Leo* v. *Land Berlin*,[32] where the Court decided that Article 12 of the Regulation required that grants be allowed on an equal basis to migrants' children even when they were studying outside the host State, and even when the State of study was their State of origin. This ruling has less connection to the idea of integration (although it is not clear from the case whether the applicant intended to move back to the State of origin permanently). However, it does serve the cause of integration on a more abstract level, in that it enforces strict equality of educational opportunity, and requires host States to treat migrants' children as full members of society for these purposes. It also supports the integration of the migrant's child into the society of the host State by affirming that leaving the host State for the purpose of study does not undermine the child's status within the host State.

Integration requires that migrants' children must "count", literally as well as metaphorically. In *Commission* v. *Belgium*[33] the Commission argued that the Belgian method of determining funding and staffing levels for higher education institutions violated Article 12 of Regulation 1612/68. Most students from States other than Belgium and Luxembourg were counted only in determining these levels to a maximum of 2 per cent of the Belgian students at an institution during the previous academic year. Advocate General Slynn noted that there was some evidence of Community students being refused access to Belgian higher education

28. *Idem*, para.48 of the Opinion of Advocate General Darmon, and paras.19–20 of the judgment.
29. *Idem*, paras.54 and 21 respectively.
30. *Idem*, para.35 of the judgment.
31. Lonbay, "Education and Law: The Community Context" (1989) 14 E.L.Rev. 363, 382.
32. Case C–380/89 [1990] E.C.R. I-4185.
33. Case 42/87 [1989] 1 C.M.L.R. 457.

institutions because of the fact that no State funding would be attached to such students. He argued that not only the actual refusal but the conditions which caused it should be considered to violate Articles 7 and 128 of the EEC Treaty, with respect to Community nationals generally, and Article 12 of Regulation 1612/68, with respect to the children of migrants who no longer reside in Belgium or are deceased. The Court accepted this argument. This case further expands the notion of "conditions of access" to include the funding of institutions as well as individual students, and potentially could be expanded to include other issues of the structure and organisation, such as academic requirements which are arranged to place obstacles to the admission of students who have completed part of their education outside the host State.

Article 7 of the Regulation has, in recent years, become increasingly significant in eliminating discriminatory funding for education. Article 7 had been rejected in *Michel S.* because it is a right pertaining to the migrant worker, not to his or her child. However, as time passed, the children of migrants became workers themselves, and could therefore use this guarantee. In *Lair* v. *Universität Hannover*[34] the Court decided that maintenance grants could be considered social advantages covered by Article 7(2), in circumstances where there was a connection between the previous employment and the education or training subsequently pursued. Otherwise, only involuntary unemployment can justify the migrant retaining the status of worker for the purpose of relying on Article 7 of the Regulation.[35] *Matteucci* extended that ruling to apply to courses taken outside the State of residence, where funding was provided by the State of residence rather than in the State of study. These cases, however, applied to adult children of migrants who had actually been workers. The next question posed to the Court would be whether a child could indirectly rely on Article 7(2) to claim an educational maintenance grant on the ground that it constituted a social advantage to the parent who was a migrant worker. This arose in *Bernini* v. *Minister van Onderwijs en Wetenschappen*.[36] The applicant was the daughter of an Italian migrant to the Netherlands. She had herself worked in the Netherlands for a short period, and then pursued university studies in Italy. She requested a maintenance grant from the Netherlands authorities, but was refused on the grounds that she was not a national of the Netherlands, and that her studies were not undertaken within the Netherlands. *Di Leo* had decided the issue of the possibility of relying on Article 12 in order to obtain the grant, but the Netherlands government

34. Case 39/86 [1988] E.C.R. 3161.
35. *Ibid.* See also Case C-357/89 *Raulin* v. *Minister van Onderwijs en Wetenschappen* [1992] E.C.R. I-1027.
36. Case C-3/90 [1992] E.C.R. I-1071.

proceeded with the *Bernini* case in order to obtain a ruling on the Article 7 issues. Earlier case law had accepted that social assistance to children could be seen as a benefit to the worker under Article 7(2). The Court now extended that to cover maintenance grants.[37] However, this would be the case only where the child was dependent on the worker. In other words, only where the maintenance grant potentially replaced funding by the parent, as opposed to self-financing by the student, would it be a social advantage under Article 7(2). Furthermore, in order to comply with Article 7, grants to migrants' children must not be subject to any conditions, such as residence, which are not imposed on nationals.[38]

Regulation 1612/68 has been useful in promoting education rights, but only in a narrow way. It guarantees basic access, which has tended not to be problematic within European Union member States as regards primary and secondary education. Its utility has largely been in guaranteeing equality of educational opportunity for post-compulsory education. While this achievement should not be minimised, it tends to help those children who are already well enough integrated into the host society in order to have completed primary and secondary education successfully. The Regulation endorses a goal of passive assimilation—the migrant child has the right to the same education as nationals, in the expectation that he or she will become absorbed into the mainstream educational system, and therefore the mainstream of society in the host State. Emphasising access, it presumes that migrant children will have the same chance of educational success as children of nationals. It does little for children with special needs, linguistic or otherwise, at the primary level. More damning is the fact that it does nothing for non-Community migrants beyond what the member State is willing to provide.

V. DIRECTIVE 77/486: BENIGN MARGINALISATION

DURING the period of mass migration following the Second World War, little attempt was made to address the special problems of migrants, particularly children, in integrating into the host State. The economic difficulties of the 1970s ended this phase of mass migration. At this time there was an expectation that at least some migrant workers would eventually wish to return to their States of origin.[39] Encouraging the maintenance of links with the language and culture of the country of origin seemed to be the most benign of methods to achieve that goal. However, it was still a policy of marginalisation, despite the fact that educationalists had begun arguing that providing some education in the mother tongue would facili-

37. *Idem*, paras.25–26.
38. *Idem*, para.28.
39. Commission of the European Communities, *Report on the Education of Migrants' Children in the European Union*, COM(94)80 Final, Brussels, 25 Mar. 1994, p.16 and Appendix, p.2.

tate greater understanding of the language of the host country and promote higher levels of academic achievement.[40] Furthermore, the policy of immediately integrating migrant children into regular classes was increasingly seen to be insufficient, and initial "reception" teaching of the host State's language became more common.[41] The goal of assimilation was being thereby pursued more actively. In Community law a new departure in the promotion of education rights of migrants' children came with the Social Action Programme of 1974, which emphasised the improvement of the conditions of freedom of movement in the Community, including policies relating to education. This led to the Commission Action Programme on behalf of migrants and their families,[42] which was the primary influence on the content of Directive 77/486. In 1977, shortly after the adoption of Directive 77/486, the Commission published a study on the education of the children of migrant workers, including a review of member States' practice in this area.[43]

Directive 77/486/EEC takes a more complex view of education rights than Regulation 1612/68. It aims to promote integration of migrants' children into the society of the host State, but accepts that this cannot be achieved merely through access rights. It also promotes the idea of teaching migrants' children the language and culture of their parents' home country. However, this laudable goal arises out of a belief that migrant workers will not establish themselves permanently in the host State, but that many will eventually return to their countries of origin, taking their families with them. This basis for the advocacy of mother-tongue teaching is clearly set out in the preamble to the Directive:

> *Whereas* host Member States should also take, in conjunction with the Member States of origin, appropriate measures to promote the teaching of the mother-tongue and of the culture of the country of origin of the abovementioned children, with a view principally to facilitating their possible reintegration into the Member State of origin.

Directive 77/486/EEC, although it applies to the same children as Regulation 1612/68, has a narrower range of application in terms of educational activities, applying only to compulsory education. While the Directive applies in law only to Community migrants, a Council declaration attached to the Directive pledges member States to applying the same principles to non-Community migrants.[44]

40. Commission of the European Communities, *The Children of Migrant Workers* (Education Series, No.1), pp.12–17.

41. See e.g. Raoufi, "The Children of Guest-Workers in the Federal Republic of Germany: Maladjustment and its Effects on Academic Performance", in Bhatnagar (Ed.), *Educating Immigrants* (1981), p.113.

42. (1976) O.J. C34.

43. *Supra* n.40.

44. Commission of the European Communities, *Report on the Implementation of Directive 77/486*, COM(88)787 Final, p.4.

The Directive sets out two basic obligations on member States in respect of the children of migrant workers:

> *Article 2*
> Member States shall, in accordance with their national circumstances and legal systems, take appropriate measures to ensure that free tuition to facilitate initial reception is offered in their territory to the children referred to in Article 1, including, in particular, the teaching—adapted to the specific needs of such children—of the official language or one of the official languages of the host State.
> Member States shall take the measures necessary for the training and further training of the teachers who are to provide this tuition.
>
> *Article 3*
> Member States shall, in accordance with their national circumstances and legal systems, and in co-operation with States of origin, take appropriate measures to promote, in co-ordination with normal education, teaching of the mother-tongue and culture of the country of origin for the children referred to in Article 1.

The Directive is thus ambivalent with regard to its goals. It seeks to achieve integration and to facilitate return of migrants. It values diversity of language and culture, but endorses marginalisation of migrant cultures. Ensuring mobility of Community migrants seems to be the only constant theme.[45]

The Directive includes two articles dealing with implementation. Article 4 is similar to provisions in many directives, requiring implementation within a specified period of time. In addition to this general obligation of implementation, Article 5 imposes a reporting obligation, similar to implementing provisions of human rights conventions.

The Commission reported on the implementation of the Directive twice, in 1984 and 1988. In 1984 it issued two reports, covering the two aspects of implementation: member State measures and Commission pilot schemes. In terms of the effective implementation of the Directive, the Commission was satisfied with the situation in only three States: Denmark, France and the Netherlands.[46] Ireland, admittedly a country with relatively few immigrants, had taken no steps at all to implement the Directive.[47] In the United Kingdom reception education facilities were adequate, but little mother-tongue teaching was undertaken.[48] The second

45. De Witte, "Surviving in Babel? Language Rights and European Integration", in Dinstein and Tabory (Eds), *The Protection of Minorities and Human Rights* (1992), p.277, at p.291.

46. Commission of the European Communities, *Report on Implementation of Directive 77/486*, COM(84)54 Final; European Parliament, Motion for resolution and explanatory statement, PE DOC A 2-12/85, pp.14–15.

47. Commission, *idem*.

48. *Idem*.

report discusses the pilot schemes undertaken within national education systems over the period 1976–1982. The goal of this approach was to identify areas of best practice within member States which might be followed more widely.[49] The Commission appears reluctant to go further than offering these pilot schemes as examples. The first endorsement of intercultural education can be found in this report:[50]

> In the face of the constant increase in the number and, above all, in the percentage of children of migrant workers in Community schools, two trends have emerged. The first trend is to adapt migrant workers' children to the patterns and teaching methods of the educational system of the host country, with due regard for their basic needs. The second approach aims essentially at changing the educational system to enable it to take on the new educational tasks imposed by the at times overwhelming presence of immigrants. By co-ordinating both trends, which are complementary rather than contradictory, schools will be able to offer all their pupils an education which meets the needs of immigrants and nationals alike.

This report also rejects the idea of mother-tongue teaching as a means of marginalisation of migrants, in the sense of marking them as temporary residents only. Instead its purpose is identified as the promotion and preservation of cultural identity.[51] The Directive's provisions on reception teaching are intended to facilitate integration into the host society, but the report recognises the possibility of segregated education being the result of abuse of reception classes.[52] Teaching of the language and culture of origin not only leads to strengthening of identity but also assists in the learning of the language of the host country.[53] With this report, the Commission moves towards the third stage of education rights for migrants. However, it does so by trying to adapt a second-stage document into a manifesto for intercultural education.

The 1988 report dealt with replies from member States relating to the period ending 1985, which meant that, as with the previous report, only ten member States were involved. It was clear that there were still substantial problems with implementation, which led the Commission to remind the member States that it had powers of enforcement which could be used if necessary.[54] For Article 2, regarding reception education, the Commission uses the language of human rights, asserting that reception teaching is "every child's subjective right".[55] It did not go as far with the

49. Commission of the European Communities, *Report on Pilot Schemes Relating to Education of Migrant Workers' Children*, COM(84)244 Final, pp.1 and 35.
50. *Idem*, p.3.
51. *Idem*, p.4.
52. *Idem*, p.12; see also Raoufi, *op. cit. supra* n.41, at pp.123–124.
53. Commission, *idem*, pp.15–16 and 21.
54. Commission, *op. cit. supra* n.44, at pp.8 and 125.
55. *Idem*, p.125. At this stage, the Commission was of the opinion that Art.2 of the Directive created direct effects: see *infra*.

rights under Article 3 to receive mother-tongue teaching, although it was of the opinion that Article 3 was sufficiently clear to determine whether or not member States were in compliance.[56] The Commission report recognised that the realisation that migrants would be permanent residents in their host countries and the presence of second-generation migrants would require new policies. The report thereby sets the stage for the debates of 1993 and 1994.

Implementation of Directive 77/486 has been a concern of the European Parliament as well as the Commission. In 1981, when the delay for implementation of the Directive had passed, the European Parliament issued its first report on the education of the children of migrant workers, prepared by its Committee on Youth, Culture, Education, Information and Sport.[57] This first report on the issues covered by the Directive still promotes a simple integration model for migrants.[58] The language is very similar to that used by the European Court in removing the financial barriers to access to education for migrants' children under Regulation 1612/68. The report then moves on to what was to become the standard list of complaints concerning the implementation of the Directive. First, the European Parliament regretted that some member States had not yet done anything to implement the Directive. Second, it called on member States, notwithstanding the overt scope of the Directive, to apply its provisions to non-Community as well as Community migrants. Finally, it requested that member States should consider applying the principles of the Directive to nursery as well as compulsory education.[59] One concern particular to this early stage of review of implementation of the Directive was the Commission's lack of reliable statistics concerning the school attendance of migrants' children.[60] This report contained a motion for resolution which became the Resolution of 18 September 1981 on the education of the children of migrant workers,[61] which, in addition to calling for better member State implementation and extension of the Directive to non-Community migrants, endorsed the Commission's indirect promotion of the Directive through pilot schemes.

The 1985 report and resolution, which relied extensively on the Commission's first reports on the implementation of the Directive, showed a change in approach. The European Parliament had rejected one of the bases on which the Directive had been enacted. It accepted that most migrants' children would not return to their countries of origin, although it

56. *Idem*, pp.126–127.
57. European Parliament. *Report: On the Education of the Children of Migrant Workers*, Doc.1-329/81, PE 73.415/fin., 30 June 1981.
58. *Idem*, p.7.
59. *Idem*, pp.7–8.
60. *Idem*, pp.10–11.
61. European Parliament, Resolution on the education of the children of migrant workers (1981) O.J. C260, 18 Sept. 1981.

still promoted teaching of mother tongues in order to facilitate the reintegration of those migrants who would eventually return.[62] It also began using the language of human rights, rather than the language of economic integration, in order to justify the rights contained in Directive 77/486.[63] The main contribution of the Commission report, however, was to provide concrete proof of the failure of implementation of the Directive by most of the member States, particularly those in which migrants were an important social phenomenon.[64] With this concrete proof in mind, the European Parliament argued, the Commission should either press member States to fuller implementation or take action under Article 169 of the EC Treaty to enforce member State obligations.[65] It reiterated its urging for the Directive's application to be extended to non-Community migrants.

In 1987, before the Commission had completed its second report, the European Parliament adopted another resolution on the implementation of Directive 77/486, endorsing the Commission's work, and again calling for enforcement actions to be taken against defaulting member States.[66] The calls by the European Parliament for the Commission to take Article 169 actions against member States on this Directive have been frequent, but always ignored. The Commission used the possibility of an enforcement action as a threat in the 1980s, but has now explicitly abandoned a confrontational approach to this issue.[67] There is, nonetheless, the possibility that an individual might bring an action relying on the Directive which is referred to the European Court under Article 177 of the EC Treaty. The question would then be to what extent the provisions of the Directive might produce direct effects. The Commission suggested in its 1988 report that Article 2 was sufficiently clear and precise to be directly effective, but that Article 3 was not.[68] The European Parliament supported the view that Article 2 was capable of producing direct effects in a 1992 report on intercultural education.[69] If such an action were to be successful, a scenario reminiscent of the *Defrenne* case might arise, where member States argue that the failure of the Commission to take enforce-

62. European Parliament, Resolution on the implementation of Directive 77/486 on the education of the children of migrant workers (1985) O.J. C122, 16 Apr. 1985; also European Parliament, *op. cit. supra* n.46, at pp.9 and 19.

63. European Parliament, Resolution on the application of Directive 77/486/EEC on the education of children of migrant workers (1987) O.J. C125, 11 May 1987, p.8.

64. Commission, *op. cit. supra* n.46, at pp.13–15.

65. *Idem*, p.13. See also 1985 resolution, *supra* n.63.

66. *Supra* n.63.

67. Commission, *op. cit. supra* n.39, at p.14.

68. Commission, *op. cit. supra* n.44, at p.8.

69. European Parliament, *Report on Cultural Plurality and the Problems of School Education in the European Community*, EP DOC A3–399/92, 3 Dec. 1992, p.19.

ment proceedings excuses their non-implementation, and justifies that direct effects be recognised only prospectively.[70]

Although the above-mentioned possibility could cause the Commission some embarrassment, the Commission's approach may reflect a political balance which even the Court would be reluctant to upset. The Community institutions, including the Court, have demonstrated their understanding of the cultural and political sensitivities of member States, and have sometimes not pushed integrative policies along their logical progression where cultural sensitivities are strong.[71]

VI. THE SOCRATES DECISION: TOWARDS INTERCULTURAL EDUCATION

THE final report on Directive 77/486 was followed by a four-year period of relative silence on the question of migrants' education. This silence was broken by a 1992 report by the European Parliament's Committee on Culture, Youth, Education and the Media, which introduced a new direction to the debate.[72] Intercultural education was advocated as a solution not only to the integration of immigrants, but also to the reduction of social exclusion and of racism and xenophobia.[73] The focus is thus not on education as a means of achieving the single market, but, instead, there is an orientation much more toward the language of human rights and of citizenship. The European Parliament's report moves toward the promotion of intercultural education for all European Union citizens, not just migrants. This arises from the acceptance that the majority of migrants to the Union became permanent residents. The issue of integration of migrants has become an issue of citizenship, particularly the shared European citizenship. The report calls on the Commission to develop an Action Programme on promoting co-operation to ensure mother-tongue teaching to migrants. While the report repeats the usual recommendation that the Commission take enforcement actions to ensure the full implementation of Directive 77/486, the European Parliament's emphasis on promotion and co-operation can be seen as an indication that it accepts the political limitations on enforcement actions in this field.

The debates following the report, leading to the adoption of a resolution on education of migrants' children, demonstrate the lack of political consensus.[74] MEPs representing the Socialist group supported the report and encouraged the promotion of multiculturalism in general and intercultural education in particular, as part of the fight against racism and xenophobia. The European People's Party (Christian Democrats) largely

70. Case 43/75 *Defrenne* v. *SABENA* [1976] E.C.R. 455.

71. De Witte, *op. cit. supra* n.45, at pp.294–295; Case 371/87 *Groener* v. *Minister for Education and City of Dublin Education Committee* [1989] E.C.R. 3967.

72. *Supra* n.69.

73. *Idem*, p.29.

74. European Parliament, Debates, No.3–426, 19 and 21 Jan. 1993.

argued against strengthening obligations to provide mother-tongue teaching and in favour of the report in so far as it advocated better teaching to integrate migrant children into the mainstream education system. While accepting the need to prevent migrants from becoming marginalised within host countries, and acknowledging the growth of racism, integration into the host country was considered by the European People's Party to be the method by which social exclusion and racism should be fought. The resolution resulting from the report and debates balanced these approaches, playing up themes of integration and equality of opportunity, on the one hand, and co-existence and multiculturalism on the other.[75] It recognised resource limitations on the extension of mother-tongue teaching to migrants' children, but called on the Commission to look into ways of promoting such teaching.

In March 1994 the Commission released its report on these issues.[76] Taking a lead from the 1992 European Parliament report, it situates the goal of intercultural education within the struggle against racism and xenophobia in Europe, and thus within the human rights field. Integration for migrants is mentioned frequently, but within a context of equality of opportunity and the reduction of social exclusion. The Commission justifies the teaching of mother tongues to migrants as part of the TEU's guarantees of protection of national identities, by extending the concept of national identity to include the cultural identities of all the citizens of a member State.[77] By doing this, the issue of intercultural education is lined with issues of culture and European citizenship.[78] Intercultural education for migrants is advocated as a means of integration as well as a means of preserving the cultural identity of migrants. The Commission cites research which shows that beginning formal education in the mother tongue enables the language of the host country to be learned more easily.[79] The report moves from the teaching of migrants to an advocacy of intercultural education for all, to improve the employment mobility of Europeans generally and to stem the growth of racism.[80]

An idea of a European dimension of education emerges from the report, arising from several policy considerations: European citizenship, eliminating racism and xenophobia, reducing social exclusion and pro-

75. European Parliament, Resolution on cultural plurality and the problems of school education for children of immigrants in the European Community (1993) O.J. C42, 21 Jan. 1993.

76. *Supra* n.39.

77. *Idem*, p.6.

78. See the Economic and Social Committee, Opinion on the citizens' Europe, CES(92) 1037 and Commission, *Report on the Citizenship of the Union*, COM(93)702.

79. Commission, *op. cit. supra* n.39, Appendix, at p.2.

80. *Idem*, p.18.

tecting cultural diversity. This report led to the development of the SOCRATES Action Programme on educational matters, which includes a chapter on the education of migrant workers, gipsies and occupational travellers.[81] This is a general programme for the exchange of information and best practice, and the funding of projects within member States. It creates no obligations on Member States but, rather, sets up a committee at Community level to administer the programme, including allocating funding. The Commission's original proposal for the decision is very cautious in the values which it advocates as underlying the Action Programme, primarily citing European citizenship as the justification for the programme.[82] The European Parliament, on its first reading, amended the proposal substantially to include numerous references to intercultural education, and incorporating references to racism and xenophobia and social exclusion in the chapter on the education of migrants.[83] The Parliament's amendments also attempted to guarantee a funding formula for the migrants' education Action. The Council's common position on the amended proposal (the Commission having accepted almost all of the Parliament's proposed amendments) removed the Parliament's funding formula.[84] It also restricted references to intercultural education to the Action on migrants' education. References to the goals of the Action Programme were removed except in the preamble, where citizenship and the elimination of racism and xenophobia were mentioned, but not the reduction of social exclusion. The Parliament and Commission reintroduced limited references to intercultural education in the context of language teaching.[85] After Conciliation Committee meetings concerning the form of committee supervision over the Action Programme, and certain budgetary matters, the decision was finally adopted on 14 March 1995.

The Action Programme may lead to the expansion of intercultural education policies within member States. It is important to remember, however, that advocacy of intercultural education has its own problems. Some experience with intercultural education systems indicates that it may lead

81. Decision 819/95/EC of the Parliament and of the Council of 14 Mar. 1995, establishing the Community Action Programme SOCRATES (1995) O.J. L87/10.

82. Commission, Proposal for a European Parliament and Council Decision establishing the Community action programme "Socrates" (1994) O.J. C66/3. The Commission also referred to integration and equality of opportunity as goals of the Action on migrants' education.

83. Proposal, amended by Parliament (1994) O.J. C128/479. The Parliament also questioned the use of both Arts.126 and 127 EC at the legal basis for the decision, being of the opinion that the programme dealt only with Art.126 issues. The common position version reinstated the dual legal basis.

84. Council, Common Position (EC) No.33/94 (1994) O.J. C244/51.

85. Parliament, second reading amendments (1994) O.J. C323/50; Commission, Opinion on European Parliament's Amendments, COM(94)502 Final.

to the assimilation of migrants, rather than an integration which preserves their cultural identity. This occurs because the hierarchy of cultures within society as a whole is reproduced within the classroom. Children from the host country see little attraction in learning the language or culture of the migrant groups and since the host country's official language is more important in terms of employment prospects, other languages are devalued or ignored.[86] The Commission report of March 1994 recognises this problem, although it does not appear to give it due weight.[87]

VII. CONCLUSION

EDUCATION policy for migrants' children in the post-war period has been developed in three stages. First, guarantees of access to education were secured. Second, teaching of the migrant's mother tongue was promoted. The third stage is to provide an education which promotes both equality of opportunity and pluralism, and does not force migrants' children to choose between identifying with their families or with the host society. In EU member States formal access to primary and secondary education is no longer a problem. However, States have shown weak commitment to developing education policy beyond the first stage. Access to education has been enforced by the European Court as a right to all the conditions of access, including finance. At best, it can be said that implementation of the second stage of Community guarantees for migrants' education, as set out in Directive 77/486, is uneven. Political obstacles have prevented the Commission from enforcing Directive 77/486 to its full extent. The SOCRATES decision introduces a move to intercultural education for migrants as the new policy direction. However, the decision places no obligations on member States to develop intercultural education policies, but instead provides a means of disseminating best practice, which, in view of the results of the Directive, may be the most realistic approach.

It is important to note that the move to intercultural education has been problematic, as demonstrated by the adoption of the SOCRATES decision. The Commission's original proposal, and the common position adopted by the Council, preferred the more vague notion of citizenship to the idea of intercultural education, which has a clear meaning to educationalists. The European Parliament has pushed for a far more radical agenda than the Council was willing to accept, in promoting not only citizenship and intercultural education for all, but also anti-racism and anti-poverty goals. The Council succeeded in removing links to the elimination of social exclusion, but compromised on accepting intercultural education and the elimination of racism and xenophobia only in the context of migrants, where the question of cultural conflict is unavoidable. The

86. Appel, *op. cit. supra* n.1, at pp.67–70.
87. Commission, *op. cit. supra* n.39, at p.18.

Council's approach has maintained the idea of a different approach to education policy for migrants and nationals, while the Parliament's would have introduced a complete break with the past, in which migrants' special needs were an add-on to general educational policy, to a policy of valuing intercultural knowledge for all children.