

# Education for foreign inmates in Norwegian prisons: A legal and humanitarian perspective

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## 1. Introduction

This article discusses the right to education for foreign inmates in Norwegian prisons, with a particular focus on the group of inmates who do not have leave to remain in Norway and could be expelled after they have served their sentence. The starting point in Norwegian criminal justice policy is that prison inmates have the same right to education as other citizens and residents in Norway. The view is, as also follows from international law, that education is a *human right* that must be provided to everyone – also to inmates.

The problem is that it is not fully clear what this right entails for foreign inmates without a residence permit in Norway. As will be developed throughout this article, national legislation only provides access to the education system for those with such a residence permit. Moreover, international law is not fully clear as regards the content of the right to

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education for inmates in prison, but relates to a certain extent the fulfilment of this right to the welfare structures that are available nationally.<sup>1</sup>

In addition, the actual provision of education services to prison inmates is not without challenges. Prison as a context for the provision of education involves several challenges, both of principled and practical nature. Foreign inmates, and in particular those who will be expelled from Norway after they have served their sentence, seem to raise specific problems: the education of foreign inmates must be provided notwithstanding substantial cultural and language barriers and in a context of limited resources. The group that will be expelled after release also raises specific questions about the role of education with respect to the reintegration of inmates into society. What is an adequate offer of education for inmates who after their sentence will not be reintegrated into Norwegian society, but will be returned to another country? And to which extent can and should the correctional services<sup>2</sup> take into account the special needs of foreign inmates linked to their reintegration in another country, in order to realise their *right* to education?

The article is motivated by the significance of these matters in view of the large and growing the proportion of foreign inmates in Norwegian prisons. Foreign inmates now account for over a third of all inmates in Norwegian prisons.<sup>3</sup> This development has sparked a debate about whether foreign inmates should have the same 'benefits' as Norwegian inmates.<sup>4</sup> Interestingly enough, the perspective of reintegration seems to be used in the debate mostly as an argument against equal treatment between foreign and Norwegian prisoners: since foreign prisoners are not to be reintegrated into Norwegian society, it is argued to be unnecessary to provide them with the skills needed for such a reintegration.<sup>5</sup> As such, this argument challenges the idea of education as a human right that must be equally accessible to all inmates. In this regard, a clarification of the right to education for foreign inmates is not only of interest for the group of foreign inmates who have to face the reality of several years of custody in Norwegian prisons. It is equally important in order to recall the principles of equal treatment and respect for individuals that the penal system is rightly based upon.

<sup>1</sup> See below in section 3 for a further clarification of national and international regulations on the right to education.

<sup>2</sup> The Norwegian term is 'Kriminalomsorgen'.

<sup>3</sup> Kriminalomsorgens statistics for 2012, <http://www.kriminalomsorgen.no/kriminalomsorgens-aarsstatistikk-for-2012.5212270-237613.html>. This tendency seems to be a general European tendency; see *Prison Education and Training in Europe: Current state-of-play and Challenges*, Report authored for the European Commission by GHK Consulting (2013).

<sup>4</sup> For an overview of this legal-political debate, see Rønning, *I hvilken grad er kriminalomsorgen rettslig forpliktet til å jobbe rehabiliterende med utenlandske innsatte i norske fengsler?: Utenlandske innsattes diskrimineringsvern - vern mot usaklig forskjellsbehandling*, Masterthesis UIO (2013) chap. 1.3.

<sup>5</sup> See for instance the debate on 'B-prisons for foreign inmates'; <http://www.aftenposten.no/nyheter/iriks/Vil-ha-B-fengsel-for-utlendinger-6993843.html>.

The intention in the following is therefore to clarify and discuss what right to education foreign-citizen inmates have - and should have -, with a particular focus on the group of inmates that could be expelled from the country once their sentence is served. The article starts, in section 2, by providing a brief overview of the different types of educational and learning activities provided in prison. In section 3, the focus is on presenting the execution of a prison sentence as a specific framework for the provision of education. The intention is here to show how education in prison relates to the Norwegian legal framework around the execution of sentences, and in particular to the guiding legal principles that follows from the Execution of Sentences Act (hereafter 'ESA').<sup>6</sup> The understanding of this framework is important in order to clarify the content of the right to education for inmates in prison generally and for foreign inmates specifically. Section 4 offers a more specific study of the right to education for foreign inmates. Since there is no distinct regulation of the right to education for inmates in the ESA, the content of this right must be inferred from general provisions on education in national and international law. Finally, in section 5 the article submits and justifies its conclusion: all foreign inmates who serve sentences of certain duration in Norwegian prisons must be ensured access to education on an equal basis with other prisoners.

The question of foreign inmates' right to education gives rise to different legal issues and touches on many areas of the law. The intention of this article is not to provide an exhaustive discussion of the topic, but rather to highlight the most important premises, rules and principles that can subsequently provide the basis for continued discussion. The article is to a large extent grounded in a Norwegian criminal justice context. On the other hand, the questions discussed are of a general and principled nature, and the challenges that are found in the Norwegian system are also found, to a large extent, in other national systems. The argumentation that is presented in the article is thus transferable to a broader European and international discussion.

## **2. Education and learning activities in prison**

There is a diversity of education services and learning activities offered in Norwegian prisons. There is also a great deal of local variety in the format of education offered between different prisons, depending on the security level of the prison, personnel resourc-

<sup>6</sup> 'Straffgjennomføringsloven', *Lov om gjennomføring av straff mv. (straffgjennomføringsloven)*, Lov av 18. mai 2001 nr. 21- An english version is available at <http://www.kriminalomsorgen.no/the-execution-of-sentences-act-in-six-languages.250423.no.html>.

es and not least on the level of cooperation with other public services.<sup>7</sup> Generally, Norway has however invested strong efforts into prison education.<sup>8</sup>

The concept of 'education in prison' relates in the first place to different kinds of formal *school* education. In order to provide access to education to inmates, the so-called 'import model' has been predominant in Norwegian prisons since the early 1970s. This model is founded on the practice of employing educational services from the ordinary public sector so that the education offered in prison is equivalent to the education offered in the society at large.<sup>9</sup>

There is, in this regard, a variety of educational programmes that can be available in prison, at different academic levels. As will be developed in section 4, it is only the provision of primary and secondary school education, as well as some specific language education for immigrants that are imposed by law to the authorities. Only these are provided for by national legislation as *rights* (and sometimes also as obligations). But, depending on the individual circumstances, inmates may also be able to take part in higher academic education by following single courses or entire degree programmes at university. Education in prison also involves the provision of different kinds of vocational training, with the possibility to obtain craft or journeymen certificates.<sup>10</sup>

In addition to formal school education, there are also a variety of informal learning activities in prison that typically do not lead to a certificate. Examples of such are art activities, various types of work training schemes and treatment programmes aimed at issues such as anger management and substance abuse. In relation to foreign inmates it is an important question whether access to formal school education in prison, due to language barriers and resource issues, could be substituted with access to different kinds of informal learning and working activities.

To broach on the matter of the right to education for foreign inmates, we will now undertake a closer study of the execution of prison sentences as a context for education.

<sup>7</sup> See further below in section 3, on the conditions for education in prison. See <http://www.kriminalomsorgen.no/utdanning-og-opplaering.237883.no.html> for a closer description of education in Norwegian prisons.

<sup>8</sup> See Hetland *et al.*, 'Former welfare clients in prison: education and self-reported learning problems', *European Journal of Social Work* (2014) p. 3.

<sup>9</sup> See St. Meld. Nr. 27 (1997-1998) *Om Kriminalomsorgen*, chapter 7.8.

<sup>10</sup> For a study of the quality of different kinds of educational activities in Norwegian prison, see Diseth *et al.* 'Education of prison inmates: course experience, motivation, and learning strategies as indicators of evaluation', *Educational Research of Evaluation* (2008) pp. 201-214.

### 3. The execution of a prison sentence as a context for education

#### 3.1 *The meaning of punishment and its relation to education in prison*

Before proceeding further on the issue of what the right to education specifically entails for foreign inmates, it is important to outline the more general framework of education as part of the execution of a prison sentence. The carrying out of a prison sentence has, as a context for the provision of education, certain peculiarities. Practical and principled issues may arise in the determination of how comprehensive the right to education must be, or should be, for inmates.

The execution of a prison sentence takes place within the criminal justice system, that is, the part of the legal system that involves defining and implementing rules pertaining to *crime* and *punishment*. The correctional services are, as a central system agent, entrusted with the function to ensure that an imposed prison sentence is truly served. In this sense, the serving of a prison sentence is governed by the basic premises of the *concept of punishment*. This concept is therefore an important part of the background to the discussion of the right to education for prison inmates.<sup>11</sup>

Punishment is a matter of *restriction of personal freedom*. Imprisonment entails a more or less comprehensive and prolonged, external limitation of the convict's opportunity to live and function freely. A prison sentence is above all a limitation of the convict's freedom of movement if they are forced to remain within the custodial institution.<sup>12</sup> This restriction of freedom represents – to link it to a traditional notion of punishment – the evil imposed on an individual as a reaction to a criminal act.<sup>13</sup> This traditional conception of punishment stands in contrast to the notion that inmates should be able to enjoy certain benefits such as education, for example. It is also not to be taken for granted that the practical conditions for granting access to education in prison are the same as those for education outside a penal context. As will be shown below, the way that education can be offered and carried out in prison is to a large extent governed by concerns related to security.

At the same time, the legal premise has to be that the execution of a sentence is not only a part of the criminal justice system, but also a part of the legal system as a whole. Thus, the serving of a prison sentence is not governed by penal considerations alone. It is also subject to the basic values and principles of the justice system pertaining to

<sup>11</sup> For a further discussion on the concept of punishment, see Gröning, 'Straffgenomföring som en del av straffrättsystemet', *Tidsskrift for Rettsvitenskap*, vol. 126 (2013) pp. 159-160.

<sup>12</sup> Cf. NOU 1988:37 *Ny fengselslov* p. 49

<sup>13</sup> See for this account on punishment Hart, *Punishment and Responsibility* (Clarendon Press, 1968), pp. 1-27. See for this view in Norwegian criminal law also Andenæs, *Statsforfatningen i Norge*, 9th ed. (Universitetsforlaget, 2004), p. 326 and Rt. 1977 p. 1207.

*individual rights and the principle of equality before the law* – the very ideological foundations of the democratic state under the rule of law. These fundamental principles provide guidance for an understanding of the overarching nature and purpose of the punishment imposed and of the way the punishment is to be administered – including the place that education is to occupy in the serving of the prison sentence. As a starting point in clarifying the content of the right to education for foreign inmates, we will now take a closer look at the legal framework through which such a right must be explained.

### 3.2 *Basic principles of individual dignity as the foundation for criminal justice*

The fundamental values of the legal system are the respect of the individual's autonomy and rights, and the principle of equality before the law. These three aspects can be consolidated into one idea: *respect for the dignity of the individual*. These values are expressed in the constitutional norms of all states under the rule of law as well as in various international human rights instruments, and they can be said to represent universal principles of law.<sup>14</sup>

These values can also be hailed as the ethical underpinning of both the criminal justice system and the execution of prison sentences. More specifically, these basic values are closely linked to two different arguments pertaining to the use of punishment by public authorities.

The first argument concerns the protection of individuals from criminal acts committed by other individuals. This argument stresses the positive obligation on public authorities to react to, deter, and try to prevent violations of individual rights committed by private parties.<sup>15</sup> To a certain extent this argument therefore concerns the safeguarding of social peace through crime prevention. In the context of the execution of sentences, this argument is mainly related to strategies of rehabilitation and social reintegration of the offender.

The other argument is about the protection of the individual vis-à-vis state power, through the limitation and control of power. This argument emphasises a negative obligation on the part of public authorities themselves not to exercise power in a manner that violates the rights of individuals (abuse of power). As such this argument is related to due process requirements in the criminal justice system. In the context of the execution of

<sup>14</sup> See for instance the preamble of the UN covenant on civil and political rights (ICCPR). See also Art. 10 that states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

<sup>15</sup> The ECHR has in this regard emphasised different positive obligations for state parties, with regards to an efficient dealing with crime, see inter alia, *Bubbins v. UK*, Judgment of 17 of March 2005. See further Aall, *Rettsstat og menneskerettigheter*, 3rd ed. (Fagbokforlaget, 2011) pp. 159-162.

sentences, this argument is often applicable to requirements for a respectful and humane treatment of the person.<sup>16</sup>

Since effective crime prevention and protection against abuse of power are two aspects of individual protection, both of these dimensions must be secured in the criminal justice system. On the other hand, the consideration for crime prevention and the protection against abuses of power bring to the fore different concerns for the individual and society as a whole, some of which can come into conflict with one another. In the execution of a prison sentence, there is often a conflict between the need to ensure the safety of society and the need to rehabilitate the individual– with the help of, for instance, education.

The basic arguments pertaining to crime prevention and the limitation of power also have links to theories and perceptions of the purpose of punishment. On a general level, a distinction can be made between theories that link the use of punishment with notions of justice (focusing on guilt and proportionality between crime and punishment) and theories that see punishment as a necessary means by which to achieve crime prevention. On a systemic level, Norwegian law particularly emphasises crime prevention as the purpose of punishment. On the other hand, consideration given to guilt and proportionality restrict whom can be held criminally responsible and how strict the punishment is to be.<sup>17</sup>

These basic values of the criminal justice system and the different conceptions of the purpose of punishment that they are linked to are also reflected in more specific principles governing the execution of sentence. These principles are primarily articulated in section 2 of the ESA. The provision states that '[the] sentence shall be executed in a manner that *takes into account the purpose of the sentence*, that *serves to prevent the commission of new criminal acts*, that *reassures society*, and that within this framework *ensures satisfactory conditions for the prisoners*'. The different principles that are emphasised, and the relationship between them, have been specified to a certain extent in regulations, guidelines, preparatory works and other official documents. We shall now take a closer look at the significance of these principles and their connection with inmates' right to education.<sup>18</sup> We will begin with a look at the significance of the purpose of punishment [*...the purpose of the sentence*] as an argument that has implications for the practical conditions of a prison sentence. Following this, we will clarify the link between crime prevention efforts (*...that serve to prevent the commission of new criminal acts*) and education, to bring a re-integrative perspective to education. The primary focus in this section will nevertheless be on education as a right and as an aspect of '*satisfactory conditions for the prisoners*'. Finally, the significance of the security argument (*'reassures society'*) will be explained as a justification for the limitation of convicts' rights and interests, such as education.

<sup>16</sup> See further Gröning 2013 pp. 166-167.

<sup>17</sup> Cf. Ot. prp. nr. 90 (2003-2004) chap. 6.

<sup>18</sup> See also Gröning 2013 pp. 145-195.

### 3.3 *The principles of the execution of sentences and their significance for the education of inmates*

#### ***The purpose of punishment: education and just punishment***

Section 2 of the ESA states that *the sentence shall be executed in a manner that takes into account the purpose of the sentence*. This means that the criminal justice system's understanding of *the purpose of the sentence* set the framework for its execution. Section 2 does not offer a more detailed specification of what is meant by the purpose of the sentence. Affirmations that appear in the preparatory works and other public documents, however, offer support for the idea that the ESA first and foremost associates the 'purpose of punishment' to arguments about the public's sense of justice, social peace and consideration for the victim.<sup>19</sup>

These arguments are related to concepts of just punishment and a proportional relationship between crime and punishment. Such arguments also provide a rationale for a differentiated system of sentencing, which has concrete significance for the sentence's enforcement when it comes to which security-level is to be chosen, or when there is a reassessment of security needs, for example when a decision is made to grant prison leave or to release the convict.<sup>20</sup>

Taking into account the purpose of the sentence may involve, for example, placing particular emphasis on the public's sense of justice, alongside security concerns.<sup>21</sup> In the case of serious criminality, it might hence be deemed appropriate to place the convict in a high-security prison, even though the isolated concern for security may favour placing the convict in an institution with a lower level of security.<sup>22</sup>

Taking into account the purpose of the sentence may also involve setting aside individual concerns in decisions where convicts are transferred to serve their sentence outside prison (i.e. under house arrest) or where they are placed or transferred to lower security wards. Thus even when considerations of individual rehabilitation are present, such decisions will not be made if they are deemed offensive to the public's perception of justice or to the victim or their family.<sup>23</sup>

<sup>19</sup> See e.g. Ot.prp.nr.5(2000-2001) *Om lovmotgjennomføring av straff mv. (straffegjennomføringsloven)* p. 28 and NOU 1988:37 pp. 46-47.

<sup>20</sup> See further on the differentiation of the Norwegian prison system in different security levels below in the section about 'security as a limiting factor in the execution of sentences'.

<sup>21</sup> On the meaning of 'the public's sense of justice', see Olaussen, *Hva synes folk om straffenivået?: En empirisk undersøkelse* (Novus 2013).

<sup>22</sup> Cf. Ot.prp. nr. 5 (2000-2001) p. 55 and guidelines to ESA point 3.3.

<sup>23</sup> Cf. Ot.prp. nr. 5 (2000-2001) p. 149 and guidelines to ESA points 3.3, 3.11, 3.14.



The practical conditions of a prison sentence are in other words governed by the punishment's purpose and the consideration it is due. This finds expression in the correlation made between the character and seriousness of the offence and its form of enforcement, as well as the prospects for early progression offered to the convict. In this respect, the purpose of the sentence also indirectly affects the educational offer available to the convict, particularly through the practical and security-related prerequisites to its provision.

### ***Education as a part of crime prevention efforts***

Irrespective of the type of institution where a convict is placed, one key aspect of the execution of the sentence is to prevent the commission of new crimes upon release.<sup>24</sup> This is also stipulated in section 2 of the ESA.<sup>25</sup> The crime-preventive function of sentence execution is primarily related to the inmates' rehabilitation and reintegration into society. In this respect, the correctional services' work is particularly intended to provide the resources that are needed for the convict to lead a life free of crime upon release. The focus is on counteracting key crime-causing factors such as unemployment and social exclusion. Accordingly, various forms of professional training, education and treatment are offered within the prison system.

Education is regarded as being particularly important as a measure to avert the commission of new crimes.<sup>26</sup> It is a basic condition for the individuals in society in order to qualify for work and acquire full social inclusion.<sup>27</sup> A number of surveys show that education has a significant and subduing impact on the likelihood of recidivism.<sup>28</sup> Rehabilitation is particularly stressed in prison education when compared to ordinary schools and is governed by the general part of the Norwegian national curriculum.

Education has an important function with regards to crime prevention. In a correctional context, education for inmates should therefore be ensured not only because of its legal status as an entitlement, but also for its crime-preventive effect and the increased

<sup>24</sup> Cf. St.meld. nr. 37 (2007-2008) *Straff som virker – mindre kriminalitet – tryggere samfunn* chap. 9.

<sup>25</sup> The sentence 'shall be executed in a manner [...] that serves to prevent the commission of new criminal acts'.

<sup>26</sup> Cf. e.g. Ot.prp. nr. 5 (2000-2001) p. 98 and St.meld. nr. 37 (2007-2008).

<sup>27</sup> For a philosophical discussion on the different functions of education, see Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (Unabridged Classic Reprint 1916).

<sup>28</sup> Cf. e.g. Chapell, Post-secondary correctional Education and recidivism: A meta-analysis of research conducted 1990-1999, *Journal of Correctional Education*, 55 (2) (2004) pp. 148-167, Steurer & Smith, *Education reduces crime. Three-state recidivism study. Executive summary*. (Lanham/Centerville: Correctional Education Association & Management/Training Cooperation 2003), Wells, *Education as prison reform: A meta-analysis* (Baton Rouge: Louisiana State University 2000).

prospects if offers for the reintegration of convicts upon release. Such a rationale is also sensible in relation to foreign inmates who are to be returned to their country of origin, both as a humanitarian gesture and in the light of increasing organised and international crime.

At the same time, this re-integrative perspective raises questions of funding and burden-sharing between the different countries involved. In order to provide adequate education to foreign inmates, not least due to language barriers, significant economic and human resources may be required. When this education is offered in order to contribute to crime prevention in another country, to which the inmate will be expelled upon release, it seems important that a discussion on burden-sharing mechanisms takes place. Such discussion could also broach on the alternative of transferring convicts to serve their sentence in their home country, or another state where education in their language is available. But what matters ultimately is that the inmates are guaranteed satisfactory conditions in the prison where they actually serve their sentence.

***Satisfactory conditions for the inmates: the right of inmates to education in light of the principles of humanity, equal treatment and normality***

Essentially education for inmates is a benefit encompassed by the obligation on the correctional services under section 2 ESA to provide satisfactory conditions for the prisoners.<sup>29</sup> The right to education, as a human right, is at the core of this requirement. As will be further explained below, the right to education derives from municipal legislation, primarily the Norwegian Education Act, as well as from Norway's international legal commitments. The correctional services are also required under section 4 ESA to cooperate with other public service providers and arrange for convicts to receive the services to which they are statutorily entitled.<sup>30</sup>

The term 'satisfactory conditions' for prisoners, however, encompasses not only the convicts' statutory rights that the authorities are more or less *obliged* to provide for, but also more general principles. In Norwegian criminal policy, there has been a particular emphasis on standards such as a *humanistic outlook on the value of human life, due process, equal treatment, and normality*.<sup>31</sup>

As described above, Norwegian sentence enforcement is rooted in the principles of democracy and the rule of law, among which respect for the individual, which is taken as a foundation for a humanistic outlook on the value of human life. This premise is reflect-

<sup>29</sup> For a further explanation of this aspect, see Gröning 2013 pp. 183-188.

<sup>30</sup> See *Rundskriv G-1/2008 om forvaltningssamarbeid mellom opplæringssektoren og kriminalomsorgen*.

<sup>31</sup> Cf. e.g. St.meld. nr. 37 (2007-2008) p. 7, p. 21.

ed in Art. 10 of the ICCPR, which states that all persons who are deprived of their liberty shall be ‘*treated with humanity and with respect for the inherent dignity of the human person*’. The right to education can also be linked to such a humanistic rationale, for example through the notion that education promotes the individual’s free life choices and brings about the conditions for political participation. In this regard foreign inmates that do not understand or speak Norwegian seem to be a vulnerable group, with special needs. Language education for foreign prisoners is therefore important, in particular for those who serve longer sentences.<sup>32</sup>

Criminal policy further bestows importance on the prisoner’s right to due process and, in particular, on the requirement to equal treatment. A fundamental premise is that all individuals have equal status as human beings and should be formally placed on equal footing before the law.<sup>33</sup> The principle of non-discrimination, as will be discussed below, is also one of the cornerstones of international human rights law and is of the utmost significance for the requirement of equal treatment of foreign inmates.<sup>34</sup>

In a criminal context, the core of the requirement of equal treatment is that all those who commit a crime must be punished, and that those who commit equally serious crimes must be punished equally harshly. In the execution of sentences, the requirement of formal equality should entail, in essence, that similar formal requirements should be imposed on – and similar benefits offered to – different convicts carrying out equally harsh prison sentences. In this vein, convicts should not be subjected to unjustified discrimination when it comes to the enforcement of their sentence or the fulfilment of their statutory rights while in custody. This principle gives weight to the notion that everyone who serves a prison sentence in Norway must be given the same access to realise their right to education, irrespective of their nationality or immigration status.

As will be discussed below, however, the more concrete content of the right to education for foreign inmates without leave to remain is not entirely clear. It is also generally difficult to give a more precise indication of how far the requirement of equal treatment reaches, and what it entails, considering that the execution of the prison sentence is largely adapted to the convict’s individual aptitudes. In any case, one basic requirement is that the correctional services must be able to justify any inconsistent decisions that become apparent, for example in the event that convicts serving sentences under the same institutional conditions are given differentiated access to education due to language barriers.<sup>35</sup>

<sup>32</sup> Cf. Recommendation CM/Rec(2012) 12 of the Committee of Ministers to member States concerning foreign prisoners, para. 29.1.

<sup>33</sup> Cf. e.g. St.meld. nr. 27 (1997-1998) *Om kriminalomsorgen* and St.meld. nr. 37 (2007-2008) p. 21.

<sup>34</sup> See below in section 3.4.

<sup>35</sup> Bernt & Rasmussen, *Frihagens forvaltningsrett*, 2. utg. (Fagbokforlaget 2010) pp. 98-99.

Finally, the *normality principle* gives expression to one of the most important goals in Norwegian penal policy. The notion is that convicts have the same rights as all other members of society, beyond the restrictions that the imposed prison sentence necessarily entails. The deeper ethical rationale behind this principle is also that those who have committed crimes will eventually be re-included as fully worthy members of society, on an equal footing with all others. This principle is articulated in several international legal instruments and has been upheld by the ECtHR in a number of areas.<sup>36</sup> It is also worthwhile to note that the transition in 1969 to an import model for education in prison was based on the premise that convicts should not be deprived of their civil rights.<sup>37</sup>

The normality principle in Norwegian penal law, aside from the aspects that are formally related to the *rights* of the convict, encompasses a more comprehensive objective of ensuring an existence that is as normal as possible while in prison. In this context, various types of activities, including education, are deemed to be important. At the same time, it is clear that normality here cannot mean living a completely normal life in prison. Many of the aspects of living a “normal existence” relate to being able to make free and independent choices. Convicts are precisely deprived of these choices while in custody.

This principle entails nevertheless that the prison sentence should be as little invasive as possible beyond what is required to achieve deprivation of freedom under justifiable, security-related conditions.<sup>38</sup> This line of reasoning also provides support for the idea that access to education should generally be secured to the extent possible with respect to security. As will be discussed below, the security dimension is of crucial importance. Practically speaking, the impact of the sentence on access to education is largely dependent on the type of facility in which the sentence is served, and the security level of the ward in question. Security concerns may also have an impact on the problem of differentiated treatment between national and foreign inmates. The education that is offered to foreign inmates as a substitute for standard school education might be more sensitive to security aspects, for example if additional resources are required.

### ***Security as a limiting factor in the execution of sentences***

It follows from section 2 ESA, read in the light of section 3, that security is a dominant concern. It represents a necessary part of the carrying out of the sentence and can also limit the prisoner’s opportunity to fully exercise all of their rights. The ECtHR has particularly emphasised that restrictions of the convict’s rights can be made when warranted by such security aspects that are part of the sentence.<sup>39</sup> The significance of security concerns

<sup>36</sup> See e.g. *Hirst v. the United Kingdom (No. 2)*, appl. no. 74025/01, 6.10.2005.

<sup>37</sup> St.meld. nr. 27 (2004-2005) section 1.2.

<sup>38</sup> NOU 1988:37 p. 49.

<sup>39</sup> See e.g. *Silver and others v. the United Kingdom*, appl. nos. 5947/72 and others, 25.3.1983.

is clear in the context of the provision of education. In the event of contradictions between the Norwegian Education Act and the Execution of Sentences Act, an administrative solution should be sought in each case, but ultimately the ESA must take precedence.

The prominence of security concerns can be justified both in principle by the criminal justice system's function of crime prevention, and functionally by the institutional prerequisites related to the enforcement of a prison sentence. More specifically, security concerns encompass three different dimensions: the security of society, the internal security of the prison, and the prevention of escape.<sup>40</sup> The security of society essentially depends on members of society being protected by ensuring that convicts do not escape and commit new crimes during their sentence. Escape control is also an independent aim with a more general preventive purpose by ensuring that the sentence imposed on a convict is in fact carried out. The internal security of the prison is a concern of a more institutional nature, to ensure the prison's daily operation as well as the safety of the staff and convicts within the facility.

To ensure an adequate level of security, the Norwegian penitentiary system is differentiated with institutions of varying security levels. Convicts execute their sentences in prisons with high security level (closed prisons) or lower security level (open prisons).<sup>41</sup> The ESA's specifications about security have a large practical impact on the working conditions of school authorities in prison, and on prisoners' access to education. An adequate balance must however be struck between security concerns and the individual needs of inmates.<sup>42</sup>

In this case, it must be underscored that the level of protection of society is not necessarily directly proportional to the institutional security level. The risk of new crimes being committed during the execution of sentence is obviously low if the sentence is served in a high-security level institution. At the same time, a high level of prison security significantly reduces the opportunity to realise a more long-term rehabilitation. The connection between control and new crime is complex, and it is not certain that a lower degree of control results in a convict being more likely to commit new crimes after having served their sentence. Particularly in relation to long-term gains for the safety of wider society, efforts aimed at rehabilitation of central importance.

It is also important to stress that there is a correlation between security, control, and strictness, since institutions with higher security and control levels also typically entail stricter conditions and more restrictions on inmates' freedom. Arguments about strictness may be easily confused with the security/control arguments, since they may well find their expression in ultimately similar freedom-restricting measures. However, it is

<sup>40</sup> Cf. ESA section 11 third paragraph.

<sup>41</sup> See ESA section 10 for the forms of the execution of a prison sentence,

<sup>42</sup> See further on the security argument in Gröning (2013) pp. 188-191.

important to keep these two types of arguments distinct from one another as they are of a different nature. Security and control are related primarily to risk and protection. Strictness is related primarily to repression and just punishment.

It is reasonable that arguments pertaining to just punishment should be influential for the choice of specific enforcement conditions of the prison sentence, such as is the case in the Norwegian differentiated penitentiary system. The choice of facility will in that sense draw on both security and strictness arguments. In all other decisions concerning the execution of sentences, that affect the convict's opportunities and rights in prison, however, only security concerns for security can justify limitations. It is the deprivation of liberty as such that constitutes the punishment.<sup>43</sup> This also means that a potential restriction on foreign inmates' access to education can be justified on the basis of security, in the same manner as for all other inmates, but never out of a notion that the foreign group should be punished more harshly.

In a nutshell, the ESA provides guiding principles that, in various ways, establish the basis for education as a part of the execution of sentences during imprisonment. They constitute the framework, principles and attitudes to be followed to determine access to education and limitations thereto for prison inmates – and these can be said to ultimately endorse the importance of education in prison. With this as a backdrop, we will now study the more specific content of the *right* to education for prison inmates, with particular focus on foreign convicts lacking a residence permit and who may be deported.<sup>44</sup>

## 4. Further on the content of inmates' *right* to education

### 4.1 *Starting points in the Execution of Sentences Act*

The ESA contains no specific rules regulating the actual content of inmates' right to education, since it is the education authorities who are responsible for education provided in prison.<sup>45</sup> Instead, the right to education for inmates follows the rules governing the wider education system, as well as Norway's international obligations.

In both national and international law, inmates are seen to have essentially the same rights to public services, as well as the same obligations and responsibilities, as the gener-

<sup>43</sup> This principle is central in Norwegian law of the execution of sentences, see *inter alia*, NOU 1988:37 p. 48. It is also an importance principle from an ECHR perspective, see *inter alia*, *Hirst v. UK*, para 69.

<sup>44</sup> According to the Norwegian immigration act, foreign citizens born in Norway and who have later had continuous residency may not be deported from Norway, regardless of immigration status.

<sup>45</sup> Cf. ESA section 4.

al public, but with the limitations that are intrinsic to the deprivation of personal liberty imposed by a prison sentence. The rules for education that apply generally in Norway therefore also apply for prison inmates. The right to education is laid down in municipal law, with the Education Act being especially significant, as well as in international instruments.

It must here be mentioned that the relevant human rights instruments apply directly under Norwegian law through their incorporation in Section 2 of the Human Rights Act 1999, and indeed take precedence if coming in conflict with national legislation. This means that national rules must be interpreted in the light of international obligations. We will now examine these rules more closely.

#### 4.2 *The right to education in the Norwegian Education Act and the Norwegian Introduction Act*<sup>46</sup>

The central rules governing the right to education in Norway are found in the Education Act. In this statute a distinction is made between children and young people of compulsory school age (normally 6-16) who, pursuant to the law, have more extensive rights to education, and young people and adults older than the compulsory school age (over 16 in most cases). Most persons in custody in Norwegian prisons are adults who are over the obligatory school age, but since the age of criminal responsibility is 15, there are also some young inmates who are of compulsory school age.

The provision under section 2-1 of the Norwegian Education Act is that all children and young people under the age of 16 in Norway have the right and the obligation to primary and lower secondary education. This applies irrespective of whether the children are Norwegian citizens or foreigners, and irrespective of whether foreign children reside illegally in Norway, as long as it is likely that the child will remain in the country longer than three months. Foreign school-age children and adolescents who are on Norwegian soil thus have a right to education on a par with other children in Norway. They have the right to the same number of hours of teaching, adapted education, special education, language education, and so forth.

Those over 16 years of age who have not received or completed primary and lower secondary education also have the right to such education, cf. section 4A-1 of the Education Act. The right to primary and lower secondary education for persons older than the compulsory school age, however, applies only to those who have legal residency in Norway. However, based on the requirements laid down in the Convention on the Rights

<sup>46</sup> The Norwegian Act on introductory programmes and Norwegian language tuition for newly arrived immigrants, adopted in 2003, commonly referred to as the Introduction Act, instituted free and compulsory language courses for newly arrived foreigners from outside the EU/EEA area.

of the Child, minors between 16 and 18 years of age must also be granted the same right to secondary education. This right should be acted upon when it is likely that the minor will remain in Norway longer than three months.<sup>47</sup>

In the guidelines to the ESA, it is emphasised that young inmates, in particular those with incomplete education, are to be stimulated and motivated to participate in the education offers.<sup>48</sup> The right to primary and lower secondary school education according to the Norwegian Education Act does not apply, however, for persons over 18 years of age who lack leave to remain in Norway.<sup>49</sup>

Persons who have completed primary and lower secondary school or the equivalent have the right to three years of full-time upper secondary education pursuant to section 3-1 of the Education Act. This right to upper secondary education is valid until the end of the calendar year in which the person in question reaches 24 years of age. In addition to the ordinary conditions for admission, it is a requirement for admission to secondary education that the applicant has leave to remain, cf. section 6-9 of the Education Act Regulation.

Adults who have completed primary and lower secondary school and are turning 25 may however apply to receive upper secondary education, provided they have leave to remain in Norway.

In addition to the provisions of the Education Act, foreign nationals derive certain rights and obligations with regards to education from the Norwegian Introduction Act. Pursuant to section 17, immigrants between the age of 16 and 55 and who have been issued a residency permit, or who are refugees meeting the requirement to protection, have both the right and obligation to follow free teaching in Norwegian language and social studies for a total of 600 hours. Pursuant to the second paragraph newly arrived immigrants between the ages of 55 and 67 who have a residence permit have the same right, without it being obligatory. Pursuant to section 18, second paragraph, an obligation is imposed on local authorities to provide up to 2400 further hours of education if they consider the immigrant has a need for this. According to the Introduction Act, immigrants coming to Norway for work and in possession of a working permit do not

<sup>47</sup> Cf. statement of the Norwegian Ministry of Justice and Public Security of 24.11.2010, <http://www.regjeringen.no/nb/dep/jd/agenda/tolkningstalelser/forvaltningsrett/opplaringsloven/-2-1---rett-til-opplaring-for-barn-med-u.html?id=629887>

<sup>48</sup> *Retningslinjer til lov om gjennomføring av straff mv (straffegjennomføringsloven) og til forskrift til loven* section 3.16.

<sup>49</sup> Cf. Ot.prp. nr. 44 (1999-2000) *Om lov om endringer i lov 17. juli 1998 nr. 61 om grunnskolen og den vidaregående opplæringa (opplæringslova) m.m.*



have the right to free education, but are under an obligation to participate in self-financed language tuition.<sup>50</sup>

The provisions in the Education and Introductory acts apply for all persons who meet the criteria in the statutes, and no exception is made for prison inmates. The educational offer must have the same quality as education received outside prison and must be grounded in the national curriculum. Certificates of completion for each educational cycle have the same validity irrespective of where they have been completed.<sup>51</sup>

Such educational rights do not apply to adult foreigners without leave to remain in Norway, as mentioned, nor to inmates who are to be expelled from the country after serving their sentences. Following national legislation this group has no right to either primary or secondary education.

This exception for inmates without residence permit is grounded in the principle of international laws that states by virtue of their sovereignty have the right to govern over their own territory and citizens, and to regulate the individuals who, by virtue of citizenship, are to partake of the welfare benefits of the state. Through various international provisions, primarily on the prohibition of discrimination, this starting point has nevertheless been watered down so that foreigners with strong bonds to a given state must be covered by that state's welfare system. Pursuant to section 4 of the Immigration Act, foreigners residing legally in the realm have the same rights and obligations as Norwegian citizens.

In terms of education, UNESCO's Convention against Discrimination in Education of 1960, in Article 3 (e) stipulates more specifically that member states are obligated to 'give foreign nationals resident within their territory the same access to education as that given to their own nationals'. The 1951 UN Convention relating to the Status of Refugees also provides allocations for certain basic rights for persons who fall under the definition of refugees. The Norwegian rules relating to education are generally in line with international standards.

The requirement to have legal residency in the country in order to participate in the national education system appears in itself to be reasonable – leaving aside the matter of the legal status of paperless immigrants. On the other hand, in specific situations in which foreign citizens are forced to remain in Norway – such as is the case when they are sentenced to a term in prison – it can be problematic to make a distinction based on a person's residency status in questions relating to, for instance, access to education. Such a distinction may entail, in reality, that these persons are denied the human rights to

<sup>50</sup> See Ot.prp. nr. 50 (2003-2004) *Om lov om endringer i introduksjonsloven mv.* chap. 6. This does not apply to any EEA nationals deriving their right of residence from the EEA agreement, or their family members regardless of nationality.

<sup>51</sup> St.meld. nr. 30 (2003-2004) *Kultur for læring.*

which they are entitled under international law. It is thus a question of relevance whether serving a prison sentence, and thus being unable to leave a country where one is residing illegally, may be a satisfactory justification for one to demand a legally enshrined right to access education. Aside from this, the issue is whether such a distinction based on immigration status may actually entail unlawful discrimination.

Keeping these questions in mind, we will now further examine how the right to education for those serving a prison sentence derives from international standards, and how the Norwegian authorities' obligation to ensure this right must be interpreted in the light of international law.

#### 4.3 *The right to education in international law*

The right to education is laid down in a number of international legal instruments. Most of these, however, are not legally binding, but rather are of an advisory nature. The most significant rules pertaining to education are found in the European Convention on Human Rights (ECHR) and the UN's International Covenant on Economic, Social and Cultural Rights (ICESCR). Both conventions are binding and give rise to Norway's international obligations. The ECHR is particularly important in Norwegian law and therefore stands at the core of what is presented in the following.

Article 13 ICESCR provides for '(...) the right of everyone to education.' The provision stresses education as a central aspect for the full development of the individual person. The monitoring committee for the ICESCR has defined basic education needs as including the ability to read and write, express oneself orally, and to live and work in dignity.<sup>52</sup> The provision also establishes relatively extensive rules regarding education at various levels. It is underscored that primary education shall be compulsory and free of charge, and that education at all levels should be available to all. However, the article provides no basis for any requirement on the content of education, and grants state parties a large degree of national discretion when organising their education system. When it comes to actual benchmark achievements, the requirements will thus vary depending on the situation and resources available in the individual state.

In the ECHR, the right to education is enshrined in additional protocol 1 (P1) Article 2. The provision emphasises that no individual shall be denied the right to education. Despite the negative wording, it is made clear in rulings of the ECtHR that the right to education in P1 Article 2 unquestionably represents an additional *right*, that is to say that member states are under an obligation to offer education.<sup>53</sup> However, the provision establishes no specific requirements as to the content of the education offered. It merely grants

<sup>52</sup> General Comment no. 13 (E/C. 12/1999/10)

<sup>53</sup> Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium, appl. nos. 1474/62 and others, 23.7.1968.

to all a right to access existing education institutions in a state at a given point in time.<sup>54</sup> This right encompasses all levels of education.<sup>55</sup> On the other hand, the provision does not impose a duty on the state to establish or subsidise education of a certain kind or at a certain level. The ECtHR's practice also emphasises that the education offered by a state, and its regulation of it, may vary based on the needs and available resources of society.<sup>56</sup> Like ICESCR Article 13, ECHR P1 Article 2 provides little guidance on the more specific content in education for prison inmates.

In addition to the binding international conventions, there are also important non-binding recommendations that can contribute to clarifying what the right to education encompasses for prison inmates. The UN's Universal Declaration on Human Rights has provided guidance for many of the binding conventions that were developed subsequently. Article 26 (1) of the Universal Declaration states that 'Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit'.

In the context of the United Nations, the UN's basic principles for the treatment of prisoners have also been adopted. It is emphasised there that all prisoners shall have the right to partake of education.

Within the Council of Europe a number of different recommendations concerning the situation and rights of prisoners have been adopted. In the Council of Europe's recommendation of 21 June 1984 pertaining to foreign prisoners, it is stipulated that foreign inmates shall have the same access to education and technical training as other inmates. Furthermore, in the Council of Europe's recommendation 'Education in Prison' of 13 October 1989, seventeen more specific recommendations are given for education provided in prison. The recommendations lay down, *inter alia*, the objectives of education in prison, the relationship between education inside and outside prison and education's place in the prison system. In section 1, it is stated that 'All prisoners shall have access to education, which is envisaged as consisting of classroom subjects, vocational training, creative and cultural activities, physical education and sports, social training and library facilities'.<sup>57</sup>

A document of great importance for Norwegian law is the Council of Europe's 'European Prison Rules'.<sup>58</sup> The prison rules contain, in Article 28, relatively extensive rules

<sup>54</sup> *Oršuš and Others v. Croatia*, appl. no. 15766/03, 16.3.2010.

<sup>55</sup> *Leyla Şahin v. Turkey*, appl. no. 44774/98, 10.11.2005.

<sup>56</sup> *Ponomaryovi v. Bulgaria*, appl. no. 5335/05, 28.11.2011.

<sup>57</sup> See also Resolution (73) 5 standard minimum rules for the treatment of prisoners, §§ 78-82.

<sup>58</sup> Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules Adopted by the Committee of Ministers on 11 January 2006.

for education. Among other things, it is specified that all prisons shall strive to provide all prisoners access to educational programmes that fulfil individual needs and at the same time take into account the hopes and expectations of the prisoners. Furthermore, priority must be given to inmates with special needs related to reading, writing and arithmetic deficiencies, and to inmates lacking primary school or vocational training. In this respect, special emphasis is to be placed on schooling for young inmates and prisoners with special needs.

In a general sense, international law proclaims quite clearly that education is a right to which all are entitled, including convicts serving a prison sentence. No specific obligation on public authorities is imposed through international law, however, to offer education of any special nature or at any particular level. In addition, it is recognised that the specific content of the education on offer may, to a certain extent, be dependent on the resources and welfare structures available. Certain requirements as to the level and quality education offered can however be derived from non-binding regulations. In these, access to education for all inmates is underscored, and no distinction is made between prisoners with or without residence permit in the country in which they are imprisoned. Nevertheless, the binding instruments of public international law, when addressing the right to education, do not of themselves provide an answer to the question of whether foreign inmates who are to be expelled from the country after they have served their sentences may be treated differently from other prisoners. To answer this question we must examine more closely the rules of international law on the principle of non-discrimination.

### 3.4 *The principle of non-discrimination*

It is a general principle of human rights that all are equal before the law, and the prohibition against discrimination is laid down in a number of international instruments. It is enshrined in ICESCR Art. 2 and ECHR Art. 14 as a requirement that the enjoyment of the rights and freedoms set forth in the conventions must be secured without discrimination. Article 26 ICCPR also contains a prohibition on discrimination.

Direct discrimination arises, simply stated, when persons in comparable situations are treated differently without an objective and reasonable justification. Indirect discrimination arises when the treatment of persons in different situations is governed by the same criteria, which at face value are not discriminatory, but which do affect one group differently than another and therefore have an indirectly discriminatory effect. In what follows, only direct discrimination will be discussed, since it is most relevant for the issue of prisoners' right to education. To clarify the implications of the principle of non-discrimination in terms of inmates' right to education, we must turn to Art. 14 ECHR and relevant ECtHR practice. Art. 14 ECHR gives rise to obligations that are at least equivalent to non-discrimination provisions in other international instruments, and sometimes

stretch further, so that examining Art. 14 will be sufficient to ascertain Norway's obligations.

The principle of non-discrimination in Art. 14 must be applied in conjunction with other, material, rights in the convention, among these the right to education. However, a violation of the material right or freedom at hand need not have taken place for the court to hear a claim of discrimination.<sup>59</sup> In other words, a discriminatory practice against foreign prisoners can be found to have taken place, even if their right to education under P1 Art. 2 has not been violated as such. In this way, the principle of non-discrimination in an educational context may entail material requirements that go beyond what is required under P1 Art. 2 as such, which as we have seen does not set out a defined standard as to the content of the education offered.

For discrimination to exist, there has to be a difference of treatment of persons in analogous or relevantly similar situations based on an identifiable characteristic or 'status'.<sup>60</sup> The difference in treatment must be directly linked to the characteristic or status, and there should be no other reasons that can justify it. Thus, not every difference in treatment is in breach of the convention, it is rather such differential treatment that has no objective and reasonable justification that is targeted. Differential treatment is regarded as objective and reasonably justified if it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>61</sup>

Since P1 Art. 2 does not stipulate any requirement as to the material content of education, but merely indicates an obligation to attain a result, there is no requirement here that all prisoners must be offered the *same* education. Norwegian and foreign inmates can be offered education with a different content without it amounting to discrimination, as long as the education's quality and scope are of *equivalent value*. A differentiated educational offer can on the contrary be regarded as necessary, taking into account the different needs and background of the inmates. In this respect, the Ministry of Justice has stressed that education offered to foreign prisoners who are to be deported from the country after serving their sentence, should seek to impart them with qualifications that may be useful to pursue work or further education in their home country. Education, therefore, must not be based on the Norwegian curriculum, but should rather offer programmes that will be of use to the prisoner, for example training in foreign languages and in practical subjects.<sup>62</sup>

<sup>59</sup> See e.g. *Sommerfeld v. Germany*, appl. no. 11956/07, 8.7.2003.

<sup>60</sup> See e.g. *Carson and Others v. the United Kingdom*, appl. no. 42184/05, 16.3.2010.

<sup>61</sup> Belgian Linguistic Case.

<sup>62</sup> St.meld. nr. 27 (2004-2005) section 3.5.

Art. 14 ECHR (and Art. 2 ICESCR) provide a non-exhaustive list of attributes that discriminatory practices may refer to, among them nationality. Immigration status is not mentioned in the list, and on the basis of the international law of state sovereignty, it is certainly not self-evident that differences in treatment based on immigration status automatically amount to discrimination.<sup>63</sup> Grounds for discrimination must be understood as attributes that should not be regarded as relevant to enjoy a certain treatment or to attain a specific benefit. In ECtHR practice, immigration status in conjunction with nationality has nevertheless been deemed as such a discrimination ground, even though from the outset there is a general acceptance that the state may need to treat this group of foreigners differently.<sup>64</sup>

In principle, differences in treatment both between Norwegian and foreign inmates, and between foreign inmates depending on immigration status, can therefore amount to discrimination on the basis of nationality. The question is whether differences in treatment between these groups of inmates, with regards to the education that is offered to them, are tantamount to discrimination.

It is crucial here whether a foreign prisoner without leave to remain can be regarded as being in an analogous situation to other prisoners. To a certain extent, this question is unresolved. The fact that the prisoners serve sentences in the same prison system and on the basis of the same penal rules would tend to affirm that their situation is analogous. On the other hand, as mentioned above, it is under international law generally accepted to treat differently aliens without leave to remain. The ECtHR, in a ruling regarding the deportation of an alien that engaged in criminal activities, stated that foreigners are not in the same situation as the state's own citizens, precisely because they lack protection against deportation.<sup>65</sup> However, in different case on paternity with a focus on the right to a fair trial, the court came to the opposite conclusion, namely that the state had no right to distinguish between aliens on the basis of immigration status.<sup>66</sup> It was decisive that the case revolved around a fundamental right, and that the difference in treatment on the part of the state resulted in the applicant being in reality deprived of the opportunity to exercise his right.

It is a general principle of international law that human rights must not be theoretical or illusory, but practical and effective. A weighty argument in this connection, therefore, is that a foreign prisoner without leave to remain in Norway, but who is serving a sentence in a Norwegian prison, is prevented for the duration of the sentence from pursuing a different education than that which is offered in prison. The longer the imprisonment,

<sup>63</sup> Cf. doc. United Nations Economic and Social Council *The right to education* (Art. 13: 08/12/99. E/C. 12/1999/19. (General Comments) on children's right to education.

<sup>64</sup> Cf. e.g. *Ponomaryovi v. Bulgaria*.

<sup>65</sup> *Moustaquium v. Belgium*, appl. no. 12313/85, 18.2.1991.

<sup>66</sup> *Anakomba Yula v. Belgium*, appl. no. 45413/07, 10.3.2009.

the greater the loss of rights that is involved for the prisoner if no access to education is given. For convicts serving sentences of a certain length, the leading principle should then be that foreign prisoners who are to be deported should not be treated differently than other prisoners.

To the degree that foreign prisoners are not given an equivalent offer of education, the third and decisive question is whether this difference in treatment must be seen as objective and reasonably justifiable, and as such compliant with the ECHR, or on the opposite whether this amounts to discrimination. In its appraisal of whether something is discriminatory, the ECtHR ultimately conducts a proportionality assessment based on the assumption the practice is in fact based on a legitimate aim, but where the question is whether the measures taken are in reality proportional to the aim to be achieved. Legitimate objectives in this respect can be linked to challenges of a practical nature or related to limited resources, such as teaching materials being unavailable, or interpreter services in the classroom being too resource-demanding.

As we have seen, security concerns are of particular import in the ESA. In the assessment of proportionality, state parties are given a certain margin of appreciation, the scope of which depends on the significance of the specific right in question. Still, as has been mentioned, rights deriving from the convention must not be illusory, and states may not invoke their margin of appreciation when the result is that the individual is denied the opportunity to exercise his rights.

In a proportionality assessment of the limitations on the prisoner's access to education, it then appears adequate to take into account the length of the sentence. The longer the imprisonment, the greater the loss of rights for the prisoner if no access to education is offered whatsoever. And the shorter the imprisonment, the greater are the practical challenges for the Correction services to secure an education offer. The planning and realisation of education, as well as the inmate's benefit from it, simply requires a certain time.<sup>67</sup> In assessing the consequences of the difference in treatment towards foreign convicts without leave to remain, importance may also be attached to whether relevant offers are made available to them as an alternative to the education offered to other prisoners, such as social activities or training in foreign languages and practical subjects. It must however be recalled that informal learning activities can hardly be considered a satisfactory substitute for formal education leading to a diploma, particularly with regards to the most basic skills required in society. In this regard it must also be recalled that prison inmates typically have a significantly lower educational level than the general population.<sup>68</sup> Another way of considering the issue is that different learning activities may be positive

<sup>67</sup> Cf. St.meld. nr. 27 (2004-2005) p. 3.5.

<sup>68</sup> See Hetland *et al.* (2014) pp. 1-14.

for inmates' personal development and reintegration upon release, *in addition to* school education rather than instead of it.

In any circumstance, a systematic deprivation of foreign inmates' access to education based exclusively on the rationale that they lack leave to remain and could be expelled after release is problematic in relation to the principle of non-discrimination. Inmates' access to education, and any need for limiting this right, must be individually assessed and be justified in every given case. Foreign prisoners are not a homogeneous group, but rather a group of individuals with different levels of competence and different learning aptitudes. The intention, for these inmates too, must be to adapt the educational offer to their individual needs, with regards to the prisoner's background and most importantly taking into account the length of the sentence to be served. It should also be added that in many cases it is unclear while the sentence is being served, whether a deportation order upon release may not be in violation with national and international legislation, and thus whether convicts, even without legal immigration status, will in fact be deported, or on the contrary be ultimately given a residence permit by virtue of their connection with Norway.

## **5. Concluding remarks**

Education is an important element in the execution of prison sentences, and the right to education has roots both in the ESA and more general legal principles. As a human right, the right to education applies to everyone, including to those who are serving sentences in prison – irrespective of their nationality. Nevertheless, education is normally offered through national education systems which are a part of the states' welfare structures. This means that to a certain extent there is a tension between education as a civil right – applicable to citizens – and education as a human right. Persons without immigration status in a state, including some foreign prisoners, are covered by the right to education as a human right but are not necessarily to be included in the state's education system and the national rules governing access to education for the state's own citizens. At the same time, both national and international law contain a general prohibition against discrimination which implies that all those in analogous situations, such as prisoners serving time in a Norwegian prison, must be given an equal offer of education. What is ultimately crucial is that all inmates are able to exercise their rights practically and effectively, and that these must not be theoretical or illusory. The conclusion in this respect has to be that foreign inmates who serve sentences in Norwegian prison of a certain duration must be ensured access to education on an equal footing with other prisoners.

International law nevertheless provides no full clarification for exactly how far the state's obligations stretch when it comes to ensuring a suitable and individualised offer of



education for foreign prisoners. There is thus room for a legitimate resource assessment. Here the re-integration potential of education could support the idea burden-sharing mechanisms. It could also be an argument for transferring prisoners to serve their sentence in their home country, or a country where education is available in their own language. But as long as such bilateral agreements have not been negotiated, the state where the inmate has to serve their sentence should bear the responsibility to offer education that is in quantity and quality equal to that offered to other inmates.

Education for prisoners should, ultimately, not only be highlighted as a legal right under national and international law, but rather the right to education must above all be considered in the light of the basic ethical considerations of respect for the individual and equality that have shaped the democratic state under the rule of law. In the context of the Execution of Sentences Act, the foundational principles of ensuring prisoners satisfactory living conditions and preventing the commission of new crimes are of particular relevance. Drawing on more general legal principles, there is a strong case to be made for preserving and safeguarding the general attitude taken in Norwegian penal policy that all prisoners should be offered an equal access to education irrespective of their nationality, immigration status, or whether they might be deported upon release. Only this attitude can be justified from a legal ethics perspective and on humanistic grounds.