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# The Destination Is Not the End

An institutional analysis of refugee education in Luxembourg



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**This thesis consists of 29,363 words, which is equivalent to 83.89 pages each with 350 words.**

## **Abstract**

*This thesis is a case study of the refugee education system in Luxembourg. Through the theoretical underpinnings of historical-sociological institutionalism, the analysis has 3 parts. First, the predominant tendencies in asylum-policies in liberal democracies identified to focus on national security rather than the rights of refugees. Luxembourgish debates on naturalisation laws support this negative view of asylum-seekers. Second, a legal analysis of the right to education for asylum-seeking and refugee children shows a different picture, namely that of a fairly strongly formulated set of rights, some of which are relatively enforceable. This inclusive rights-regime seems to be in contrast with the negative asylum-policy regime. Third, a de facto analysis of policies implemented in the field of refugee education in Luxembourg shows that the Grand-Duchy has a surprisingly inclusive system of refugee education, and that asylum-seeker and refugee children's rights are to a large extent realised since they are seen primarily as children rather than asylum-seekers. Finally, I seek to explain my findings through key institutionalist concepts such as institutional inertia, the stickiness of initial institutional design, path dependence, and contextual factors such as Luxembourg's unique history of immigration and its current population composition.*

## **List of acronyms**

**ADR** – The Luxembourgish nationalist conservative party

**ASR children** – Asylum-seeking and refugee children

**CADE** – UNESCO Convention Against Discrimination in Education

**CASNA** – Cellule d'accueil scolaire pour élèves nouveaux arrivants

**CEAS** – Common European Asylum System

**CESCR Committee** – United Nations Committee on Economic, Social and Cultural Rights

**CJEU** – Court of Justice for the European Union

**CRC Committee** – United Nations Committee on the Rights of the Child

**CSV** – The Luxembourgish Christian Democratic Party

**DP** – The Luxembourgish Democratic Party

**ECHR** – European Convention of Human Rights

**ECSC** – European Coal and Steel Community

**ECSR** – European Committee of Social Rights

**ECtHR** – European Court of Human Rights

**ESC** – European Social Charter

**EU** – European Union

**EU Charter** – The Charter of Fundamental Rights of the European Union

**HI** – Historical institutionalism

**JHA** – EU Justice and Home Affairs

**LSAP** – The Luxembourgish Social Democratic Party

**OECD** – Organisation for Economic Cooperation and Development

**OLAI** – The Luxembourgish Office for Reception and Integration

**SI** – Sociological institutionalism

**UAM** – Unaccompanied minor

**UDHR** – Universal Declaration of Human Rights

**UNCRC** – United Nations Convention of the Rights of the Child

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## **Chapter 1: Introduction and research question**

Education forms an indispensable precondition for the enjoyment of many other human rights and freedoms. This is established in numerous human rights instruments. While most people can agree to this statement, the question is how to ensure the realisation of the right to education for groups of children who are particularly vulnerable? From early childhood to postsecondary education, immigrants and their children face unique challenges and barriers in educational attainment compared to their native-born peers. How can education, and thus the basis for the realisation of other human rights, be ensured for children who find themselves at the margin of society, at risk not just of poverty but also social exclusion?

This thesis focuses on asylum-seeking and refugee (ASR) children and their right to education in the host country, both during the often very long periods of time it takes for state authorities to process their asylum claims, and after the decision has been made.

In this thesis I seek to explain the emergence of a relatively inclusive and comprehensive system of refugee education in the context of predominantly negative discourses and immigration policies at the national as well as European levels, by focusing my analysis on the Grand-Duchy of Luxembourg as a host state.

My research question comprises the following two parts:

- 1. In light of the continued scepticism towards asylum-seekers in Luxembourg, has refugee education been implemented in a way that realises the rights of these children?**
- 2. How can the current system of refugee education be explained through the lens of historical-sociological institutionalism?**

In Chapter 2 I explain my methodological considerations and their consequences. I place my research within the qualitative paradigm. My research strategy is exploratory, with a constructionist ontology and an interpretivist epistemology. My research design is a case study

of Luxembourg, and the data I use comes from semi-structured interviews as well as official documents and academic literature.

Chapter 3 provides the theoretical underpinnings of the subsequent analysis. I rely on a historical-sociological institutionalist framework which affects the way I view sources of institutional change and actor incentives. In my framework, institutions are marked by inertia, and change comes about because of a logic of social appropriateness rather than a rational means-end logic. Furthermore, initial institutional designs are hard to change once they have been implemented. Finally, I present six factors which have been said to affect migration policies in Western states. This is done in order to strengthen the explanatory power of my theoretical framework vis-à-vis my case.

Chapter 4 presents the first part of my 3-part analysis. Here I present the so-called 'security-rights nexus' in immigration policies. In Western states, the tendency has been to give more weight to national security than to the rights of refugees arriving to these states. I describe the development of this negatively loaded asylum-regime which is reflected in the continued scepticism among national populations towards asylum-seekers and refugees. I trace this development through a historical overview of the international context of migration and refugee governance. I gradually narrow the focus to the regional EU level and finally to the Luxembourgish national level, stressing the debates and political developments which have affected the responses to refugee flows since the Second World War.

In Chapter 5 I analyse the relationship between the state as a duty bearer and the child as a rights holder. This chapter constitutes the second part of the analysis – namely a detailed legal analysis of the right to education for ASR-children in Luxembourg. In this *de jure* analysis I start at the international level with the Convention on the Rights of the Child and other relevant legal instruments. Then I move on to the European level and the human rights instruments found here. Finally, I look at the Luxembourgish Constitution and its provisions regarding the right to education and the principle of non-discrimination. The result is a rights regime which seems fairly strongly formulated and which is also enforceable to a considerate extent. This rights-regime seems to clash with the strong security focus in asylum-policies identified in Chapter 4.



In Chapter 6 I give a *de facto* analysis of the right to education for ASR-children in Luxembourg. I analyse how and when policies have been implemented to ensure the education of these vulnerable children, as well as the general conditions they find themselves in. I identify a dichotomy between the way ASR-children are seen – either as primarily asylum-seekers or as children, depending on who is making the definition. In general, the authorities who process asylum applications see these children primarily as asylum-seekers. This creates a risk of their rights not being completely fulfilled. But in the system of refugee education, these children are seen primarily as children, and the analysis shows a surprisingly inclusive education system.

In Chapter 7 I discuss how the results of my analysis can be explained through my theoretical framework. I explain how the case of Luxembourg has turned out to represent competing regimes, which expectedly would favour the stronger security focus rather than ASR-children's rights. But the very particular composition of the Luxembourgish population and its history of immigration provide one important part of the explanation of the highly developed, structured, and inclusive system of refugee education found there.

In Chapter 8 I present a conclusion of the thesis as a whole.

## **Chapter 2: Methodological considerations**

The way research is conducted in the social sciences is different depending on the approach researchers take and the type of questions they ask. This in turn informs the methods of data collection, data analysis and the conclusions which can be drawn from a study. In this chapter I will describe the methodological considerations underlying this thesis. First, I will describe the research strategy, which is qualitative and exploratory. Then I will outline the research design and research methods in order to make the research process transparent to the reader.

### **2.1. Research strategy – a qualitative, exploratory approach.**

This thesis is embedded in a qualitative research paradigm. A paradigm is essentially a worldview; a whole framework of beliefs, values and methods within which research takes place. According to Creswell (1994), "a qualitative study is defined as an inquiry process of understanding a social or human problem, based on building a complex, holistic picture, formed with words, reporting detailed views of informants, and conducted in a natural setting". Following this paradigm, qualitative research places emphasis on understanding through looking closely at people's words, actions and records. It examines the patterns of meaning which emerge from the data and these are often presented in the participants' own words. The task of the qualitative researcher is to find patterns within those words (and actions) and to present those patterns for others to inspect while at the same time staying as close to the construction of the world as the participants originally experienced it. The goal of qualitative research is to discover patterns which emerge after close observation, careful documentation, and thoughtful analysis of the research topic. A qualitative study is contextually embedded, and thus what can be discovered by qualitative research are not sweeping generalisations but contextual findings. This process of discovery is basic to the philosophic underpinning of the qualitative approach (Creswell, 1994).

### **2.2. Constructionist ontology**

Questions of ontology are concerned with the nature of social entities. The central point is whether social entities can and should be considered objective entities that have a reality external to social actors, or whether these entities are social constructions built up from the

perceptions and actions of social actors. The latter is referred to as constructionism and is the antithesis to the former position, namely objectivism, which is traditionally associated with quantitative research. Constructionism asserts that social phenomena and their meanings are continually being accomplished by social actors. It implies that not only are social phenomena and categories produced through social interaction, but they are constantly in a state of revision. The researcher always presents a certain version of the world, and knowledge is viewed as indeterminate (Bryman, 2012, p. 33). In other words, qualitative researchers assume multiple and dynamic realities that are context-dependent. Therefore, qualitative researchers embrace an ontology that denies the existence of (or at least the efficacy of arguing for the existence of) an external reality – meaning one that exists outside and independent of our interpretations of it (Searle, 1995, p. 154). As such, qualitative researchers value the participant's own interpretations of reality, and these interpretations are deeply embedded in a rich contextual web that cannot be separated and generalised out to some mass population.

### **2.3. Interpretivist epistemology**

A researcher's views on the nature of reality, in turn, affect how he or she comes to gain knowledge of his or her reality. A constructionist ontology feeds into the way research is carried out and how knowledge is obtained. Since qualitative researchers embrace internal reality, they cannot embrace an objective epistemology. The epistemological point of departure for this thesis is thus interpretivist. The underlying assumption of my research is that the researcher and the subject are interdependent, and that they create knowledge in a common process of assigning meaning to social objects. Knowledge emerges hermeneutically from an empathetic interaction between researcher and subject, and the outcomes of the research are necessarily context- and time-dependent working hypotheses leading to understanding (Crotty, 1998).

### **2.4. Research design – case study**

What I want to explore and understand in this thesis is the policies and practice of refugee education in Luxembourg. I want to explore the context into which refugee education is embedded as well as the tensions which potentially challenge an ideal realisation of refugee children's rights. This will be done through the analysis of such official documents as laws and policy guidelines, as well as through semi-structured interviews with relevant government

officials and NGO workers. This is best represented through a qualitative case study, and in the following paragraph I will present the main features of this way of conducting research.

A qualitative case study is an approach to research that facilitates exploration of a phenomenon within its context using a variety of data sources. This ensures that the issue is not just explored through one lens, but rather a variety of lenses which allows for multiple facets of the phenomenon to be revealed and understood (Baxter and Jack, 2008). I will use both official documents such as laws and guidelines for teachers of ASR students, as well as policy reports, academic journal articles and other literature on the subject. Furthermore, I will use information obtained through semi-structured interviews with individuals who work in the field of refugee education in one way or another. I will discuss my data collection in more detail below.

In accordance with my ontology and epistemology, the philosophical underpinning of a qualitative case study is constructionism, the premise being a social construction of reality.

According to Yin (2014) a case study design should be considered when: (a) the focus of the study is to answer “how” and “why” questions; (b) you cannot manipulate the behaviour of those involved in the study; (c) you want to cover contextual conditions because you believe they are relevant to the phenomenon under study; or (d) the boundaries are not clear between the phenomenon and context (Yin, 2014).

In my case, the research question and topic fit all four reasons for applying a case study design, seeing that I am aiming at: (a) exploring how and why refugee education is carried out in Luxembourg and how it complies with key human rights standards; (b) the actors I am investigating are part of the real world and thus cannot be manipulated; (c) the contextual conditions of refugee education are highly influential, e.g. the political, economic and social context; and (d) since refugee education is a policy as well as a practice, it is entwined in and affected by other policy areas, both at the national and regional level. For these reasons a case study seems like an appropriate way to go about my study of refugee education in Luxembourg.

## **2.5. Data collection: Semi-structured interviews and official documents**

People's words and actions represent the data of qualitative inquiry and this requires methods that allow the researcher to capture language and behaviour. That is why I will compliment the analysis of official documents with semi-structured interviews. The interview is one of the major sources of data collection in qualitative research, and it is also one of the most difficult ones to get right. According to Mischler (1986), its particular features reflect the distinctive structure and aims of interviewing, namely, that it is discourse shaped and organised by asking and answering questions. In accordance with my ontological and epistemological positions, I am aware that an interview is a *joint product* of what interviewees and interviewers talk about together and how they talk with each other. The record of an interview that researchers make and then use in the work of analysis and interpretation is a representation of that talk.

The interview situation is never neutral and only for fact-finding. There are always dynamics and potential power asymmetries going on between interviewer and respondent, or interview subject. The dynamics are different according to the type of interview subject. Different interview subjects entail different social relations and styles of questioning, such as when interviewing members of a foreign culture, or children and elites in the researcher's own culture.

Interviews seeking distinct types of knowledge for specific purposes will take different forms. That is why the researcher must be aware of the interview subject at hand and adapt the questions, body language, and the way the questions are asked and followed up to the respective interview subjects (Kvale, 2007). My interviews are of the elite kind since the interview subjects are either government officials or NGO workers, all of whom have a comprehensive knowledge of their own main focus area regarding asylum-seeking children and refugee education in Luxembourg. Even though I have done my best to gain knowledge of the topic in advance, the nature of the interview is to explore what I cannot find out by reading official documents, and thus my main task as an interviewer is to probe for detailed knowledge about my thesis topic, and also to obtain recommendations for further, potentially useful interview subjects.

One of the key techniques in good interviewing is the use of probes. Patton (1990) identifies three types of probes, namely detail-oriented, elaboration and clarification probes (Patton,

1990). In my interviews I have drawn inspiration from these types of probes (See Appendix A for examples of the probes used).

I have thus been aware of a number of factors that are at play in an interview situation, and I have attempted to deal with them accordingly in order to obtain valid information from the interviews.

## **2.6. Data analysis**

Once the interviews had been transcribed, I analysed them through a process of open coding, getting a rough image of the recurring categories. Categories represent phenomena such as events, objects, incidents, and actions, but also description, themes and assertion (Creswell, 1994). The guiding categories were the different types of refugee education and as such they were defined during the process of gaining knowledge of the refugee education system in Luxembourg. When categories are identified, it is possible to analyse the data in a more systematic way. I compared and contrasted those interviews that spoke about the same categories and themes, noticing differences in what the interview subjects had said. In case of strong differences I contacted another expert in the field to find out the accurate position. Ideally I would have done interviews with at least two people from each organisation, but due to time constraints on both my part and theirs, this has not been possible. This is why I have attempted other forms of triangulation of the knowledge obtained through the interviews – e.g. by asking other experts who were not necessarily from the same organisation as the interview subject to verify the statements of the latter.

### **Chapter 3: Theoretical framework – Historical and sociological institutionalism**

How do specific policies come about? What affects the behaviour of political actors? And which role do institutions play? Throughout the second half of the 20<sup>th</sup> century, scholars have grappled with these questions, which can be summarised in the following question: How can we explain political phenomena? Two competing paradigms emerged: Rational choice theory and institutionalism. Both were a response to the behavioural and group theories of the 1940s and 1950s. Both seek to clarify the relationships between actors, rational behaviour, institutions, and politics. Rational choice theory has three essential components: individual actors (methodological individualism); rationality; and cost-benefit analyses. It focuses on the rational choices of actors in a given situation and the way their preferences change if the situation changes.

Parallel to the development of the rational choice paradigm, another paradigm emerged, based on an increasing recognition of the fact that *institutions matter*. This other paradigm, which was called institutionalism, sought to explain sequences of social, political, and economic behaviour and change across time through institutions. As Mabee (2011) said: “The goal of institutional analysis is often to understand why particular political orders are robust, and difficult to overcome” (Mabee, 2011, p. 36).

Apart from reacting to the group theories of the 1940s and 1950s, it was also a response to the structural-functionalism theories of politics which were prominent in political science in the 1960s and 1970s. Three prominent variants of institutionalism have emerged: rational institutionalism, historical institutionalism and sociological institutionalism<sup>1</sup>. The analysis of this thesis is embedded in a predominantly historical institutionalist (HI) framework because of the scope and idiosyncrasies of the case study at hand. However, the theoretical framework also draws on elements from sociological institutionalism (SI) where the latter approach is deemed to enhance the explanatory power of the HI framework vis-à-vis the case. The two

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<sup>1</sup> Sociological institutionalism is also known as sociological neo-institutionalism and is part of a group of theoretical developments that developed somewhat in parallel to the traditional historical institutionalist framework.

approaches are combined in a way that is compatible with essential assumptions of both theories in that several similarities can be found between historical and sociological institutionalism. In this way I let the two approaches complement each other in order to create a stronger theoretical framework of analysis. I will highlight these similarities as I lay out the key features of HI in the following paragraph.

HI draws on both of the theories it reacted against. From group theories it acknowledges that conflict among rival groups lies at the heart of politics, but HI seeks better explanations for specific national outcomes and of the inequalities that often characterise these outcomes. HI found the explanations in the way society is organised through institutions in ways that privilege some interests but demobilise others. From structural functionalists, HI accepts the contention that the polity is an overall system made up of interacting parts. But instead of accepting the social, psychological or cultural traits of individuals as the driving force behind policies, HI saw the institutional organisation of the polity and the political economy as the principal factor structuring collective behaviour and generating specific political outcomes. It emphasised the 'structuralism' implicit in institutions rather than the 'functionalism' of previous approaches that viewed political outcomes as responses to needs in the system (Hall and Taylor, 1996, p. 937).

### **3.1. Definition of institutions**

In the traditional HI approach, institutions are defined as 'the formal or informal procedures, routines, norms, and conventions embedded in the organisational structure of the polity or political economy' (Hall and Taylor, 1996, p. 938). This definition is relatively narrow in comparison with later developments, and I will expand the definition of institutions in accordance with SI. SI applies a much broader definition of institutions than HI. It expands the HI definition to include not just formal and informal rules, norms and conventions, but also the symbol systems, cognitive scripts, and moral templates that provide the 'frames of meaning' which guide human action (Hall and Taylor, 1996, p. 947). This definition blurs the traditional distinction in political science between institutions and culture, and in a way it merges the two types of explanations – cultural and institutional explanations become one. In my analytical framework I will use the SI definition of institutions.



In comparison with the other institutional approaches, four features are distinctive for HI. I will describe these features and explain how they relate to key features of SI. From the SI framework I add a fifth feature to the framework.

### **3.2. Key features of historical institutionalism**

First, HI is eclectic in that the assumption about actors is one of both calculation (associated with rational choice neo-institutionalism) and culture (associated with SI), and that the interplay between institutions and actors is complex and quite broad (Hall and Taylor, 1996, p. 940). This eclectic nature is also found in SI (Ethington and McDonagh, 1995), and the focus of my framework is on the cultural approach rather than the calculus approach. This has implications for the way key concepts are defined, as we shall see below. However, I will refrain from a comprehensive comparison of the calculus versus the cultural approach since the aim of this chapter is to present the theoretical framework that I will apply in my analysis, and not to discuss the theory of HI in its entirety.

Second, HI has a strong emphasis on power-asymmetries in the development and operation of institutions. According to Hall and Taylor, all institutional analyses have a 'direct bearing on power relations' (Hall and Taylor, 1996, pp. 940–41). HI is very attentive to the way in which institutions distribute goods unevenly across social groups, and they do not see the world as one consisting of freely contracting individuals. Rather, they assume a world in which access to decision-making processes is given disproportionately to some groups or interests over others, and where, as a result of these power asymmetries, some lose while others win.

Third, its view of institutional development is based on critical junctures, path-dependency and unintended consequences. In HI, the ideas of critical junctures and path dependency are linked. Critical junctures are periods of crucial change in the history of given countries or other political units that are said to leave distinct legacies. Path dependency is the trajectory of change stemming from and constrained by critical junctures (Collier and Collier, 1991). In asserting that social causation is path dependent, HI rejects the traditional postulate that the same operative forces will generate the same results everywhere. The link between critical junctures and path dependency is positive feedback, which causes initial institutional designs to persist over time – historical institutionalists talk about the 'stickiness' of initial institutional design. Pierson (2004) states, "in the contexts of complex social interdependence, new

institutions often entail high start-up costs, and they produce considerable learning effects, coordination effects, and adaptive expectations. Established institutions will typically generate powerful inducements that reinforce their own stability and further development” (Pierson, 2004). As opposed to rational institutionalism, HI and particularly SI recognise the possibility for inefficiency, contingency and accident in history. Institutions, and the policies that they structure and produce, are not always rational, seen from a goal-oriented perspective based on a Weberian idea of bureaucratic efficiency and logic. That is why certain institutions persist even though they may produce unintended consequences.

One of the factors that influence political outcomes from a domain outside the state’s sphere of control is global norms and ideas. The fourth distinct feature of HI is a concern with the way in which institutional analysis can be combined with the analysis of ideas and other kinds of factors, in order to explain political outcomes. Parallel to this acknowledgment of the potential influence of ideas, SI also recognises the relative autonomy of ideas and symbolic action in historical development (Ethington and Mcdonagh, 1995, p. 468). In this way, ideological regimes and norms can also be important influencing factors pushing policies in one direction or another.

Finally, following the concept of path dependency, an important hallmark of the SI framework of analysis is the “contextualisation of institutions within sociohistorical processes (and vice versa)” (Katznelson, 1992; Krasner, 1984; March and Olsen, 1989, 1984; Smith, 1988). SI goes further than HI in stressing the influence of social context, which shapes or even constitutes social actors and their goals (Powell and DiMaggio, 1991; Scott and Meyer, 1994). Here, they are inspired by the cultural and phenomenological traditions of Berger and Luckmann (1967) and Goffman (1970), which stress “the socially constructed nature of reality, and the extent to which social behaviour reflects the enactment of socially appropriate frames in a given context (in contrast to, say, images of rational calculation)” (Schofer et al., 2012, p. 58). This has implications for how institutional change, and more specifically, policy change comes about. I will explain the sources of policy change in the SI framework in the following paragraph.

In delineating those contextual features relevant for the research question at hand, I draw upon factors that traditionally inform migration policies according to Gibney (1999, pp. 176–

77). Gibney identifies the following 6 factors that are likely to shape the political limits of state action to assist refugees and asylum seekers over time:

1. **The needs of the claimants:** If it is clear that the refusal of residence will likely result in the loss of the potential entrant's life or in great physical harm being inflicted upon them, a strong case should be made for that person entering. The presence of the asylum seeker at the border makes it difficult for a state to deny its unique responsibility.
2. **The State's economy:** Unemployment and economic growth are determinants of a state's response to entrants. During a time of recession, there is usually a demand for restrictions in asylum policies.
3. **Ethnic affinity:** Affinities based on ethnicity often have the strength to override perceived economic interests in entry decisions. Some outsiders are seen not as competitors but as part of the state's "extended family". This is typically outsiders who possess religious, racial, or linguistic links to the state's dominant ethnic group.
4. **Integration history:** The history of integration in the state plays a role in the likelihood of the absorption of new entrants. Chances of accepting new entrants are higher if the state has in place the right infrastructure (government departments, community organisations, etc.) to ensure that entrants are transformed into citizens with little social and political tension.
5. **The actions of other states:** One state's asylum policies can have a great effect on the surrounding states. On the one hand, a hostile state can use asylum policies to 'dump' unwanted or undesirable members of its citizenry on another political community. On the other hand, inter-state cooperation and coordination can promote successful resettlement and can potentially mitigate a refugee crisis. The Common European Asylum System is one attempt at coordinating and harmonising asylum policies between European states, as we shall see below.
6. **Population and the number of entrants:** In general, the larger the political community, the easier it will be to absorb large numbers of new entrants into the community without backlash. However, it can be difficult for a state of any size to accommodate a mass-influx of refugees; scepticism will rise in a national population if it looks like the

state has lost control of its borders. Moreover, the regional concentration of new entrants is almost as important as the number in determining the response of citizens.

In the analysis of contextual features that influence policy change I will integrate these factors insofar as they are relevant to the research question. At a general level, the SI framework adopts an explanation of policy change that is quite different from that of rational institutionalists.

### **3.3. Sources of policy change**

In contrast to rational institutionalists, the SI framework argues that organisations often adopt a new institutional practice not because it advances the means-end efficiency of the organisation but “because it enhances the social legitimacy of the organisation or its participants” (Hall and Taylor, 1996, p. 949). In other words, organisations embrace specific institutional reforms or practices because they are widely valued within a broader cultural environment. In some cases these practices may actually not be constructive in regard to achieving the organisation’s formal goals. This can be described as a ‘logic of social appropriateness’ as opposed to a ‘logic of instrumentality’ (Campbell, 1989).

If changes in institutional practices are adopted because they are seen as socially appropriate, how is this social appropriateness determined? What confers legitimacy of social appropriateness to some institutional arrangements but not others? Ultimately, this is an issue regarding sources of cultural authority, and it differs within the field of SI scholars. Three sources can be distinguished:

- The modern state (of growing regulatory scope) imposes certain practices on societal organisation by public fiat.
- Growing professionalism creates communities with the cultural authority to press certain standards on their members.
- Interactive processes of discussion among members of a network – about shared problems, how to interpret them, and how to solve them. Networks range from business schools to international conclaves.

Out of such interchanges, the actors are said to develop shared cognitive maps, often embodying a sense of appropriate institutional practices, which are then widely deployed. It

even happens on a transnational scale, where “conventional concepts of modernity confer a certain measure of authority on the practices of the most ‘developed’ states and exchanges under the aegis of international regimes encourage shared understandings that carry common practices across national boundaries” (Hall and Taylor, 1996, p. 950). However, competing and conflicting international regimes may emerge in the same time period, and the analysis of this thesis will provide an example of the interplay of competing, yet overlapping regimes.

As mentioned in the introduction, in this thesis I identify two main dichotomies which characterise the regimes through which refugee children’s rights are formulated, advocated and implemented.

The first lens is the security-rights nexus in asylum or entrance policies. The security-rights nexus pits national security against the rights of asylum-seekers. Asylum-seekers are for the most part lumped together without distinctions between their varying levels of vulnerability. This means that the greater vulnerability of asylum-seeking children, women, handicapped and the elderly are not taken into consideration in a consistent manner through the security-rights lens. The emergence and effect of the security-rights nexus will be discussed in Chapter 4.

The second lens identifies two ways of looking at asylum-seeking children specifically. In asylum-policies it can be of great importance whether the asylum-seeking child is seen as primarily an asylum-seeker or primarily a child. If the latter is the case, there is a greater likelihood of adherence to universal children’s rights. This lens will be discussed in Chapters 5 and 6 through a de jure and a de fact analysis of the right to education for ASR-children in Luxembourg.

## **Chapter 4: The security-rights nexus of asylum policies in liberal democracies**

This thesis is about asylum-seeking children in Luxembourg and their integration into society through the realisation of their right to education. The issue of asylum, and the living conditions of asylum-seeking children in particular, highlights a core issue for liberal democracies today: The increasing pressure on the legitimacy of the nation-state, caused by accelerated globalisation and international migration (Bauman, 1993; Hardt and Negri, 2003; Zizek, 1999). In order to set the stage for my analysis of refugee education in Luxembourg I will dedicate the following chapter to describing the development of different regimes of refugee governance over time. The emergence of asylum issues on Western political agendas and the resulting conflicts for states between different types of rights, policies and moral obligations will be discussed within the historical-sociological institutionalist framework. In doing so, I will draw upon current debates about the links between globalisation and refugees.

Over the last thirty years, asylum has become one of the central issues in the politics of liberal democratic states. On a broad scale, the presence of asylum-seekers and refugees creates tension between national sovereignty and human rights, requiring states to balance the claims of citizens and refugees. The role and rights of refugees have been highly debated in ideal normative theory as well as in concrete policies at the national, regional and international levels.

Before going into the debates about rights, policies and moral obligations related to refugees, it is necessary to consider what a refugee is. The most influential definition is found in the 1951 UN Convention Relating to the Status of Refugees, to which all liberal democratic states are signatories. According to this convention, refugees are individuals who, “owing to a well-founded fear of persecution for reasons of political opinion, race, religion, nationality, and membership in a social group are outside their country of nationality and are unable or, as a result of such fear, unwilling to return to it”. This definition has been criticised for missing key groups of refugees like internally displaced people who have not crossed a national border and those forced from their homeland by generalised states of violence rather than individual persecution. Furthermore, the definition has been criticised for

being Eurocentric seeing as it was a response to the refugees of the 1940s and 1950s, most of whom came from East and Central Europe as the result of relatively transient forces (international conflict, totalitarian regimes) (Gibney, 1999, pp. 170–71). Finally, the definition does not take into account the phenomenon of so-called environmental refugees which has arisen with the changing climate over the past decades.

In spite of these limitations this definition of a refugee is widely used by Western liberal democracies. A definition very similar to this one is used by the EU in the recast Qualification Directive and is therefore applicable to Luxembourg (The European Parliament and Council, 2011, Art. 2 (d)).

#### **4.1. History of global migration and refugee governance**

While immigration and refugee flows to Europe is by no means a new phenomenon, the question of refugee policy was almost absent from the political debates in West European countries until the 1980s. However, the issues of economic migrants and refugees have always been inextricably linked in policies and public discourses as well as in the migration flows themselves. I will now give a brief introduction to the emergence of global and European regimes of refugee governance.

In the period from the 1950s-1980s migration to Western Europe was mainly of an economic nature. More specifically, from 1945 to about 1973 when the oil crisis hit, the core industrial nations of Western Europe all imported labour either from the European periphery (Southern Europe, Ireland, Finland, North Africa, and Turkey) or from former colonies in Africa, the Caribbean, and Asia. The provision of mainly low-skilled labour through migration was part of the political economy of a Western European boom. However, the institutional designs which created policies amenable to labour immigration had the unintended consequence of making it attractive for these labour migrants to stay, even though no North European country sought to increase its population through permanent non-European migration. No one predicted that those workers who were encouraged to come, or who arrived without encouragement, would be anything but temporary guests. The pivotal role of migration-related issues in European politics is all the more striking given that virtually no one would have predicted or wanted a multicultural Europe. Indeed, one of the constants in Europe—and perhaps even in North America—has been public suspicion of continued immigration (Hansen, 2002, p. 260).

However, parallel to the inflow of labour migrants, from the 1950s, large-scale refugee movements started to develop in the Global South in response to decolonisation and struggles around the formation of new states in Asia, Africa, and Latin America. In response to this critical juncture, a dual refugee regime emerged, according to both Charles Keely (2004, 2001) and B.S. Chimni (1998). One was called the 'Northern regime', run by the United States and Western European states. This was designed to resettle Cold War refugees in the West. The other was called the 'Southern regime' and was developed in response to mass flight from violence. I will focus on the former regime because of the geographical focus of the thesis.

#### **4.2. The initial Northern refugee regime**

A major actor in the creation of the international refugee regimes was the United Nations. According to Castles and Hear (2011), the international refugee regime established by the UN Refugee Convention of 1951 had focused on the situation of Europe in the aftermath of the Second World War, but was quickly adapted to Cold War exigencies, serving as a mechanism for welcoming fugitives from communist countries in Western countries. The numbers were small, due to the exit restrictions of Soviet-Bloc countries, so that generosity towards those who succeeded in traversing the Iron Curtain provided valuable propaganda to the West (Castles and Hear, 2011, p. 290). But the Northern refugee regime came under increased pressure from the mid-1980s onwards, following an exponential rise in the numbers of asylum-seekers in Europe, many coming from the South. With restricted opportunities for legal immigration and rising numbers of asylum-seekers in that decade, concerns about immigration and race relations were transferred to the question of asylum (Boswell, 2000, p. 550). The asylum route was governed by the relatively generous and liberal Northern regime, which had not seriously been questioned since the Second World War. As both governments and the public became increasingly hostile to escalating numbers of new arrivals, the asylum debate became highly politicised after the end of the Cold War.

Though the refugee flows were already high, in the years immediately following the collapse of the Soviet Bloc, Europe experienced another rapid increase in migration flows, this time an East-West flow resulting from the meltdown of the Soviet Union and the former Yugoslavia, as well as states like Romania and Albania (Castles and Hear, 2011, p. 292). These migration flows included both forced and economic migrants. In Luxembourg, the bulk of asylum-seekers came



and still comes from countries in the former Yugoslavia (Conrardy, 2014). But the largest flows were to Germany – which received 438,000 asylum seekers in 1992—as well as to Italy and Sweden. This resulted in an upsurge in racist violence and extreme-right mobilisation, which contributed to the overall scepticism of refugees and migrants in Europe.

Following these two upsurges in migration flows, there was widespread panic at the idea of a flood of impoverished people on the march from East to West. European politicians and large sections of the media claimed that many asylum claimants were economically motivated, and were abusing the system. I will elaborate more on the image of asylum-seekers as a threat to the welfare state in the paragraph on root causes below.

The emphasis of the international refugee regime shifted to containment of refugees in their areas of origin. The reason for this shift was the ‘perceived asylum crisis’ (Gibney, 2004) of the 1990s. Gibney named the phenomenon a ‘perceived’ crisis because it was constructed more as a result of people’s fears than the actual number of asylum-seekers, once the post-Soviet collapse has quieted down. It soon became clear that the expected mass flows from East to West were not taking place (Thränhardt, 1996).

Moreover, it also became evident that, contrary to the migrant flows of the 1950s and 1960s, the flows of the 1990s were very mixed indeed, both in regard to motivation and country of origin. The dividing lines between categories of migrants became blurred, with some asylum-seekers sending remittances back to their countries of origin and thus becoming economic migrants at the same time. In terms of country of origin, these economic and/or forced migrants came from countries in Africa, Latin America, and Asia as well as from Eastern Europe.

This global movement of refugees and asylum-seekers has been accompanied by the growing unwillingness of states to grant asylum (Marfleet, 2006; Roberts, 1998), resulting in a wave of measures to restrict asylum across Western Europe (Boswell, 2000, p. 550). The initial response of European states to the new trends of the 1990s was to strengthen national border control measures. European states adopted a range of measures to improve border control, including visa requirements, carrier sanctions, temporary protection systems for refugees, and

safe third-country rules. National asylum regimes were tightened up to deter claimants through prohibitions on work, reduced welfare entitlements, and detention of certain groups. Thus, the institutional design of asylum policies changed from open in the 1950s and 1960s to more restricted in the 1990s as a response to the rapid change in the influx of asylum-seekers, which can be seen as the second critical juncture in the history of refugee governance.

This critical juncture also had an effect at the national level. In Luxembourg, the first law regulating asylum procedures was introduced in 1996, with further legislation being implemented in 2000. Along with other European states, Luxembourg struggled with the question of what constituted its responsibility towards asylum-seekers. It had to decide who to admit, based on what grounds and how ethically and politically it could defend its responses to this mass movement of people (Pinson et al., 2010). It soon became apparent that national border control alone was doing little to stop movements of asylum seekers and ‘unwanted’ migrants. The vast discrepancies between Europe and the South in terms of incomes, welfare, and human rights encouraged migration despite high barriers. The initial designs of Luxembourgish asylum laws, with their restrictionist intentions, have remained a core feature over time in spite of later adjustments. This illustrates the stickiness of initial institutional design, but it also goes hand in hand with the public discourse in Luxembourg.

The public discourse on immigration and asylum in Luxembourg took on an overtly negative turn in the mainstream press over the course of the 1990s (Horner, 2009). This has continued into the twenty-first century and is bound up with the on-going debate concerning “the effect on national identity if foreign nationals outnumber Luxembourgers, as they are expected to do within the next few decades” (Nickels, 2007, p. 37). At the supranational levels, the framing of asylum discourse in Luxembourg reflects the restrictive undercurrent identified in European asylum discourse and in the globalisation debates more generally (Ibidem).

In globalisation debates and in the current complexity of global human mobility, asylum-seekers and refugees have become one of the most visible and politically sensitive aspects of reality (Jordan and Düvell, 2002; Richmond, 1994). Refugees have been described as the ‘human waste’ of globalisation by Bauman. According to him, refugees are stripped of all other identities but one – that of being stateless and status less. While this position, as outcasts,

makes them highly visible as the 'Other in our midst', all other aspects of their being and individuality are erased. Refugees are physically and symbolically 'out of place' (Turton, 2002); they are often described as one of globalisation's 'discontents'. Bauman's description creates a strong image in the mind of the reader, although most refugees are in fact not stateless since they are in most cases citizens of the country they are fleeing. But Bauman's picture of refugees as the 'Other in our midst' becomes relevant, nonetheless, when considering the current popularity of repatriation and root-cause approaches to migration flows at the European level. These approaches "indicate as much about the constrained options that international organisations face, given the reluctance of states to resettle refugees, as they do about what is in the best interests of the refugees themselves" (Gibney, 2004, p. 21, see also Harrell-Bond, 1996; Turton and Marsden, 2002). This way, refugees in Europe get caught in a clash of normative regimes, namely that of state security versus the rights of refugees. In the following paragraph I will describe this dichotomy, and after that I will present the Common European Asylum System.

### **4.3. The security-rights nexus**

A dominating aspect of the European political debates on migration, asylum and integration is the fact that migrants are increasingly linked to security issues as well as rights (Sasse, 2005). The so-called 'security-rights nexus' is put forward in favour of restricting immigration, along with various other arguments: economic concerns; concerns about possible integration of minority groups; and threats to the existing social, cultural and political order (Collinson, 1993; Extra et al., 2009; Pinson et al., 2010). Stalker (2002) argues that there are two main conflicting factors when it comes to accepting refugees. The main reason given for accepting refugees is 'responding to the humanitarian impulse' to create a safe haven for those who have a 'well founded fear of persecution'. However, '[t]he primary reason for trying to limit the flows of refugees is usually economic, since refugees can be seen as a drain on publicly funded welfare service ...' (Stalker, 2002, p. 163). As mentioned above, asylum-seekers and refugees have increasingly been represented as threats to the welfare state and to the economy (Geddes, 2006), and as bogus asylum seekers searching for ways to enjoy the wealth of income-rich states. The main assumption underlying this image is that asylum-seekers are in fact economic migrants, looking for better lives rather than safety (Marfleet, 2006). "At best, the redefined refugee is a maker of false or unfounded claims that must be unmasked through effective

bureaucratic scrutiny. At worst, the refugee is criminalised or politicised as a threat to order” (Whitaker, 1998, p. 414). Since refugees are seen as a threat to order, they are today increasingly associated with criminality (Marfleet, 2006). This image of asylum-seekers as mere economic migrants using dubious means to get a better life could possibly have a direct effect on the way they are received once in the host country, specifically when it comes to the social policies like welfare benefits and education offered to asylum seekers. Before further discussing the policies that are implemented in order to restrict asylum flows, it is relevant to briefly describe the Common European Asylum System.

#### **4.4. EU approaches: Root causes versus externalisation of border control**

At the European level, member states moved towards cooperation in the area of asylum and created a common European Union (EU) response in the form of harmonised (and restricted) standards. Initial efforts through the Schengen Agreement, the Dublin Agreement, and various European Union measures were designed to improve border protection, prevent ‘asylum shopping’, and harmonise policies. The Treaty of Maastricht, which was ratified in 1993 in the wake of the Bosnian War, also included provisions for harmonising asylum procedures across EU member-states. Today this set of directives and regulations is known as the Common European Asylum System (CEAS) (Hansen, 2002, p. 260) and governs the process of asylum-seeking and everything related to it across and between EU member states. The CEAS is currently in its second phase after the revision of key directives and regulations in the past years (see appendix B for a list of legal instruments in the revised CEAS).

Inevitably, these restrictive steps taken by the EU for a variety of reasons often made it difficult for genuine refugees to enter a potential asylum country to lodge a claim. An unintended, though unsurprising, side effect was to force many refugees into the hands of people-smugglers, generating a new and lucrative transnational business opportunity. In any case, border control at the European level proved little more effective than national measures (Castles and Hear, 2011, p. 293). The result was a trend towards integration of migration and asylum into the EU's foreign policy, known as the ‘external dimension’ of EU cooperation in Justice and Home Affairs (JHA) (Boswell, 2003, p. 619).

The 'external dimension' of EU cooperation in JHA took two very different forms. The first was to gain the cooperation of origin and transit countries in externalising border control: through getting these countries to deter asylum seekers and irregular migrants from departing, to combat people-smuggling, and to readmit persons who had been deported from the EU. The second form was cooperation with origin and transit states on preventive measures: measures designed to address the factors that influence people's migration decisions, for instance by improving refugee protection, as well as through measures to promote development, trade, investment, or human rights. Such measures can appropriately be referred to as root causes approaches (Boswell, 2003, p. 620; Castles and Hear, 2011, p. 293). The notion of root causes essentially refers to measures designed to reduce migration (especially South–North migration) by dealing with the supposed driving factors in origin countries, especially violence, human rights violations, disparities in living standards, and poverty. As such, the idea is inextricably bound up with notions of development, poverty alleviation, and conflict reduction (Castles and Hear, 2011, p. 287).

The struggle between proponents of externalisation of border control and of root causes approaches has been a constant theme of European migration management since the late 1990s. Seeing that international migration represents one of the most obvious and lasting contemporary manifestations of globalisation (Betts and Hear, 2011), a tightened regime of border control has proven ineffectual for the EU as a means to contain migration flows. As a result of this, host states have shifted the focus from admissions policies to social policies and benefits received by asylum-seekers.

#### **4.5. From immigration policy to social policy**

In recent years, many liberal democracies have shifted from a focus on immigration policy, namely controlling the right of asylum-seekers and refugees to enter the country – to social policy, which controls their access to rights once admitted (Hammer, 2000; Weiner, 1995). This has also been the case for Luxembourg, where the social aid given to asylum-seekers in reception centres was sharply reduced in 2012 (REM-PCN-LU, 2012, pp. 116–117). Among the most important reforms were:

- Reductions of the monthly financial aid. For an adult asylum-seeker who is housed and fed by the Luxembourgish Office for Reception and Integration (OLAI) it dropped from 107.90 to 25 Euro, and for children below the age of 2 it dropped from 133.50 to 12.50 Euro .
- A number of new reasons for limiting or withdrawing the social aid:
  - If the asylum-seeker refuses to attend the language or spelling courses.
  - If the asylum-seeker refuses to complete the assigned tasks of cleaning in the reception centres run by OLAI.
  - If the asylum-seeker refuses to enrol their children in elementary school once they reach the age of obligatory schooling.
  - If the asylum-seeker refuses to follow the recommendations for preventive or healing treatment regarding public health.

However, most liberal democracies still honour their moral obligation to promote human rights by allowing asylum-seekers to claim asylum. The reluctance towards allowing asylum-seekers to enter the country can be seen both in the strict admissions policies (allowing only a fraction of asylum-seekers to settle and find a home at least temporarily), but also in the use of access to social rights as a mechanism of deterrence and exclusion from full membership of the host state community. In this context, those who are most vulnerable are in effect the 'noncitizens' and particularly their children. Non-citizens are transient people who are neither strangers nor insiders (Benhabib, 2004), living in what Agamben describes as a state of 'bare life' (Agamben, 1998).

The public discourse of asylum-seekers as a threat to the economy, security and culture of the host state, although not officially a reason for these reforms, has no doubt played an important part in justifying these restrictions of social aid. In fact, several Luxembourgish neighbourhoods have expressed direct concern at the prospect of receiving asylum-seekers, supposedly fearing that the arrival of asylum-seekers would increase problems of crime and drugs (REM-PCN-LU, 2012, p. 115).

In a context of hostile discourse, admissions policies and social policies, there is unfortunately a risk of violations of the rights of these vulnerable groups. The emphasis of security for the

national citizens rather than fulfilling the rights of refugees and asylum-seekers is visible in the Luxembourgish debate on citizenship and naturalisation.

#### **4.6. Realisation of whose rights? Citizens versus refugees**

Another manifestation of the security-rights dichotomy in current immigration debates are the conflicting pressures on nation-states regarding responsibilities towards the interests of national citizens on the one hand and the rights of refugees seeking international protection on the other.

More than any other type of human movement, the irregularity and unpredictability of forced migration has come to symbolise the deficiency of the sovereign power of the state and the permeability of its boundaries (Moran, 2005). Refugees have become the scapegoat of citizens' fears of insecurity in the new unstable global order.

Whether the decision is to keep the door open or closed in the face of increasing numbers of refugees, the presence and pressure represented by the movement of refugees globally reflects the incapacity of nation-states to exercise fully their power of sovereignty within a globalising world (Muller, 2004). As (Whitaker, 1998, p. 416) argues, the problem is that '[r]efugees have claims upon the host country that arise from outside the host country's jurisdiction'. For many EU member states, the transfer of sovereignty to a supranational level has been a matter of continued public scepticism, and the debate about EU integration in two speeds, although not new, has been refuelled by the recent financial crisis. The Common European Asylum System has also been subject to this debate and reluctance, both in regard to public discourse and actual policy. For example, the United Kingdom, Ireland and Denmark have not adopted the recast Qualification Directive.

However, The Grand Duchy of Luxembourg is somewhat atypical in this regard. The fear of losing national sovereignty has not been an issue in either policies or public debates, and contrary to other European constitutions, sovereignty is hardly mentioned in the Luxembourgish constitution, except in Article 32, which I will discuss below. Luxembourg has always focused on regional integration and the advantages thereof for a country that is small in geographical, demographic as well as economic size. In fact, smallness is argued as a strategic advantage for Luxembourg because the European partners are not threatened by its

size and thus are more likely to be sympathetic to its initiatives and preferences (Ballie, 1998). Luxembourgish foreign policy is centred on its role played in the EU, and it is active and visible in Union activities. For instance, in the single currency debate, Luxembourg was at the forefront of the drive towards economic and monetary union throughout the 1990s (Osborn, 1999). Furthermore, Luxembourg has been enthusiastic in supporting the idea of EU Enlargement (Hey, 2002).

Luxembourg has a long history of regional cooperation and integration. As early as in 1842, Luxembourg joined the German customs union, Zollverein. In 1921, Luxembourg formed an economic union with Belgium (BLEU), creating an inter-exchangeable currency and common customs regime. The Benelux Custom Union was founded in 1944. In 1951, Luxembourg was among the founding countries of the European Coal and Steel Community (ECSC), which was the predecessor of European Union (Tsoi, 2007). The constitution of Luxembourg dates back to the 19th century, when the idea of limiting sovereignty, according to current thought, could not have been foreseen. Nonetheless, the parliament believed that the spirit and the letter of their constitution would not prevent them from approving the Treaty establishing the European Coal and Steel Community (Schaus, 1952; Tsoi, 2007). To the extent that sovereignty is mentioned in the Luxembourgish Constitution (Article 32), it establishes the fact that sovereignty is vested in the nation rather than in the people. The idea of sovereignty resting 'essentially in the nation' raises questions about the concept of the nation and its relation to the people. Normally 'nation' is used without explanation, assuming perhaps earlier ideas about how a nation emerges when individual persons unite to form a common will, a necessary step in creating society (Galligan, 2013).

Rather than sovereignty, nationality and the rights of citizens versus foreigners have been at the heart of Luxembourgish public debates. The principles governing the attribution of the Luxembourgish nationality to foreigners have developed greatly over time, reflecting the changing demographics and political realities of Luxembourg. Today, the question of whether foreigners should have the right to vote at Luxembourgish elections is highly topical. A look at the legal developments in the areas of citizenship and naturalisation provides valuable insight into this important aspect of the policies pertaining to the rights of foreigners – policies which are closely linked to immigration and refugee issues today.



#### 4.7. The Luxembourgish debate on citizenship and naturalisation

The right to national citizenship is closely connected with a number of different political, social and economic privileges for individuals within a state. The right to nationality expresses the state's prerogative on exclusion and inclusion since only citizens benefit from the broad range of civil and political rights and privileges granted by the state.

According to Denis Scuto, nationality can be defined as the legal manifestation of an individual's membership of a state. There are four main types of manifestations of this link between individuals and the state, which govern the attribution of nationality. These manifestations are expressed in the following four criteria or principles (Scuto, 2005):

1. **The principle of birthplace:** Being born in a territory where the state exercises sovereignty may give access to nationality. This is known as *jus soli* in Latin, which means the right of the soil.
2. **The principle of parentage:** The nationality of one or both parents is transferred to an individual. This is known as *jus sanguinis* in Latin, or birthright.
3. **The principle of marital status:** Being married to a national of a state often gives the right to a legal status of nationality of the state concerned.
4. **The principle of residence:** Previous, present or future residence of a longer or shorter time on the territory of the state may give access to nationality.

With the massive influx of immigrants to Luxembourg in the 1970s, the question of nationality became politicised. This means that nationality is now at the same time a right and a policy: It is a right which is granted to individuals, and it is a policy which is determined by the legislators of the state. Throughout Luxembourg's history, the weight given to the various principles governing the attribution of nationality has changed. Scuto (2005) traces four main periods in the history of Luxembourgish nationality.

Between 1803 and 1878 the Luxembourgish nationality law was greatly inspired by the French Civil Code which replaced the old principle of *jus soli* with the principle of *jus sanguinis*. Nationality was transferred from father to son, and a wife automatically adopted the nationality of her husband. The principle of *jus soli*, however, was still considered an important element of the acquisition of Luxembourgish nationality by children born by foreigners. The

policy of naturalisation was marked by a certain caution at this time. Naturalisation was an individual right which, by the will of the constituents of 1848, gave the foreign applicant all civil and political rights of a Luxembourgish citizen through a legal act, granted by the legislature.

The period of 1878-1934 was characterised by a more liberal nationality legislation based on openness. These policies were dominated by the liberal politician Paul Eyschen, who was Director-General for Justice from 1876 until 1888 when he became Prime Minister. Former Minister of Justice, the socialist René Blum, was also influential. The equality principle was at centre stage, and the aim was the socialisation of foreigners into the Luxembourgish society. In 1878, Eyschen introduced the “double right of the soil”, which meant that an individual born in Luxembourg to a foreign parent was Luxembourgish. This initially only applied to an individual with a foreign father, but in 1890 it was expanded to include children of a mother of Luxembourgish origin who had become a foreigner through marriage. Eyschen also put great emphasis on the importance of a long residence in Luxembourg and the rights of children of foreign parents who had grown up in Luxembourg. René Blum had a strong influence on the law of 23 April 1934 on Luxembourgish natives. The motivating factors behind this law was twofold: First, it sought to counterbalance the declining Luxembourgish birth-rate by opening more possibilities for acquiring Luxembourgish nationality and permitting women to keep their Luxembourgish nationality if they married a foreigner, while maintaining the double right of the soil. Secondly, the law aimed at avoiding the emergence of national minorities within Luxembourg by limiting the cases of dual nationality.

The liberal period was followed by a period characterised by a more closed policy on nationality between 1934 and 1968. Having gained independence in the second half of the 20th century, and with the threat of neighbouring Nazi Germany, Luxembourg implemented a less open nationality law on 9 March 1940. Paradoxically, in order to defend itself against German plans of annexation, Luxembourg adopted a German logic in its nationality law, based on an ethno-cultural definition of a Luxembourger. Previous liberal developments were repealed. Most importantly, it abolished the double right of the soil and replaced it with the *jus sanguinis* principle, and women once again had to take on the nationality of their husbands. Finally, for the first time in a legal text about Luxembourgish nationality, there was a specific requirement of “sufficient assimilation”. This law was the legal manifestation of a process that had in fact begun much earlier, to which the surprisingly low number of

naturalisations in Luxembourg in the period of 1914-1950 testifies. This number was zero. The memories of the suffering experienced in World War II, the fear of spies, traitors and those who gained a Luxembourgish citizenship only to better serve German interests still hovers in the back of the mind of the Luxembourgish people, and this constitutes part of the lens through which the debates on naturalisation is seen today.

The fourth period, from 1968 to today, saw a partial reversal of the restrictions of the law of 1940 but still represented a mix of openness and distrust towards foreigners. The law of 22 February 1968 restored some possibilities of gaining nationality, but it kept the residency requirement for naturalisation at the 15 years established in the 1940 law. It also maintained the discriminations against women, who thus still had to follow the nationality of their husbands. This was changed, however, with the law of 1977, although the double right of the soil was still not reinstated. In the law of 1986, the required age of naturalisation was lowered from 25 to 18 years. This law also put in place the first language requirements, which are the most visible (and measurable) criteria. Special focus was on Luxembourgish since it had become the national language in 1984. The most recent modification of the Luxembourgish law on nationality is the law of 2001. Though the law of 2001 lowered the residency requirement from 10 years to 5, it rendered naturalisation more difficult by explicitly stipulating the language requirements and making them stricter than previous practices of 'sufficient assimilation'. In Article 7, paragraph 4, the language clause is stipulated, and, notably, the word 'assimilation' has been replaced by the word 'integration':

*Naturalisation will be refused to the foreigner [ . . . ] if he [sic] does not demonstrate sufficient integration, in particular if he [sic] does not demonstrate sufficient active and passive knowledge of at least one of the languages stipulated by the language law of February 24th 1984 and, if he [sic] does not have at least a basic knowledge of the Luxembourgish language, accompanied by certificates or by official documents. (Mémorial 2001, translation from French) (Horner, 2009, p. 154).*

The law of 2001 was the first law on Luxembourgish nationality that was not passed unanimously. Rather, the Parliament was split according to the traditional political spectrum, with the right wing parties, i.e. the Christian democrats (CSV), the liberal Democratic Party (DP), and the populist nationalist conservative party (ADR) voting for, and the social democrats

(LSAP), and the left of centre parties, i.e. the Greens and ex-communists voting against (Scuto, 2005). Although reactions to the 2001 language clause varied, politicians across the political spectrum agreed that social cohesion requires linguistic homogeneity. This idea was propagated through the discourse of integration (Horner, 2009). As one social democrat put it: 'In sum, from a linguistic point of view, a foreigner must already be Luxembourgish before he can acquire the Luxembourgish nationality (my own translation from French) (Scuto, 2005, pp. 44–45). This attitude towards foreigners was different than most other Western European countries, where the predominant approach seemed to be 'the foreigners are staying, so let us open the doors to nationality for them'. Naturalisation was seen as a step in the process of integration, and not as the final result as in Luxembourg.

Throughout history, the principles for granting the Luxembourgish nationality to foreigners have changed, from *jus soli* to *jus sanguini* and back. But today the focus on language requirements is one of the strongest principles of naturalisation in Luxembourg, although the discourse has changed and assimilation has given way to a word with a more positive connotation – namely integration. This focus on linguistic requirements has an important link to what is considered the Luxembourgish national identity. Although it is not the main focus, I will present a brief note on the link between linguistic requirements, citizenship legislation and national identity. In relation to language testing and citizenship legislation, maintains that '[s]tandard languages, in particular, are seen as both a vehicle for articulating and achieving common political goals and a manifestation of a common purpose and singular identity' (Stevenson, 2009, p. 147). But there is a paradox in standard languages, which are at the same time 'embodiments of both national identity and state-endorsed social inequality'. The latter point is usually toned down or 'rendered invisible' (Irvine and Gal, 2000, p. 38) in debates on language testing and citizenship legislation. Named languages lie at the heart of nationalist ideologies but are, in fact, double-edged swords: while they are depicted as iconic of all-inclusive membership in the nation-state, they may also be exploited to recursively split their speakers in terms of those who do and those who do not conform to norms of standardisation and related literacy practices (Horner, 2009; Milroy and Milroy, 2012).

In the case of Luxembourg, according to (Horner, 2009), it is the trilingual ideal (German, French, and Luxembourgish) rather a single language that is positioned as iconic of or depicting or displaying the national group's 'inherent nature or essence' (Irvine and Gal, 2000,

p. 37). This is relevant for a study of refugee education because language courses are an inherent part of that, as we will see below.

As the previous paragraphs show, liberal democracies like Luxembourg face tensions between the rights of national citizens and refugees. Furthermore, the tension between sovereignty and human rights remains relevant for Luxembourg in regard to admissions policies, even if the question of sovereignty transfers to a supra-national level has not been at centre stage in the process of European integration and cooperation. The dichotomy between national security and the rights of refugees is maintained in the linguistic requirements of naturalisation in Luxembourg because these requirements are set up as a protection against the undermining of welfare goods by foreigners.

But the tension between national security and refugee rights is not merely a matter of policies. A liberal democracy faces a moral challenge since the presence of asylum-seekers and refugees raises the question of fairness, especially in relation to human rights. To a large extent the economic discourse is used to justify and strengthen the legitimacy of restricting immigration in the name of social stability and preserving the national identity and character of the state (Benhabib, 2004; Gibney, 1999; Weiner, 1995). In the context of the tensions described in the previous paragraphs, between sovereignty and human rights regimes and between economic and political-ethical considerations, refugees are left most vulnerable.

The vulnerability of refugees is evident not only in the receiving countries but also in their countries of origin. The difficulties involved in dealing with root causes make an ethical examination of admissions policies, as well as refugee education, pressing. The goals of ending ethnic violence, rebuilding devastated economies and establishing durable democracies are much easier to profess than accomplish. As Gibney sombrelly puts it: "Even if we make the questionable assumption that states and international organisations have the knowledge and ability to achieve these goals, these tasks would take many years to achieve" (Gibney, 2004, p. 22).

Thus, more than for any other type of migration, the presence of those who seek protection in liberal democratic states raises the moral and ethical questions underlying this tension (Gibney, 2004; Pinson et al., 2010; Weiner, 1995). In the following paragraph, the main moral

arguments for assisting refugees will be presented.

#### **4.8. Moral arguments for assisting refugees**

On which criteria would a morally defensible admissions policy rest? As part of the moral debate about immigration to Western liberal democracies and the tension between human rights and the sovereignty of the nation-state, the question arises of why these states should provide for incoming refugees. Why should 'we' provide for 'them'? Liberal democracies and their educational systems have become embroiled in this ethical question since they have to balance their legal and ethical responsibility to protect those in need with their legal and moral responsibility to their citizenry to protect the community's resources and limit the access of 'aliens' to it (Gibney, 2004). These two sets of responsibilities are known in contemporary political thought as impartiality and partiality, respectively.

##### **4.8.1. Partiality: Community, citizenship and the defence of closure**

The partial view defends the claim that states, as representative of communities and citizens, are morally entitled to privilege the interests of their own citizens in entrance policies. This approach is rooted in communitarianism, conservatism and nationalism, among others, and it seeks to justify the right of states to put in place their own criteria for whom to admit and whom to reject entrance to the state's territory. It appeals to the importance of political and cultural autonomy for communities. States are viewed as distinct cultural communities with a right to self-determination, and this is what justifies priority for the interests of citizens over those of refugees in entrance decisions. An admissions policy without limitations would lead to the potential erosion of the welfare state seeing as a high number of refugees would be a strain on the scarce state resources. This in turn could break down the policies that liberal democracies implement in order to overcome differences in wealth for their own nationals (Gibney, 2004, 1999).

#### **4.8.2. Impartiality: Freedom, equality and open borders**

Impartiality, on the other hand, asserts the rights of all people. It draws on global liberal and utilitarian political thought and argues that states are obliged to take into account the interests or rights of the human community in its entirety in decisions on entry.

Impartiality does not accept a limit to entrance justified by the pressure on public goods. The disappearance of public goods would simply be one interest among many to be considered, and the needs and desire of community members should be weighed equally with those of strangers. Given the fundamental needs of refugees, states could not legitimately use the desire to preserve welfare measures as an argument for restricting entrance (Singer and Singer, 1988). Singer and Singer's utilitarian argument therefore is that, considering the benefit to refugees as well as the costs to community members, states are obliged to increase the intake of refugees "until there exists an equilibrium between the marginal utilities gained through extra immigration by both residents and potential entrants" (Ibidem, p. 128).

Current admissions policies in Western Europe are very far from the impartial standard according to Singer and Singer, because they "overwhelmingly privilege the interests of citizens and show scant regard for the needs of refugees" (Ibidem). But impartiality does not promote open borders at all costs. For global liberals, states are justified in restricting entrance if additional entrants would jeopardise public order, national security, or the maintenance of liberal institutions. As we have seen above, Luxembourg for one has used arguments pertaining to exactly these issues in the discourse on restricting entrance.

#### **4.8.3. The humanitarian principle**

Gibney criticises both the partial and impartial views of a morally justifiable admissions policy. While they have strong, although opposed, moral claims, they each have weaknesses that require modern policy-makers to consider following another common principle, namely the humanitarian principle. To Gibney, partiality has the weakness of an unjustifiable assumption of the legitimacy of the current territorial holdings of states and the harm that states do. Not surprisingly, impartiality is criticised for its limited ability to take into account the claims and interests of citizens.

He argues that the process for translating the results of ideal theory into practical responsibilities for governments must be informed by the fact that states are particularistic moral agents, that their integrative abilities are politically constructed, and that there are real difficulties in predicting the consequences of particular asylum (or entrance) policies in advance. This is in line with the historical-sociological institutionalist framework, which as we know focus on power asymmetries, critical junctures, path dependence and unintended consequences of policies.

As a way forward, Gibney proposes the humanitarian principle, which has been formalised in the following way: Every individual has an incumbent duty to assist those in great distress or suffering when the cost of doing so is low. This moral principle holds between strangers who share nothing but the fact that they are human beings. The acknowledgement of the humanitarian principle represents a minimal point rather than an ideal in moral relations between people, and between citizens and refugees. Humanitarianism is not only better suited for practical implementation, but it also bridges the gap between partiality and impartiality and takes into account the particularities of the state as an agent. Thus, the humanitarian principle might have practical implications for the current policies of liberal democratic states.

#### **4.9. Summary of analysis, part one**

In this chapter I have analysed the emergence of changing international regimes of refugee governance in light of the security-rights dichotomy. I have shown how, as a response to unintended consequences of migrant worker policies and of two critical junctures in refugee flows, the European asylum policies are marked by a concern for national security rather than the rights of refugees. At the national Luxembourgish level, this concern is specifically expressed in the debate on the rights of citizens versus the rights of foreigners and the development of Luxembourgish laws on naturalisation with strict linguistic requirements. Thus, Luxembourg appears to have a relatively strict admissions policy in combination with a negative and sometimes hostile public discourse on issues of asylum-seekers and refugees.

Finally, I have laid out the main moral arguments for assisting refugees. The two opposing strands of ideal political theory are partiality and impartiality. Partiality, which stresses the rights of national communities, is the moral underpinning of many European asylum policies today. Impartiality emphasises the need to protect people not because they are citizens of a



certain community, but because they are human beings. Thus, impartiality advocates for more open borders. A practical solution to the shortcomings of both these principles is presented in the form of humanitarianism which sets out a minimum standard of helping refugees if the costs of doing so are low for the host country.

In the next chapter I will tackle the second main dichotomy of the thesis: the dual position of the refugee child as both asylum-seeker and child and how the way that an asylum-seeking child is seen affects the fulfilment of his or her rights. The chapter will focus on relevant legal instruments as institutional developments at the global, regional and national levels. This will result in a *de jure* analysis of refugee education in Luxembourg. In other words, I will analyse the legal context in which asylum-seeking children find themselves in terms of protection and the right to education. The *de jure* analysis will be followed by a *de facto* analysis of the existing system of refugee education in Luxembourg.

## **Chapter 5: The child and the state**

There is no legal instrument focusing solely on the right to education for ASR-children. For this reason, in order to determine these children's right to education, it is necessary to look at legal instruments governing the right to education and read them in combination with non-discrimination clauses of those same instruments. That way the entitlement of ASR-children of the right to education can be conferred, typically by virtue of their residence in the territory of a contracting party and thus their falling under its jurisdiction and its obligations.

In this chapter I will first discuss the development of a child rights regime, of which ASR-children are an especially vulnerable subset. The main types of protection at the EU level will also be presented in order to set the legal context of ASR-children's rights when in Luxembourg.

Following this, I will engage in a *de jure* analysis of the right to education in general, and for ASR-children in particular, as it is laid out in international, regional and national Luxembourgish legal instruments. At each level, I will make use of those interpretations and commentaries which have been deemed authoritative regarding the legal instrument in question. While the right to education is mentioned in a number of international instruments, I will focus on the United Nations Convention of the Rights of the Child (UNCRC) because it draws on most of the other instruments and is the strongest instrument from a child rights perspective. At the regional level I will analyse the European Convention of Human Rights (ECHR), the European Social Charter (ESC) and the EU Charter of Fundamental Rights (EU Charter). Finally, I will analyse the Luxembourgish Constitution. For each instrument I will determine the content and scope of the right to education as well as enforcement mechanisms and legal value of the instrument in Luxembourg.

### **5.1. The notion of childhood**

Historically, the concept of childhood has not always existed. Before the Enlightenment children were merely seen as a kind of unfinished adult subject to the same ideas and rules of how to be a part of society, particularly in terms of how to be a good worker. But at the turn of the 20th century childhood emerged as a category and as a political, social and economical

phenomenon (Ariès, 1986). Children in Western societies came to be perceived as innocent beings, potential victims who need adult protection to maintain their wellbeing (Burman, 1994; Giner, 2007). Children were constructed as spiritually sublime and emotionally invaluable beings whose innocence and vulnerability required that they be kept separate from the world of adults (Cunningham, 2005; Zelizer, 1985). The family was seen as the guardian of this separation and protection. This picture, however, was later undermined by an increasing concern that parents' irresponsibility, abuse and neglect lead to children's anti-social behaviour (Giner, 2007, p. 6). This led to politicians and legal scholars expressing this concern throughout the latter half of the 20th century. Their assertion was that children needed to be treated as individual rights-holders, that children should be secured widespread rights, and that they should be heard in matters concerning themselves (Vitus Andersen and Smith Nielsen, 2011, p. 142). This wave of emerging child rights norms and the resulting formation of a global child rights movement challenged the existing construction of childhood by replacing the image of children as weak, dependent and incomplete beings with a recognition of the child as an active participant in society (Prout, 2005). The culmination of this notion was the adoption of the United Nations Convention on the Rights of the Child (UNCRC) in 1989, which is perhaps the most influential critical juncture in the history of children's rights. However, many of the legal instruments guaranteeing the right to education date back to the time before 1989, and thus we will find that the emancipated role of the child as the primary rights-holder is not found in these instruments. The traditional respect of the parent as the primary caregiver, particularly when it comes to the content of education, is often emphasised, and parents' religious and philosophical convictions are often taken into account. A thorough discussion of how to determine the best interests of the child would merit several chapters in itself, but this is not the purpose here. It is merely worth noting that legal instruments like the ECHR, the ESC and instruments that draw on them tend to have a different view of the parents' role in a child's education than the UNCRC does. This is not to say that the UNCRC denounces a child's parents as a primary caregiver and educator, but the UNCRC has a stronger child-focus and instates children as the primary rights holders, which is not the case in the other instruments. This role as rights holders in their own virtue is an important element in the collective of norms and ideas surrounding ASR-children because it bestows rights upon the children that must be respected, also in the asylum-seeking process. The dual role of the

asylum-seeking child as both a child and an asylum-seeker will be discussed as part of the de facto analysis of the Luxembourgish system of refugee education below.

## **5.2. Protection at the EU level**

The decisions of the host state seriously affect the asylum applicants. For EU member states and thus Luxembourg, the legally binding instrument applicable when determining the status of an asylum-seeker is the “Recast Qualification Directive” of 2011, which replaces the Qualification Directive adopted in 2004<sup>2</sup>. The Recast Qualification Directive sets out standards regarding who qualifies as a beneficiary of international protection as well as the content of protection granted.

There are two main decisions that immigration authorities make in response to asylum applications. These decisions grant an asylum-seeker either the refugee status or subsidiary protection status.

The refugee status implies that the host state recognises the need for the protection of the third country national or stateless person in full, including a number of rights such as maintaining family unity (Art. 23), residence permit for a minimum of 3 years (Art. 24), travel documents (Art. 25), access to employment (Art. 26), access to education (Art. 27), access to procedures for recognition of qualifications (Art. 28), access to social welfare (Art. 29) and access to healthcare (Art. 30).

Subsidiary protection status is granted to asylum-seekers who are not eligible for refugee status, but who nonetheless have a valid need for protection. According to the European Database on Asylum Law, subsidiary protection is “The protection given to a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 of

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<sup>2</sup> Except for the United Kingdom, Ireland and Denmark who have not adopted the recast Qualification Directive.

the [Recast] Qualification Directive”<sup>3</sup>. Traditionally, European states have allowed such de facto refugees to remain in their territories. However, the legal status of their stay and the rights associated with it have varied widely between countries, ranging from mere tolerance of presence (non-refoulement alone) to the issuance of legal permits authorising stay and access to certain benefits (McAdam, 2005, p. 461).

The Directive can thus be seen as a set of minimum standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection. The remainder of this chapter will focus on the content and scope of the right to education for ASR-children, which is secured in Art. 27 of the Directive.

### **5.3. The UN Convention on the Rights of the Child**

The UNCRC entered into force on 2 September 1990, and by 2004 it had been ratified by all countries in the world except Somalia and the United States who have signed but not ratified it. This makes the UNCRC almost universal (Verheyde, 2006, p. 1). Under the UNCRC, states are the prime duty bearers in realising the rights of children, and children are the rights holders. The new notion of children as active participants in society and rights holders in their own right, shaped four ‘general principles’ or basic values about what should constitute the treatment of children and their participation in society (Pinson et al., 2010, p. 2). These four principles are:

1. Right to life (Art. 6)
2. Best interests of the child (Art. 3)
3. Respecting the views of the child (Article 12)
4. No child should suffer discrimination (Article 2)

The UNCRC is intended to bestow universal rights on young people under the age of 18, regardless of citizenship. This instrument constitutes the central pillar in the modern effort to award children the status of a special category of human being with specific rights that are over and above those enjoyed by other population groups. Through its near-universal

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<sup>3</sup> See <http://www.asylumlawdatabase.eu/en/keywords/subsidiary-protection>. The link refers to the older version of the Qualification Directive, but in the quote I replaced the legal reference with the corresponding article of the recast Qualification Directive so as to be up to date.

ratification the treaty has concretised the notion of a global citizenship for the young, in that its framework is intended to govern childhoods everywhere.

The right to education is found in Article 28 in the UNCRC. The first sentence of the UNCRC, Article 28(1) reads:

*“States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity (...)”*

The use of the words “achieving this right progressively” reveals that this right is part of the economic, social and cultural rights, also known as positive rights or second-generation rights. Positive rights imply an obligation on the part of the state to actively provide education to the rights holders, the children. Second-generation rights are generally considered rights that require affirmative government action for their realisation. They are also sometimes referred to as group rights or collective rights because they pertain to the well-being of entire societies or subsets thereof, rather than being individual entitlements as is the case for the first generation civil and political rights. Economic, social and cultural rights are codified in the International Covenant of Economic, Social and Cultural Rights, adopted in 1966, and in Articles 23-29 in the Universal Declaration of Human Rights of 1948. Two common criticisms of second generation rights are relevant here (Ruppel, 2008, p. 102). First, some writers argue that while all states can realise the civil and political rights regardless of their political system or economic development, the realisation of second-generation rights can be very costly for a state, and not all states have the financial or technical resources to comply with the provisions of these rights. Secondly, second-generation rights in international human rights treaties cannot be enforced through courts because the enforcement of affirmative duties on states is not possible. Second generation rights are usually monitored by international human rights bodies made up of contracting nations at the UN level through periodic reports, and there is no possibility of recourse for individuals who seek direct enforcement. This leaves the UNCRC as such with a weak legal value. But if a state has transposed the UNCRC into national legislation the question of enforcement can change.

In the following section I will analyse the content and scope of the right to education as it is found in the UNCRC (and other international instruments). Then I will relate the analysis to the

Luxembourgish case through relevant jurisprudence and assess the legal value of the UNCRC in Luxembourg.

### **5.3.1. Content and scope of the right to education in the UNCRC**

In this paragraph I will attempt to identify the content and scope of the right to education and the corresponding State obligations enshrined in Article 28 of the UNCRC.

The full wording of Article 28 is as follows:

#### UNCRC Article 28

1. States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and

modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 28, concerning the right to education, should be read together with Article 29, concerning the aims of education. This is because the right to receive education does not only guarantee access to education but also implies that the aims of education must be achieved (Verheyde, 2006, p. 1).

The wording of Article 29 is as follows:

#### UNCRC Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or Article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.



Since the right to education is laid down in several international legal instruments, and given the holistic nature of the UNCRC, Article 28 should not only be read together with Article 29 but also with several other articles of the Convention, especially with the provisions constituting the four basic principles mentioned above. In this analysis I will put a special focus on Article 2 concerning non-discrimination, since this provision can strengthen the protection of ASR-children and their right to education when read in combination with Article 28 and 29.

Following Verheyde (2006) in the interpretation of the provisions in Article 28, I will make use of the general interpretation rules laid down in the Vienna Convention on the Law of Treaties, as well as the findings of the UN Committee on the Rights of the Child and relevant doctrine on the subject.

Article 31(1) of the Vienna Convention on the Law of Treaties states that a treaty should be interpreted 'in accordance with the ordinary meaning to be given to the term of the treaty in their context and in the light of its object and purpose'. That is the reason why I will put the wordings of Article 28 in relation to other provisions in the Convention and the preamble, as well as other international and regional human rights conventions. According to Verheyde (2006, p. 3) "The preamble of the UNCRC recalls the basic principles of the United Nations, and specific provisions of relevant human rights treaties and proclamations, such as the Universal Declaration of Human Rights of 1948 (UDHR) and both International Covenants on Human Rights of 1966. Article 31(3)(c) of the Vienna Convention states that 'there shall be taken into account, together with the context any relevant rules of international law applicable in the relations between the parties'".

The UN Committee on the Rights of the Child (hereafter the CRC Committee or the UNCRC in references) can be considered the most authoritative body monitoring the Convention. That is why its General Comments as well as its country specific Concluding Observations are of a high ranking when interpreting Article 28, even though neither of them are of an international legally binding nature. Because of the importance of the Committee, General Comments and Concluding Observations are considered authoritative interpretations of the UNCRC.

Finally, the relevant legal doctrine used in identifying the scope of Article 28 is found primarily with the UN Special Rapporteur on the Right to Education.

The right to receive education constitutes the core of the right to education under international law. The first paragraph of Article 28 guarantees this right by imposing positive obligations on the States parties to develop and maintain an educational system in order to provide education for all children at specific levels (primary, secondary, and higher) and, according to the level, cost-free and compulsory.

But what is education according to Article 28? Like most international legal instruments, this article does not contain a clear definition. Normally, however, education is defined with a double meaning (Delbrück, 1992, p. 104):

- a) education as the provision of basic skills; and
- b) education as the development of the intellectual, spiritual and emotional potential of the young person or in other words the broader development of his or her personality.

Article 28(1) undoubtedly refers to education in both senses (Verheyde, 2006). In General Comment number 1 on the aims of education, the CRC Committee makes it clear that basic skills do not only include 'literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life' (UNCRC, 2001, p. 4, no. 9).

Given the double meaning of education both as a human right and as an indispensable means to realising other human rights, the right to education is abundantly guaranteed in several global and regional, general and specific human rights instruments. But the new feature of the UNCRC, Article 28, is the fact that education should be child-centred and child friendly in both a protective and empowering way. Here the protective element is of essence, because it means that children should be protected against both inhumane disciplinary system in schools and child labour, and the article contains specific protection measures to ensure the education of vulnerable children. The wording 'vulnerable children' applies to refugee and asylum-seeking children as can be seen in numerous documents from the CRC Committee, e.g. UNCRC (2006, p. 4, no. 8).

Apart from the new protective features of Article 28, the focus on the child as the rights holder consequently omits the traditionally recognised parental right to respect for their religious and philosophical convictions in the education of their children. This is in accordance with the development in the literature mentioned above which acknowledged that parents do not necessarily, or not in all cases, know what constitutes the best interest of the child. This very modern notion is why the UNCRC is worded so strongly in terms of children themselves being the rights holders. Furthermore, the provisions in Article 28 can be attributed with encompassing both the formal and informal educational sphere (Verheyde, 2006). However, there is considerable debate in this area, and since I will only analyse the formal system of refugee education in this thesis, I will refrain from going into the details of the arguments.

In Article 28(1), the duration of education has not been defined, neither by a starting nor ending age. This has mostly been discussed in regard to pre-schooling and whether or not the States parties have obligations to provide a system of pre-schooling. The fact that the right to pre-schooling is also absent from most other regional human rights instruments leads some scholars to the conclusion that this obligation for states does not exist (Tomaševski, 2003, p. 53). However, the CRC Committee congratulates States parties who have set up systems of pre-schooling, and the general practice is thus the inclusion of pre-schooling. Just like the duration of education overall, the length of the different types of education (primary, secondary, and higher) is left to the discretion of the States parties since Article 28 is silent on the matter. The only instance of the CRC Committee specifying the duration of education is in regard to compulsory education, which in practice often covers primary and part of secondary education. The CRC Committee states that “governments should establish a minimum and a maximum age for the completion of compulsory education, and put forward that the end of compulsory education should coincide with the minimum age for employment” (Verheyde, 2006, p. 15).

Article 28(1) imposes an obligation on the States to make education available and accessible. Even though both terms are not mentioned equally for all three types of education, it can be assumed that the obligation applies to all types because availability and accessibility are interlinked, and having education that was available but not accessible would not make sense – and vice versa (Verheyde, 2006, p. 16). Accessibility and availability are part of the 4 A’s scheme put forward by the Committee on Economic, Social and Cultural Rights (CESCR

Committee) in its analysis of the content of the right to education in the General Comment no. 13. The other two components are 'acceptability' and 'adaptability' (CESCR, 1999). The meaning of these four components could be discussed at length, but for the purpose of this thesis it suffices to give a brief definition of each one, with particular attention to accessibility since this component encompasses a non-discrimination factor. The CESCR Committee gives the following definitions in General Comment no. 13 (CESCR, 1999, no. 6):

1. **Availability:** Functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party; (...).
2. **Accessibility:** Educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.  
Accessibility has three overlapping dimensions:
  - a. **Non-discrimination:** Education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination);
  - b. **Physical accessibility**
  - c. **Economic accessibility**
3. **Acceptability:** The form and substance of education, including curricula and teaching methods, have to be acceptable.
4. **Adaptability:** Education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

While all four components naturally merit consideration in the context of an analysis of refugee education, it would appear that accessibility and in particular non-discrimination, as well as acceptability potentially would have more weight in such an analysis because of the fact that ASR-children are especially vulnerable and very often have a different cultural background than the prevailing culture of the host country. Here it is relevant to look at another provision of the UNCRC, namely Article 2 on non-discrimination. This article reads:

#### UNCRC Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or

his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 2 establishes the right not to be discriminated on the basis of a number of grounds, many of which apply directly to ASR-children. Thus, Article 2 strengthens the right of these children to receive education under Article 28, because any kind of discrimination would constitute a violation of the accessibility component of the right to education, and in general because a state has the obligation to achieve all the articles of the CRC.

In sum, the analysis of the content and scope of the CRC Article 28 has established that the right to education consists of receiving means to further both basic skills and the broader development of a child's personality, and that this should be compulsory and cost-free according to the level. Moreover, it should be in accordance with the 4 A's scheme including non-discrimination. Article 28 guarantees the right to receive education for all children, and if read in combination with Article 2 on non-discrimination it is clear that the right to education applies to ASR-children in Luxembourg, regardless of their asylum- or other legal status.

I will now look at how the UNCRC has been transposed into national law in Luxembourg, as well as the country-specific jurisprudence relating to the education of ASR-children, in the form of Concluding Observations to Luxembourg's periodic reports.

### **5.3.2. The UNCRC in Luxembourg**

As we recall, governments are the prime duty bearers responsible for fulfilling children's rights under the UNCRC. The Grand-Duchy of Luxembourg is a signatory of the UNCRC, and it ratified the convention in a law of 20 December 1993 (Memorial A no. 104). Apart from ratifying the UNCRC this law also made changes to the Luxembourgish civil code to ensure compliance with the convention. Of particular importance for this thesis is Article 2 (3) which establishes the right to be heard and the best interests of the child in the civil code.

The law of 20 December 1993 is cited by a number of legal documents and executed by one regulation<sup>4</sup>, namely the Grand-Ducal Regulation of 17 August 2011 on the approval of managers of activities for children, young adults and families in distress. Thus, the UNCRC has been partly transposed into national law. However, Article 28 on the right to education has not been mentioned in any national law (this might be because the Luxembourgish laws already comply with the standards laid out in the article, and thus there was no need to change any laws to ensure compliance).

The first reporting cycle to the CRC Committee regarding the UNCRC for Luxembourg was in 1998, at the Committee's 18th session. The Concluding Observations did not mention refugee children or refugee education at all, and this was probably due to the fact that the Luxembourgish system of refugee education was not put in place until 1999, primarily as a reaction to the influx of refugees from the wars in Yugoslavia.

However, concerns about the difficulties faced in the Luxembourgish educational system by ASR-children were expressed in the second as well as the combined third and fourth reporting cycle. These concerns were in regard to Article 28 (education) in the UNCRC.

The Concluding Observations of the second reporting cycle, 38th session of the Committee, March 2005, paragraphs 50-51 are of interest here (UNCRC, 2005):

*50. The Committee notes with satisfaction that refugee and asylum-seeking children have free access to the school system in Luxembourg and that the Ministry of Education has appointed intercultural mediators in order to facilitate the integration of foreigners in the educational system. However, the Committee is still concerned that a large number of foreign children (more than 40 per cent of the school population) are often disadvantaged by the educational programme and teaching methods in Luxembourg, including language problems.*

***51. The Committee recommends that the State party consider all possible measures through which foreign children and children of asylum-seekers can be granted equal access to the same standard of services in the field of education. The Committee also encourages the State party to ensure that language does not become an obstacle in education and recommends any initiative, including support classes, to help children to learn the needed languages.***

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<sup>4</sup> <http://eli.legilux.public.lu/eli/etat/leg/loi/1993/12/20/n2/jo/references>

The Committee's recommendation focuses on two issues: firstly on equal access to the same standard of educational services for all children in Luxembourg; and secondly on the linguistic problems, and the potential obstacles stemming from them, faced by foreign and ASR-children.

Eight years later, at the following reporting cycle in 2013, the Committee was still concerned about the linguistic difficulties faced by children of migrant workers, ASR-children (UNCRC, 2013, paras. 42-43).

This criticism remained even though the state of Luxembourg in its combined third and fourth periodic report to the Committee responded to the critique by describing various measures which had been put in place in order to ameliorate the points in paragraphs 48-51 of the concluding observations from 2005. Notably, the *Cellule d'accueil scolaire pour élèves nouveaux arrivants* (The welcome schooling unit for newly arrived pupils, hereafter: CASNA) had been established (The Luxembourgish Ministry of the Family and Integration, 2010, p. 140).

Furthermore, in 2005 the Committee was concerned about discrimination against vulnerable groups such as refugee and asylum-seeking children, and in paragraphs 18 and 20 it recommended that Luxembourg adopt a "proactive and comprehensive strategy to eliminate discrimination on any grounds and against all vulnerable groups" and increase its efforts to ensure compliance with existing laws guaranteeing the principle of non-discrimination. This recommendation is not reiterated in the Concluding Observations from 2013, which might indicate an improvement on the part of Luxembourg in this matter.

In sum, the main concern for the CRC Committee seems to be the linguistic difficulties faced by the children of foreigners coming to Luxembourg. The practice of Luxembourg in this area will be presented in the *de facto* analysis. But first I will take a brief look at the UNESCO Convention Against Discrimination in Education.

#### **5.4. The UNESCO Convention Against Discrimination in Education**

At the UN level there is another legal instrument pertaining to the thesis topic. This is the UNESCO Convention Against Discrimination in Education (CADE). This Convention was adopted in 1960 and entered into force in 1962. Luxembourg ratified it on 20 January 1970.

Article 1 reads:

*1. For the purpose of this Convention, the term “discrimination” includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:*

*(a) Of depriving any person or group of persons of access to education of any type or at any level;*

*(b) Of limiting any person or group of persons to education of an inferior standard;*

*(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or*

*(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.*

*2. For the purposes of this Convention, the term “education” refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.*

The article provides for a very broad definition of discrimination in that it covers a range of grounds of discrimination as well as types thereof. Again there is a focus on access to education, and more specifically, to all types of education and at any level. Furthermore, this article provides for a very broad and slightly unclear definition of the content and scope of education in that it encompasses access to, standard and quality of education, as well as the conditions under which it is given. The purpose is probably to be as inclusive as possible in order to cover everyone who might suffer from one or other forms of discrimination in education. As with all inclusive and broad definitions, there is a risk of losing the operative capability, and this seems to be the case for the CADE. However, it is a very strong normative instrument because it calls attention to the risk of being discriminated in education and it provides a channel through which to give voice to such concerns.

The CADE is one of the 3 UNESCO conventions that are monitored regularly by the UNESCO Committee on Conventions and Recommendations. Like other UN reporting procedures, the



monitoring committee can only give recommendations based on national reports received within a given cycle of reporting. Countries are grouped together, Luxembourg being in group 1, and thus the Committee does not give country specific recommendations. Although seemingly weak in a legal sense, with no hard core enforcement mechanisms, the CADE serves as an important reference point for later interpretations of more enforceable instruments and general developments in the field of education rights. For instance, in the authoritative commentary of the Charter of Fundamental Rights of the EU, the authors make a specific reference to the CADE. Thus the CADE is part of the rights regime that developed after the Second World War and strengthened the right to education for all in a non-discriminatory manner. This in turn relates to the rights of ASR-children in realising their right to education.

But how did the regional European organisations formulate the rights to education and non-discrimination? Next, I will analyse the ECHR, the ESC and the EU Charter.

## **5.5. The European Convention of Human Rights**

The European Convention of Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms, hereafter ECHR) was drafted by the then newly established Council of Europe. The ECHR was signed on 4 November 1950 and entered into force on 3 September 1953 with all 47 members of the Council of Europe being States parties, including Luxembourg.

The ECHR established the European Court of Human Rights (ECtHR or 'the Court') which secures the enforcement of the treaty. A State party can bring a case before the Court involving violations committed by another State party, cf. Article 33. Following Article 34, any individual, non-governmental organisation or group of individuals who finds that their rights have been violated can also take a case to court. Each case must fulfil the admissibility criteria laid out in Article 35. These include having exhausted all domestic remedies, having the case not being substantially the same as a matter previously examined by the Court, not being manifestly ill-founded, and finally, the applicant has to have suffered a 'significant disadvantage'. I will not go into a discussion of the meaning of these criteria, since the listing of them is merely meant to show that taking a case to the Court is associated with a fairly great effort on the part of the applicant. Also, the Court notoriously has a very large backlog of

cases, making the time between the lodging of an application and a potential judgment very long. Efforts of dealing with this have been made through Protocol 14 (ECtHR, 2013).

The judgments of the Court are binding for States parties. The Court can issue monetary compensations to be paid by the State to the violated party. The monitoring of these payments is carried out by the Committee of Ministers, cf. Article 46. Thus, the ECHR has a fairly strong legal value in States parties to the ECHR, in that it can be enforced.

In the ECHR, the right to education is found in Article 2 of the first Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms from 20 March 1952 (hereafter: P1-2). This protocol contains three rights which the signatories could not agree to place in the ECHR itself. Although Monaco and Switzerland have signed but never ratified the first Protocol, Luxembourg has both signed and ratified it.

The article reads:

#### *ARTICLE 2*

##### *Right to education*

*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*

The right to education is phrased as a negative right in that it obliges inaction on the part of the contracting state – the state is obliged not to deny anyone the right to education.

However, just like the UNCRC, Article 2 does not specify the content, duration or quality of education. *The Belgian Linguistic case (No. 2)* from 1968 is a formative case on the right to education under the ECHR, P1-2. It relates to ‘certain aspects of the laws on the use of languages in education in Belgium’.

Among other things, the *Belgian Linguistic case (no. 2)* addresses the content and scope of the right enshrined in P1-2. In the judgment, the Court first establishes that “In spite of its negative formulation, this provision uses the term "right" and speaks of a "right to education". Likewise the preamble to the Protocol specifies that the object of the Protocol lies in the collective

enforcement of "rights and freedoms". There is therefore no doubt that Article 2 (P1-2) does enshrine a right" (ECtHR, 1968, para. B3). It further states that this right is secured to everyone within the jurisdiction of a Contracting State (Ibidem).

Regarding the scope of the right to education within the meaning of the first sentence of Article 2 of the Protocol, "the Court must bear in mind the aim of this provision. It notes in this context that all member States of the Council of Europe possessed, at the time of the opening of the Protocol to their signature, and still do possess, a general and official educational system. There neither was, nor is now, therefore, any question of requiring each State to establish such a system, but merely of guaranteeing to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time" (Ibidem).

If persons subject to the jurisdiction of a contracting state thus have the right to avail themselves of the existing means of instruction, this must apply to ASR-children on par with nationals in Luxembourg, because the former are within Luxembourgish jurisdiction.

Furthermore, the scope of P1-2 is not limited to guaranteeing primary education. The Court stated the following about P1-2 in *Ponomaryovi vs. Bulgaria* (2011), with reference to *Leyla Sahin v. Turkey* (2005): "There is little doubt that secondary education is covered by that provision" (ECtHR, 2011, para. 49).

As for the content of education "The Convention lays down no specific obligations concerning the extent of these means and the manner of their organisation or subsidisation. In particular, the first sentence of Article 2 does not specify the language in which education must be conducted in order that the right to education should be respected. (...) However, the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be" (Ibidem).

The Court continues: "The first sentence of Article 2 of the Protocol consequently guarantees, in the first place, a right of access to educational institutions existing at a given time, but such access constitutes only a part of the right to education. *For the 'right to education' to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should*

*have the possibility of drawing profit from the education received* [italics added], that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies he has completed” (ECtHR, 1968, para. B4).

Although the Court only establishes the right to receive education in one of the national languages, the highlighted sentence could be relevant for ASR-children, in that mere access to the existing educational system is not enough. The ASR-child, who by virtue of being under Luxembourgish jurisdiction has the right to receive education in Luxembourgish schools, would not benefit from this right if he or she could not ‘draw profit from the education received’ due to linguistic barriers. Even though the Court only specifically mentions recognition of completed studies, and though the circumstances of the case differ from those of ASR-children, this could perhaps be seen as an argument in support of special linguistic classes to be used in the transition period from the arrival of ASR-children and until they had acquired sufficient levels of at least one of the national languages to follow regular education.

Finally, in discussing the general aim of the ECHR, the Court states that “The Convention therefore implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter” (Ibidem). Taken in conjunction with the non-discrimination clause in the ECHR, which prohibits discrimination with respect to rights under the Convention (Art. 14) and in any legal right, so long as it is prohibited by national law (Protocol 12), this could also be read as a favourable argument for the importance of the right to education for ASR-children. However, the argument based on the findings of the *Belgian linguistic case (no.2)* cannot easily be extended to cover the teaching of mother tongue classes for ASR-children: The Court opined that the right to education implied the right to be educated in the national language, and did not include the provision that the parent’s linguistic preferences be respected.

Overall, the provisions in P1-2, read in conjunction with Article 14 and Protocol 12 to the ECHR, guarantee primary and secondary education as a right, free and accessible to all within a Contracting State’s jurisdiction. Bearing in mind the non-discrimination clauses, this must then also apply to ASR-children.

## **5.6. The European Social Charter**

Another regional instrument that provides for the right to education is the European Social Charter (ESC). It was drafted by the Council of Europe in 1961 and ratified by Luxembourg on 10 October 1991. The ESC was revised in 1996, but Luxembourg has not yet ratified this version of the treaty.

Article 17(2) is of particular interest for the purpose of this thesis. Article 17 provides overall for the right of children and young persons to social, legal and economic protection, and paragraph 2 specifies the right to education:

Article 17:

*With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed: (...)*

- 2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.*

The content and scope of the right to education has been laid out by the Secretariat of the European Social Charter in an Information Document of 17 November 2006. The Secretariat can be considered authoritative in interpreting the Revised Social Charter. Although the Information Document is not legally binding on the ECSR, it provides an interesting amount of detail regarding the right to education for vulnerable groups such as ASR-children. Thus it represents core values of the Council of Europe.

The following excerpts from the Information Document clarify the meaning and scope of the right to education.

“Article 17 of the Revised Charter includes a general right to education (in addition to Article 10, 15 etc). It requires states to establish and maintain an education system that is free of charge” (Secretariat of the ESC, 2006, p. 2). This means that no one should have to pay for their compulsory education, regardless of their legal status in a Contracting state.

Regarding the duration of education, “The Appendix provides that Article 17§2 does not imply that there is an obligation to provide compulsory education up to the age of 18. Nevertheless the ECSR considers that education should be compulsory for a reasonable period in general until the minimum age for admission to employment”. This interpretation can protect ASR-children from being tempted to work instead of attending school.

Furthermore, education should be effective and accessible. Effective in the sense of functioning system of primary and secondary education, and accessible in that “there is a fair geographical and regional distribution of schools (in particular with respect to urban/rural areas). Secondly, that the basic education system is free of charge; any hidden costs such as books, uniforms etc must be reasonable and assistance must be available to limit their impact on the most vulnerable groups. Thirdly, equal access to education must be guaranteed for all children”. Again, it is emphasised that education must be free of charge so vulnerable children do not face a disadvantage. And importantly, equal access is guaranteed for all children – that is taken to include ASR-children as well as nationals.

The Secretariat goes even further in securing the rights of equal access to education for children from vulnerable groups in stating that “Particular attention must be paid to ensure that vulnerable groups benefit from the right to education and have equal access; for example children from minorities, *children seeking asylum, refugee children* [italics added], children in hospital, children in care, pregnant teenagers, teenage mothers, and children in young offender institutions/serving custodial sentences. Where necessary equal access to education for these children should be guaranteed through special measures [italics added] (...) (Secretariat of the ESC, 2006, p. 3).

Article 17(2) of the ESC thus provides the right to free compulsory education for all children and it provides for special measures for ASR-children in order to ensure the realisation of their right to education.

The European Committee of Social Rights (ECSR) rules on the conformity of national law and practice with the Charter. It adopts conclusions in the framework of a reporting procedure and decisions under a collective complaint procedure. In the “Conclusions XVII-2 (Luxembourg), Articles 7, 8, 11, 14, 17 and 18 of the Charter” from 2005, the ECSR “notes the

failure of Luxembourg to respect fully its obligation, under the Charter, to report on the implementation of this treaty within the deadline. Under the circumstances the Committee was unable to reach any Conclusions in respect of these provisions during the supervision cycle” (ECSR, 2005). The Committee has not followed up on this reporting failure or made any conclusions regarding the compliance with Article 17 by Luxembourg in any of the later reports.

The collective complaints procedure was added through an Additional Protocol to the Charter which came into force in 1998. However, Luxembourg has not accepted this procedure.

While it serves as an important ideal in the rights regime for refugees, and particularly ASR-children’s right to education, the European Social Charter is not a legally binding treaty and thus does not have any hard core legal value for its signatories. It can be seen as part of the ideal institutions in the sociological institutionalist sense, based on common norms and values that aim at securing human rights globally and regionally.

## **5.7. The EU Charter of Fundamental Rights**

The Charter of Fundamental Rights of the European Union (the Charter) enshrines a number of civil, political, economic and social rights for EU citizens and residents into EU law. The first version, which was binding for EU institutions only, entered into force in 2000. With the entry into force of the Lisbon Treaty in 2009, the second version of the Charter also became effective, now binding EU Member States as well as institutions. Article 51(1) of the Charter addresses the Charter to the EU's institutions, bodies established under EU law and, when implementing EU laws, the EU's member states. The Charter is only applicable in cases involving the implementation of EU law, the reason being that it was made in order to submit EU institutions to human rights standards that were already covered by other instruments for EU member states. Following this, individuals will not be able to take a member state to court for failing to uphold the rights in the Charter unless the member state in question was implementing EU law. Luxembourg has fully ratified the Charter (only the United Kingdom and Poland have a so-called ‘opt-out protocol’).

Like any other EU law, the Charter is enforced by the Court of Justice for the European Union (CJEU). The CJEU thus ensures that the EU acts and legislates in compliance with the Charter. In

practice, however, the Luxembourgish courts are the main enforcers of the Charter, under the control of the CJEU.

The right to education is found in Article 14 of the Charter. The content and scope have been laid out in a commentary of all the articles of the Charter by the EU Network of Independent Experts on Fundamental Rights (EU Network), which was set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Thus, this commentary can be seen as the authoritative interpretation of the Charter.

Article 14 on the right to education in the EU reads:

- 1. Everyone has the right to education and to have access to vocational and continuing training.*
- 2. This right includes the possibility to receive free compulsory education.*
- 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.*

Like the authoritative interpretations of the other instruments, the commentary of the Charter emphasises that “education forms an indispensable precondition for the enjoyment of many other human rights and freedoms. For example, individuals cannot benefit from economic rights such as the right to work and to choose one’s occupation without the requisite education and training. Likewise, political rights such as the right to vote or the right of equal access to public service depend on a minimum of education, including literacy” (EU Network, 2006, p. 141).

In Article 14(1) the emphasis is on non-discriminatory access to education and vocational training. The leading CJEU decision regarding students was in the case of *Gravier v. City of Liège* (1985), where the Court held that equal access means that persons moving to another Member state for the sole purpose of studying must be granted the same conditions as nationals – which means if the training is free for nationals, fees cannot be charged for non-nationals. In *Commission v. Austria* (2005), the ECJ decided that “Austria’s refusal to treat



secondary education diplomas obtained in other Member States differently from Austrian diplomas for the purpose of gaining access to university courses constitutes indirect discrimination on grounds of nationality” (EU Network, 2006, p. 144).

Following this case law, the EU right to education applies in a transnational context only, meaning that a national cannot claim a right to education toward their home state under the Charter.

Because of a preoccupation with vocational training on the part of the CJEU, there is no definition of general education in Community law, and the commentary refers to relevant international and regional instruments like the UDHR, the CESCR, the UNCRC and the CADE, and the ECHR (EU Network, 2006, p. 145). The commentary contrasts the negatively phrased right to education found in Protocol 1, Article 2 of the ECHR with the positive phrasing in the EU Charter. While the ECHR emphasises the liberal aspect of the right not to be denied access to education, the Charter guarantees a right to education. The commentary concludes that “such wording suggests Member States’ obligation to not only refrain from interfering with the human right to obtain an education, but to facilitate it through positive action” (Ibidem). This means for instance that there is an obligation for Member states to actively construct educational institutions and facilities if such do not already exist. The argument is that “access to education is rendered meaningless unless facilities are available to which a person may claim such access and receive an education of quality” (Ibidem, p. 146). This is contrary to the interpretation of ECHR P1-2, where such an obligation did not exist based on the assumption that the contracting parties already had such structures in place at the time of ratification. The interpretation of there being a positive obligation for the Member State corresponds with the second sentence of Article 14 of the Charter, which grants free and equal access to compulsory education. Pursuant to the case of *Casagrande v. Landeshauptstadt München* (1974), equal access to general education “permits the student to attend school ‘under the best possible conditions’ including access to any ‘general measures intended to facilitate educational attendance,’ meaning financial assistance such as grants (Ibidem, p. 146). Casagrande, the son of a deceased migrant worker, was denied an allowance to attend school in Germany because of his Italian nationality. The CJEU referred to Article 12 of Regulation 1612/68, which stipulates that a worker’s child may receive education on the same conditions as nationals’

children. This case could be relevant in a case involving the right to education for ASR-children because they are migrants, although of a different kind than Casagrande.

The second sentence of Article 14 makes education compulsory. Thereby it obliges the State to provide education, but it also obliges the individual to make use of his or her right to education. The nature and extent of the compulsory education is left for the Member State to decide. However, the commentary notes that “Pursuant to Member States’ obligations under international law, however, and the constitutional guarantees most of them have in place, compulsory education must encompass at least elementary education” (Ibidem, p. 146). Luxembourg goes further than this in that within its jurisdiction, not just primary education is compulsory, but also upper secondary education (ECtHR, 2011, para. 37).

The third sentence of Article 14 guarantees respect for the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions in accordance with national law. The reference to national law is put in place so as to not encroach upon Member states’ jurisdiction over the regulation of education systems – an area where Community law does not have jurisdiction. The wording of the third sentence is based on P1-2 of the ECHR which upholds the obligation of Contracting States to respect parents’ religious and philosophical convictions in the education of their children because parents are recognised as their primary caregivers and educators. Although this role of the parents is also found in the UNCRC in Articles 14(2) and 18(1), the UNCRC still grants children the right to education by virtue of being children and right holders in their own right, not to be subject to the will of parents if it is not in their best interest.

In the case of *Campbell and Cosans v. United Kingdom* (1982), the ECtHR emphasised that those philosophical convictions must be “worthy of respect in a democratic society” (ECtHR, 1982, para. 36) and not be incompatible with human dignity, and furthermore, they must not conflict with the fundamental right of the child to education.

Finally, pursuant to Article 24 of the Charter, which discusses the rights of the child, the third sentence is also interpreted in the commentary to encompass a due reference to the best interests of the child and the right of the child to be heard “on matters which concern them in accordance with their age and maturity” (EU Network, 2006, p. 148).

In sum, the right to education found in Article 14 of the Charter strongly resembles that of Article 2 of the First Protocol of the ECHR in content and scope. It has a strong focus on equal and non-discriminatory access to education, which potentially strengthens the right to education for ASR-children to education. But the nature of the jurisdiction of the Charter itself, relevant for Member States only when implementing EU law, gives it a weaker legal value at the Member State level than the ECHR.

## **5.8. The Luxembourgish Constitution**

The Luxembourgish Constitution of 1868 also contains the right to education. This right is found in Article 23, pursuant to the revision on 26 May 2004. Article 23 reads<sup>5</sup>:

### *Article 23*

*The State sees to the organisation of primary education, which will be obligatory and free and to which access must be guaranteed to every person inhabiting the Grand Duchy. Medical and social assistance is regulated by the law.*

*It creates establishments of free secondary instruction and the necessary courses of higher education. The law determines the means of supporting public instruction as well as the conditions of supervision by the Government and the communes; it regulates additionally all [matters] concerning education and provides, according to the criteria that it determines, a system of financial aid in favour of pupils and students.*

*Anyone is free to study in the Grand Duchy or abroad and to attend the universities of his choice, subject to the provisions of the law on the conditions of admission to employment [in], and to the exercise of[,] certain professions.*

The right to education has been among the fundamental principles of the Luxembourgish constitution ever since the Constitution of 1848. In this analysis of Article 23 of the Luxembourgish Constitution, I rely on the authoritative interpretation of the State Council of Luxembourg. The State Council has always been in favour of a broad interpretation of Article

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<sup>5</sup> Since there is no official translation of the Luxembourgish Constitution, I have used the one made in 2009 by William S. Hein & Co., Inc. published on [https://www.constituteproject.org/constitution/Luxembourg\\_2009.pdf](https://www.constituteproject.org/constitution/Luxembourg_2009.pdf). This ensures that the latest revisions of Article 23 from 2004 are included in the translation.

23 and has defended freedom in education. Even though the regulation of education lies with the state and the municipalities, it is not unconstitutional to have private schools alongside public schools, so long as the former are supervised by state law (State Council of Luxembourg, 2006, p. 105). The principle of freedom in education is found in many other European states, among them in Belgium, the Netherlands and Germany. The State Council then refers to the fact that this principle is also found in P1-2 of the ECHR and Article 14 of the EU Charter. The rights of parents to choose an appropriate form of education for their children is also found in Article 23, but the State Council notes that such a choice has to always be based on the principle of best interests of the child as laid out in the UNCRC. Thus, the Constitution has a more child-friendly focus than the ECHR, the ESC and the EU Charter.

Regarding the content of the right to education, the right is based on free and equal access as well as on the non-discrimination principle. This is highly relevant for ASR-children, because the scope of Article 23 extends to all children residing within the territory of Luxembourg and who thus fall under the jurisdiction of the Constitution. This follows from the revision of Article 23 of 2 June 1999.

In a revision of the Constitution in 1948, primary education was made compulsory and free of charge. In 1989, secondary and technical high schools were also included as free of charge. In accordance with the Luxembourgish debate of citizenship rights versus the rights of foreigners, it was highly debated whether these entitlements should be restricted to Luxembourgish citizens only. The State Council was strongly opposed to this, and their view prevailed, based on the grounds that the right to education was an international norm. Here we can see the effect of the international rights regime or normative institution on a piece of national legislation.

The State Council sums up the right to education as follows (my translation from French): “The right to education, as expressed by international instruments, is a fundamental right of the citizen, and this implies that every citizen should have access to the education he needs in order to secure his personal development and social integration” (Ibidem, p. 108). It goes on to say that *all children* should have adequate education, thus clarifying the extended scope of the right. Finally, it states that this right continues to develop, and the conditions which render possible its implementation follow from the realisation of various international instruments in the field of education.

In sum, the right to education in Article 23 of the Luxembourgish Constitution is very strongly formulated, and the right to free and compulsory primary education can be taken to include ASR-children as well as nationals. The Constitution is enforced by the Luxembourgish Constitutional Court and thus has a very strong legal value.

### **5.9. Summary of analysis, part two**

The development of a children's rights regime paired with existing instruments entailing the right to education and non-discrimination principles provide for a fairly strong normative institution in the field of refugee education in Luxembourg. This institution, which is not only based on ideas but also on enforceable legal instruments such as the classical historic institutionalists prescribed, is in stark contrast with the negative tendencies found in the institution of asylum laws and public sentiment towards asylum-seekers in Chapter 4. Thus, one could expect the negative institution of asylum laws to have a negative influence on the realisation of the rights found in the child rights regime, resulting in a system of refugee education which is less inclusive than what is provided by the child rights regime.

In the next chapter I will carry out a *de facto* analysis of State actions in the field of refugee education in Luxembourg, including a discussion of the asylum-seeking child as both a child and an asylum-seeker and the consequences of this dual position. The aim is to investigate whether Luxembourgish practice complies with the legal obligations found in the *de jure* analysis, and thus if the facts support the *de jure* inclusive system of refugee education in Luxembourg in spite of the competing negative asylum institution.

## **Chapter 6: De facto analysis of state practice: Refugee education in Luxembourg**

In this chapter I will first present a brief overview of the special characteristics that define the grand-Duchy of Luxembourg in terms of migration and its population. Then I will describe in detail the system of refugee education as it is prescribed by law and as it is practiced. I will look at all types and levels of refugee education: elementary level and secondary level; particularly vulnerable groups of children, namely unaccompanied minors; and the so-called “classes passerelles” carried out by the NGO Caritas for students older than 16 years on arrival who would otherwise escape the institutional guarantees of education.

### **6.1. Luxembourg – population characteristics**

Luxembourg has some specific characteristics regarding migration and its population. Historically, the country has gone from being a poor agricultural state characterised by mass emigration to more than doubling its population in little over a century<sup>6</sup>. In the 19<sup>th</sup> century, one third of the population or about 72,000 people emigrated to France and the United States. The 20<sup>th</sup> century was marked by ups and downs in population growth, until an upsurge started in the 1990s. This upsurge was in part due to an increase in birth rate but notably to a rise in immigration. Today, nearly half of the country’s population of 537,000 inhabitants consists of non-Luxembourgish citizens, and Luxembourg has residents from 150 countries. Foreign residents represent 44.5 % of the total population, with approximately 86 % of foreign residents being EU nationals. The strongest represented communities are the Portuguese (16.4 % of the total population), followed by French (6.6 %), Italians (3.4 %) and Belgians (3.3 %)<sup>7</sup>.

This composition of non-Luxembourg migrant communities is also reflected in the Luxembourgish educational system for newly arrived children alongside the ASR-children. In this system of special educational offers, no distinction is made between the children of migrants in general and refugee and asylum-seeking children. When analysing the

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<sup>6</sup> According to the UN Development Program’s 2013 Human Development Report, Luxembourg has a net immigration rate of 17,6 out of 1000 people.

<sup>7</sup> Source: <http://www.luxembourg.public.lu/en/luxembourg-glance/population-languages/population-demographics/index.html>

Luxembourgish system of refugee education, it is necessary to keep this specific reality in mind.

## **6.2. Refugee education in Luxembourg**

As shown in the de jure analysis of the right to education for refugee and asylum-seeking children in the previous chapter, this particularly vulnerable group of children has a strong and somewhat enforceable right to education, particularly through the ECHR and the Luxembourgish Constitution.

In Luxembourg, primary and secondary education is free of charge and accessible to all persons living or residing in the country regardless of their immigration status or that of their parents (ECtHR, 2011, para. 37). Furthermore, education is compulsory until the upper secondary level, which means that every child who lives in Luxembourg must go to school from age 4 to 16 (Conrardy, 2014; ECtHR, 2011, para. 37). Ms. Eliane Kettels from the 'Service de la scolarisation des enfants étrangers' confirms this point: "Refugee children are considered as every other child, as long as they live in Luxembourg. Even if they have no papers at all, they still have to go to school. They have the right to, and they need to go to school" (Kettels, 2014a).

The establishment of a system to provide education for ASR-children coincided with the upsurge in population growth in the 1990s, which was partly due to refugees coming to Luxembourg as a result of the Balkan wars. These programs of education for newly arrived students were implemented under the auspices of the Ministry of National Education, Childhood and Youth (hereafter: Ministry of Education). A unit under the Ministry of Education called the "Service de la scolarisation des enfants étrangers" has coordinated measures to support the integration of students of a foreign mother tongue into the Luxembourgish school system since 1999. Since their inception, these programs have grown in budget and staff. According to Ms. Kettels, the staff went from one person in 1997, when the precursor of the 1999-program was carried out, to eleven full time employees and 28 freelancers in 2014. Likewise, the budget has grown continually. For instance it went from 169,386 euro in 2001 to 248,500 euro in 2007, representing a budget increase of 47 % in a 6-year period (Kettels, 2014b). This indicates a continued political will to prioritise the area of education for foreign children in Luxembourg.

In the context of an analysis of refugee education, it is important to emphasise the fact that these programs were never specifically aimed at refugee and asylum-seeking children, but rather encompassed any child with a foreign mother tongue, regardless of the status of their parents as refugees, asylum-seekers, economic migrants or other categories. The main characteristic of the program in 1999, as well as today, is an intense immersion in language courses for the newly arrived children. This feature can naturally be attributed to the fact that without a certain level of the language of instruction in a country, a foreign child is unlikely to benefit from it. But it is also very much in line with the history of principles governing the attribution of Luxembourgish nationality, which have very specific linguistic requirements (cf. Law on naturalisation from 2001). In this way, the education of foreign students is already paving the way for a potential application for nationality later on in these children's life. This is contrary to other European countries' systems of refugee education, for instance Denmark, which only provide language courses to a lesser extent (Vitus Andersen and Smith Nielsen, 2011, p. 146).

But before discussing the merits of the education of foreign children in Luxembourg, I will examine the way this system works – in other words, how education policies regarding foreign children are implemented in practice. For the sake of the topic of analysis, I will describe this process as it is seen from the view of an asylum-seeking child, even though it would be very similar for the children of economic migrants.

### **6.3. The practical process of refugee education**

In terms of education, when foreign children arrive in Luxembourg, the first thing they must do is take a test in math and the languages they know at the “Cellule d'accueil scolaire pour élèves nouveaux arrivants” (CASNA), which is a specialised unit under the Ministry of Education which takes care of the initial placement process of foreign children and cooperates closely with the “Service de la scolarisation des enfants étrangers”. After the tests, the children are sent to regular schools all over Luxembourg to attend so-called ‘welcome classes’. These classes will be described below. The CASNA informs the children and their parents about the Luxembourgish school system in different languages. CASNA also provides information about the programs for assisting newly arrived children. These programs are classes which aim at teaching the primary languages of instruction, notably French and German, and also



Luxembourgish. All newcomers from twelve to eighteen years of age must pass through CASNA for inclusion in a class or training corresponding to their profile (The Luxembourgish Ministry of the Family and Integration, 2010, p. 140).

As stated above, refugee and asylum-seeking children only make up a part of the children in the education system for foreign students. The percentage of ASR-children naturally varies each year because of the variations in refugee flows. Comprehensive data on these children in the education system are not easily obtained because the Ministry of Education has not been consistent in collecting the data in their yearly report on school activities. However, the data that I have managed to acquire from reports and other official documents from the Ministry of Education, combined with interviews with an official working in CASNA and a Red Cross staff working with refugee children, is presented below in table 1.

| School year | ASR-children in both regular and welcome classes |           | Number of welcome classes      |                               | ASR-children as a percentage of all newly arrived pupils |
|-------------|--|-----------|--------------------------------|-------------------------------|--|
|             | Elementary                                       | Secondary | Elementary (classes étatiques) | Secondary (classes d'accueil) |  |
| 2013-2014   |  | +/- 50    | 14                             | 29                            |  |
| 2012-2013   | 206  | 78        | 22                             | 28                            | 11 %   |
| 2011-2012   | 458  | 112       | 21                             | 30                            | 22 %   |
| 2010-2011   |  |           | 5                              | 22                            |  |

*Table 1 – Statistics on refugee education in Luxembourg*

The data in this table shows that there was a peak in the inflow of asylum-seeking children in the school year 2011-2012. According to Ms. Conrardy, there were about 2000 asylum-seekers (both adults and children) in total. This caused longer processing time for the asylum cases, especially because the migration authorities implemented a practice whereby they fast tracked certain groups of asylum-seekers based on their country of origin, the reason being that they expected to have to reject most of the asylum applications from that group. The countries of origin for this group were the countries that made up the former Yugoslavia, which is no longer considered as dangerous and war-torn as it was 10 and fifteen years ago (Conrardy, 2014). But

this school year the number of asylum cases has gone down to about 1000, which in Ms. Conrardy's words is "back to normal". But even without a backlog of pending asylum applications, the waiting time can be up to three years for an asylum-seeker. This prolonged period of waiting takes place during the formative years of these children's lives, and that is why the education offered to children is of utmost importance.

The Luxembourgish school system, as it pertains to ASR-children, is divided into two main parts: the primary and the secondary level. Schooling is mandatory for a two year pre-primary period as well, but this has not been relevant to refugee education until now. Languages hold a very important role in the Luxembourgish school system, which is demonstrated by the high number of languages taught in Luxembourgish schools: in primary school children learn German, and Luxembourgish is the spoken language. In the second year of primary school they are taught French. Finally, in secondary school they are also taught English, at the age of 13 (Kettels, 2014a).

#### **6.4. Primary school**

If ASR-children arrive with no knowledge or only limited knowledge of one of the official languages of Luxembourg, they are offered intensive language courses – called 'welcome classes'. For children at the primary level, they are placed in a regular class, and then they attend welcome classes for 6 to 8 hours a week out of the total school week of 30 hours. This is within the regular curriculum at school, and foreign children are thus not required to be in school for more hours than Luxembourgish children.

In case a municipality receives a high number of foreign children and does not have the capacity to place all of them in a regular school, it is provided by law that the state has an obligation to organise a "state class" (classe étatique in table 1) for these children. In this case there can be a class of only ASR-children at the primary level, although this is not the norm.

By virtue of the law, newly arrived children must not stay in welcome classes for more than 1 year – this is the time considered sufficient to acquire the necessary level of French or German for the children to be able to participate in a regular class. But according to Ms. Kettels, the law is not strictly adhered to, because the best interest of the child has a greater weight. Every situation is different, and sometimes children move from one part of Luxembourg to another,

in which case the school is different, and the children's learning process may be delayed. But Ms. Kettels emphasised that children should not stay too long in the welcome classes. The authorities try to integrate the foreign children in the best possible way, and as soon as a child has a sufficient level of French or German they may go to a regular class full time (Kettels, 2014a).

### **6.5. Secondary school and classes passerelles**

In secondary school it is different. Here they have welcome/insertion classes which are special classes for newcomers, no matter if they are asylum-seekers or economic migrants. Thus, asylum-seekers are in the same classes as Portuguese pupils, Chinese pupils and other nationalities. There are no classes only for asylum-seeking pupils at the secondary level. The welcome/insertion classes are intensive language courses of 15 hours a week of French. And children who already know French upon arrival may learn German.

But in practice, most asylum-seeking children do not know any of the languages, and some of them are illiterate. Two to three years ago Luxembourg received for the first time children who had never been to school before, or only for a very short time. These children were mostly Roma. In order to accommodate them, the authorities created a new kind of welcome class in order for them to learn to read and write. This is called the "classes d'alphabétisation", and today this type of class has not only asylum-seeking children but also illiterate migrant children, primarily from Africa. The classes d'alphabétisation are located in a specific school in Luxembourg – the Lycée Technique du Centre, because this school has French as its language of instruction, and most of the newcomers learn French before German. This means that once the children in welcome classes and classes d'alphabétisation have reached a sufficient level, they can continue in the same school in a regular class. The Lycée Technique du Centre is the school in Luxembourg with the highest number of newcomers, with nearly all the classes being for this group of children. In the school year 2013-2014 it had four welcome classes (Kettels, 2014a).

As written above, the state only has a duty to offer schooling to children until the age of 16 years. Unfortunately, many asylum-seeking children turn 16 during the time they wait for a decision of their asylum-application. And sometimes age assessment of these children are not very accurate since there is not yet an established and good method of age assessment in

Europe which lives up to the requirements of not being intrusive for the child, as is the case with x-raying. Once they have turned 16, or once the authorities claim that the children are 16, there is no longer an obligation for the state to offer education to them, and thus these children risk exclusion from the educational system. However, Luxembourg has a very active civil society, and the two main NGOs that assist asylum-seekers and refugees with reception facilities like housing, food and legal assistance are the Red Cross and Caritas. In terms of education, Caritas has created a special type of classes for those children above the age of 16 years – the so-called “classes passerelles” which encompass language courses as well as ordinary school subjects. This way there exists a kind of safety net for children who are not covered by the national right to education, but from a child rights’ point of view one could argue that the education of these children ought to be secured by the state since an individual is a child until the age of 18 and since every child has the right to education according to the UNCRC.

## **6.6. Teaching of mother tongue and intercultural mediators**

In order for the foreign pupils to stay in touch with their mother tongue, some language classes are offered in Italian and Portuguese, among others. These classes take place during the normal school day at the primary school level, and the language teachers are hired and paid for by the respective embassies (The Luxembourgish Ministry of the Family and Integration, 2010, p. 140). This service is naturally very limited since it is paid for by embassies, and not all the nationalities of asylum-seekers have an embassy willing or able to carry out the mother tongue teaching. However, the main challenge to mother tongue teaching is the lack of skilled teachers, which is a similar issue in many European countries (Bourgonje, 2010, p. 49).

The law requires teachers to meet with the parents of primary school pupils at least twice a year. Normally the parents of asylum-seeking children do not speak Luxembourgish, German or French. In these meetings, CASNA provides translators, the so-called intercultural mediators to make it possible for teachers and parents to communicate. This does not only happen during the required meetings, but also if a problem occurs at school and the teacher needs to contact the parents of the child.

The intercultural mediators were in fact the first part of the education programme for newly arrived students back in 1999. Over the years, the number of languages covered by the

intercultural mediators has gone from only a few to over 30 today, e.g. Portuguese, Chinese, and Nepalese. This is a very high number of languages covered compared to Luxembourg's neighbouring countries (Kettels, 2014a).

### **6.7. Teacher training**

Regarding teacher training, there is no formal training necessary in Luxembourg in order for certified teachers to teach a welcome class. If a teacher wishes to take on this task, he or she is usually free to do so. For many teachers, the position of teaching foreign pupils is very rewarding because these pupils progress quite fast in learning the new language. Some teachers have learned FLE - Français langue étrangère, and often the teachers of welcome classes also know Portuguese because the majority of the children in a welcome class often speak Portuguese as their mother tongue. This has the curious effect that sometimes asylum-seeking children learn Portuguese before they learn French, because this is the main language spoken among the children (Conrardy, 2014). Teachers of welcome classes usually stay with the same class in order to provide continuity.

### **6.8. Unaccompanied minors**

Unaccompanied minors (UAMs) are refugee children who arrive at the border of a host state without any adults accompanying them. This is a particularly vulnerable group of refugee children who need special protection in areas such as reception facilities, guardianship, age assessment, detention, return and reintegration, family tracing and reunification, and Dublin II practice. In Luxembourg, the UAMs often come from Afghanistan, Congo or the African countries like Ethiopia, Somalia and Eritrea. This is different from asylum-seekers in general, who as mentioned above mostly come from the Balkans, and whose likelihood of getting to stay in Luxembourg is very low because of the changed circumstances in their countries of origin. For the most part, UAMs have been allowed to stay in Luxembourg, especially if they became well integrated via the schools. But in the past couple of years there is a new trend in the flow of UAMs. An increasing number of young people from Maghreb countries have arrived to Luxembourg. These young people are typically not asylum-seekers to begin with, and they have often been in Europe for several years before they reach the border of Luxembourg. They then end up asking for asylum because there is no other possibility for them. But even though their asylum applications are processed, chances are not very high that

they will get the refugee status. This is because for one, they do not fulfil the criteria for getting asylum, and second, there are many problems with their behaviour due to them living in the streets for many years. They very often have problems going to school. This means that the Red Cross, who acts as their guardian in Luxembourg, will not have enough evidence to say they are well integrated into the schools (Conrardy, 2014).

Regarding schooling, Ms. Conrardy states:

*“Very often teachers don't make a difference between ASR-children; those still in the procedure and those with refugee status. They don't always know if the children came with a family or if they came alone. I'm not sure if they are making a difference. For me it's okay if they put them in one group, they should not be in different classes. I think that very often the teachers are not aware that the kids are alone here without their family and with all the history they had before and everything they lived before arriving here. It is a completely different situation if you're coming from Serbia with your family or from Afghanistan alone” (Ibidem).*

Thus asylum-seeking children are treated the same as refugee children, and in fact they are treated the same as migrant children in general. However, it is a fine line to strike between making the teachers aware of the UAM's special needs while not ostracizing them. Ms. Conrardy states the following on the information given to the welcome class teachers:

*“Often they [the teachers] know that the children are asylum-seekers, but they don't know the context and for us [the UAM's guardian, the Red Cross] it is always difficult to find the good middle. We don't want to tell the teachers all the story of why they came, it wouldn't make sense, and it is also a question of protecting the minor, so they don't have to speak about all their problems everywhere to everybody. But on the other hand the teachers need enough information to understand at least where the children are coming from and to be more aware of the situation” (Ibidem).*

For this reason, Ms. Conrardy suggests that teachers are provided more specific training to be aware of the potential problems faced by the UAMs. Luxembourg does not have a long history of caring for UAMs. The Grand-Duchy first received UAMs about ten years ago, which is not a long time compared to other European countries. And although a lot has been done in these ten years, it is necessary to take further steps. [All](#) actors who in one way or the other are in

contact with the UAMs should contribute to realising their rights; including the authorities, social workers, NGOs, the schools, and the local communities. The main thing is that UAMs are recognised better, according to Ms. Conrardy:

*“I think there are more needs that we ignored until now or didn't recognise that well. We would like to have [a] more specific centre for UAMs where there is staff present day and night seven days a week; this is not the case now. I think we underestimate very often the psychological situation of the child, problems due to different reasons like what happened in their country of origin, what happened on the migration trail, the separation from their parents and family, traumas that they live with. So there are different things to which we don't have the right response yet. Together with every actor here in Luxembourg we should try to improve in the coming years” (Ibidem).*

The question of recognition is an issue shared by not just UAMs but asylum-seeking children in general. If a child is recognised as a child first, and only second as an asylum-seeker, chances are better that the child's rights will be fulfilled, and that the asylum-process will take place in a child-friendly way, e.g. with government personnel who are specifically trained to interview children doing the asylum-interview. However, more often than not, these children are seen first and foremost as asylum-seekers, and this has negative consequences on the realisation of their rights.

## **6.9. The dual position of the refugee child**

Asylum-seeking children are in a dual position as both children and asylum-seekers. This dual position applies when the politico-bureaucratic system determines who these children are and also when asylum policies are put into practice at the reception centres. In this way asylum-seeking children constitute an ambivalent political identity-category since they are embedded in two political identity discourses at the same time. On the one hand asylum-seeking children are part of excluding discourses and policies of immigration control based on the “institutionalised suspicion” prevailing in Europe (Giner, 2007; Hansen, 2002). This is the discourse found in the first part of the analysis in Chapter 4. On the other hand, these children are part of inclusive childhood discourses about protection of and equal rights for all children. This discourse was found in the legal analysis of children's right to education in Chapter 5.

This dual position makes it possible to assign the children different statuses in the asylum system – as primarily children or asylum-seekers – which in turn potentially creates tensions in the framework guiding their care (Vitus Andersen and Smith Nielsen, 2011, p. 139). Child welfare advocates take a human rights approach and contend that the children are largely akin to refugees as victims of abuse and economic circumstance. Under this argument, their care and treatment should correspond to the care and treatment of domestic children. Immigration security advocates, on the other hand, argue that unauthorised immigrants (including unaccompanied minors) are associated with increased community violence and illicit activities such as gang memberships (Uehling, 2008). Children therefore throw into bold relief two contradictory impulses in immigration policy and discourse: an impulse to protect them as vulnerable persons, and an impulse to, in the face of rising immigration, protect and barricade existing communities.

In Luxembourg, concerns over migration policy seem to dominate concerns over policies of children in the area of asylum. Asylum-seeking children are primarily seen as asylum-seekers, and their identity as children is subordinate to that legal status. However, there is a constant effort on the part of NGOs to change this situation so that children are seen first as children and only second as asylum-seekers. They also advocate putting a greater focus on the principle of the ‘best interests of the child’ in the processing of asylum-seeking children’s applications. Advances have been made in the past years so that government authorities now ask more child-friendly questions in the interviews with asylum-seeking children (Conrardy, 2014).

### **6.10 Summary of analysis, part three**

In this chapter I have analysed the de facto system of refugee education in Luxembourg and how it is implemented. In general the education system for foreign children is very well-developed and highly inclusive, which is a bit surprising considering the strong institution of negative public sentiment and restrictive asylum policies in Luxembourg, cf. Chapter 4. When comparing the two parts of the analysis in Chapters 4 and 6, there seems to be a clash between the reduction of social aid for asylum-seekers and the continued development of the activities of CASNA. This manifests the competing institutions and the continuing struggle for resources going on in the different policy spheres in which ASR-children find themselves.



Nonetheless, all children who live in Luxembourg must go to school, and the CASNA makes sure that foreign children are placed in welcome classes and regular classes in a way that suits the children's profile. The system does not differentiate between different types of foreign children, and as such, the same schooling is offered to asylum-seeking, refugee and economic migrant children. The possibility for mother tongue instruction, however, is very limited and does not cover all the languages that these children speak. Furthermore, this action is not carried out by the state, but rather by the respective embassies.

CASNA has a high number of intercultural mediators who translate between the welcome class teachers and the foreign children's parents. Luxembourgish intercultural mediators cover a very large number of languages.

UAMs are a particularly vulnerable group of asylum-seeking children, and they need special protection. Unfortunately, they often have to wait a long time for their asylum application to get processed, and they risk turning sixteen during the waiting time, which means that they no longer have a right to education in Luxembourg. In Luxembourg, there is a solution, provided by Caritas, in the form of "classes passerelles" which are offered to children above 16 years of age. However, it would be better if the state took on the responsibility to fulfil their obligation pursuant to the UNCRC to guarantee education as long as children are below 18 years old.

Finally, the asylum-seeking child is the epitome of the two competing institutional regimes found in Chapter 4 and 5 respectively. They can be seen as primarily asylum-seekers, caught in a negative discourse with a focus on immigration control and an institutional design which seeks to prohibit their staying in Luxembourg. Or they can be seen as rights holders in and of themselves, in the protective discourse on child rights which has gained momentum and which has become more and more institutionalised legally since World War II.

The analysis of the system for education of foreign children in Luxembourg has thus proven to be quite inclusive. Firstly because the foreign students for the most part are sent to regular Luxembourgish schools and are integrated in regular classes as soon as their linguistic skills allow them to. Secondly, there is a primary focus on the children as children rather than asylum-seekers in the education system. This can be seen in the fact that teachers do not necessarily know if the children in the welcome classes are asylum-seekers, refugees, or economic migrants. While their rights are thus fairly well realised in a school context, the view

of asylum-seeking children in the asylum process, is still primarily that of asylum-seekers, and the civil society continues to try to make these processes more child-friendly.

The analysis of Chapters 4, 5 and 6 can overall be summarised in the following table:

*Chapter 4*

| Policy/dominant norm | Security focus | Rights focus |
|----------------------|----------------|--------------|
| Entrance policies    | X              |              |

*Chapter 5:*

| Policy/dominant norm  | Asylum-seeker      | Child         |
|-----------------------|--------------------|---------------|
| Position of the child | X (asylum process) | X (education) |

Chapter 6:

| Policy/dominant norm | Inclusion | Non-inclusion |
|----------------------|-----------|---------------|
| Refugee education    | X         |               |

*Table 2: Summary of the three parts of the analysis*

As table 2 shows, there is a dominant norm in entrance policies which focuses on security of the state rather than rights of refugees. This is in line with the view of the ASR-child as primarily an asylum-seeker in the asylum system. But it is in contrast with the view of the ASR-child as primarily a child in the system of refugee education. Finally, the child friendly view of the ASR-child dominates in the implementation of the refugee education in Luxembourg. In conclusion, my analysis of refugee education in Luxembourg has identified a system which is surprisingly inclusive, given the findings in Chapters 4 and 5.

In Chapter 7 I will attempt to explain why the child-friendly regime seems to have predominance over the security-focus when it comes to refugee education.

## Chapter 7: Discussion of analysis results

How can the findings of my 3-part analysis be explained? In my attempt to shed light on at least a part of many potential explanations, I will look at my findings through the prism of my theoretical framework. More specifically, my explanation will be placed within the framework of historical-sociological institutionalism, presented in Chapter 3. Furthermore, in my explanation I will include Gibney's moral arguments for assisting refugees, and lastly I will make use of Gibney's contextual factors which typically influence entry policies, cf. Chapter 4.

In the analysis of the security-rights nexus, the child rights regime and the facts of refugee education in Luxembourg I have identified a clash of competing normative regimes. In view of the increasingly restrictive entrance policies and the local scepticism towards refugees one would perhaps not expect the refugee education system to be of marked political priority, and as a consequence one might expect a system that was not very developed, inclusive or systematised. But as we saw in the analysis of the Luxembourgish system of refugee education, this is not the case. In the following paragraph, I will point to some potential explanatory factors.

From an institutionalist point of view, the specific national context marked by a very multicultural society has exerted influence in the sphere of refugee education. The system, which was originally put in place to ensure education for refugee children, enjoyed the reinforcement of an added interest stemming from the high number of migrant children in Luxembourg. Thus, the implementation of the right to education for asylum-seeking children has been strengthened because of overlapping interests with migrant children and migrant groups in general, who were more numerous and potentially had a stronger voice in Luxembourgish politics and society than did the refugees. This has resulted in a shift in the expected power asymmetries of the policy area of refugee education. Power asymmetries in refugee education are not the same as in entrance policies, which are still dominated by the security-rights nexus. Because of the continuous influx of migrants, forced as well as economic, the system of refugee education has now developed from an expectedly temporary niche to alleviate the refugees from the Balkan wars in the late 1990s to being a socially appropriate response to the influx. In institutionalist terms, the growth of the system can be seen as an unintended consequence of a response to the Balkan wars. The logic of social appropriateness

of sociological institutionalism has thus taken the driver's seat rather than a rationalist instrumental logic focusing on costs. ASR-children happen to find themselves in an educational system that is supported by an increasing population group. Finding growing support among the rising numbers of immigrants, a down-scaling of the system today would meet significant opposition in the migrant and NGO communities who are developing a strong voice that cannot be ignored by the government. In other words, even if ASR-children, or at least asylum-seekers in general if not specifically the children themselves, face a negative public discourse, there is a growing number of the Luxembourgish population who have a strong interest in sustaining the system of education for foreign children. This educational system can be expected not only to be sustained, but perhaps even to be further developed in the future, seeing as the percentage of non-Luxembourgish residents in the Grand-Duchy is expected to exceed that of Luxembourgish nationals in the not so distant future.

Although the logic of social appropriateness has a fair amount of explanatory power vis-à-vis my findings, there is also an element of the instrumental logic in the continued development of refugee education. This logic goes hand in hand with the humanitarian principle presented by Gibney. As we recall, according to this principle, a state is morally required to assist refugees if the cost of doing so is low. This is exactly the case for refugee education in Luxembourg today due to the already established system of education for newly arrived pupils. New pupils are not adding increasing costs to the system of refugee education to the same extent as when the system was first established. The refugee education system can thus be seen as an expression of Gibney's humanitarian principle.

This leads me to another point from the institutionalist framework. As with every institution, it is hard to change or abolish it once it has been established. The stickiness of initial institutional design, paired with Gibney's influencing factors, provides a fairly strong part of the explanation. Of particular importance are the following factors: the state's economy, ethnic affinity, integration history, population, and the number of entrants. There has been an economic basis for continuing the system of education for foreign children because Luxembourg's economy has emerged from the economic and financial crisis in relatively good shape, and today Luxembourg enjoys the highest per capita income among the OECD countries (OECD, 2012). Ethnic affinity may not apply between Luxembourgers and migrants, but this affinity is nonetheless found between existing and settled groups of immigrants and refugees

because of Luxembourg's particular history of immigration and integration. Contrary to Gibney's point regarding the factor about population and the number of entrants, which is that a smaller state will be less likely to absorb a high number of entrants, Luxembourg has absorbed an unusually high number of immigrants and refugees over the years. This is because the Luxembourgish economy has relied on foreign immigration, and thus we see a loop that feeds on itself and in the process strengthens the position of the more vulnerable group of forced migrants in social policies, at least in those policies where an interest overlap exists between forced and economic migrants.

To sum up my explanation, Luxembourg may not have initiated these policies as a conscious effort towards acting in a morally defensible manner, but somehow the result of the specific context, political pressures and the sticky institutional design Luxembourg ended up with a refugee education system that in fact is morally defensible and which lives up to the humanitarian principle.

## **Chapter 8: Conclusion**

In this thesis I have analysed the Luxembourgish system of refugee education and the factors which shape its implementation. My analysis has been tripartite and underpinned by a historical and sociological institutionalist theoretical framework as well as by key concepts from Gibney. I identified competing normative regimes in asylum policies and ASR-children's right to education, respectively. Notably, I identified a surprisingly inclusive system of refugee education.

In Luxembourg, refugee education is tied up with the education of immigrant children at large. This explains why, even though asylum-policies have tightened over the years and social aid has been restricted, the system of refugee education has continued to develop. One way to see it would be to say that ASR-children benefit from the particularities of the highly multicultural Luxembourgish society. There is a large number of newly arrived children in the obligatory school age who either do not speak, or have only a limited knowledge of, the official languages of Luxembourg. This is a widely acknowledged phenomenon and not new at all.

Luxembourg's dependency on foreign immigration has promoted such integrative practices as a functioning educational system for newly arrived foreign children.

In Luxembourg, ASR-children are not seen as different from other migrant children in the educational system. That is why ASR-children in terms of education have to be seen as part of the general policies on migrant education rather than through the lens of admissions policies or the public discourse on asylum-seekers. As such, it could be argued that the Luxembourgish system of refugee education takes the universalistic stance on the role of the asylum-seeking child. Once in Luxembourg, a child of obligatory school age is seen primarily as a child rather than an asylum-seeker. Often the teachers do not know the legal status of the children in their welcome classes. Thus, the system of refugee education in Luxembourg does realise the rights of ASR-children to a large extent.

In sum, the inclusive system of refugee education can, at least to some extent, be explained by institutionalist concepts: Luxembourg's particularities regarding migration history, the critical juncture of the Balkan wars which initiated the system, and the stickiness of institutional design. Finally, at the moral level, the system can be seen as an expression of the humanitarian principle.

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## Appendix A: Interview probes

Adapting them to my specific research questions, I have attempted to apply the types of probes when it would benefit the interview:

- *Detail-oriented probes:* In our natural conversations we ask each other questions to get more detail. These types of follow-up questions are designed to fill out the picture of whatever it is we are trying to understand. We easily ask these questions when we are genuinely curious.
  - Who was with you?
  - What was it like being there?
  - Where did you go then?
  - When did this happen in your life?
  
- *Elaboration probes:* Another type of probe is designed to encourage the interviewee to tell us more. We indicate our desire to know more by such things as gently nodding our head as the person talks, softly voicing 'un-huh' every so often, and sometimes by just remaining silent but attentive. We can also ask for the interviewee to simply continue talking.
  - Tell me more about that.
  - Can you give me an example of what you are talking about?
  - I think I understand what you mean.
  - Talk more about that, will you?
  - I'd like to hear you talk more about that.
  - How are you going to try to deal with the situation?
  
- *Clarification probes:* There are likely to be times in an interview when the interviewer is unsure of what the interviewee is talking about, what she or he means. In these situations the interviewer can gently ask for clarification, making sure to communicate that it is the interviewer's difficulty in understanding and not the fault of the interviewee.
  - I'm not sure I understand what you mean by 'hanging out'. Can you help me understand what that means?
  - I'm having trouble understanding the problem you've described. Can you talk a little more about that?
  - I want to make sure I understand what you mean. Would you describe it for me again?
  - I'm sorry. I don't quite get it. Tell me again, would you?

## Appendix B: Legal instruments in the revised CEAS<sup>8</sup>

- **The revised Asylum Procedures Directive**, which regulates minimum standards on procedures in Member States for granting and withdrawing refugee status.
- **The revised Reception Conditions Directive**, which establishes common standards of conditions of living of asylum applicants.
- **The revised Qualification Directive**, which sets out standards as to who qualifies as a beneficiary of international protection and the content of protection granted.
- **The revised Dublin Regulation**, which establishes the state responsible for examining the asylum application and clarifies the rules governing the relations between states.
- **The revised Eurodac Regulation**, which regulates a database for comparing fingerprints of asylum seekers and some categories of illegal immigrants, among other things to help implement the Dublin Regulation.
- **The Temporary Protection Directive from 2001**, which allowed for a common EU response to a mass influx of displaced persons unable to return to their country of origin.
- **The Family Reunification Directive from 2003**, which determines the conditions under which third-country nationals residing lawfully on the territory of the Member States may exercise the right to family reunification. It also applies to refugees.

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<sup>8</sup> Source:

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration)