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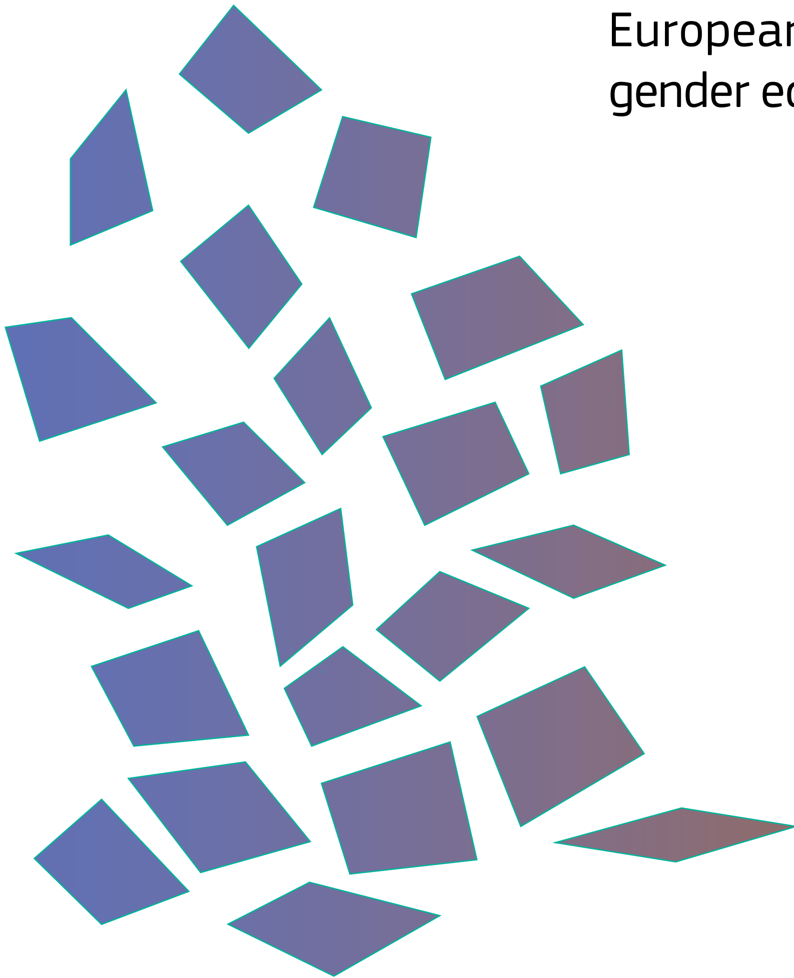

Racial discrimination in education and EU equality law

Including summaries in English, French and German

Justice and Consumers

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Racial discrimination in education and EU equality law

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Abbreviations

CADE	Unesco Convention Against Discrimination in Education
CADO	Centre for Advocacy and Human Rights (Romania)
CEE	Central and Eastern Europe
CERD	Committee on the Elimination of Racial Discrimination
CFCF	Chance for Children Foundation (Hungary)
CJEU	Court of Justice of the European Union
CNCD	National Council for Combating Discrimination (Romania)
CRC	United Nations Convention on the Rights of the Child
DIHR	Danish Institute for Human Rights (Denmark)
DO	Equality Ombudsman (Sweden)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights (the Strasbourg Court)
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
EDUMIGROM	Ethnic differences in education and diverging prospects for urban youth in an enlarged Europe project
ESA	Equal Status Acts (Ireland)
ESCR	European Committee of Social Rights
ETA	Equal Treatment Act (Hungary)
ETC	Equal Treatment Commission (Netherlands)
FCNM	Council of Europe Framework Convention on the Rights of National Minorities
GHM	Greek Helsinki Monitor (Greece)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IESCR	International Covenant on Economic, Social and Cultural Rights
KZD	Protection Against Discrimination Commission (Bulgaria)
NHRI	National human rights institutions
OSJI	Open Society Justice Initiative (Open Society Foundations)
PADA	Protection Against Discrimination Act (Bulgaria)
RED	Racial Equality Directive
UNESCO	United Nations Educational, Scientific and Cultural Organisation

Executive summary

This thematic report analyses national and international (case) law and assesses the jurisprudential and practical impact of the Racial Equality Directive on racial or ethnic discrimination in education. The report is based on information and analysis provided by the national experts of the European network of legal experts in gender equality and non-discrimination by means of a questionnaire addressing the major themes. The report indicates the contribution of each national expert and, where available, refers to the primary sources of the analysis. The report hereafter comprises an introduction followed by 5 sections: the first maps out the multiple sources of European equality law on racial or ethnic discrimination in education. Section 2 presents up-to-date information about national legislation and its compliance with EU law and international treaties signed and ratified by the Member States. Section 3 analyses national jurisprudence on racial or ethnic discrimination in education. Section 4 investigates the enforcement of racial equality in education and Section 5 sets out our overall conclusions.

The Racial Equality Directive[1] (RED) prohibits racial discrimination in the field of education in both the private and public spheres. The directive does not exist in a vacuum, as is recognised in its preamble, which refers to various international human rights treaties that prohibit racial discrimination and/or safeguard the right to education, and have been signed, as well as ratified by the Member States. To fully grasp the right to equal treatment in education in relation to racial or ethnic origin, the report charts its historical evolution under international and EU law, with specific attention to ethnic minority education and the 'integrationist rationale' governing it.[2]

Section 1 spells out the meaning and scope of Articles 2 and 3(g) of the Racial Equality Directive, on the types of discrimination and the field of education. International treaties approach racial and ethnic discrimination in education from different angles, of which some are analogous with the directive, while others are not. It is argued that apparent clashes between the teleologies and interpretations of the relevant treaties and the directive can be resolved with reference to the EU Charter of Fundamental Rights (the Charter) and the case law of the Court of Justice of the European Union (CJEU), in other words, the legal regime can be rendered coherent and consistent with adequate interpretive tools.

The anti-discrimination regime in EU Member States has been described as multi-source and interordinal,[3] meaning that the norms stem from a host of treaties – United Nations and Council of Europe treaties, European Union treaties and directives – and national anti-discrimination laws, being enforced by diverse (international) courts, tribunals and agencies in a field where legal action can be channelled in a variety of ways, including but not limited to, references for a preliminary ruling to the CJEU and individual complaints to the European Court of Human Rights (ECtHR). Importantly, insofar as the RED is concerned, the most important sites of enforcement are national courts and equality bodies, i.e. bodies established to promote racial equality under Article 13 of the Racial Equality Directive.

At the UN level, the analysis centres on the UNESCO Convention Against Discrimination in Education (CADE), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child and the Covenant on Economic, Social and Cultural Rights, which all prohibit discrimination in education. The academic and advocacy focus on case law under the European

1 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, (Racial Equality Directive) OJ L 180, 19/7/2000, pp. 22-26.

2 Thornberry argues that the UNESCO Convention Against Discrimination in Education (CADE) favours a 'majoritarian view' of integration over ethnic separation. See, Thornberry, P. (2016), *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, OUP, pp. 378-383.

3 Gordillo, L. (2012) *Interlocking Constitutions: Towards an Interordinal theory of National, European and UN Law*, Oxford: Hart Publishing.

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), particularly on *D.H. and Others* v. *the Czech Republic*[4] (and other Roma education cases) has overshadowed the significance of UN treaties in shaping and clarifying the normative foundations of equality and non-discrimination in the education of racial or ethnic minority children, despite the fact that the latter contain nuanced and detailed normative prescriptions for the multitude of players who shape education in Europe. Moreover, the prevailing discourse has taken the limelight away from judgments that address highly salient issues across the EU, such as language-based discrimination, which was dealt with in *Oršuš and Others* v. *Croatia* and various domestic judgments.[5]

UN treaties are key for the interpretation of discrimination in education, particularly because unlike the ECHR and EU law, they explicitly prohibit segregation as a free-standing form of discrimination. Although CADE and ICERD explicitly prohibit segregation, they do not define it. However, they provide important signposts for interpretation of the concept. For instance, they do not require that segregation be forced and/or total, i.e. that only fully segregated educational units should count as segregated. While ICERD categorically prohibits racial segregation, CADE provides a set of conditions under which segregation may exceptionally be permissible.

Bearing in mind these specificities, the report investigates segregation in EU and national laws from the perspectives of prohibition, definition and justification. Given its salience at the regional level, the analysis takes the ECtHR jurisprudence as a starting point and shows in what way it can serve as a baseline for adjudication by the CJEU and national courts in the application of the Racial Equality Directive. Building on Advocate General Sharpston's opinion in *Bougnaoui*,[6] the report highlights that the *principle* of equal treatment safeguarded in Article 14 of the ECHR yields a different level of protection than the *right* to equal treatment ensured in Protocol 12 of the ECHR, the Racial Equality Directive, and various other international treaties, as well as national laws. Pursuant to Article 52(3) of the EU Charter of Fundamental Rights,[7] the meaning and scope of the principle of non-discrimination embedded in Article 21 of the Charter should be the same as the corresponding right in the ECHR. Given, however that the ECHR itself provides for non-discrimination as a principle (Article 14) and equal treatment as a right (Protocol 12), the potential difference in adjudicating cases under the two provisions must be resolved, and in that respect, this report relies on the Advocate General's opinion in *Bougnaoui* with reference to Article 51 of the Charter.

The report draws on the Court of Justice of the European Union's *CHEZ*[8] verdict to exemplify the use of the Charter and the way in which the Convention case law can be rendered coherent with the directive. The leading Roma rights case under Protocol 12 ECHR that safeguards the *right* to equal treatment – *Sejdić and Finci* v. *Bosnia and Herzegovina*[9] – served as the key reference point in *CHEZ,* which creates a bridge between the Convention (Protocol 12) and the Racial Equality Directive, simultaneously clarifying the applicability of ICERD.

4 ECtHR, *D.H. and Others* v. *The Czech Republic*, [GC] No. 57325/00, judgment of 13 November 2007.
5 ECtHR, *Oršuš and Others* v. *Croatia*, [GC] No. 15766/03, judgment of 16 March 2010.
6 CJEU, Opinion of Advocate General Sharpston of 13 July 2016, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH)* v. *Micropole SA*, Case C-188/15, ECLI:EU:C:2016:553.
7 Charter of Fundamental Rights of the European Union, 2000/C 364/01.
8 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD* v. *Komisia za zashtita ot diskriminatsia (Nikolova)*, Case C-83/14 ECLI:EU:C:2015:480; Opinion of Advocate General Kokott delivered on 12 March 2015 in *CHEZ Razpredelenie Bulgaria AD* v. *Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:170.
9 ECtHR, *Sejdić* and *Finci* v. *Bosnia and Herzegovina*, [GC] Nos. 27996/06 and 34836/06, judgment of 22 December 2009.

The first thematic report on racial discrimination in education[10] generated debate among legal scholars[11] as concerns the qualification of segregation under EU law. The current report revisits a significant aspect of jurisprudence, namely that although the ECtHR has neither established that segregation amounts to direct discrimination as such, nor held that direct racial or ethnic discrimination is not justifiable on the basis of a proportionality test – a key point of conflict with EU law – it has nonetheless found justification defences inadequate in practice.

The child's best interest conceived as being free from racial segregation – the safeguarding of which is a pressing public interest – has been given primacy in Strasbourg adjudication,[12] but this principle has come into conflict with the parents' free choice in domestic case law. The long-standing and ever-changing nature of racial discrimination and the central role that free choice plays in domestic policy, public debates and case law requires special attention, therefore the report discusses the ways in which potential conflicts between the basic tenets and principles should be resolved. The implications of Strasbourg jurisprudence for the interpretation of assumed, associated and multiple discrimination are also assessed.

Section 2 is dedicated to national law. It summarises information relayed by country experts on the national legal framework, canvassing the prohibition of discrimination in education, the scope of protection – particularly as concerns selection, admission, expulsion, transfer and disciplinary measures – and the explicit prohibition of harassment and segregation. The analysis pays particular attention to the normative sources at the national level, detailing whether provision is made in anti-discrimination law, education law, secondary legislation or other forms of regulation.

Section 3 analyses jurisprudence by delving into the Member State level to capture the true nature of the complex interordinal legal regime and the significant impact that EU law has had through decentralised enforcement, i.e. adjudication by domestic courts. We have highlighted cases in which domestic interpretation does or does not comply with the standards laid out in treaty law. The case law of national courts, equality bodies and field specific enforcement agencies (school inspectorates) is conceived as part of EU law's decentralised application,[13] driven by collective legal action in various Member States.[14]

Key elements of racial equality in education are identified and, for each area, the report presents the requirements and standards set out in the multi-source legal regime, and then presents the interpretation found in national jurisprudence. Each sub-section concludes with a comparison, pointing out differences, tensions and, if relevant, the non-compliance of national (judicial) interpretation with EU anti-discrimination law. The following key elements are addressed and compared with national case law: the prohibition of discrimination (direct, indirect and harassment); the explicit/implicit prohibition of segregation, assumed, associated and multiple discrimination; the use of ethnic data (statistical

10 Farkas, L. (2007) *Segregation of Roma Children in Education: Addressing structural discrimination through the Race Equality Directive*, Luxembourg, European Commission.

11 Goodwin, M. (2009) 'Taking on racial segregation: the European Court of Human Rights at a *Brown* v. *Board of Education* moment?' *Rechtsgeleerd Magazijn* THEMIS 2009-3, Devroye, J. (2009) 'The Case of *D.H. and Others* v. *the Czech Republic*', North Western Journal of International Human Rights, Vol. 7(1), pp. 81-101, Medda-Windischer, R. (2009) 'Dismantling Segregating Education and the European Court of Human Rights. *D.H. and Others* vs. *Czech Republic*: Towards an Inclusive Education?', *European Yearbook of Minority Issues*, Vol. 7, 2007/8. O'Nions, H. (2010), 'Divide and Teach: educational inequality and the Roma', *International Journal of Human Rights*, Vol. 14, issue 3, pp. 464-489. Van den Bogaert, S. (2011) 'Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters', *Heidelberg Journal of International Law*, (*Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*), Vol. 71, pp. 719-754. Arabadijeva, K. (2016) 'Challenging the school segregation of Roma children in Central and Eastern Europe', *The International Journal of Human Rights*, Vol. 20 (1). Rosa Drown, R. (2013) 'Equal Access to Quality Education' for Roma: how indirect and unintentional discrimination obstructs progress' *Race Equality Teaching*, Vol. 31, No. 2, Spring 2013, pp. 32-36.

12 ECtHR, *D.H. and Others v. Czech Republic*, [GC] No. 57325/00, judgment of 13 November 2007, para. 203.

13 Albors-Llorens, A. (2014) 'Judicial protection before the Court of Justice of the European Union', *European Union Law*, pp. 255-299.

14 EU anti-discrimination law introduces requirements that facilitate collective enforcement. See, Claire Kilpatrick and Bruno de Witte in Muir, E., Kilpatrick, C., Miller, J. and de Witte, B. (eds) (2017), *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum*, EUI Working Papers, Law, p. 4.

evidence); material scope of provisions; justification defences with particular emphasis on the child's best interest and free choice; and finally, sanctions.

The analysis in Section 4 takes into account the significant differences in enforcement across the Member States. In **Ireland**, **Sweden**, and **France** – and previously in the **Netherlands** – the equality bodies have investigated complaints and/or assisted applicants. Elsewhere in the west and more particularly in southern Europe, individual litigation has been the major avenue of enforcement, with few legally focused non-governmental organisations engaging in (collective) legal action, such as in **Greece**. In contrast, *quasi*-judicial agencies in eastern Europe have played a significant role; for example, the **Romanian** equality body has developed robust standards for protection against ethnic segregation. In **Bulgaria**, **Hungary** and **Slovakia**, representative actions brought by specialised NGOs have mobilised courts to protect the right of Roma children to equal treatment in education. In the **Czech Republic** and **Slovakia**, the public defenders of rights and school inspectorates have bolstered the fight against school segregation.

This report describes the role that equality bodies, national human rights institutions and school inspectorates have played in stemming racial discrimination in education. Field-specific agencies such as school inspectorates can act as agents of EU law, as they have done in the **Czech Republic** and **Slovakia**, or fail to engage in enforcement despite specific requests to do so, as is the case in **Romania** and **Hungary.** The failure of education-specific agencies to engage with EU anti-discrimination law is a deeply troubling aspect of non-compliance, particularly because the level of equality body engagement also varies across the Member States.

Incoherence between European and domestic adjudication can disadvantage racial minorities, while national judicial and agency activism can provide sanctions and remedies that benefit the communities. Given that the literature has focused on international adjudication, little is known about the way in which domestic (quasi)judicial bodies enforce EU law. The report seeks to fill this gap and offer good practice examples for agencies and courts, national and European actors.

Two decades after the adoption of the Racial Equality Directive, the question of enforcement occupies a central place in debates and research. The section on the enforcement of racial equality in education presents recent insights into private enforcement undertaken primarily by legally-focused non-governmental organisations alongside an assessment of public enforcement by equality bodies and other agencies. Against the backdrop of social research findings on persisting educational inequalities, the report reflects on studies about legal enforcement: the 2015 study on Strasbourg litigation published by the Open Society Justice Initiative (the Zimova report for OSJI),[15] the 2015 study of policy interventions issued by the Harvard FXB Centre (the Matache report),[16] insights into the *D.H.* campaign on school integration (*Realizing Roma Rights*)[17] and OSJI's 2018 global report on the impact of strategic litigation.

The thematic report conceives of legal enforcement as 'integral to a holistic social change strategy that may also include community mobilisation, leadership and economic development, media outreach, policy analysis, and empirical research',[18] which is driven by individuals, communities, NGOs, activists, agencies and courts. Section 4 sketches developments in every setting where European equality law is enforced.

15 Zimová, A. (2016) *Strategic Litigation Impacts: Roma School Desegregation*, OSJI, March 2016.

16 FXB Center for Health and Human Rights (2015) *Strategies and Tactics to Combat Segregation of Roma Children in Schools, Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria and Greece*, Harvard University.

17 Bhabha, J., Mirga, A. & Matache, M. eds., (2017) *Realizing Roma Rights* University of Pennsylvania Press.

18 Hershkoff H. and Hollander, D. (2000) 'Rights into Action: Public Interest Litigation in the United States' in *Many Roads to Justice*, p. 90.

The difficulties of enforcing groundbreaking judicial rulings that grant or broaden the scope of fundamental rights has a vast literature in research on law and society in the United States[19] and the most recent strand highlights the importance of investigating law in conjunction with politics and courts, lawyers, as well as other actors who use the law in order to achieve social change.[20] The report draws on these insights when mapping the extent to which norm compliance is facilitated by community organising, financial incentives, policy initiatives, public or private enforcement, direct action, or a combination of these social change tools. It seeks to answer the question whether, in relation to racial discrimination in education, enforcement has been funded from public or private resources, and driven by individuals or collective actors (i.e. bundled claims, representative action[21] or *ex officio investigations*). Which collective actor has been the most active: minority communities, (inter-racial) NGOs or public agencies?

Impact may be measured in terms of structural changes with a generally decreasing level of inequality, but the local and/or immaterial effects of judicial rulings, such as the recognition of the harm to dignity[22] or the momentum that important precedents create for advocacy and direct action in a circular trajectory of (legal) mobilisation may also indicate meaningful social change. The report reflects on these ideas of impact and success, looking beyond 'paper remedies' to see whether they become effective, proportionate and dissuasive in the hands of courts, public authorities, NGOs, lawyers and minority communities.

19 See, Rosenberg, G.N. (1991) *The hollow hope: Can courts bring about social change?*, University of Chicago Press and Rosenberg, G.N. (1992) 'Hollow hopes and other aspirations: A reply to Feeley and McCann', *Law and Social Inquiry*, Vol. 17, No. 4, 1992, pp. 761-778., McCann, M. (1992) 'Reform litigation on trial', *Law and Social Inquiry*, Vol. 17 No. 4, 1992, pp. 715-743. McCann, M. (1996) 'Causal versus constitutive explanations (or, on the difficulty of being so positive…', *Law and Social Inquiry*, Vol. 21 No. 2, pp. 457-482.

20 Cummings, S. L. (2017) 'Rethinking the Foundational Critiques of Lawyers in Social Movements', *Fordham Law Review*, Vol. 85, 1987.

21 For a short discussion on representative action see, Farkas, L. (2014) 'Collective actions under European anti-discrimination law', *European Anti-discrimination Law Review*, Issue 19.

22 McCann, Michael (1994) *Rights at Work: Pay equity reform and the politics of legal mobilisation*, Chicago, University of Chicago Press.

Résumé

Le présent rapport thématique s'attache à examiner le droit national et international (et sa jurisprudence) et à évaluer l'impact jurisprudentiel et concret de la directive relative à l'égalité raciale sur la discrimination raciale ou ethnique dans le domaine de l'éducation. Basé sur les informations et analyses transmises par les membres nationaux du Réseau européen d'experts juridiques en matière d'égalité des genres et de non-discrimination au moyen d'un questionnaire couvrant les principaux thèmes, il indique la contribution de chacun desdits experts nationaux et, dans la mesure du possible, les sources primaires de l'analyse. Le rapport ci-après comprend une introduction suivie de cinq chapitres: le premier recense les multiples sources du droit européen en matière d'égalité portant sur la discrimination raciale ou ethnique dans le domaine de l'éducation; le deuxième fournit des informations actualisées concernant les législations nationales et leur conformité au droit de l'UE et aux traités internationaux signés et ratifiés par ses États membres; le troisième chapitre analyse la jurisprudence nationale consacrée à la discrimination raciale ou ethnique dans le domaine de l'éducation; le quatrième se penche sur la mise en application de l'égalité raciale dans l'éducation; et le cinquième présente nos conclusions générales.

La directive sur l'égalité raciale[1] (DER) interdit la discrimination raciale dans le domaine de l'éducation tant pour le secteur public que pour le secteur privé. La directive n'existe pas isolément, ce que reconnaît son préambule en faisant référence à divers traités internationaux relatifs aux droits de l'homme qui interdisent la discrimination raciale et/ou protègent le droit à l'éducation, et qui ont été signés et ratifiés par les États membres. Afin d'appréhender pleinement le droit à l'égalité de traitement dans le domaine de l'éducation sous l'angle de l'origine raciale ou ethnique, le rapport en retrace l'évolution historique en vertu du droit international et de l'UE en réservant une attention particulière à l'éducation des minorités ethniques et à la «logique intégrationniste» qui la régit.[2]

Le premier chapitre expose la signification et le champ d'application des articles 2 et 3, point g), de la directive sur l'égalité raciale pour ce qui concerne les types de discrimination et le domaine de l'éducation. Les traités internationaux abordent la discrimination raciale et ethnique selon des perspectives différentes – certaines se rapprochant de la directive, d'autres pas. Le rapport montre que les conflits apparents entre les téléologies et interprétations des traités concernés et la directive peuvent être résolus en se référant à la Charte des droits fondamentaux de l'UE (la Charte) et à la jurisprudence de la Cour de justice de l'Union européenne (CJUE); en d'autres termes, des outils d'interprétation adéquats permettraient de rendre le régime juridique cohérent.

Le régime antidiscrimination en place dans les États membres de l'UE est décrit comme émanant de sources et d'ordres juridiques multiples[3] avec pour conséquence que les normes découlent de toute une série de traités (traités des Nations unies et du Conseil de l'Europe, traités sur l'Union européenne et directive de l'UE) et de législations nationales antidiscrimination dont l'application est assurée par des juridictions, tribunaux et organismes (internationaux) divers dans un domaine où les recours en justice peuvent être intentés selon une grande diversité de voies incluant sans s'y limiter des demandes de décisions préjudicielles adressés à la CJUE et des plaintes individuelles adressées à la Cour européenne des droits de l'homme (CouEDH). Il est important de préciser, en ce qui concerne la DER, que sa mise en

1 Directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique (Directive sur l'égalité raciale), JO L 180 du 19.7.2000, p. 22-26.

2 Thornberry fait valoir que la Convention de l'UNESCO concernant la lutte contre la discrimination dans l'enseignement favorise une «vision majoritaire» de l'intégration face à la séparation ethnique. Voir Thornberry, P. (2016), *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, OUP, pp. 378-383.

3 Gordillo, L. (2012) *Interlocking Constitutions: Towards an Interordinal theory of National, European and UN Law*, Oxford: Hart Publishing.

application est principalement assurée par les juridictions nationales et les organismes de promotion de l'égalité, à savoir des organes institués pour promouvoir l'égalité raciale en vertu de son article 13.

En ce qui concerne les Nations unies, l'analyse se concentre sur la Convention de l'UNESCO concernant la lutte contre la discrimination dans l'enseignement, sur la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, sur la Convention relative aux droits de l'enfant et sur le Pacte international relatif aux droits économiques, sociaux et culturels, qui tous interdisent la discrimination dans l'éducation. La focalisation des analyses académiques et des actions de plaidoyer sur la jurisprudence liée à la Convention européenne de sauvegarde des droits de l'homme et libertés fondamentales (CEDH), et sur l'affaire *D.H. et autres c. République tchèque*[4] en particulier (ainsi que sur d'autres affaires en rapport avec l'éducation des Roms), a occulté l'importance du rôle des traités des Nations unies dans la conception et la clarification des fondements normatifs de l'égalité et de la non-discrimination dans l'éducation des enfants appartenant à des minorités raciales ou ethniques, alors qu'ils contiennent des prescriptions normatives détaillées à l'intention de la multitude d'acteurs qui façonnent l'enseignement en Europe. Le discours dominant a, de surcroît, détourné l'attention d'arrêts portant sur des problématiques très importantes dans l'ensemble de l'UE, telle la discrimination fondée sur la langue qui a été abordée dans *Oršuš et autres c. Croatie* et divers arrêts nationaux.[5]

Les traités des Nations unies sont déterminants pour l'interprétation de la discrimination dans l'éducation, notamment parce qu'à l'inverse de la CEDH et du droit de l'UE, ils interdisent explicitement la ségrégation en tant que forme spécifique de discrimination. Même si la Convention de l'UNESCO concernant la lutte contre la discrimination dans l'enseignement et la Convention internationale sur l'élimination de toutes les formes de discrimination raciale interdisent explicitement la ségrégation, elles ne la définissent pas. Elles n'en fournissent pas moins d'importantes balises pour l'interprétation du concept. Ainsi par exemple, elles n'exigent pas que la ségrégation soit forcée et/ou totale, autrement dit que seules des unités d'enseignement totalement séparées soient considérées comme ségréguées. Alors que la Convention sur l'élimination de toutes les formes de discrimination interdit catégoriquement la ségrégation raciale, celle de l'UNESCO prévoit une série de conditions dans lesquelles une ségrégation peut être exceptionnellement admise.

Gardant ces spécificités à l'esprit, le rapport étudie la ségrégation dans les législations de l'UE et nationales sous les angles de l'interdiction, de la définition et de la justification. Étant donné son poids à l'échelon régional, l'analyse prend la jurisprudence de la CouEDH pour point de départ et montre de quelle façon elle peut servir de référence aux décisions prises par la CJUE et les juridictions nationales concernant l'application de la directive sur l'égalité raciale. S'appuyant sur les conclusions de l'Avocat général Sharpston dans l'affaire *Bougnaoui*,[6] le rapport souligne que le *principe* de l'égalité de traitement consacré par l'article 14 de la CEDH engendre un autre niveau de protection que le *droit* à l'égalité de traitement garanti par le Protocole n° 12 de la CEDH, la directive sur l'égalité raciale et divers autres traités internationaux, de même que par les législations nationales. En vertu de l'article 52, paragraphe 3, de la Charte des droits fondamentaux de l'Union européenne,[7] le sens et la portée du principe de non-discrimination consacré par l'article 21 de la Charte devraient être les mêmes que ceux du droit correspondant garanti par la CEDH. Étant donné toutefois que la CEDH elle-même fait de la non-discrimination un principe (article 14) et de l'égalité de traitement un droit (Protocole n° 12), il convient de résoudre la divergence éventuelle selon que les arrêts sont rendus en vertu de l'une ou de l'autre disposition; le présent rapport se fonde à cet égard sur les conclusions de l'Avocat général dans l'affaire *Bougnaoui* en référence à l'article 51 de la Charte.

4 CouEDH, *D.H. et autres c. la République tchèque*, [Grande chambre], requête n° 57325/00, arrêt du 13 novembre 2007.
5 CouEDH, *Oršuš et autres* c. *Croatie*, [Grande chambre], requête n° 5766/03, arrêt du 16 mars 2010.
6 CJUE, Conclusions de l'Avocat général Sharpston du 13 juillet 2016, *Asma Bougnaoui et Association de défense des droits de l'homme (ADDH) c. Micropole SA*, Affaire C-188/15, ECLI:EU:C:2016:553.
7 Charte des droits fondamentaux de l'Union européenne, 2000/C 364/01.

Le rapport s'appuie sur l'arrêt de la Cour de justice de l'Union européenne dans l'affaire *CHEZ*[8] pour illustrer le recours à la Charte et la manière de parvenir à une cohérence entre la jurisprudence découlant de la Convention et la directive. L'arrêt de principe en matière de droits des Roms en vertu du Protocole n° 12 à la CEDH garantissant le *droit* à l'égalité de traitement – *Sejdic et Finci c. Bosnie-Herzégovine*[9] – a servi de point de référence essentiel dans l'affaire *CHEZ*, ce qui crée un pont entre la Convention (Protocole n° 12) et la directive sur l'égalité raciale tout en clarifiant dans le même temps l'applicabilité de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale.

Le premier rapport thématique consacré à la discrimination raciale dans l'enseignement[10] a suscité le débat parmi les juristes[11] pour ce qui concerne la qualification de la ségrégation en droit de l'UE. Le présent rapport reconsidère un aspect majeur de la jurisprudence, à savoir que la CouEDH, sans avoir jamais établi que la ségrégation équivalait à une discrimination directe en tant que telle, et sans avoir jamais estimé qu'une discrimination directe fondée sur la race ou l'origine ethnique ne pouvait être justifiée sur la base d'un critère de proportionnalité – point de conflit majeur avec le droit de l'UE – a néanmoins constaté que les défenses de justification s'avéraient inadéquates dans la pratique.

L'intérêt supérieur de l'enfant conçu comme exempt de discrimination raciale – et dont la sauvegarde relève d'un intérêt général impérieux – a primé dans la décision prise à Strasbourg,[12] mais ce principe est entré en conflit avec le libre de choix des parents dans la jurisprudence nationale. Compte tenu de la nature permanente mais changeante de la discrimination raciale, et du rôle central du libre choix dans les politiques nationales, les débats publics et la jurisprudence, le rapport examine les pistes qui permettraient de résoudre les conflits éventuels entre doctrines et principes de base. Il mesure également les implications de la jurisprudence de Strasbourg pour l'interprétation de la discrimination présumée, la discrimination par association et la discrimination multiple.

Le chapitre 2 est consacré au droit national. Il résume les informations transmises par les experts des différents pays concernant leur cadre législatif interne avec une attention particulière à l'interdiction de discrimination dans l'enseignement, à son champ d'application (en matière de sélection, d'admission, de renvoi, de transfert et de mesures disciplinaires notamment) et à l'interdiction explicite de harcèlement et de ségrégation. L'analyse s'intéresse plus particulièrement aux sources normatives au niveau national en s'attachant à déterminer si des dispositions sont prévues en droit antidiscrimination, en droit scolaire, en droit dérivé ou dans d'autres formes de réglementation.

Le chapitre 3 analyse la jurisprudence en se plaçant au niveau des États membres pour saisir la véritable nature d'un régime légal complexe émanant de plusieurs ordres juridiques ainsi que l'impact majeur du droit de l'UE appliqué de manière décentralisée (arrêts rendus par des juridictions nationales). Nous avons mis en évidence des affaires dans lesquelles l'interprétation nationale se conforme ou ne se conforme pas aux normes énoncées dans le droit des traités. La jurisprudence des juridictions nationales,

8 Arrêt du 16 juillet 2015, *CHEZ Razpredelenie Bulgaria AD* c. *Komisia za zashtita ot diskriminatsia (Nikolova)*, Affaire C-83/14 ECLI:EU:C:2015:480; Conclusions de l'Avocat général Kokott présentées le 12 mars 2015 dans *CHEZ Razpredelenie Bulgaria AD* contre *Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:170.

9 CouEDH, *Sejdić et Finci c. Bosnie-Herzégovine*, [Grande chambre], requêtes n° 27996/06 et 34836/06, arrêt du 22 décembre 2009.

10 Farkas, L. (2007) *Ségrégation des enfants roms dans l'enseignement: la directive sur l'égalité raciale comme moyen de lutte contre la discrimination structurelle*, Luxembourg, Commission européenne.

11 Goodwin, M. (2009) «Taking on racial segregation: the European Court of Human Rights at a *Brown* v. *Board of Education* moment?» *Rechtsgeleerd Magazijn* THEMIS 2009-3; Devroye, J. (2009) «The Case of *D.H. and Others* v. *the Czech Republic*», North Western Journal of International Human Rights, vol. 7, n° 1, p. 81-101; Medda-Windischer, R. (2009) «Dismantling Segregating Education and the European Court of Human Rights. *D.H. and Others* vs. *Czech Republic*: Towards an Inclusive Education?», *European Yearbook of Minority Issues*, vol. 7, 2007/8; O'Nions, H. (2010), «Divide and Teach: educational inequality and the Roma», *International Journal of Human Rights*, vol. 14, n° 3, p. 464-489; Van den Bogaert, S. (2011) «Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters», *Heidelberg Journal of International Law* (*Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*), vol. 71, p. 719-754; Arabadijeva, K. (2016) «Challenging the school segregation of Roma children in Central and Eastern Europe», *The International Journal of Human Rights*, vol. 20, n° 1; Rosa Drown, R. (2013) «Equal Access to Quality Education for Roma: how indirect and unintentional discrimination obstructs progress», *Race Equality Teaching*, vol. 31, n° 2, Spring 2013, p. 32-36.

12 CouEDH, *D.H. et autres c. la République tchèque*, [Grande chambre], requête n° 57325/00, arrêt du 13 novembre 2007, point 203.

des organismes de promotion de l'égalité et d'organismes spécifiquement chargés de la mise en application dans le secteur concerné (inspections scolaires) est envisagée comme s'inscrivant dans cette mise en application décentralisée,[13] impulsée par des actions judiciaires collectives dans plusieurs États membres.[14]

Le rapport recense les éléments clés de l'égalité raciale en matière d'éducation et présente, pour chaque domaine, les exigences et normes figurant dans le régime juridique multisource avant d'en exposer l'interprétation dans la jurisprudence nationale. Les différentes sections de ce chapitre s'achèvent par une comparaison qui met en évidence les disparités, les tensions et, le cas échéant, les non-conformités de l'interprétation (judiciaire) nationale par rapport à la législation antidiscrimination de l'UE. Les éléments clés suivants sont recensés et comparés à la jurisprudence nationale: l'interdiction de discrimination (directe, indirecte et harcèlement); l'interdiction explicite/implicite de ségrégation et la discrimination présumée, par association et multiple; l'utilisation de données ethniques (preuves statistiques); le champ d'application matériel des dispositions; les défenses de justification avec un accent particulier sur l'intérêt supérieur de l'enfant et le libre choix; et, pour terminer, les sanctions.

L'analyse du chapitre 4 prend en compte les différences importantes entre les États membres pour ce qui concerne la mise en application. En **Irlande**, en **Suède** et en **France** – et auparavant aux **Pays-Bas** – les organismes de promotion de l'égalité ont instruit des plaintes et/ou aidé des requérants. Ailleurs en Europe occidentale, et méridionale surtout, ce sont les contentieux individuels qui ont été le moyen principal de faire appliquer la législation tandis que quelques organisations non gouvernementales à vocation juridique ont engagé des actions judiciaires (collectives); tel a notamment été le cas en **Grèce**. Les organes quasi-judiciaires ont, en revanche, joué un rôle important en Europe orientale: ainsi l'organisme **roumain** pour la promotion de l'égalité a développé des normes solides en matière de protection contre la ségrégation ethnique. En **Bulgarie**, en **Hongrie** et en **Slovaquie**, des actions représentatives intentées par des ONG spécialisées ont mobilisé les tribunaux en vue de protéger le droit à l'égalité des enfants roms dans le domaine de l'éducation. En **République tchèque** et en **Slovaquie**, les défenseurs publics des droits et les inspections scolaires ont dynamisé la lutte contre la ségrégation scolaire.

Le présent rapport décrit le rôle assumé par les organismes de promotion de l'égalité, les institutions nationales pour les droits de l'homme et les services d'inspection scolaire pour mettre fin à la discrimination raciale dans l'enseignement. Des organismes propres au secteur tels que les derniers cités peuvent agir en qualité d'agents du droit de l'UE, comme ce fut le cas en **République tchèque** et en **Slovaquie**, ou s'abstenir de participer à la mise en application de ce droit en dépit de requêtes spécifiques en ce sens, comme c'est le cas en **Roumanie** et en **Hongrie.** Le non-engagement d'organismes spécialisés en matière d'éducation vis-à-vis du droit antidiscrimination de l'UE est un manquement particulièrement préoccupant du fait notamment que le degré d'implication des organismes de promotion de l'égalité est, lui aussi, assez variable selon les États membres.

Le manque de cohérence entre les décisions européennes et nationales peut défavoriser les minorités raciales, tandis que l'activisme judiciaire et de la part d'agences au plan national peut donner lieu à des sanctions et des voies de recours bénéfiques aux communautés. Du fait que la littérature s'est concentrée sur les décisions internationales, on sait très peu de la façon dont les organes (quasi-) judiciaires nationaux font appliquer le droit de l'UE. Le rapport s'efforce de combler cette lacune et propose des exemples de bonnes pratiques à l'intention des agences et des tribunaux ainsi que des acteurs nationaux et européens.

13 Albors-Llorens, A. (2014) «Judicial protection before the Court of Justice of the European Union», *European Union Law*, p. 255-299.

14 Le droit antidiscrimination de l'UE introduit des exigences qui facilitent la mise en application collective. Voir Claire Kilpatrick & Bruno de Witte dans Muir, E., Kilpatrick, C., Miller, J. & de Witte, B. (Éd.) (2017), *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum*, EUI Working Papers, Law, p. 4.

Vingt ans après l'adoption de la directive sur l'égalité raciale, la question de sa mise en application est encore au cœur des débats et des travaux de recherche. Le chapitre consacré à sa mise en application dans le domaine de l'éducation présente des observations récentes à propos du processus privé principalement mené à cette fin par des organisations non gouvernementales à vocation juridique ainsi qu'une évaluation du processus parallèlement mené par des instances publiques (organismes de promotion de l'égalité ou autres). Avec pour toile de fond les conclusions de la recherche sociale consacrée à la persistance des inégalités éducatives, le rapport articule sa réflexion autour d'une série d'études axées sur la mise en application juridique: l'étude de 2015 sur les contentieux de Strasbourg publiée par l'Open Society Justice Initiative (rapport Zimova à l'OSJI),[15] l'étude de 2015 relative aux interventions stratégiques publiée par le Harvard FXB Centre (rapport Matache),[16] un aperçu de la campagne *D.H.* concernant l'intégration scolaire (*Realizing Roma Rights*)[17] et le rapport général 2018 de l'OSJI sur l'impact des actions en justice à visée stratégique.

Le rapport thématique envisage la mise en application juridique comme faisant partie intégrante d'une stratégie holistique de changement social pouvant également inclure la mobilisation, le leadership et le développement économique des communautés, la diffusion médiatique, l'analyse des politiques et des recherches empiriques,[18] et comme étant impulsée par des particuliers, des communautés, des ONG, des activistes, des agences et des cours et tribunaux. Le quatrième chapitre esquisse des évolutions dans chacun des contextes où s'applique le droit européen de l'égalité.

Les difficultés posées par la mise en application d'arrêts judiciaires novateurs qui octroient des droits fondamentaux ou en élargissent le champ d'application, font l'objet de très nombreuses publications de recherche consacrées au droit et à la société aux États-Unis,[19] dont les plus récentes soulignent à quel point il est important d'étudier le droit en concertation avec les politiques et les tribunaux, les juristes et d'autres acteurs qui recourent à la loi pour réaliser le changement social.[20] Le rapport s'appuie sur ces observations pour déterminer la mesure dans laquelle la conformité aux normes est facilitée par une organisation des communautés, des incitations financières, des initiatives politiques, une mise en application publique ou privée, une action directe ou une combinaison de ces différents outils de changement social. Il vise à répondre à la question de savoir si, en ce qui concerne la discrimination raciale dans l'enseignement, la mise en application a été financée par des ressources publiques ou privées, et si elle a été impulsée par des acteurs individuels ou collectifs (plaintes regroupées, action représentative[21] ou enquêtes d'office). Communautés minoritaires, ONG (interraciales) ou organismes publics: quel est l'acteur collectif le plus actif?

L'impact peut se mesurer en termes de changements structurels s'accompagnant d'un taux généralement décroissant d'inégalité, mais les effets locaux et/ou immatériels des arrêts judiciaires, tels que la reconnaissance de l'atteinte à la dignité[22] ou l'impulsion que d'importants précédents peuvent conférer au travail de plaidoyer et à l'action directe dans une trajectoire circulaire de mobilisation (juridique), peuvent également dénoter un changement social important. Le rapport étudie ces notions d'incidence

15 Zimová, A. (2016) *Strategic Litigation Impacts: Roma School Desegregation*, OSJI, mars 2016.

16 FXB Center for Health and Human Rights (2015) *Strategies and Tactics to Combat Segregation of Roma Children in Schools, Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria and Greece*, Harvard University.

17 Bhabha, J., Mirga, A. & Matache, M. Ed., (2017) *Realizing Roma Rights* University of Pennsylvania Press.

18 Hershkoff H. & Hollander, D. (2000) «Rights into Action: Public Interest Litigation in the United States» in *Many Roads to Justice*, p. 90.

19 Voir Rosenberg, G.N. (1991) *The hollow hope: Can courts bring about social change?*, University of Chicago Press et Rosenberg, G.N. (1992) «Hollow hopes and other aspirations: A reply to Feeley and McCann», *Law and Social Inquiry*, vol. 17, n°4, 1992, p. 761-778; McCann, M. (1992) «'Reform litigation on trial», *Law and Social Inquiry*, vol. 17 n° 4, 1992, p. 715-743; McCann, M. (1996) «Causal versus constitutive explanations (or, on the difficulty of being so positive…)», *Law and Social Inquiry*, vol. 21, n° 2, p. 457-482.

20 Cummings, S. L. (2017) «Rethinking the Foundational Critiques of Lawyers in Social Movements», *Fordham Law Review*, vol. 85, 1987.

21 Pour un bref commentaire concernant l'action représentative, voir Farkas, L. (2014) «Collective actions under European anti-discrimination law», *European Anti-discrimination Law Review*, numéro 19.

22 McCann, Michael (1994) *Rights at Work: Pay equity reform and the politics of legal mobilisation*, Chicago, University of Chicago Press.

et de succès en regardant au-delà des «recours sur papier» pour déterminer s'ils deviennent effectifs, proportionnés et dissuasifs entre les mains des cours et tribunaux, des pouvoirs publics, des ONG, des juristes et des communautés minoritaires.

Zusammenfassung

Der vorliegende Themenbericht analysiert die nationale und internationale Gesetzgebung und Rechtsprechung zu rassistischer oder ethnischer Diskriminierung in der Bildung und untersucht die rechtstheoretischen und praktischen Auswirkungen der Antidiskriminierungsrichtlinie auf diese Art von Diskriminierung. Er basiert auf Informationen und Analysen, die von den nationalen Vertreterinnen und Vertretern des Europäischen Netzwerks von Rechtsexpertinnen und experten für Geschlechtergleichstellung und Nichtdiskriminierung anhand eines Fragebogens zu den wichtigsten Themen zur Verfügung gestellt wurden. In dem Bericht werden die Beiträge der einzelnen Länderexperten und -expertinnen kenntlich gemacht und, sofern verfügbar, die primären Quellen der Analyse benannt. Der Bericht umfasst eine Einleitung und fünf Abschnitte: Abschnitt 1 beschreibt die verschiedenen Quellen des europäischen Gleichbehandlungsrechts in Bezug auf rassistische oder ethnische Diskriminierung im Bildungsbereich; Abschnitt 2 liefert aktuelle Informationen zur nationalen Gesetzgebung und zu deren Übereinstimmung mit dem Unionsrecht und den von den Mitgliedstaaten unterzeichneten und ratifizierten internationalen Verträgen; Abschnitt 3 analysiert die nationale Rechtsprechung zu rassistischer oder ethnischer Diskriminierung im Bildungsbereich; Abschnitt 4 untersucht, wie Gleichbehandlung ohne Unterschied der Rasse im Bildungsbereich durchgesetzt wird, und in Abschnitt 5 werden allgemeine Schlussfolgerungen gezogen.

Die Antirassismusrichtlinie[1] verbietet rassistische Diskriminierung in der Bildung, sowohl im privaten als auch im öffentlichen Sektor. Die Richtlinie existiert nicht im luftleeren Raum. Dies ergibt sich aus der Präambel, die auf verschiedene internationale Menschenrechtsabkommen verweist, die rassistische Diskriminierung verbieten und/oder das Recht auf Bildung schützen und die von den Mitgliedstaaten sowohl unterzeichnet als auch ratifiziert wurden. Um das Recht auf Gleichbehandlung in der Bildung in Bezug auf „Rasse" bzw. ethnische Herkunft vollständig zu begreifen, zeichnet der Bericht seine historische Entwicklung im Rahmen des internationalen Rechts und des Unionsrechts nach, wobei er der Bildung ethnischer Minderheiten und der „integrationistischen Logik", die diese bestimmt, besondere Aufmerksamkeit widmet.[2]

Abschnitt 1 erläutert Sinn und Geltungsbereich von Artikel 2 und Artikel 3 Buchstabe g der Antirassismusrichtlinie zu den verschiedenen Arten von Diskriminierung und zum Bereich der Bildung. Internationale Verträge behandeln das Thema rassistische und ethnische Diskriminierung in der Bildung aus unterschiedlichen Blickwinkeln, von denen manche der Richtlinie entsprechen, andere jedoch nicht. Der Bericht argumentiert, dass augenscheinliche Konflikte zwischen den Teleologien und Auslegungen der einschlägigen Verträge und der Richtlinie unter Bezugnahme auf die EU-Grundrechtecharta (die Charta) und die Rechtsprechung des Gerichtshofs der Europäischen Union (EuGH) gelöst werden können. Anders ausgedrückt: Mit geeigneten Auslegungsinstrumenten kann die Rechtsordnung kohärent und konsistent gestaltet werden.

Die Rechtsordnung der EU-Mitgliedstaaten im Antidiskriminierungsbereich wurde als *multi-source* und *interordinal*[3] bezeichnet. Damit wird zum Ausdruck gebracht, dass die Rechtsnormen aus einer Vielzahl von Verträgen – Verträge der Vereinten Nationen und des Europarats, Verträge und Richtlinien der Europäischen Union – und nationalen Antidiskriminierungsgesetzen herrühren, die von verschiedenen (internationalen)

1 Richtlinie 2000/43/EG des Rates vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft (Antirassismusrichtlinie), ABl. L 180, 19.7.2000, S. 2226.

2 Thornberry argumentiert, dass das UNESCO-Übereinkommen gegen Diskriminierung im Unterrichtswesen einer „mehrheitlichen Auffassung" von Integration den Vorzug vor ethnischer Trennung gibt. Vgl. Thornberry, P. , *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, OUP, 2016, S. 378-383.

3 Gordillo, L., *Interlocking Constitutions: Towards an Interordinal theory of National, European and UN Law*, Oxford: Hart Publishing, 2012.

Gerichten, Tribunalen und Behörden in einem Bereich durchgesetzt werden, in dem Klagen auf vielerlei Wegen, unter anderem – jedoch nicht ausschließlich – über Vorabentscheidungsersuchen an den EuGH und Individualbeschwerden an den Europäischen Gerichtshof für Menschenrechte (EGMR) kanalisiert werden können. Was die Antirassismusrichtlinie betrifft, so sind nationale Gerichte und Gleichbehandlungsstellen – Einrichtungen also, die mit der Förderung der Gleichbehandlung ohne Unterschied der „Rasse" nach Artikel 13 Antirassismusrichtlinie betraut sind – die wichtigsten Durchsetzungsinstanzen.

Auf der Ebene der Vereinten Nationen konzentriert sich die Analyse auf das UNESCO-Übereinkommen gegen Diskriminierung im Unterrichtswesen, das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung (ICERD), das Übereinkommen über die Rechte des Kindes und den Pakt über wirtschaftliche, soziale und kulturelle Rechte – allesamt Instrumente, die Diskriminierung in der Bildung verbieten. Der wissenschaftliche und juristische Fokus auf die Rechtsprechung im Rahmen der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten (EMRK), insbesondere auf *D.H. u.a. gegen Tschechische Republik*[4] (sowie auf andere Rechtsstreite, in denen es um Diskriminierung von Roma im Bildungsbereich ging), hat die Bedeutung der VN-Verträge bei der Klärung und Gestaltung der normativen Grundlagen von Gleichheit und Nichtdiskriminierung in der Erziehung und Bildung von Kindern rassischer oder ethnischer Minderheiten überlagert, obwohl diese Verträge genaue, differenzierte Vorschriften für die Vielzahl von Akteuren enthalten, die Bildung in Europa gestalten. Darüber hinaus hat der vorherrschende Diskurs dazu geführt, dass Urteile, die Themen von großer Bedeutung für die gesamte EU betreffen (z. B. sprachbezogene Diskriminierung, die in *Oršuš u.a. gegen Kroatien* und in verschiedenen nationalen Urteilen behandelt wurde), in den Hintergrund getreten sind.[5]

VN-Verträge sind für die Auslegung von Diskriminierung in der Bildung vor allem deshalb von großer Bedeutung, weil sie im Gegensatz zur EMRK und zum Unionsrecht Segregation als eigenständige Form von Diskriminierung ausdrücklich verbieten. Das UNESCO-Übereinkommen gegen Diskriminierung im Unterrichtswesen und das ICERD verbieten Segregation zwar ausdrücklich, definieren diese aber nicht. Sie liefern jedoch wichtige Hinweise für die Auslegung dieses Konzepts. Sie verlangen zum Beispiel nicht, dass Segregation erzwungen und/oder vollständig sein muss, dass also nur vollständig segregierte Bildungsbereiche als segregiert gelten können. Während das ICERD eine Trennung nach „Rassen" verbietet, zählt das UNESCO-Übereinkommen gegen Diskriminierung im Unterrichtswesen eine Reihe von Bedingungen auf, unter denen eine solche Trennung ausnahmsweise zulässig sein kann.

Unter Berücksichtigung dieser Besonderheiten untersucht der Bericht Segregation in den Rechtsvorschriften der EU und der Mitgliedsstaaten unter den Aspekten des Verbots, der Definition und der Begründung. Angesichts ihrer Bedeutung auf regionaler Ebene nimmt der Bericht die Rechtsprechung des EGMR als Ausgangspunkt und zeigt auf, wie diese als Grundlage für Entscheidungen des EuGH und der nationalen Gerichte bei der Anwendung der Antirassismusrichtlinie dienen kann. Aufbauend auf den Schlussanträgen der Generalanwältin Sharpston in *Bougnaoui*[6] weist der Bericht darauf hin, dass der in Artikel 14 EMRK verankerte *Grundsatz* der Gleichbehandlung ein anderes Schutzniveau gewährleistet als das im EMRK-Protokoll Nr. 12, in der Antirassismusrichtlinie, in verschiedenen anderen internationalen Verträgen und in nationalen Gesetzen festgeschriebene *Recht* auf Gleichbehandlung. Gemäß Artikel 52 Absatz 3 der EU-Grundrechtecharta[7] hat der in Artikel 21 der Charta verankerte Grundsatz der Nichtdiskriminierung die gleiche Bedeutung und Tragweite wie das entsprechende in der EMRK garantierte Recht. Da jedoch die EMRK selbst Nichtdiskriminierung als einen Grundsatz (Art. 14) und Gleichbehandlung als ein Recht (Protokoll Nr. 12) betrachtet, bedarf es hinsichtlich der potenziellen Differenz bei der Beurteilung von Fällen nach diesen beiden Bestimmungen einer Lösung, wobei sich der Bericht diesbezüglich auf die Schlussanträge der Generalanwältin in *Bougnaoui* unter Bezugnahme auf Artikel 51 der Charta stützt.

4 EGMR, *D.H. u.a. gegen Tschechische Republik*, [Große Kammer] Nr. 57325/00, Urteil vom 13. November 2007.

5 EGMR, *Oršuš u.a. gegen Kroatien*, [Große Kammer] Nr. 15766/03, Urteil vom 16. März 2010.

6 EUGH, Schlussanträge der Generalanwältin Sharpston vom 13. Juli 2016, *Asma Bougnaoui und Association de défense des droits de l'homme (ADDH) gegen Micropole SA*, Rechtssache C-188/15, ECLI:EU:C:2016:553.

7 Charta der Grundrechte der Europäischen Union, 2000/C 364/01.

Anhand des Urteils des EuGH in der Rechtssache *CHEZ*[8] wird in dem Bericht der Einsatz der Charta veranschaulicht und aufgezeigt, wie die konventionsbasierte Rechtsprechung mit der Richtlinie in Einklang gebracht werden kann. *Sejdic und Finci gegen Bosnien und Herzegowina*[9] als maßgeblicher Rechtsstreit zum Thema Roma-Rechte auf der Grundlage des 12. Protokolls zur EMRK, in dem das *Recht* auf Gleichbehandlung verankert ist, diente in *CHEZ* als wichtiger Bezugspunkt, der eine Brücke zwischen der Konvention (Protokoll Nr. 12) und der Antidiskriminierungsrichtlinie schlägt und gleichzeitig den Geltungsbereich des ICERD klärt.

Der erste Themenbericht über rassistische Diskriminierung in der Bildung[10] löste unter Rechtswissenschaftlern Diskussionen über die Qualifikation von Segregation im Rahmen des Unionsrechts aus.[11] Der vorliegende Bericht greift einen wichtigen Aspekt der Rechtsprechung wieder auf: Obwohl der EGMR weder festgestellt hat, dass Segregation eine unmittelbare Diskriminierung im eigentlichen Sinne darstellt, noch verneint hat, dass unmittelbare rassistische oder ethnische Diskriminierung auf der Grundlage einer Verhältnismäßigkeitsprüfung gerechtfertigt werden kann – ein zentraler Konfliktpunkt mit dem Unionsrecht –, hat er Rechtfertigungseinwände in der Praxis dennoch für unzureichend erachtet.

Die Straßburger Rechtsprechung hat dem Kindeswohl im Sinne der Freiheit von rassistischer Segregation – an deren Bewahrung großes öffentliches Interesse besteht – eine Vorrangstellung eingeräumt,[12] in der nationalen Rechtsprechung ist dieser Grundsatz jedoch mit der freien Wahl der Eltern in Konflikt geraten. Der dauerhafte, sich ständig verändernde Charakter rassistischer Diskriminierung sowie die zentrale Rolle, die die freie Wahl in der Innenpolitik, in öffentlichen Debatten und in der Rechtsprechung spielt, erfordern besondere Aufmerksamkeit. Der Bericht geht daher der Frage nach, wie potenzielle Konflikte zwischen den wesentlichen Prinzipien und Grundsätzen gelöst werden sollten. Die Auswirkungen der Straßburger Rechtsprechung auf die Auslegung der Begriffe „Diskriminierung aufgrund einer Vermutung“, „Diskriminierung durch Assoziierung“ und „Mehrfachdiskriminierung“ werden ebenfalls untersucht.

Abschnitt 2 widmet sich dem innerstaatlichen Recht. Auf der Grundlage der von den Länderexpertinnen und -experten übermittelten Informationen liefert dieser Abschnitt einen Überblick über die nationalen Rechtsrahmen und untersucht dabei speziell das Verbot von Diskriminierung in der Bildung, den Schutzumfang – insbesondere in Bezug auf Auswahl, Zulassung, Ausschluss, Wechsel und Disziplinarmaßnahmen – sowie das ausdrückliche Verbot von Belästigung und Segregation. Besondere Aufmerksamkeit widmet die Analyse den normativen Quellen auf nationaler Ebene; sie liefert genaue Angaben dazu, ob Vorschriften im Antidiskriminierungsrecht, im Bildungsrecht, im Sekundärrecht oder in anderen Regelungen enthalten sind.

8 Urteil vom 16. Juli 2015, *CHEZ Razpredelenie Bulgaria AD gegenKomisia za zashtita ot diskriminatsia (Nikolova)*, Rechtssache C-83/14, ECLI:EU:C:2015:480; Schlussanträge der Generalanwältin Kokott vom 12. März 2015 in *CHEZ Razpredelenie Bulgaria AD gegen Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:170.

9 EGMR, *Sejdić und Finci gegen Bosnien und Herzegowina*, [Große Kammer] Nr. 27996/06 und Nr. 34836/06, Urteil vom 22. Dezember 2009.

10 Farkas, L., *Segregation of Roma Children in Education: Addressing structural discrimination through the Race Equality Directive*, Luxemburg, Europäische Kommission, 2007.

11 Goodwin, M., „Taking on racial segregation: the European Court of Human Rights at a *Brown* v. *Board of Education* moment?“, *Rechtsgeleerd Magazijn* THEMIS 2009-3, 2009; Devroye, J., „The Case of *D.H. and Others* v. *the Czech Republic*“, North Western Journal of International Human Rights, Bd. 7(1), S. 81-101, 2009; Medda-Windischer, R., „Dismantling Segregating Education and the European Court of Human Rights. *D.H. and Others* vs. *Czech Republic*: Towards an Inclusive Education?“, *European Yearbook of Minority Issues*, Bd. 7, 2007/8, 2009; O'Nions, H., „Divide and Teach: educational inequality and the Roma“, *International Journal of Human Rights*, Bd. 14, Nr. 3, S. 464-489, 2010; Van den Bogaert, S., „Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters“, *Heidelberg Journal of International Law*, (*Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*), Bd. 71, S. 719-754, 2011; Arabadijeva, K., „Challenging the school segregation of Roma children in Central and Eastern Europe“, *The International Journal of Human Rights*, Bd. 20 (1), 2016; Rosa Drown, R., „Equal Access to Quality Education' for Roma: how indirect and unintentional discrimination obstructs progress“ *Race Equality Teaching*, Bd. 31, Nr. 2, Frühjahr 2013, S. 32-36, 2013.

12 EGMR, *D.H. u.a. gegen Tschechische Republik*, [Große Kammer] Nr. 57325/00, Urteil vom 13. November 2007, Abs. 203.

Abschnitt 3 befasst sich eingehend mit der Rechtsprechung auf der Ebene der Mitgliedstaaten, um die genaue Beschaffenheit des komplexen, interordinalen Rechtssystems und den beträchtlichen Einfluss zu verstehen, den das Unionsrecht durch dezentrale Rechtsdurchsetzung, sprich die Rechtsprechung der nationalen Gerichte, gehabt hat. Es werden sowohl Fälle beleuchtet, in denen die nationale Auslegung den vertragsrechtlichen Standards entspricht, als auch solche, in denen dies nicht der Fall ist. Die Entscheidungen der nationalen Gerichte, Gleichbehandlungsstellen und fachspezifischen Behörden (Schulämter) werden als Teil der dezentralen Anwendung des Unionsrechts verstanden,[13] die durch kollektive Klagen in verschiedenen Mitgliedstaaten angetrieben wird.[14]

Der Bericht bestimmt Schlüsselelemente von Rassengleichheit in der Bildung, beschreibt – für jeden Bereich – die in der *Multisource*-Rechtsordnung festgelegten Anforderungen und Standards und geht anschließend auf die in der nationalen Rechtsprechung gefundene Auslegung ein. Jeder Unterabschnitt schließt mit einer Gegenüberstellung, in der Unterschiede, Konflikte und gegebenenfalls Nichtübereinstimmungen der nationalen (gerichtlichen) Auslegung mit dem EU-Antidiskriminierungsrecht aufgezeigt werden. Die Schlüsselelemente, die beschrieben und mit der nationalen Rechtsprechung verglichen werden, sind folgende: Verbot von Diskriminierung (unmittelbare und mittelbare Diskriminierung sowie Belästigung); explizites/implizites Verbot von Segregation, Diskriminierung aufgrund einer Vermutung, Diskriminierung durch Assoziierung und Mehrfachdiskriminierung; Verwendung ethnischer Daten (statistische Evidenz); sachlicher Geltungsbereich der Vorschriften; Einwände einer gerechtfertigten Ungleichbehandlung, vor allem in Bezug auf das Kindeswohl und die freie Entscheidung, und schließlich Sanktionen.

Die Analyse in Abschnitt 4 nimmt die erheblichen Unterschiede in den Blick, die in puncto Rechtsdurchsetzung zwischen den Mitgliedstaaten bestehen. In **Frankreich**, **Irland** und **Schweden** – früher auch in den **Niederlanden** – haben die Gleichbehandlungsstellen Beschwerden untersucht und/oder beschwerdeführende Parteien unterstützt. In anderen westlichen Ländern und insbesondere in Südeuropa sind Individualklagen das wichtigste Mittel der Rechtsdurchsetzung; nur selten haben juristisch orientierte Nichtregierungsorganisationen (kollektiv) Klage erhoben, zum Beispiel in **Griechenland**. Im Gegensatz dazu haben quasi-gerichtliche Einrichtungen in Osteuropa eine wichtige Rolle gespielt; so hat die **rumänische** Gleichbehandlungsstelle zum Beispiel robuste Standards für den Schutz vor ethnischer Segregation entwickelt. In **Bulgarien**, der **Slowakei** und **Ungarn** haben Verbandsklagen spezialisierter NROs die Gerichte mobilisiert, um das Recht von Roma-Kindern auf Gleichbehandlung in der Bildung zu schützen. In der **Slowakei** und der **Tschechischen Republik** haben die Ombudspersonen und die Schulaufsichtsbehörden den Kampf gegen schulische Segregation unterstützt.

Der Bericht beschreibt die Rolle, die Gleichbehandlungsstellen, nationale Menschenrechtsinstitutionen und Schulaufsichtsbehörden bei der Bekämpfung rassistischer Diskriminierung im Bildungswesen spielen. Fachspezifische Behörden wie z. B. die staatliche Schulaufsicht können entweder – wie in der **Slowakei** und der **Tschechischen Republik** geschehen – als Vertreterinnen des Unionsrechts agieren oder sich – wie im Fall von **Rumänien** und **Ungarn** – trotz entsprechender konkreter Aufforderungen der Rechtsdurchsetzung verweigern. Die Weigerung bildungsspezifischer Stellen, sich auf das EU-Antidiskriminierungsrecht einzulassen, ist ein sehr besorgniserregender Aspekt von Nichteinhaltung, vor allem deshalb, weil auch das Engagement der Gleichbehandlungsstellen von Mitgliedstaat zu Mitgliedstaat unterschiedlich ist.

Inkohärenzen zwischen europäischer und nationaler Rechtsprechung können ethnische Minderheiten benachteiligen; engagiertes Eintreten der nationalen Gerichte und Behörden hingegen kann für Sanktionen

13 Albors-Llorens, A., „Judicial protection before the Court of Justice of the European Union", *European Union Law*, 2014, S. 255-299.

14 Das EU-Antidiskriminierungsrecht hat Regeln eingeführt, die eine kollektive Durchsetzung erleichtern. Vgl. Claire Kilpatrick und Bruno de Witte in Muir, E., Kilpatrick, C., Miller, J. und de Witte, B. (Hrsg.), *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum*, EUI Working Papers Law, 2017, S. 4.

und Abhilfemaßnahmen sorgen, die den betroffenen Bevölkerungsgruppen zugute kommen. Da sich die Fachliteratur auf die internationale Rechtsprechung konzentriert hat, ist wenig darüber bekannt, wie Gerichte und quasi-gerichtliche Stellen auf nationaler Ebene das Unionsrecht durchsetzen. Ziel des Berichts ist es, diese Lücke zu schließen und Good-Practice-Beispiele für Behörden und Gerichte sowie nationale und europäische Akteure aufzuzeigen.

Zwei Jahrzehnte nach Verabschiedung der Antirassismusrichtlinie nimmt die Frage der Rechtsdurchsetzung in den Debatten und in der Forschung einen zentralen Platz ein. Der Abschnitt zur Durchsetzung rassismusfreier Gleichbehandlung in der Bildung stellt aktuelle Erkenntnisse über die private Rechtsdurchsetzung vor, die in erster Linie von juristisch orientierten Nichtregierungsorganisationen betrieben wird, und liefert eine Einschätzung der öffentlichen Rechtsdurchsetzung durch Gleichbehandlungsstellen und Behörden. Vor dem Hintergrund sozialwissenschaftlicher Erkenntnisse über anhaltende Bildungsungleichheiten geht der Bericht auf verschiedene Studien zum Thema Rechtsdurchsetzung ein: die Studie der Open Society Justice Initiative von 2015 über Prozessführung vor dem Straßburger Gericht (der Zimova-Bericht für die OSJI),[15] die Studie des Harvard FXB Centre von 2015 über politische Interventionen,[16] den Matache-Bericht mit Einblicken in die *D.H.*-Kampagne zur schulischen Integration (*Realizing Roma Rights*)[17] und den Gesamtbericht der OSJI von 2018 über die Auswirkungen strategischer Prozessführung.

Der Bericht begreift Rechtsdurchsetzung als integralen Bestandteil einer ganzheitlichen Strategie des sozialen Wandels, die auch Mobilisierung von Communities, Leadership und wirtschaftliche Entwicklung, Medienarbeit, politische Analyse und empirische Forschung umfassen kann[18] und die von Einzelpersonen, Communities, NROs, Aktivistinnen und Aktivisten, Behörden und Gerichten angetrieben wird. Abschnitt 4 beschreibt Entwicklungen in den verschiedenen Kontexten, in denen das europäische Gleichbehandlungsrecht durchgesetzt wird.

Die Schwierigkeiten bei der Durchsetzung wegweisender Gerichtsurteile, die die Reichweite von Grundrechten bestätigen oder erweitern, wurden in der rechts- und sozialwissenschaftlichen Fachliteratur der Vereinigten Staaten ausführlich untersucht,[19] wobei jüngste Denkansätzen darauf hinweisen, wie wichtig es ist, Gesetze im Zusammenhang mit Politik und Gerichten, Anwälten und anderen Akteuren zu untersuchen, die die Gesetze nutzen, um soziale Veränderungen zu bewirken.[20] Ausgehend von diesen Erkenntnissen untersucht der Bericht, inwieweit die Normbefolgung durch Community Organising, finanzielle Anreize, politische Initiativen, öffentliche bzw. private Rechtsdurchsetzung, direkte Aktion oder eine Kombination dieser Instrumente des sozialen Wandels erleichtert wird. Es wird versucht, die Frage zu beantworten, ob Rechtsdurchsetzung in Bezug auf rassistische Diskriminierung in der Bildung aus öffentlichen oder privaten Mitteln finanziert und von Einzelpersonen oder Kollektivklägern (Klagebündelung, Verbandsklagen[21] oder Ermittlungen von Amts wegen) angetrieben wurde. Welcher Kollektivkläger war der aktivste: Minderheitengemeinschaften, (inter-ethnische) NROs oder öffentliche Stellen?

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15 Zimová, A., *Strategic Litigation Impacts: Roma School Desegregation*, OSJI, März 2016.

16 FXB Center for Health and Human Rights, *Strategies and Tactics to Combat Segregation of Roma Children in Schools, Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria and Greece*, Harvard University, 2015.

17 Bhabha, J., Mirga, A. und Matache, M. (Hrsg.), *Realizing Roma Rights*, University of Pennsylvania Press, 2017.

18 Hershkoff, H., und Hollander, D., „Rights into Action: Public Interest Litigation in the United States", in *Many Roads to Justice*, 2000, S. 90.

19 Siehe Rosenberg, G.N., *The hollow hope: Can courts bring about social change?*, University of Chicago Press, 1991, und Rosenberg, G.N., „Hollow hopes and other aspirations: A reply to Feeley and McCann", *Law and Social Inquiry*, Bd. 17, Nr. 4, 1992, S. 761-778; McCann, M., „Reform litigation on trial", *Law and Social Inquiry*, Bd. 17, Nr. 4, 1992, S. 715-743; McCann, M., „Causal versus constitutive explanations (or, on the difficulty of being so positive…", *Law and Social Inquiry*, Bd. 21, Nr. 2, 1996, S. 457-482.

20 Cummings, S. L., „Rethinking the Foundational Critiques of Lawyers in Social Movements", *Fordham Law Review*, Bd. 85, 1987 (2017).

21 Eine kurze Auseinandersetzung mit dem Thema Verbandsklagen liefert Farkas, L., „Collective actions under European anti-discrimination law", *European Anti-discrimination Law Review*, Nr. 9, 2014.

Die Wirkung kann an strukturellen Veränderungen mit tendenziell rückläufiger Ungleichheit gemessen werden, aber auch die lokalen und/oder immateriellen Auswirkungen gerichtlicher Entscheidungen – etwa die Anerkennung der Verletzung der Würde[22] oder die Dynamik, die wichtige Präzedenzfälle für Lobbyarbeit und direkte Aktion im Kreislauf (juristischer) Mobilisierung erzeugen – können Indiz für bedeutsame soziale Veränderungen sein. Der Bericht geht diesen Vorstellungen von Wirkung und Erfolg – jenseits von unseriösen Heilsversprechen – nach, um herauszufinden, ob sie in den Händen von Gerichten, Behörden, NROs, Anwälten und Minderheiten wirksam, verhältnismäßig und abschreckend sein können.

22 McCann, Michael, *Rights at Work: Pay equity reform and the politics of legal mobilisation*, Chicago, University of Chicago Press, 1994.

Introduction

Racial or ethnic origin matters in education in various different ways. Perspectives on racial or ethnic diversity in a given Member State may play a significant role in policy making, designing the curriculum and education materials, as well as on teacher training. Racial or ethnic origin may serve as a ground of unequal treatment, but also of justifiable special (favourable) treatment, particularly in relation to education dedicated to the preservation of minority identity. The conception of racial or ethnic in/equality in education depends on the understanding of the ground and the field.

The material scope of protection is undisputedly wide, because international, EU and domestic law cover education at all levels, including pre-school, vocational and tertiary education. Conversely, the personal scope – as much as the ground of racial or ethnic origin – is often narrowly conceived. This report considers uncertainties concerning the personal scope with reference to the 2017 report, *The meaning of racial or ethnic origin under EU Law: between stereotypes and identities*.[1] The 2017 report underlines the socially constructed nature of the ground and the correspondingly significant role of stereotypes, which makes it imperative for adjudication to embrace a constructivist approach, at the heart of which is an awareness of the process of 'race making' and the general assumptions that it creates *vis-a-vis* minorities.

Racial or ethnic origin is thus conceived as a composite and transversal ground, meaning that it is constructed with reference to race, colour, descent, national or ethnic origin, religion, language, nationality and geographic origin in a geographically and temporally bounded manner. The fact that characteristics, such as national or geographic origin, religion and minority language often serve as the basis of 'racialisation' or 'race making' is significant in the context of educational discrimination as well.[2]

While these observations may seem novel in the context of anti-discrimination law, they are consistent with the concept of minority rights in Europe. Under the League of Nations system established after World War I, race was synonymous with population groups identified with reference to religion, language and nation (beyond the borders of nation states).[3] This perspective has a lasting legacy on the 'Old Continent', which impacts on the application of international treaties,[4] in the context of which distinctions between racial and ethnic origin serve to dispel scientific misconceptions of race and racial origin.[5]

Kings, nobles, religious denominations, local communities and social innovators maintained their own educational institutions for centuries in Europe and many were given the right to continue doing so as the modern state education systems emerged in the second half of the 19th century.[6] With the introduction of state control and compulsory education for all – not just the middle classes – emerging nation states deployed public schools to imbue a national identity and foster loyalty in students to a uniform language

1 European Commission, Farkas, L. (2017) *The meaning of racial or ethnic origin in EU law: between stereotypes and identities*, European network of legal experts in gender equality and non-discrimination.

2 European Commission, Farkas, L. (2017) *The meaning of racial or ethnic origin in EU law: between stereotypes and identities*, European network of legal experts in gender equality and non-discrimination.

3 The terminology included '*minorité de race, de langue et de religion*' as well as '*minorité nationale*'. Andrysek, O., (1989) 'Report on the definition of minorities', *SIM Special No. 19*, Netherlands Institute of Human Rights.

4 Pejic, J. (1997) 'Minority rights in international law', *Human Rights Quarterly*, Vol. 19. No. 3, pp. 666-685.

5 See Thornberry, P. (1991) *International Law and the Rights of Minorities*, pp. 159-160: 'Up to 1950, the term "racial minorities" and not "ethnic minorities" was generally used in the United Nations. General Assembly Resolution 217c(III) referred to "racial" and "national", but not "ethnic" minorities. The etymological root of "ethnic" is the Greek *ethnos* or "nation". The Concise Oxford English Dictionary defines "ethnic" as "pertaining to race". These roots and definitions do not result in any ability to distinguish between "race", "ethnic group", and "nation" – the suggestion is rather that they are synonymous. Some have attempted to give substance to distinction … [including a] UNESCO Committee of experts on race problems … [Their] highly abstract, genetically based definition may be supplemented by reference to the common usage of the term "race" to denote physical differences between peoples, particularly their colour. The ethnic group by contrast refers to a "cultural" entity with or without distinct "physical" characteristics'.

6 Rudolf, A. (2006), *Bevezetés a szociológiába*, Osiris.

and culture.[7] Liberal pedagogy conceived of the preparation of children for their civic duties as the key purpose of education, while socialist and religious doctrines prioritised participation in the employment market, community and social life, presenting ideological challenges that national education systems sought to reconcile and/or counterbalance. Minority communities, on their part, struggled to fit into the uniform system of national/public education.

The peace treaties concluding World War I granted rights to national, ethnic, linguistic and/or (ethno-) religious minorities to maintain their pre-existing educational institutions, and bilateral treaties were drawn up to govern financial, methodological and curricular assistance from kin states and/or religious communities. Faith schools, on the other hand, have been maintained by a plethora of majority, as well as minority denominations, fully or partly funded by/through states.

European Union Member States do not mandate non-denominational public education, whereby the establishment of faith-based schools or the engagement of religious personnel in public education would be prohibited. Quite the contrary, denominational schools play an important function in public education, dominating service provision in **Ireland** and to a lesser degree in every other Member State, including the ones that place emphasis on their secular nature (*laïcité*) or transition from a communist past to embrace more pluralistic pedagogical doctrines.

Given the considerable overlap between religious and ethnic affiliation, faith schools can function as *de facto* ethnicity-based schools both for majority and minority communities, including cultural minorities that are officially recognised and those that are not. The students' religion, language and racial or ethnic origin overlap in minority schools and many mainstream institutions as well, rendering it difficult to separate out religion, language and ethnicity when it comes to discrimination.

Under certain conditions discussed below, contracting parties – including EU Member States – to international treaties outside the scope of EU law can permit the operation of minority schools on their territories without, however, being obliged to fund them.

The Roma constitute an exception, first on account of being (only) recently recognised as a national minority under international law and domestic statutes, although they remain a rather heterogeneous group both linguistically and in terms of religious affiliation,[8] and secondly, of having access to publicly funded education that strives to accommodate minority traditions and language. Importantly, Roma minority education cannot rely on the support of a kin state, so that minority language education is typically provided by mainstream public schools, rather than institutions maintained by the Roma communities themselves. Thus, Roma minority education often lacks the autonomy and community control that schools servicing established ethnic, ethno-religious, linguistic and cultural minorities possess.

7 Heater, D. (2004) *Citizenship: The Civic Ideal in World History, Politics and Education*, third edition, Manchester University Press, Manchester and New York, pp. 77-80.

8 Gheorghe, N. (1991) 'Roma-Gypsy Ethnicity in Eastern Europe' in *Social Research*, Vol. 58, No. 4, Nationalism in Central and Eastern Europe (Winter 1991), pp. 829-844; Surdu, Mihai and Kovats, Martin (2015) 'Roma Identity as an Expert-Political Construction' in *Social Inclusion* Vol. 3, Issue 5, pp. 5-18 (ISSN: 2183-2803); Simhandl, Katrin (2006) 'Western Gypsies and Travelers – Eastern Roma: the creation of political objects by the institutions of the European Union', *Nations and Nationalism*, Vol. 12, Issue 1.

Empirical research,[9] comparative data[10] and human rights reports[11] have long demonstrated that racial or ethnic inequality is coded in European education systems, intersecting with socio-economic disadvantages. Decades ago, Pierre Bourdieu argued that public education perpetrates inequality and conserves the social order by employing exclusion and selection processes that reproduce differences in cultural and social capital,[12] and the Bourdieusian model enjoys a high degree of influence even today.[13] Bourdieu also called attention to 'a real risk of downward mobility' that threatens 'children of the upper echelons of societies',[14] highlighting one of the structural causes of resistance to efforts at counterbalancing socio-economic and racial inequalities.

A common characteristic of many Roma, less assimilated national minorities and children with a migration background (especially first and second generation) in western Europe is a lower level of proficiency in the national language, which is also the language of instruction. The inequalities they suffer display common features, namely that socio-economic background plays a significant role in the educational inequalities of racial or ethnic minorities and that the accommodation of the students' bilingual needs in tandem with the inclusion of their parents in educational decision making can substantially improve scholarly achievements.[15] Racial or ethnic origin as a basis of unequal treatment may, however, be concealed with reference to the students' special needs (disability).[16]

Socio-economic background, migration background and ethnicity impact on education outcomes across Europe. A recent study combining data from diverse international data sets shows that:

> '*relative* socioeconomic inequality patterns are stable, or even somewhat on the rise in Europe. Ethnic inequalities, in contrast, fluctuate more over time, possibly as a consequence of and a reaction to new waves of immigrants. Between 1995 and 2007, ethnic inequalities in achievement scores have increased slightly, especially at younger ages, but they seem to be declining after 2007. However, from 2012 again an increase in inequalities at age 15 is visible, possibly extending to older ages.'[17]

Differences also exist in relation to the capacity of the school systems and the willingness of teachers and other actors to adequately respond to the needs of minorities. Research conducted in the framework of the Ethnic differences in education and diverging prospects for urban youth in an enlarged Europe (EDUMIGROM) project paints a 'less-than positive picture of the lives, opportunities and future perspectives of Europe's ethnic minority adolescents', underlining that schools not only 'serve to maintain and even produce disadvantages in access to quality education', but equally importantly, by stigmatising minority students as 'others', they 'tend to devalue their performance on cultural grounds, and as such, hinder

9 For instance, the civil rights project based at the University of California Los Angeles, in collaboration with the University of Ghent and the Free University of Brussels recently researched segregation, immigration and equality in Europe and the United States. The research results are reported in several volumes available at the following website: https://www.civilrightsproject.ucla.edu.

10 Organization for Economic Cooperation and Development (2016) *PISA 2015 Results (Volume I), Excellence and Equity in Education*, Paris. PISA stands for Programme for International Student Assessment.

11 European Roma Rights Center (2004) *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe*, Budapest; Fundamental Rights Agency of the European Union (2011) *Roma survey – Data in focus, Education: the situation of Roma in 11 EU Member States*, Vienna; and a host of materials from other EU agencies, the World Bank, UNICEF, the Council of Europe, the Organisation for Security and Cooperation in Europe and leading international NGOs, such as the Roma Education Fund.

12 Bourdieu, P. and Passeron, J-C. (1990) *Reproduction in Education, Society and Culture*, Sage Publications, London-Thousand Oaks-New Delhi, 2nd edition.

13 Despite its internal incoherence arising from taking domination into account both directly and indirectly and giving too much emphasis to self-selection (by students and their families), rather than the actions of external actors. Nash, R. (1990) 'Bourdieu on Education and Social and Cultural Reproduction', *British Journal of Sociology of Education* Vol. 11, 1990 – Issue 4.

14 Weininger, E. B. and Lareau, A. (2018) 'Pierre Bourdieu's Sociology of Education: Institutional Form and Social Inequality' in Medvetz, T. and Sallaz, J. (eds) *The Oxford Handbook on Pierre Bourdieu*.

15 Janta, B. and Harte, E. (2016) *Education policy responses for the inclusion of migrant children in Europe*, Rand Institute.

16 Gillborn, David (2015) 'Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender and Disability in Education', *Qualitative Inquiry*, Vol. 21(3) pp. 277-287.

17 Rözer, Jesper and van de Werfhorst, Herman, (2017) *Inequalities in Educational Opportunities by Socioeconomic and Migration Background: A Comparative Assessment Across European Societies*, p. 43.

their advancement and stymie any prospects for a better future'.[18] There are important differences, however, particularly in relation to the attitude of teachers *vis-a-vis* students of ethnic and migration backgrounds in the east and the west, as well as the positive values students themselves attach to ethnically segregated neighbourhoods and the schools that serve them. Western countries examined by EDUMIGROM fare better in both aspects.[19]

The ACCEPT pluralism research project conducted in five central and eastern European countries highlights 'a disturbing disjuncture between policy and practice', whereby even promising policies fail at the implementation stage.[20] The problem of school segregation is recognised, but 'successive coalitions of Governments, NGOs, and other actors joining forces to formulate [policy responses] have all failed', not because of the socio-economic differences and diverse historic trajectories of the states, but because they have not succeeded in adequately addressing the root causes: residential segregation, highly selective school systems and poor teacher-parent relations.[21] The reasons for this include insufficient political will, nationalism, misguided policy responses and racism.[22]

Although these conclusions shine the light on relations between majoritarian institutions and the minority communities, they do not necessarily explain the impact of majority attitudes, conduct and pressures on the institutions and minority communities. Recent research has suggested that the choice of school is the single most important factor when it comes to segregation and discriminatory practices.[23] Majority parents regularly resist desegregation measures, as the analysis below shows.

Policy experts recommend mainstreaming, rather than exclusively focusing on the needs of minority students. They posit that '[i]nstead of thinking about minorities and underserved groups as pupils with special needs and challenges, the most promising approaches examine the demands future citizens will face through a skills and strengths lens rather than a solely needs-focused lens.' Thus, governance responses should 'move beyond the focus on newly arrived populations and instead develop integration or social cohesion as a muscle that the whole of society has to work to build.'[24]

This shift cannot override the necessity of adequately responding to students' language needs as a horizontal priority, which has been a constant challenge for schools, particularly in the context of migrant inclusion.[25] According to a recent study, approximately '10 per cent of the EU population were born in a different country from the one in which they reside and children under the age of 15 constitute five per cent of this group'.[26] The same study found that children with a migrant background (first, second, or higher-order-generation migrants) show tendencies towards lower educational performance and are more likely to leave school early than their counterparts from a native background, even though trends vary across Member States. It also concludes that some evidence 'suggests that socio-economic disadvantage can have a more negative impact on educational outcomes than being from a migrant background' and it is

18 Ethnic Differences in Education and Diverging Prospects for Urban Youth in an Enlarged Europe (EDUMIGROM), an EU-funded project examining how ethnic differences in education contribute to diverging prospects for minority ethnic youth in multi-ethnic urban settings. For details see https://cordis.europa.eu/project/rcn/87811/brief/en.

19 EDUMIGROM (2011) *Final Report Summary (Ethnic Differences in Education and Diverging Prospects for Urban Youth in an Enlarged Europe)*, Executive summary.

20 Fox, Jon and Vidra, Zsuzsanna (2013) *Applying Tolerance Indicators: Roma School Segregation*, European University Institute, p. 26.

21 Fox, Jon and Vidra, Zsuzsanna (2013) *Applying Tolerance Indicators: Roma School Segregation*, European University Institute, pp. 26-27.

22 Fox, Jon and Vidra, Zsuzsanna (2013) *Applying Tolerance Indicators: Roma School Segregation*, European University Institute, pp. 28-29.

23 Zolnay, János (2018) 'Commuting to segregation: The role of pupil commuting in a Hungarian city: between school segregation and inequality' in *Review of Sociology* 28(4): 133–151.

24 Ahad, Aliyyah and Benton, Meghan (2018) *Mainstreaming 2.0: How Europe's education systems can boost migrant inclusion*, Brussels: Migration Policy Institute Europe, p. 34.

25 See, most recently, European Commission/EACEA/Eurydice (2019) *Integrating Students from Migrant Backgrounds into Schools in Europe: National Policies and Measures*, Eurydice Report, Luxembourg: Publications Office of the European Union, pp. 131-145.

26 Janta, B. and Harte, E. (2016) *Education policy responses for the inclusion of migrant children in Europe*, Rand Institute.

'more likely that a high concentration of children from a socio-economically disadvantaged background' more significantly impacts on outcomes than a high concentration of migrant children.

While studies on minorities in the west explicitly point to the salience of language as a basis of discrimination and inequalities in education, the focus on school segregation and the apparently well-developed minority rights framework conceal the significance minority language plays in discriminatory treatment and unequal outcomes in the east.[27] To address this inconsistency, this report highlights the ECtHR jurisprudence on discrimination against Roma children in education, where alleged lack of knowledge of the national language is used as a pretext for discrimination – including *Oršuš and Others* v. *Croatia* – and argues that Strasbourg case law should be read critically under the EU Charter and the RED to ensure that language proficiency is not seen as independent from racial or ethnic origin, but as a constitutive element.

Awareness of the structural nature of racial inequality in education, its embeddedness in socio-economic differences and the massive resistance to changing the *status quo* are important in the context of the role that EU anti-discrimination law can play – its strengths as well as constraints. It must be borne in mind that legislation, litigation and legal enforcement represent only one route to reforming or making the system more just and fair, even though at times they may be more significant than other tools of social change, particularly *in lieu* of direct action.

Education is a complex, lengthy and multi-actor process, in which the public interests (of societies and communities), the general interests of institutions (national, EU and international) and the self-interests of majority and minority children and parents interact, coincide or come into conflict, testing and probing principles, such as the pluralist nature of public education and the best interest of the child. Given that education is not only a right, but also an obligation in the EU, unless the states eliminate racial discrimination, they necessarily *coerce* minority students into a situation whereby the latter must endure less favourable treatment. The European Court of Human Rights has addressed this conundrum by curtailing the free choice of both majority and minority parents, which transpires from its positive obligation doctrine, seeking to ensure that states satisfy the obligations that they have undertaken and guarantee equal and quality education to all, regardless of racial or ethnic origin.

There are various junctions where impermissible exclusion and discriminatory selection may occur during the long years an average European child spends in the education system. This report focuses on placement testing, admission, disciplinary measures and spatial segregation to chart the basic mechanisms through which racial or ethnic discrimination in schools manifests itself. It discusses the forms that discrimination takes and the norms that prohibit it as they relate to the conduct and liability of policy makers, legislators, teachers, parents and children.

27 Byrne, Kevin and Szira, Judit *Mapping of research on Roma children in the European Union 2014-2017*, European Commission.

1 The multiple sources of European equality law on racial discrimination in education

European equality law in education derives from multiple sources, including United Nations, Council of Europe and European Union treaties and directives, as well as countless soft law measures adopted by these and other international organisations. National legislation completes the normative basis and domestic adjudication is the first place where inconsistencies come to the surface. This section provides an inventory of the normative sources and discusses the ways in which gaps may be bridged and conflicts smoothed out.

1.1 Racial equality in education in the UN treaty system

International standard setting regarding the right of minorities to education and racial equality in education began in the immediate aftermath of World War II. The Universal Declaration of Human Rights (1948) was the first instrument to assert the principle of non-discrimination on various grounds, including racial or ethnic origin, and proclaim the right to education. Following the report of the special rapporteur appointed in 1954 by the Economic and Social Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities to provide sufficient comparative information on national education systems, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) adopted the Convention against Discrimination in Education (1960).[28]

Signed and ratified by 26 EU Member States,[29] the convention (CADE) does not stop at asserting the *principle* of equal treatment in education, but contains clear and detailed norms on the *right* to racial or ethnic equal treatment in education. It covers all types and levels of education, including individual and group access, the equality of standards and quality of education, the conditions of schooling (specifically prohibiting those 'incompatible with the dignity of man') and separation within the educational system or institutions except for purposes explicitly spelt out in the convention.

Discrimination is taken in CADE to include '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 [that] has the purpose or effect of nullifying or impairing equality of treatment in education' (emphasis added).[30] Exceptions to the prohibition of spatially separated educational institutions must be specifically permitted in a state to be acceptable under CADE.

CADE distinguishes between discrimination and segregation, rendering both the lower quality and/or physical conditions of education, and physical separation in and of themselves unlawful. Its approach to segregation can be characterised as a prohibition with exceptions, meaning that it permits physical separation as long as stringent conditions are met and sets forth a clear test for situations in which racial or ethnic separation in schools may be deemed lawful.

While categorically prohibiting exclusion, CADE provides detailed rules on the permissibility of segregation by stipulating that the 'establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level' is permissible (Article 2(b)). The

28 Daudet, Yves and Eisemann, Pierre Michel (2005) 'Rights to Education', *Commentary, Convention against Discrimination in Education*, UNESCO, Paris, 2005, pp. 1-7.

29 See Annex 1 for a full list of ratifications.

30 Article 1(1) of the Convention against Discrimination in Education (CADE).

convention prohibits segregation in private schools as well, i.e. in situations when education is not funded by the state.[31]

Article 5(1)(c) of CADE sheds light on the reason why only self-segregation is permissible and justifiable only under strict conditions:

> 'It is essential to recognise *the right of members of national minorities to carry on their own educational activities*, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:
> (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
> (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
> (iii) That attendance at such schools is optional.'

These provisions become significant in the context of racial or ethnic discrimination because of the prominent roles that religion and language play in both racial or ethnic self-identification and the construction of racial or ethnic origin in Europe. As Thornberry explains, the integrationist rationale behind the prohibition of segregation and the limitation of self-segregation in CADE – and subsequent UN treaties – lies in the fear of the secession of territories inhabited by minorities.[32]

As an education-specific instrument that was adopted early on, CADE predates the relevant international treaties that regulate racial discrimination in education. It provides a coherent set of rules and envisages a system in which the state's duty not to intervene is supplemented with that of accommodating parental choices in relation to specifically guaranteed rights. In order to achieve such a coherent regulatory framework, CADE defines the content and manner in which parental choice can be made and professed. It sets out the criteria under which the state must exercise control over parental choices in the best interest of the child – even though the term is not used in CADE, the content of the limitations seeks to ensure that children do not suffer disadvantages.

CADE is invoked in the preamble of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1965 and in force since 1969. ICERD has been signed and ratified by all the 28 EU Member States. ICERD prohibits both direct and indirect racial discrimination[33] and categorically – i.e. without exceptions – prohibits segregation (Article 3)[34] 'in the enjoyment of the right to education'.[35] The Committee on the Elimination of All Forms of Racial Discrimination (CERD) has interpreted this provision as prohibiting spontaneous, unintended, in other words *de facto* physical

31 CADE, Article 2(c): The 'establishment or maintenance of private educational institutions' is permitted as long as 'the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.'

32 Thornberry, P. (2016) *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, OUP.

33 Article 1(1): 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

34 ICERD, Article 3: 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.'

35 ICERD, Article 5(e)(v) provides that '… States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of … the right to education'.

separation as well.[36] ICERD has served as a reference text in European courts, but only as far as the definition of racial discrimination (Article 1) is concerned, thus its application to disputes concerning racial or ethnic discrimination, and more particularly segregation in education remains to be seen. The European Court of Human Rights seems not to have accorded a central place to either ICERD or CADE in its interpretation of racial or ethnic discrimination in education. Even though these instruments are invoked as relevant sources of international law, the Strasbourg Court does not apply the tests set forth in CADE, Article 2(b) and 5(1)(c), or ICERD, Article 3.

These treaties do not require segregation to be coercive, nor do they define the level or unit at which segregation occurs, leaving the question open to a broad interpretation. Finally, the treaties do not set forth a degree of segregation that must be reached for it to be unlawful, i.e. exclusion ought not to result in ethnically homogenous educational units. Where the overwhelming majority or simply the majority of students belong to a minority racial or ethnic origin, segregation can be established. These questions are revisited below.

Under Article 18(4) of the International Covenant on Civil and Political Rights, states undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. According to Article 24(1), every child should have, without any discrimination as to race, colour, language, religion, national or social origin or property the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The International Covenant on Economic, Social and Cultural Rights provides the right to education under Article 13 and prohibits discrimination in Article 2(2) on the basis of racial or ethnic origin. The ICESCR sets out a programmatic right to primary education that is 'compulsory and available free for all'.[37] An important aspect of the right to education in the EU is that even though Member States have signed and ratified the covenant, only a tiny minority permit individual complaints under the optional protocol.[38]

According to Unesco, '*De facto* discrimination in access to education, especially quality education because of the economic situation is a question of major concern.'[39] The UN Commission on Human Rights has adopted several resolutions on the right to education, affirming state obligations and recognising the interdependence between CADE and the ICESCR.[40] Unesco has stated that addressing 'racial discrimination, economic exclusion, growing poverty as well as the adverse impact of the privatisation of educational services' is a priority if education is to be preserved as "a *common good*".[41]

Finally, the Convention on the Rights of the Child (CRC) sets forth, as a fundamental principle, the child's best interest and guarantees the right to education. Pursuant to Article 28(1)(a) CRC 'States Parties recognize 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 [m]ake primary education compulsory and

36 ICERD prohibits apartheid and segregation in Article 3. According to General Recommendation No XIX, states bear liability for failing to stem spontaneous (residential) segregation. General recommendation, Racial segregation and apartheid (Art. 3), 8/08/95, CERD, General recommendation XIX, 1995. Under Article 3, States parties undertake to prevent, prohibit and eradicate all practices of racial segregation in territories under their jurisdiction, which shall include 'partial segregation [that] may also arise as an unintended by-product of the actions of private persons', such as residential patterns reflecting group differences in income, race, colour, descent and national or ethnic origin (3). States must take into account that 'racial segregation can also arise without any initiative or direct involvement by the public authorities (4).

37 Plans of action for primary education (art.14): E/C.12/1999/4, General Comment 11 (1999), the United Nations Committee on Economic, Social and Cultural Rights, Twentieth Session, Geneva, 26 April-14 May 1999.

38 Only Belgium, Finland, France, Italy, Luxembourg, Portugal, Slovakia and Spain signed and ratified the optional protocol.

39 UNESCO Convention against Discrimination in Education (1960) and UNESCO (2006) *Articles 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: A comparative analysis*, p. 47.

40 See, Resolutions 2003/19 and 2004/25 on the right to education, adopted by the Commission on Human Rights and United Nations High Commissioner for Human Rights, The right to education, Commission on Human Rights: Resolutions 2002/23, 2003/19 and 2004/25. 48.

41 UNESCO, (2006) *Articles 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: A comparative analysis*, p. 48.

available free to all.' Article 30 CRC provides that in 'those States in which *ethnic, religious or linguistic minorities* exist, a child belonging to such a minority shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language' (emphasis added).

It must be borne in mind that establishing and maintaining ethnic minority schools is a collective right, as spelled out in Article 5(1) CADE and Article 13 of the Framework Convention on the Rights of National Minorities (FCNM). The goal of minority education is the preservation of minority identity, in which instruction in the minority language plays an instrumental role. As the report, *Equal Rights v Special Rights*, notes, in its general recommendations on specific minority groups, the CERD Committee explicitly calls on states to ensure that mother tongue and bilingual education are guaranteed.[42]

Ethnic communities may or may not be recognised at the national level, which should not prevent the judicial protection of ethnic minority rights, including the use of language and other traditions. Denial of access to education of a Sikh boy wearing his traditional turban was found to constitute direct discrimination based on ethnic origin in *Mandla and another* v. *Dowell Lee* in the United Kingdom.[43] In an analogous French case, Bikramjit Singh was first excluded from class and then expelled from school because he refused to take off a small Sikh turban, the *keski*. Unlike Mandla, who invoked race equality legislation in the UK, Singh complained under the ICCPR for the violation of his right to manifest his religion, and therefore the UN Human Rights Committee found against France on this ground, rather than ethnicity.[44] Given the differences in framing arguments so far, a reference for a preliminary ruling or a domestic judgment interpreting EU and international law could usefully clarify whether less favourable treatment in relation to displays of religious symbols by an ethno-religious group would be covered by the Racial Equality Directive, notably in the context of education.

The UK expert of the European network of legal experts in gender equality and non-discrimination stresses that in her country – as in many other Member States – state funding is provided for schools that select their pupils by religious adherence, which has implications for racial diversity in intake. The main religious groups that provide state-funded schooling are Protestants and Catholics, (providing between them, for instance, a third of state-funded schools in England, but nearly all primary schooling in Northern Ireland). This can lead to fewer minority ethnic pupils in such schools, particularly if the admission criteria are not controlled for potential racial bias and families traditionally associated with the religious denomination maintaining the schools are given preference.

There is a small number of Jewish and Muslim schools, as well as schools maintained by less sizeable religious groups, such as Hindus and Sikhs. Although in the UK, Jewish or Sikh is defined as both a race and an ethnic group, the ethno-religious character of these groups may be less straightforward elsewhere. Even if the admission criteria are based on religion, they may have ramifications for race-based inequalities, but treating minority and majority communities in an identical manner in this respect

42 Henrard, Kristin (2007) *Equal Rights* v. *Special Rights: Minority Protection and the Prohibition of Discrimination*, European Commission, p. 49.

43 UK, *Mandla* v. *Dowell Lee* [1983] 2 AC 548 http://www.bailii.org/uk/cases/UKHL/1982/7.html 'For a group to constitute an ethnic group in the sense of the 1976 Act [precursor to the Equality Act 2010], it must… regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion, different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community….'

44 UN Human Rights Committee, *Bikramjit Singh* v. *France*, Communication No. 1852/2008, Views adopted by the Committee at its 106th session (15 October-2 November 2012).

may, according to some commentators, unfortunately lead to unreasonable limitations on minority identity.[45]

The Supreme Court in the UK grappled with this conundrum in *R(E)* v. *Governing Body of JFS & Ors*, in which the majority held that discrimination based on the religious rules of matrilineal descent would amount to discrimination on grounds of race,[46] because 'one thing is clear about the matrilineal test; it is a test of ethnic origin.' The question for the Supreme Court was whether a policy that restricted admission to a Jewish school to those recognised as 'Jewish' by the Chief Rabbi, who applied a test based on maternal descent, amounted to direct race discrimination, in respect of which no justification or defence was available to the school under the Race Relations Act, or merely to direct religious discrimination in respect of which a specific defence would have applied. The claimant was a boy who practised as an Orthodox Jew but was not recognised as such by the Chief Rabbi or the school, because his mother (who had not been born Jewish) had converted to Judaism in a ceremony not recognised by the Chief Rabbi. It was found that, notwithstanding the fact that the school was not motivated by racism, the approach it took to the recognition of Jewishness crossed the line into impermissible race discrimination. The claimant had been treated less favourably in relation to admission to the school on the basis that he was not recognised as 'Jewish', and this was a test which turned on ethnicity and therefore on race.

1.2 Racial equality in education under the ECHR

The significance of CADE and ICERD is accentuated by the fact that they explicitly prohibit and/or define segregation. In contrast, the EU Charter and the RED, like the European Convention on Human Rights, do not explicitly prohibit racial or ethnic segregation in education.

Under Article 14 of the ECHR, the enjoyment of the rights and freedoms set forth in the Convention must be secured without discrimination on any ground such as race, colour, language, religion, national or social origin, association with a national minority, property or other status. Under Protocol I Article 2:

> '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 religions and philosophical convictions' (emphasis added).

Article 14 safeguards the principle of equal treatment that the ECtHR has applied to both direct and indirect racial or ethnic discrimination in an identical manner.[47] Protocol 12 to the ECHR guarantees the right to equal treatment in all walks of life and explicitly covers direct and indirect discrimination. Neither the Convention adopted in 1951, nor Protocol 12 adopted in 2000, specifically prohibit harassment and segregation.[48] It is important to note that while the Convention has been signed and ratified by all, Protocol 12 has been signed and ratified by only 10 EU Member States.[49] This partly explains why the ECtHR has been seized upon to adjudicate racial discrimination in education with reference to the right

45 Petty, Aaron R. (2014) 'Faith, However Defined: Reassessing JFS and the Judicial Conception of Religion', *Elon Law Review* 6(1) pp. 117-150. Petty investigates whether the concept of religion and more particularly religious membership 'favours religions in which membership is based largely, if not exclusively, on confessing a particular faith at the expense of those where membership is bound up to a significant extent with ethnicity and lineage and where "faith" (in the sense of propositional faith or "belief in" something) is not considered determinative of membership' (p. 118), finding that 'religion' is historically contingent, and 'that the idea of "religion" [in Europe] takes Christianity as its prototype' (p. 120).

46 UK Supreme Court, *R (on the application of E)* v. *Governing Body of JFS and the Admissions Appeal Panel of JFS and others (United Synagogue)* [2009] UKSC 15, 16 December 2009, https://www.supremecourt.uk/cases/uksc-2009-0136.html

47 Farkas, L. (2007) *Segregation of Roma Children in Education: Addressing structural discrimination through the Race Equality Directive* and Farkas, L. (2014) *Report on Discrimination of Roma Children in Education*, European Commission, October 2014.

48 The leading case is *Sejdic and Finci* v. *Bosnia and Herzegovina*, in which a Roma and a Jewish citizen challenged the discriminatory impact of election legislation on smaller national minorities not regarded as constituent nations by the Dayton Agreement.

49 Protocol 12 to the ECHR is ratified by the following EU Member States: Croatia, Cyprus, Finland, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovenia, Spain.

to education (Article 2, Protocol 1) and the principle of equal treatment (Article 14), rather than the right to equal treatment in the field of education (Protocol 12).

The ECtHR has so far delivered six judgments in the Roma education cases and found three other applications inadmissible.[50] The Court has dealt with two cases that relate to the segregation of Roma children in special schools (the misdiagnosis cases: *D.H. and Others* v. *the Czech Republic* and *Horváth and Kiss* v. *Hungary*), two cases that addressed class level segregation – one within the same school building (*Oršuš and Others* v. *Croatia*) and one in different buildings (*Sampanis et al* v. *Greece*), and two other cases where segregation occurred between Roma only and integrated schools (*Sampani et al* v. *Greece* and *Lavida et al* v. *Greece*).

While examining these cases, the ECtHR has reflected on white flight (*Sampani*), resistance by non-Romani parents to integrated education (all except for the misdiagnosis cases), measures intended to address lack of proficiency ('deficiencies') in the official language (*Oršuš*) and measures necessary to bring about integration (*Oršuš, Horváth and Kiss, Sampani* and *Lavida*). Except for *D.H.* and *Oršuš*, the cases were decided by unanimous vote and became final without appeal.

D.H. is the best-known European case and even though its significance at the Member State level is far from straightforward, it has dominated advocacy on school integration at the regional level. The Grand Chamber delivered judgment in *D.H. and Others* v. *the Czech Republic* seven years after filing – in November 2007 – establishing that the overrepresentation of Roma children in special schools amounted to indirect discrimination and ordering the respondent state to pay EUR 4 000 to each applicant. The *D.H.* litigation set out to achieve the adoption of domestic anti-discrimination legislation, but at the time the final judgment was delivered, the Czech Republic remained the last Member State without it.

A year after the *D.H.* 'landslide', no violation was found in *Oršuš* by the chamber, following which the Grand Chamber ruled in favour of the applicants in 2010, granting EUR 4 000 to each. The case is the leading precedent in Croatia,[51] and given that it deals with segregation and the limits and inadequacy of measures addressing the lack of proficiency in the official language, it is likely to become an important reference for courts across the EU.

Four more Strasbourg verdicts were delivered in quick succession and even though the Court's approach grew bolder, international litigation could seldom achieve what states were not prepared to grant.[52] *D.H.* laid the ground of judicial interpretation whereby the child's best interest was construed as tantamount to the right to equal treatment, which prevailed over parental choice – also because the choice did not rest on informed consent.[53] Despite this robust finding, it could not be predicted that subsequently the Strasbourg Court would not find discrimination in the Roma education cases justifiable, rendering the 'qualification debate' obsolete.

50 ECtHR, *D.H. and Others* v. *the Czech Republic*, [GC] No. 57325/00, judgment of 13 November 2007, *Sampanis and Others* v. *Greece*, No. 32526/05, judgment of 5 June 2008, *Oršuš and Others* v. *Croatia*, [GC] No.15766/03, judgment of 16 March 2010, *Sampani and Others* v. *Greece*, No. 59608/09, judgment of 11 December 2012, *Horváth and Kiss v. Hungary*, judgment of 29 January 2013, *Lavida and Others* v. *Greece*, No. 7973/10, judgment of 30 May 2013. *Horváth and Vadászi* v. *Hungary*, *CFCF* v. *Hungary*, and *Amanda Kósa* v. *Hungary* have been found inadmissible.

51 Municipal Court of Čakovec, judgment no.P.313/02 of 26 September 2002 and Croatian Constitutional Court, decision no. U-III/3138/2002 of 7 February 2007.

52 Three cases were filed from Greece: *Sampanis and Others* v. *Greece*, *Lavida and Others* v. *Greece*, *Sampani and Others* v. *Greece*. In the context of misdiagnosis, for instance, six challenges were filed in Hungary in 2005, but domestic courts granted compensation only to István Horváth and András Kiss, with the Supreme Court refusing to find structural discrimination, suggesting that systemic reform be sought from the Constitutional or the Strasbourg Court. By then, however, misdiagnosis was severely curtailed by a decree passed in 2007 so that when *Horváth and Kiss* v. *Hungary* was filed with the ECtHR, the single unresolved issue was whether the Court would establish racial or ethnic discrimination, and if so, with what qualification.

53 See, ECtHR, *D.H. and others* v. *Czech Republic*, [GC] judgment of 13 November 2007, para. 203.

The fact that indirect discrimination was established in *D.H.* – following *Hoogendijk* v. *the Netherlands*,[54] *Zarb Adami* v. *Malta*[55] and *Thlimmenos* v. *Greece*[56] – did not change the conception of discrimination under the convention (treating persons in analogous situations unequally and those in different situations equally). Notwithstanding the reference in *D.H.* to indirect discrimination as defined in the Racial Equality Directive and the reference to *D.H.* in subsequent cases, the Strasbourg Court's equality maxim remained unchanged.[57]

The Strasbourg approach can cause complications in national legal orders that safeguard the *right* to equal treatment and/or explicitly prohibit segregation. The finding of indirect discrimination and/or the application of the proportionality test in the Roma education cases opens the door to interpretation that reads down domestic anti-discrimination law that otherwise complies with ICERD and CADE, as far as justification is concerned. The Strasbourg approach runs counter to international human rights treaties that categorically prohibit segregation, undermining the understanding of segregation as unjustifiable structural and/or concealed direct discrimination, whereby concealment techniques serve to hide from view the intent to separate racial minority students. It is notable that the Strasbourg approach seems to require that applicants show the existence of intent on the part of state authorities to make a finding of direct discrimination. Therefore, even the flagrant disregard of the consequences of the state's (in) action in a manner that is unacceptable in that particular situation will lead to a finding of indirect discrimination, unless discriminatory intent is proven.[58] Under EU anti-discrimination law, intent does not form part of the disposition of any type of discrimination.

The *Report on discrimination of Roma children in education* published in 2014 has already analysed discrimination, and this report follows on from its main arguments.[59] In the respondent states implicated in the misdiagnosis cases – the Czech Republic and Hungary – the diagnosis of mentally sound children as disabled came about in response to a massive increase in the number of Roma children in primary schools in the 1970s, which was a result of successful mobilisation by the then communist states. The sudden growth of the proportion of ethnic minority students triggered resistance from ethnic majority parents and teachers, as a result of which Roma children of sound intellect were pushed out of mainstream schools. Given that primary education was compulsory, these children could not be kept out of school entirely, so transferring them to special schools established for the disabled seemed the only feasible option. These trends had already been described by social scientists in both countries before litigation commenced, but the Strasbourg Court dealt with this expert evidence only in *Horváth and Kiss*

54 *Hoogendijk* v. *The Netherlands*, Application No. 58641/00, decision as to the admissibility of 6 January 2005.

55 *Zarb Adami* v. *Malta*, Application No. 17209/02, judgment of 20 June 2006.

56 *Thlimmenos* v. *Greece*, Application No. 34369/97, judgment of 6 April 2000.

57 See further, Farkas, L. (2014) *Report on Discrimination of Roma Children in Education*, European Commission. On the equality maxim, see, Arnardóttir, Oddný Mjöll (2003) *Equality and Non-Discrimination Under the European Convention on Human Rights*, Martinus Nijhoff, The Hague-London-New York.

58 In *Horváth and Kiss*, the Strasbourg Court noted that 'the policy and the testing in question have not been argued to aim specifically at' the Roma (*Horváth and Kiss v. Hungary*, judgment of 29 January 2013, para. 111). However, that was obviously not the case, given that the Court itself said that it 'cannot accept the applicants' argument that the different treatment as such resulted from a de facto situation that affected only the Roma', (para. 110). Similarly, in *Oršuš*, the Court emphasised the lack of intent on the part of the relevant authorities, while finding that the impugned measure 'was applied exclusively to the members of a singular ethnic group' (*Oršuš and Others* v. *Croatia*, [GC] No.15766/03, judgment of 16 March 2010, para. 155). The Court observed that the relevant authorities had officially recognised the existence of segregation in the school in question, and the need to correct it. It could not subscribe to the Government's argument that for the 2009-2010 academic year, it would have sufficed for the applicant parents to request the transfer of their children to another ordinary school in order to end the feeling of discrimination (para. 69). In *Lavida*, the Court made crystal clear that unless intent can be shown on the part of the central administration, direct discrimination will not be established. It held that 'in the absence of any discriminatory intent on the part of the State, the Court considers that the continuation of the education of Roma children in a public school attended exclusively by Roma and the decision against effective desegregation measures – for example, dividing the Roma in mixed classes in other schools or redrawing catchment areas – due in particular to the opposition of parents of non-Roma pupils, can not be regarded as objectively justified by a legitimate aim', (*Lavida and Others* v. *Greece*, No. 7973/10, judgment of 30 May 2013, para. 73).

59 Farkas, L. (2014) *Report on Discrimination of Roma Children in Education*, European network of legal experts in the non-discrimination field, European Commission, pp. 24-38.

v. *Hungary*,[60] while mentioning the key aspect of concealment *obiter dicta* in *D.H. and Others* v. *the Czech Republic*.[61]

In the Czech Republic, given the (financial) difficulty of accessing pre-school education after the political transition, at the time of enrolment, Roma children were simply not prepared by educational institutions to take IQ tests,[62] a fact of life disregarded by the educational system, but one in which the children's ethnic origin was clearly central. In Hungary, the concealment technique was vested in the flagrant disregard of IQ levels set by the World Health Organisation for mild mental disability, which facilitated misdiagnosis also of children of average intelligence,[63] and the invention of the category of 'familial disability' to justify the placement of Roma children with a background of extreme poverty into special schools, rather than providing them with early childhood education to compensate for their socio-economic disadvantage.[64] While many non-Roma children also grow up in extreme poverty, it is important to mention here that even during the recent standardisation of the most developed IQ test in Hungary (WISC IV), the experts were unable to find a control group from the majority ethnic origin with which to compare the most impoverished Roma children taking the test.[65]

The level of ratification by EU Member States of the European Social Charter is low, particularly as concerns the right of non-governmental organisations to raise collective complaints against states before the European Committee of Social Rights.[66] The majority of collective complaints concerning racial or ethnic discrimination pertain to housing, only tangentially discussing education, but the opinions of the ECSR leave one in no doubt that all forms of discrimination are covered under the Social Charter and that equality planning, as well as effective sanctions, are required to stem racial discrimination.[67]

The Council of Europe's Framework Convention on the Rights of National Minorities (FCNM) guarantees the right to minority education. The FCNM was adopted in 1994 and entered into force four years later. It has a weak enforcement mechanism – reporting by the Advisory Committee – because proposals to supplement it with an additional protocol setting out 'clearly defined rights which individuals may invoke before independent judicial organs' failed.[68] Consequently, the right to minority education under the FCNM is not justiciable in court. The Council of Europe's Charter for Regional or Minority Languages safeguards minority language rights.[69] While national minorities that have European kin states are relatively well catered for, Romanes is among the languages that receive a lower level of protection,

60 *Horváth and Kiss* v. *Hungary*, judgment of 29 January 2013, 'Scholarly literature suggests that the systemic misdiagnosis of Roma children as mentally disabled has been a tool to segregate Roma children from non-Roma children in the Hungarian public school system since at least the 1970s', (para. 9). The Court noted that 'the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests' (para. 116).

61 The Court underlined that 'at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them.' *D.H. and others v. Czech Republic*, [GC] judgment of 13 November 2007, para. 201.

62 For further information and analysis on 'misdiagnosis', see, Roma Education Fund (2012) Pitfalls and Bias, entry testing and the overrepresentation of Romani children in special education, April 2012, Budapest.

63 The ECtHR found it 'troubling that the national authorities significantly departed from the WHO standards.' *Horváth and Kiss* v. *Hungary*, judgment of 29 January 2013, para. 118.

64 The Court recognised that the concept of 'familial disability' played the same role in the Hungarian context as the quasi-automatic placement of Romani children into Czech remedial schools '[owing] to real or perceived language and cultural differences between Roma and the majority.' *Horváth and Kiss* v. *Hungary*, judgment of 29 January 2013, para. 115.

65 Bass, L., Kő N., Kuncz, E., Lanyine Engelmayer, Á., Mészáros, A., Mlinkó, R., Nagyné Réz, I., Rózsa, S. (2008) *Tapasztalatok a WISC-IV gyermek-intelligenciateszt magyarországi standardizálásáról* (Experiences of the standardisation of the WISC-IV child IQ test in Hungary), Educatio Társadalmi Szolgáltató Kht., Budapest, p. 71.

66 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints ratified by Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Portugal and Sweden.

67 European Union, de Schutter, O. (2016) *The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights*, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs.

68 Gilbert, G., (1996) 'The Council of Europe and Minority Rights', *Human Rights Quarterly*, Vol. 18. No. 1, p. 162. PACE 1995 Recommendation.

69 Three weaknesses are identified in relation to the Language Charter. The first is its tendency to limit language rights to national minorities, while leaving unclear what is a national minority. The second is a weak enforcement model. The third can be pinned down to different levels of protection dependent on the language spoken. De Varennes, F., (2001) 'Language rights as an integral part of human rights', *International Journal on Multicultural Societies* 3.1, pp. 15-25.

and accommodation is lacking when it comes to the languages spoken by 'cultural' minorities that are not officially recognised. Both aspects diminish the salience of this otherwise non-justiciable instrument.

The European Commission against Racism and Intolerance (ECRI) has issued several recommendations relevant or specific to discrimination in education for various racial or racialised minorities. ECRI defines segregation as *de facto* discrimination that can amount to direct or indirect discrimination.[70] This is, unfortunately, not in line with ICERD, according to which segregation is a stand-alone form of less favourable treatment, nor with CADE, which prohibits segregation with specific exceptions. Although ECRI's conception blurs distinctions between direct and indirect, intentional and unintentional segregation, it does purport to prohibit *de facto* segregation.[71]

ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial intolerance (GPR No. 7) is an important document within the Council of Europe.[72] It defines direct and indirect discrimination on the grounds of racial or ethnic origin, building on the Racial Equality Directive.[73] GPR No.7 broadens the concept of racial discrimination to less favourable treatment based on nationality, language and religion, influencing the Strasbourg Court's interpretation.[74]

1.3 The Racial Equality Directive and resolving potential collisions with EU law

The Racial Equality Directive (RED) adopted in July 2000[75] prohibits direct and indirect discrimination, harassment and victimisation. According to Article 3(1)(g) RED, 'Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to (...) education'. All types of education are covered, from pre-school to higher education, technical and vocational (explicitly mentioned in Article 3(1)(b)), formal or informal, public or private education, religious or secular.

The RED preamble references various human rights treaties that are ratified by Member States and prohibit racial discrimination.[76] Paragraph 3 of the preamble notes

> 'The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.'

70 ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial intolerance adopted on 13 December 2002 and revised on 7 December 2017.

71 Bowman, Kristi and Nantl, Jiri (2014) 'Liability and Remedies for School Segregation in the United States and the European Union', *International Journal of Education Law and Policy*, 2/2014.

72 On 13 December 2002, the Council of Europe's' European Commission against Racism and Intolerance (ECRI) adopted General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination.

73 Cardinale, G., (2004) 'The preparation of ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination', Chopin, I. and Niessen, J. (eds), *The development of legal instruments to combat racism in a diverse Europe*, Martinus Nijhoff Publishing, 2004, pp. 82-83.

74 It defines racial discrimination as follows: '1. For the purposes of this Recommendation, the following definitions shall apply: (b) '*direct racial discrimination*' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. ...(c) '*indirect racial discrimination*' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification.'

75 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

76 Racial Equality Directive, preamble, paragraph 3.

This is relevant, because before the Charter addressing this issue entered into force, it was held that 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.'[77]

The Charter, adopted in December 2000 and having the same value as the Treaties (under the Treaty of Lisbon) prohibits discrimination on the grounds of race, colour, ethnic or social origin, language and membership of a national minority.[78] Unlike the European Convention of Human Rights, the rights and principles of the Charter do not have a self-standing basis. Pursuant to Article 51 paragraph 1, the Charter

> 'is addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'

Although the Charter does not establish a general power for the European Commission to intervene in the area of fundamental rights, it provides a legal basis to act when EU law applies or when national measures are taken in application of EU law,[79] including measures taken under EU financial mechanisms.[80] Pursuant to Article 3 of the Racial Equality Directive, the Charter applies in relation to racial discrimination, and in education and vocational training.

Article 14 of the Charter ensures the right to education as follows:

> '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.'

The formula in Article 14(3) of the EU Charter is identical to that in Article 2 of Protocol 1 to the ECHR, with the caveat that, under the Convention, the state has no express duty to respect the right of parents to ensure education to their children in conformity with their pedagogical convictions. However, if

77 Judgment of 14 May 1974, *J. Nold, Kohlen- Und Baustoffgrosshandlung* v. *Commission of the European Communities*, Case C-4/73, ECLI:EU:C:1974:51, para. 13. With regard to the ECHR, see Article 52(3) of the Charter.

78 Charter of Fundamental Rights of the European Union, Article 21(1) and Article 22.

79 In Judgment of 26 February 2013, *Åklagaren* v. *Hans Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, the CJEU delivered a ruling on the scope of the Charter of Fundamental Rights, clarifying the relationship between national and EU law in general. The judgment is significant, because Article 51 leaves out the broader category of 'the scope of EU law,' while the Explanatory Note concerning this provision seems to contradict the idea that under the Charter the Court's previous case law on fundamental rights could be restricted. In *Fransson*, the CJEU held that Article 51 (1) 'confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union' (para. 18). The CJEU did not see a reason to distinguish 'implementation' from 'scope of application', underlining that '[s]ince the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter' (para. 21). The court went on to conclude that, 'Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction' (para. 22). Among other things, in Judgment of 6 March 2014, *Siragusa*, C-206/13, ECLI:EU:C:2014:126, the Court confirmed its previous settled case law according to which 'the concept of "implementing EU law", as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other' (para. 24).

80 See, for instance, Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission on 11 May 2015 in Case OI/8/2014/AN. The inquiry concerned the way in which the European Commission ensures that the fundamental rights enshrined in the Charter are complied with when EU cohesion policy is implemented by Member States.

pedagogical convictions include the prohibition of corporal punishment in schools, the education of boys and girls in co-educational settings and curricula reflecting the democratic values in pluralist societies, the ECtHR case law provides ample support for such a concept.

Articles 21, 22 and 24 of the Charter are also relevant in respect of racial discrimination in education. Pursuant to Article 21(1), 'Any discrimination based on any ground such as race, colour, ethnic or social origin, language, religion or belief, membership of a national minority … shall be prohibited.' Under Article 22, the 'Union shall respect cultural, religious and linguistic diversity'. According to Article 24(2), 'In all actions relating to children, whether taken by public authorities or private institutions, the *child's best interests* must be a primary consideration' (emphasis added).

The EU Charter cannot in itself impose rights and obligations on Member States in the field of education in general. When it comes to implementing Article 3 of the RED in relation to racial discrimination in education and vocational training, the Charter cannot be construed as granting parents the right to choose a specific school, because free choice is limited to *religious, philosophical and pedagogical convictions,* in accordance with national laws. Pedagogical convictions are not defined. Thus, parents have the right to choose one of the schools that satisfies their religious, philosophical or pedagogical convictions, but EU law grants no express right to enroll their children in one specific school. This follows from the practical impossibility of guaranteeing free choice to every parent, given the limited number of schools and classes. Moreover, the right of parents to ensure a certain type of education serves to retain a right to found schools without placing a corresponding duty on states to finance them.

A recommendation for the adoption of a Roma-specific directive explicitly prohibiting segregation and imposing a duty on Member States to take positive action measures to remedy structural discrimination was made in 2004, to no avail.[81] A decade later, the Council Recommendation on effective Roma integration measures (2013) was adopted, seeking to compensate for the shortcomings of domestic policy processes taken in pursuance to the 2011 EU Framework for National Roma Integration Strategies.[82] The recommendation addresses Roma-specific issues neglected during the accession of central and eastern European states, and subsequent policy processes,[83] with the document aiming to enhance the effectiveness of enforcement,[84] without giving specific attention to legal remedies.[85] Since it was a recommendation, it was not legally possible to require Member States to introduce transposing legislation.[86] More recently, desegregation guidance was issued to spur compliance by recalcitrant Member States.[87]

Education is a key area within the EU policy framework for migrant integration, even though the integration of migrants is a national competence. The Treaty of Lisbon signed in 2007 gives European institutions the mandate to incentivise and support action at the Member State level and the EU has periodically set priorities and goals to drive policies, legislative proposals and funding opportunities. The 2004 common basic principles guide most EU actions in the area of integration. Peer review is an important building block in soft governance and best practice examples have been collected and circulated on the education

81 Xanthaki, A. (2005) 'The Proposal for an EU Directive on Integration', *Roma Rights* 2005/1 and Xanthaki, A. (2005) 'Hope Dies Last: An EU Directive on Roma Integration', *European Public Law*, 11/4 pp. 515ff. The proposal was based on Article 21 of the EU Charter.

82 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020, COM/2011/0173 final.

83 See, for instance Kóczé, A., Kullmann, A., Scharle, A., Szendrey, O., Teller, N. and Zentai, V. (2014) *Programming the Structural Funds for Roma Inclusion in 2014-20* and Open Society Foundations (2015) 'Making the Most of EU Funds for Roma Inclusion to Conclude in 2015-16', press release, 6 February 2015.

84 Preamble, paragraph 20.

85 Goodwin, M. and Buijs, R. (2013), 'Making Good European Citizens of the Roma: A Closer Look at the EU Framework for National Roman Integration Strategies', German Law Journal 14(2013), p. 2041.

86 Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States (2013/C 378/01).

87 European Commission (2015) *Guidance for Member States on the use of European Structural and Investment Funds in tackling educational and spatial segregation*, EGESIF_15-0024-01 11/11/2015, European Structural and Investment Funds.

of migrant children[88] at the initiative of the European Commission's Directorate General on Education and Culture and the Education, Audiovisual and Culture Executive Agency.[89]

International organisations have not established a permanent structure for collaboration on standard setting and interpretation as concerns racial discrimination in education.[90] Rather, they have adopted parallel norms and oversight mechanisms that engage with domestic actors separately. Oversight is norm (treaty) based and fragmented across ground and field-based instruments.

None of the international reporting or complaint mechanisms has penetrated domestic decision making as profoundly as EU law, due partly to the dialogue that the preliminary ruling mechanism has forged between domestic courts and the CJEU, partly to the fact that the RED requires the establishment of domestic agencies – the equality bodies – and partly to the sanctions applicable to the Member State in case of non-compliance (given that such sanctions are not provided by the other international mechanisms). Specialised agencies play an essential role in interpreting and implementing international standards at the national level, at times forming part of national human rights institutions (NHRI). Domestic bodies and courts are directly exposed to the multitude of international norms.

The EU legal order is a supranational, multi-layered system. EU law can be enforced in a 'centralised system', before the CJEU, but more frequently, it is enforced in a decentralised manner before national courts.[91] According to jurisprudence setting out the supremacy and direct effect of EU law, courts are expected to interpret national provisions in compliance with EU law, while in case of dispute or uncertainty,[92] interpretation can be sought from the Court of Justice of the European Union.[93] Preliminary rulings promote judicial dialogue between national courts and the CJEU, augmented by 'EU collective actor legislative requirements' that have opened the way for equality bodies to raise questions through domestic courts about the anti-discrimination directives.[94]

The fragmented and complex nature of European equality law inspires 'forum shopping'.[95] In situations where domestic courts refuse to make a reference for a preliminary ruling, a dispute may be resolved by other international tribunals that are directly accessible to parties, whose requests for a reference was not taken up by national courts.[96] The European Commission has a duty to respond to all complaints, but also has discretionary power to decide whether and when to launch an infringement procedure. While it cannot intervene in individual cases, the Commission – similar to Member States – has the right to make a submission on the issue at hand in preliminary ruling cases pending before the Court of Justice

88 European Commission (2008) *Education and Migration: strategies for integrating migrant children in European schools and societies, A synthesis of research findings for policy-makers*, independent report submitted to the European Commission by the NESSE network of experts, available at http://www.nesse.fr/nesse/activities/reports/activities/reports/education-and-migration-pdf.

89 European Commission/EACEA/Eurydice, (2019) *Integrating Students from Migrant Backgrounds into Schools in Europe: National Policies and Measures.* Eurydice Report. Luxembourg: Publications Office of the European Union.

90 Identified as crucial by the High Commissioner for National Minorities. See Roma (Gypsies) in the CSCE Region Report on the situation of Roma and Sinti in the OSCE Area, 2000, report available at https://www.osce.org/hcnm/42063?download=true.

91 Albors-Llorens, A. (2014) 'Judicial protection before the Court of Justice of the European Union', *European Union Law*, 2014, pp. 255-299.

92 Timmermans, Christiaan (2004), 'The European Union's judicial system', Common Market Law Review, Vol. 41 Issue 2, 2004 pp. 393-405.

93 Mayoral, Juan A. (2017) 'In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe', Common Market Law Review, Vol. 55, Issue 3, May 2017, pp. 551-568.

94 The term 'EU collective actor legislative requirements' was coined by Claire Kilpatrick and Bruno de Witte in Muir, E., Kilpatrick, C., Miller, J. and de Witte, B. (eds) (2017) *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum*, p. 4.

95 'Forum shopping' describes the concept of choosing the (judicial) venue where a legal dispute takes place. It may be an opportunity that is celebrated (in the hands of inventive human rights lawyers), or an unwelcome possibility, when it comes to settling commercial disputes. See, for instance, Helfer, L. R. (1999) 'Forum Shopping for Human Rights', *University of Pennsylvania Law Review,* Vol. 148:285 and Clermont, Kevin M. and Eisenberg, T. (1995) 'Exorcising the Evil of Forum-Shopping'. *Cornell Law Review*, Vol. 80, issue 6.

96 The ECtHR provided 'a form of "external" control of the compliance with the CJEU case law (in particular the Cilfit decision)', European University Institute (2017) *ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter*, 'Module 6 – Non-discrimination', pp. 56-58.

of the European Union. It can launch infringement proceedings against recalcitrant Member States, and in these proceedings it bears the burden of proof concerning consistent and general administrative practice in breach of EU law and can benefit from no presumptions. While formal steps towards launching infringement proceedings concerning national practices failing to comply with the RED in the field of education have been taken as concerns the segregation of Roma children in the **Czech Republic**, **Slovakia** and **Hungary**, legal action before the CJEU has not yet been launched.[97] Moreover, similar steps have not yet been taken in relation to western Member States, where segregation also occurs, although it manifests itself in a somewhat different way, as described in Section 3.3, below.

In the event a dispute relates to the discriminatory measures, practices or omissions of Member States and the issue does not come before the CJEU or European institutions fail to take action, the states may be held accountable by international tribunals and the delays and other procedural errors in the handling of the case of EU institutions may be publicly exposed by the European Ombudsman.[98] It is notable that complaints to the European Ombudsman automatically trigger investigation unless manifestly ill-founded. It should be noted, however, that the Ombudsman's mandate extends only to determining compliance with the EU institutions' administrative procedure, rather than to assessing the adequacy of the substance of decisions.

International tribunals rely on national courts to protect the right to equal treatment and non-discrimination, but they themselves are not (directly) accessible to all. In respect of instruments that relate to racial discrimination in education, the UN treaties and the ECHR provide individuals direct access (the right to individual petition) but complaints are not automatically permitted by Member States, and when they are, they must meet admissibility requirements. For example, Protocol 12 to the European Convention is signed and ratified by only 10 EU Member States and therefore applicants outside these countries are unable to rely on it.[99] The level of ratification by EU Member States of the European Social Charter is low, particularly in relation to the right of non-governmental organisations to raise collective complaints against states before the European Committee of Social Rights.[100] As far as the individual communications under Article 14 of the International Convention on the Elimination of All forms of Racial Discrimination to submit complaints to CERD is concerned, **Croatia**, **Greece**, **Latvia**, **Lithuania** and the **United Kingdom** still have not recognised the procedure. In contrast, references for a preliminary ruling to the CJEU, the 'ultimate interpreter' of EU anti-discrimination law are available, subject to the decision of national courts.[101] Courts against whose judgments appeal cannot be laid are under an obligation to refer,[102] however, as will be seen below, some refuse to do so without sufficient reasons.[103]

97 Infringement number 20142174, 25/09/2014 Formal notice Art. 258 TFEU, Czech Republic; Infringement number 20152025, 29/04/2015 Formal notice Art. 258 TFEU, Slovakia; Infringement number 20152206, Reasoned opinion Art. 258 TFEU, Hungary; Proceedings relating to Non-conformity with Directive 2000/43/EC on Racial Equality – Discrimination of Roma children in education.

98 Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission. At para. 46, the Ombudsman stated that 'the vast majority of Member State actions, taken in the context of EU cohesion policy, will be actions taken in the implementation of EU law', in relation to which it is imperative 'to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved'. As underlined in CJEU, *Hernández and others v. Spain*, Case C-198/13, EU:C:2014:2055, para. 47.

99 Protocol 12 to the ECHR is ratified only by Croatia, Cyprus, Finland, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovenia, Spain.

100 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints ratified by Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Portugal and Sweden.

101 Dawson, M. Muir, E. and Claes, M. (2012) 'Enforcing the Rights Revolution in the EU: the Case of Equality', *European Human Rights Law Review*, 2012, p. 276.

102 Treaty on the Functioning of the European Union, Article 267.

103 If the provision disputed is clear or its meaning has already been clarified, no referral should be made. Broberg, M. (2008) 'Acte Clair Revisited: Adapting the Acte Clair criteria to the demands of the times', *Common Market Law Review* 45: 1383-1397.

Interordinality, which is the coexistence of parallel sources of anti-discrimination law, may at times trigger legal uncertainty or inconsistencies in legal interpretation,[104] and create conflicting treaty obligations.[105] Courts naturally seek to forge connections with other legal regimes through judicial dialogue, but mechanisms for multilateral dialogue and a common interpretive mechanism do not exist. This makes it imperative that international courts and tribunals play their part in rendering the law coherent and consistent.

The Strasbourg Court has an 'external influence' over the interpretation of EU law, without interpreting EU law directly.[106] Given that the CJEU has not yet been engaged to rule on racial or ethnic segregation in education, the approach of the Strasbourg court to the RED is the leading international source for the interpretation of the directive also in the national contexts. Indeed, the CJEU also draws on Strasbourg case law.[107]

When applying EU law, both the CJEU and Member States' courts must ensure that judicial interpretation is consistent with international treaties that are binding on all Member States. International treaties ratified by the EU or all Member States also become a source of interpretation through the Charter of Fundamental Rights of the European Union. The Charter sets two limitations to the interordinal interpretation of EU law: 1. it cannot chip away protection enshrined in international treaties signed and ratified by Member States,[108] and 2. more extensive protection under EU law must prevail. This follows, on the one hand, from Article 53, pursuant to which the Charter shall not 'be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by *international agreements to which the Union, the Community or all the Member States are party*' (emphasis added).[109] On the other hand, pursuant to Article 52(3), insofar as a right is protected under the European Convention, the meaning and scope laid down by the Convention will govern interpretation, unless Union law provides more extensive protection.[110]

Important questions arise in the context of racial discrimination in education. First, given that some Member States have not signed and ratified the UNESCO Convention Against Discrimination in Education, its general applicability is not straightforward. Simultaneously, however, CADE is invoked in the preamble of the International Convention on the Elimination of All Forms of Racial Discrimination, which in turn has been signed and ratified by all the Member States. ICERD and CADE provide identical protection, because even though the former categorically prohibits segregation, it permits – and in some instances requires –

104 Gordillo, L.I. (2012) *Interlocking Constitutions: Towards an interordinal theory of national, European and UN law*, Oxford: Hart Publishing.

105 Spielmann, D. (1999) 'Human rights case law in the Strasbourg and Luxembourg courts: conflicts, inconsistencies, and complementarities', in Alston, P. (ed.), *The EU and Human Rights*, Oxford, Oxford University Press, p. 757. See also, Farkas, L. (2018) 'Throwing the babies out with the bathwater: the CJEU, xenophobia and equality bodies after Jyske Finans', *European equality law review*, 1/2018, pp. 20-29.

106 Gordillo, L.I. (2012) *Interlocking Constitutions: Towards an interordinal theory of national, European and UN law*.

107 See, for instance the references to ECtHR case law: Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD* v. *Komisia za zashtita ot diskriminatsia (Nikolova)*, Case C-83/14 ECLI:EU:C:2015:480; Opinion of Advocate General Kokott delivered on 12 March 2015 in *CHEZ Razpredelenie Bulgaria AD* v. *Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:170.

108 As mentioned above, these treaties are mentioned in the RED's preamble. For instance, CADE and the FCNM are not ratified by all the Member States, while the relevant UN treaties are.

109 Article 52 of the Charter permits limitation to Charter rights as long as they are 'provided for by law and respect the essence of those rights and freedoms,' and 'are necessary and genuinely meet objectives of *general interest* recognised by the Union or the need to protect the rights and freedoms of others'.

110 Opinion of Advocate General Kokott in CHEZ: Article 21(1) of the Charter draws on, inter alia, Article 14 of the European Human Rights Convention. In so far as Article 21(1) corresponds to Article 14 of the Convention, 'it applies in compliance with it' (Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303, p. 17 (at p. 24); those explanations were drawn up as a way of providing guidance in the interpretation of the Charter and, under the third subparagraph of Article 6(1) TEU in conjunction with Article 52(7) of the Charter, must be given due regard by the courts of the European Union and of the Member States).

positive action measures (Article 2(2)).[111] Consequently, its prohibition of segregation (Article 3) can be interpreted as permitting exceptions in a manner identical to those contained in CADE and therefore the two international treaties can be interpreted by national courts – including the courts of EU Member States – in a consistent manner.

Secondly, the CERD Committee interprets the ground of racial or ethnic origin more broadly than either the Strasbourg or Luxembourg Courts. In light of recent European verdicts concerning nationals of foreign origin,[112] it is important to emphasise that in the Committee's view discrimination based on geographic origin, nationality and Islamophobia[113] fall under ICERD. Given that both the ECtHR and the CJEU have invoked ICERD Article 1 to define the ground of racial or ethnic origin[114] and that under Article 53 of the EU Charter, the CERD Committee's broad definition should prevail, the level of protection should not fall below that available under ICERD.

In *CHEZ*, the CJEU adopted a sufficiently broad interpretation of racial discrimination by tracing the process of race making and reconstructing the way in which the Roma district at the centre of the dispute was stigmatised and assumed/presumed to constitute a neighbourhood prone to criminal activities (electricity theft).[115] As the CJEU noted, the ethnic Bulgarian Ms Nikolova suffered less favourable treatment 'together with the Roma', as part of a collective formed by stereotype, as much as by geographic proximity.[116] Accordingly, the judgment establishes perception-based, as well as associative discrimination.[117]

Constructivist judicial interpretation can also be helpful in analysing racialisation with reference to the lack of proficiency in the official language, particularly if the process applies to a well-defined minority group, such as for instance the Roma in the ECtHR's ruling in *Oršuš and Others* v. *Croatia*.[118] The Strasbourg Court treated the lack of proficiency in Croatian as an apparently neutral criterion in relation to ethnicity, even though minority language forms part of its definition and students in classes designated to provide extra tuition in Croatian were exclusively Roma. In light of the *CHEZ* ruling, it is necessary to chart the formation of language classes catering for ethnic or racial minorities.

It is important to note that extra language tuition is often provided to students of 'foreign background', who come from diverse ethnic identities. Nonetheless, they share an ascribed characteristic: non-majority ethnicity on the basis of which schools cater for their special needs. Given this common ascription, it is important not to arbitrarily dissect this group on the basis of self-identification or 'objective' geographic origin, particularly when individual students are assigned to the group by policy design, rather than choice or necessity.[119] Clearly, physical separation should be avoided at all costs and maintained only as long as strictly necessary.

111 Pursuant to Article 2.2. 'States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'

112 Atrey, S. (2018) 'Race discrimination in EU law after *Jyske Finans*', *Common Market Law Review*, 55, p. 627 and Möschel, M. (2017) 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain', *The Modern Law Review*, Vol. 80, Issue 1, pp. 121-132.

113 CERD GR 35 and *TBB-Turkish Union in Berlin/Brandenburg* v. *Germany*, Communication No. 48/2010, UN Doc. CERD/C/82/D/48/2010, 4 April 2013.

114 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD* v. *Komisia za zashtita ot diskriminatsia (Nikolova)*, Case C-83/14 ECLI:EU:C:2015:480.

115 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD* v. *Komisia za zashtita ot diskriminatsia (Nikolova)*, Case C-83/14 ECLI:EU:C:2015:480, paras. 82-84.

116 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD* v. *Komisia za zashtita ot diskriminatsia (Nikolova)*, Case C-83/14 ECLI:EU:C:2015:480, paras. 50 and 60.

117 Lahuerta, S. B., (2016) 'Ethnic discrimination, discrimination by association and the Roma community: *CHEZ*', *Common Market Law Review* 53: 797-818, 2016, *Case note on* Case C-83/14, *CHEZ Razpredeleine Bulgaria AD v. Komisia za zashtita ot discriminatsia*, Judgment of the Court (Grand Chamber) of 16 July 2015, EU:C:2015:480.

118 Judgment 16 March 2010, *Oršuš and Others* v. *Croatia*, [GC] No.15766/03, para.157.

119 See on this point, but in a different field: Farkas, L. (2018) 'Throwing the babies out with the bathwater: the CJEU, xenophobia and equality bodies after *Jyske Finans*', *European Anti-discrimination Law Review* 1/2018.

These considerations seem to have informed a decision of the **Finnish** Discrimination Tribunal triggered by a complaint from the Non-Discrimination Ombudsman. According to the curriculum of the City of Helsinki, the organisation of teaching must be based on a division into language teaching groups in accordance with the pupils' skill level, but the division into classes in Aurinkolahti Comprehensive School was mainly based on the pupils' immigrant background. Because of its primacy, the Constitution was taken into consideration in the interpretation of discrimination. Under Section 6(2) of the Constitution, no one will be treated differently from other persons on the ground of origin, language, religion, etc.[120] This provision also applies to segregation that can be justified from the perspective of fundamental rights. The justification test for segregation is particularly stringent and therefore the National Discrimination Tribunal decided to prohibit the city and the school from forming classes on the basis of immigrant background.

The Luxembourg and Strasbourg Courts' interpretations of assumed and associated discrimination seem identical. In light of the *CHEZ* judgment, it seems rather straightforward that both assumed and associated racial or ethnic discrimination should be established without difficulties. The Strasbourg Court has found in favour of the applicants in many cases where discrimination was based on assumed racial or ethnic origin – particularly in cases concerning racial violence. Recently, in *Škorjanec* v. *Croatia*[121] it established associative racial discrimination.

In contrast, the interpretation of multiple discrimination in education may lead to inconsistencies, particularly because EU law covers discrimination in vocational training only, when it comes to grounds other than nationality and racial or ethnic origin, but also because EU law and the Convention diverge as concerns the grounds protected.[122] Interpreting multiple discrimination involving grounds not enumerated in the anti-discrimination directives will be deemed to fall outside the competence of the CJEU, even if listed in the EU Charter. Given that the RED recognises the importance of tackling multiple discrimination based on gender and racial or ethnic origin, it remains to be seen whether racial minority children who suffer discrimination in education at the intersection of these grounds will be considered to be covered by EU law – even beyond the scope of vocational training – according to the CJEU and/or national courts.[123]

As far as intersectional discrimination is concerned, the European Court of Justice ruled that if a measure is not capable of creating discrimination on any of the grounds prohibited by Directive 2000/78/ EC – when these grounds are taken alone – then it cannot be considered to constitute discrimination as a result of the combined effect of such grounds, in the case sexual orientation and age.[124] While discrimination may indeed be based on several protected grounds under EU law, the CJEU considered that there could be no new category of discrimination consisting of the combination of more than one of those grounds.

In another relevant ruling, the European Court of Justice held that Directive 2000/43 and Directive 2000/78 clearly cannot be applied to discrimination as regards pay on the basis of socio-professional category or place of work as the principle of equal treatment enshrined in those directives applies by reference to the grounds exhaustively listed in Article 1 thereof.[125] In comparison, Strasbourg case law

120 Finland, National Discrimination Tribunal, Reg. No: 2732/66/2004, 31.1.2006, https://www.yvtltk.fi/material/attachments/ytaltk/sltkntapausselosteet2006/IiN7LfBZf/38990_SLTK-tapausseloste_3112006_2732_L1_versio_2.pdf.

121 ECtHR, *Škorjanec* v. *Croatia*, no. 25536/14, judgment 28 March 2017.

122 See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 3.1(b) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 14.1(b).

123 RED Preamble (14): 'In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.'

124 CJEU, judgment of 24 November 2016, *David L. Parris* v. *Trinity College Dublin and Others*, C-443/15, ECLI:EU:C:2016:897.

125 CJEU, judgment of 7 July 2011, *Ministerul Justiției si Libertăților Cetățenesti* v. *Stefan Agafiței and Others*, C-310/10, ECLI:EU:C:2011:467.

regularly discusses the intersections between socio-economic vulnerability and ethnic origin – without necessarily finding discrimination on one or either grounds, however.[126]

Thirdly, cases concerning segregation under the Racial Equality Directive may require judicial interpretation that engages with legal orders other than EU law, because the RED does not specifically prohibit this form of discrimination. This author's 2007 report on structural discrimination in education argued for an interpretation of segregation as direct discrimination[127] on the basis that segregation is inescapably obvious in the case of visible minorities and also that it is the most severe form of discrimination, which should not, therefore, be more easily justifiable than direct discrimination. The qualification of segregation as direct or indirect discrimination seemed significant in principle because the Strasbourg Court applied the reasonable justification test to direct discrimination, whereas under the RED,[128] justification was permitted in the case of indirect discrimination, but direct racial discrimination was only justifiable by positive action measures or genuine occupational requirements. These conclusions have been debated.[129]

In practice, none of the justifications presented in the Roma education cases have been permitted by the Strasbourg Court, rendering segregation thus far *de facto* unjustifiable, at the supranational level. This is significant, because pursuant to the EU Charter, Strasbourg interpretation should be taken to constitute a minimum level of protection.[130] Simultaneously, however, the Strasbourg test has been used by national courts to override national legislation that does not permit reasonable justification for segregation.[131]

Initially, the Court of Justice of the EU recognised that the general principles of Union law serve as sources of interpretation as far as fundamental rights are concerned,[132] but it has also increasingly, albeit not entirely consistently, made use of the European Convention of Human Rights when ruling on issues concerning fundamental rights. Augmenting reference to individual judgments of the European Court of Human Rights as part of its reasoning,[133] it has also relied on ICERD, as discussed below.

According to Article 52(3) of the EU Charter, Strasbourg jurisprudence constitutes the minimum level of protection,[134] consequently, at the very least, segregation should be prohibited and qualified as (indirect) discrimination. A higher level of protection could also be attained, however, because Strasbourg jurisprudence cannot set the upper limits of protection of fundamental rights under EU law. This is particularly relevant in relation to the right to equal treatment and non-discrimination. As Advocate General Sharpston pointed out in *Bougnaoui*, in contrast to its ancillary nature subject to a certain margin of appreciation under the ECHR, non-discrimination is a fundamental principle of EU law under which

126 For instance, in *Yordanova and Others* v. *Bulgaria* both aspects were discussed, but the Court did not establish discrimination in the end. *Yordanova and Others* v. *Bulgaria*, Application No. 25446/06, judgment of 24 April 2012.

127 Farkas, L. (2007) *Segregation of Roma Children in Education: Addressing structural discrimination through the Race Equality Directive*.

128 Opinion Of Advocate General Sharpston, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH)* v. *Micropole SA,* Case C-188/15, ECLI:EU:C:2016:553.

129 Goodwin, M. (2009) 'Taking on racial segregation: the European Court of Human Rights at a Brown v. Board of Education moment?' *Rechtsgeleerd Magazijn* THEMIS 2009-3. Devroye, J. (2009) 'The Case of *D.H. and Others* v. *the Czech Republic*', North Western Journal of International Human Rights, Vol. 7(1), pp. 81-101, Medda-Windischer, R. (2009) 'Dismantling Segregating Education and the European Court of Human Rights. *D.H. and Others* vs. *Czech Republic*: Towards an Inclusive Education?', *European Yearbook of Minority Issues*, Vol. 7, 2007/8. O'Nions, H. (2010), 'Divide and Teach: educational inequality and the Roma', *International Journal of Human Rights*, Vol. 14, issue 3, pp. 464-489. Van den Bogaert, S. (2011) 'Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters', *Heidelberg Journal of International Law*, (*Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*), Vol. 71, pp. 719-754. Arabadijeva, K. (2016) 'Challenging the school segregation of Roma children in Central and Eastern Europe', *The International Journal of Human Rights*, Vol. 20 (1). Drown, R. (2013) 'Equal Access to Quality Education' for Roma: how indirect and unintentional discrimination obstructs progress' *Race Equality Teaching*, Vol. 31, No. 2, Spring 2013, pp. 32-36.

130 Charter of Fundamental Rights of the European Union, Articles 52-53.

131 Hungary, Budapest Appeals Court 2, *CFCF* v. *Ministry of National Resources*, Pf.21.145/2018/6/I, 14 February 2018.

132 *Stauder* v. *City of Ulm*, Case 29/69, [1969] E.C.R. 419.

133 Rosas, A. (2009) 'The European Union and Fundamental Rights/Human Rights', in Krause, C. & Scheinin, M. (eds) *International Protection of Human Rights* 443, 457-59.

134 Charter of Fundamental Rights of the European Union, Articles 52-53.

justification is narrowly confined, which may at times necessitate the levelling up of protection from discrimination available under the Convention.[135]

The CJEU may in the future be called upon to examine issues brought to the fore in the Roma education cases that the Luxembourg Court itself has not yet contemplated under the RED, i.e. selecting the comparable units of education when examining segregation, and the 'absolute' ethnic homogeneity or predominance of ethnic students in such units. The ECtHR Chamber judgment delivered in *Oršuš* dealt with the proportion of Roma children at the *level of schools*, and found that the statistical evidence failed to support a *prima facie* case of racial discrimination at *class level*. The Chamber grappled with the fact that ethnic homogeneity was not absolute, because certain Roma children studied in overwhelmingly majority ethnic classes.[136] These shortcomings were not remedied by the Grand Chamber either, because the *school level* and *class level* statistics were not properly distinguished, which was in fact the reason why the Strasbourg Court did not establish direct discrimination even in the case of ethnically homogenous Roma classes.[137] The reasoning suggests that direct discrimination would be found only in the event of absolute ethnic homogeneity in all units.

Advocate General Kokott has addressed the lack of absolute homogeneity in the context of EU law in *Belov* and *CHEZ* as concerns housing (access to electricity). In *Belov*, the Advocate General argued that in order to find indirect (sic!) discrimination, the given district's inhabitants must be predominantly Roma,[138] whereas in *CHEZ* she was satisfied with the CJEU's approach, according to which a simple majority suffices.[139] The Luxembourg Court based its judgment on the undisputed fact that discrimination in *CHEZ* arose from assumptions made in relation to a so-called 'Roma district', a neighbourhood 'lived in mainly, but not exclusively, by persons of Roma origin'.[140] Importantly, despite the lack of absolute ethnic homogeneity, the Court found that direct racial discrimination could also be established if the measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned. It was for the national court to assess whether this was the case. It is worth pointing out in this respect that once a district is assumed to be lived in by Roma, from the perspective of the perpetrators it may not matter whether it is *de facto* ethnically homogenous.

135 As Advocate General Sharpston underlined in her Opinion delivered on 13 July 2016 in *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH)* v. *Micropole SA*, Case C-188/15, EU:C:2016:553. Request for a preliminary ruling from the Court of Cassation (France) lodged on 24 April 2015. See, particularly paras 58-72.

136 ECtHR, *Oršuš and Others* v. *Croatia*, [GC] No.15766/03, judgment of 16 March 2010, para. 67: 'The data submitted for the year 2001 show that in the Macinec Elementary School forty-three percent of pupils were Roma and seventy- three percent of those attended a Roma-only class. In the Podturen Elementary School ten percent of pupils were Roma and thirty-six percent of those Roma pupils attended a Roma-only class. In the Orehovica Elementary School twenty-six percent of pupils were Roma and forty-six percent of them attended a Roma-only class. These statistics show that out of three of the elementary schools in question, only in the Macinec Elementary School did a majority of Roma pupils attend a Roma-only class, while in the two remaining schools the percentage was below fifty percent, which shows that it was not a general policy in these schools to automatically place Roma pupils in separate classes'.

137 ECtHR, *Oršuš and Others* v. *Croatia*, [GC] 2010, No.15766/03: 'As to the present case, the Court firstly notes that the applicants, unlike in the *Sampanis and Other*s case, attended regular primary schools and that the Roma-only classes were situated in the same premises as other classes. The proportion of Roma children in the lower grades in Macinec Primary School varies from 57% to 75%, while in Podturen Primary School it varies from 33% to 36%. The data submitted for the year 2001 show that in Macinec Primary School 44% of pupils were Roma and 73% of those attended a Roma-only class. In Podturen Primary School 10% of pupils were Roma and 36% of Roma pupils attended a Roma-only class. These statistics demonstrate that only in Macinec Primary School did a majority of Roma pupils attend a Roma-only class, while in Podturen Primary School the percentage was below 50%. This confirms that it was not a general policy to automatically place Roma pupils in separate classes in both schools at issue. Therefore, the statistics submitted do not suffice to establish that there is prima facie evidence that the effect of a measure or practice was discriminatory', (para. 152; see also para. 153).

138 'It is clear, however, that the two districts concerned are inhabited predominantly by people belonging to the Roma community.' Opinion of Advocate General Kokott delivered on 20 September 2012, *Valeri Hariev Belov*, C-394/11, ECLI:EU:C:2012:585, para. 99.

139 '… was not rather based on motives relating to the ethnic origin of the majority population of the Gizdova mahala district.' Opinion of Advocate General Kokott delivered on 12 March 2015, *CHEZ Razpredelenie Bulgaria AD*, C-83/14, ECLI:EU:C:2015:170, para. 115.

140 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, para. 47.

In *CHEZ*, the Advocate General made reference to the Strasbourg Court's case law under Article 14 of the Convention, particularly to *D.H. and Others v the Czech Republic*.[141] It is important to note here that the CJEU chose to refer to other Roma judgments, including *Sejdic and Finci* v. *Bosnia and Herzegovina*, a case brought under Protocol 12, i.e. the right to equal treatment.[142] Through arguing that practices limited to a so-called 'Roma neighbourhood' could amount to direct racial or ethnic discrimination if they were introduced because of the inhabitants' origin, and referencing the Strasbourg Court's jurisprudence on the right to equal treatment, the Luxembourg Court opened a path to levelling up the protection from what is generally available under the ECHR. It remains to be seen, whether this approach will be pursued in the context of racial discrimination in education, and whether then the CJEU will again choose not to refer to the Roma education cases adjudicated under Article 14 of the Convention, i.e. under the principle of non-discrimination.

The clarity of the provisions prohibiting and/or permitting segregation in the relevant UN treaties can provide useful guidance in cases that have not yet been adjudicated by either the ECtHR or the CJEU. For instance, when it comes to the provision of extra language instruction for students from an immigrant or minority ethnic background, Article 2.2 ICERD clearly sets out that if such provision is made in the form of positive action measures – entailing, if need be, segregated education – this situation should not prevail permanently, rather such measures should 'in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved'.[143]

141 *CHEZ*, AG opinion, fn 20.
142 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, para. 46.
143 ICERD, Article 2.2.

2 Overview of the national context

This section provides an inventory of national legislation that prohibits different forms of racial or ethnic discrimination in education. It investigates whether direct and indirect discrimination, harassment, and segregation are explicitly prohibited, and if they are, whether the prohibition is placed in national anti-discrimination legislation, education legislation or other laws. The section also analyses whether the legal provisions are in compliance with the Racial Equality Directive and the relevant international treaties.

The comprehensive framework provided by the EU Racial Equality Directive[144] has shaped the landscape of European equality law for almost two decades now. Directive 2000/43/EC is innovative in many ways, because besides covering all persons, it extends the scope of protection against discrimination well beyond the traditional area of employment into fields such as education and applies to both the public and private spheres. This is significant, because across the EU, private schools play a significant role in providing education to children at all levels, including students of compulsory school age.

While the definition of direct discrimination set out in the Racial Equality Directive was inspired by legislation in the field of sex discrimination,[145] the definition of indirect discrimination was drawn from the case law of the European Court of Justice (ECJ) relating to the free movement of workers.[146] Both harassment and an instruction to discriminate were deemed to be types of discrimination.

The requirement to provide protection against victimisation, a crucial element in allowing individuals to assert their rights, applies to all four concepts of discrimination.[147] Whilst Member States were familiar with this obligation in terms of discrimination between men and women in the employment field, Directive 2000/43/EC extends the rules on the burden of proof into new areas including education. The directive also obliges the Member States to create a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.[148]

2.1 Anti-discrimination and education law: material scope

The Racial Equality Directive has been transposed into national laws in all 28 Member States[149] and domestic provisions conform with its requirements to a great degree.[150] While Directive 2000/43/EC requires discrimination on the ground of racial and ethnic origin to be forbidden in the area of education,[151] many countries go beyond this requirement and extend the protection against discrimination on other grounds as well.[152]

144 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22.

145 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ L 14 of 20/1/1998, p. 6).

146 *O'Flynn*, C-237/94, ECR 1996 I-02617, ECLI:EU:C:1996:206 – Directive 2002/73/EC has now incorporated this definition in the sex discrimination field (OJ L 269 of 5 October 2002, p. 15).

147 Report from the Commission to the Council and the European Parliament, the application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (2006) 643 final, 30 October 2006, on Directive 2000/43/EC.

148 Report from the Commission to the Council and the European Parliament, the application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (2006) 643 final, 30.10.2006, on Directive 2000/43/EC.

149 Directive 2000/43/EC had to be transposed by 19 July 2003 by EU-15, by 1 May 2004 by EU-10, by 1 January 2007 by Romania and Bulgaria, and by 1 July 2013 by Croatia.

150 COM (2006) 643 final, 30 October 2006, on Directive 2000/43/EC and COM (2014) 2 final, 17 January 2014, joint Report on 2000/43/EC and Directive 2000/78/EC.

151 Directive 2000/43/EC, Article 3(1).

152 European Commission (2018), *A comparative analysis of non-discrimination law in Europe*, European network of legal experts in gender equality and non-discrimination.

The material scope of protection in national anti-discrimination law broadly covers the education sector in all Member States. The general provisions relating to discrimination apply in education, interpreted as broadly covering admission, expulsion, transfer, disciplinary measures and any other related aspects.

National anti-discrimination law explicitly covers the field of education – in both the public and private sector – in countries such as in **Belgium** (access to and benefiting of education),[153] **Bulgaria** (all aspects, including educational process and curriculum),[154] **Hungary** (access, requirements of education process, evaluation, services, benefits, accommodation, certificates, termination),[155] **Ireland** (admission, access, conditions of participation, expulsion),[156] and **Romania** (access, admission, establishment of educational institutions).[157]

Education law in **France**, **Germany**, **Slovakia**, **Spain** and **Romania** refers specifically to equal access, admission or inclusion, while in **Bulgaria** the education law covers implicitly all aspects of pre-school and school education, including admission, transfer, and disciplinary measures. Education law in **Latvia** prohibits discrimination on the basis of race and ethnic origin in relation to all aspects of education including equal access. Furthermore, education law in the **Czech Republic**, **Estonia**, **Germany**, **Lithuania**, **Poland**, **Portugal** and **Slovenia** refers generally to the principle of equality, non-discrimination, equal treatment or equal opportunity principles. Incomplete information is available as concerns secondary legislation on discrimination in education, because reporting focuses on broad-brush measures and key primary acts of law.

2.2 Anti-discrimination and education law: direct and indirect discrimination and harassment

Anti-discrimination laws in all EU Member States prohibit the forms of discrimination explicitly spelt out in the Racial Equality Directive and the field of education is not an exception to this. Thus, both direct and indirect racial discrimination as well as harassment are prohibited in domestic anti-discrimination laws in the field of education.

However, the situation is different in Member States with respect to the national law on education. Only a few Member States explicitly prohibit direct discrimination, indirect discrimination and harassment in national sector-specific laws. This is the case in **France**,[158] **Hungary**,[159] **Slovakia**,[160] **Spain**[161] and **Sweden**.[162]

Education law in the **Czech Republic**,[163] **Germany**[164] and **Romania**[165] prohibits discrimination as a matter of principle applicable throughout the educational process. A similar approach with reference

153 Belgium, French Community ET Decree, 2007, Flemish Community/Region Anti-Discrimination Framework Decree 2008, German Community ET Decree, 2012.
154 Bulgaria, Protection Against Discrimination Act 2003.
155 Hungary, Equal Treatment and the Promotion on Equal Opportunities 2003.
156 Ireland, Equal Status Acts 2000-2018.
157 Romania, Government Ordinance on preventing and sanctioning all forms of discrimination 2000.
158 France, Law No. 2013-595, Article 2; Article L111-1 and L111-2, Code of education.
159 Hungary, Act CXC of 2011 on National Public Education, Article 1.
160 Slovakia, Act No 245/2008 on Education, Section 3(d), Section 29(1), Section 76(10), Section 145, Section 156(1), Act No 131/2002 on Higher Education, Section 55.
161 Spain, Law 2/2006 on Education, Articles 1, 84 and 124.2.
162 Sweden, Education Act (2010:800), Chapter 1 Section 8.
163 Czech Republic, Act no. 561/2004 of 24 September 2004, on Pre-school, Basic, Secondary, Tertiary Professional and Other Education, Section 2(1)(a).
164 Germany, Baden-Württemberg School Act Sec. 1.1; Sec. 2.1 Berlin School Act; Sec. 3.1 Brandenburg School Act; Sec. 3.4 Bremen School Act; Sec. 1. sent. 2 Hamburg School Act; Sec. 2.2 no. 7 Hessen School Act; Sec. 1.1 North Rhine - Westphalia School Act; Sec. 1.1 Rhineland-Palatinate School Act; Sec. 1.1 Saarland School Rules Act; Sec. 1.1 Saxony-Anhalt School Act; Sec. 1.2 Thüringen School Act.
165 Romania, Education Law 1/2011, Articles 2(4), 118 and 202.

to the principle of equality, equal treatment or equal opportunity is found in **Estonia**,[166] **Lithuania**,[167] **Poland**,[168] **Portugal**[169] and **Slovenia**.[170]

The prohibition of all forms of discrimination, including segregation, is stipulated in the Education Act in **Slovakia**.[171] In some countries, discrimination in education is prohibited by other laws too, for example by the Criminal Code in **Finland**,[172] the law on petty crimes in **Hungary**,[173] the Ombudsman's Act in **Ireland**[174] and by the Law on the rights and liberties of aliens in **Spain**.[175]

Direct discrimination in education on grounds of racial or ethnic origin is prohibited in the anti-discrimination laws of all the Member States. In the absence of a single anti-discrimination law, in **Latvia**, direct discrimination in the education sector is prohibited by the Education Law.[176]

There are common elements in the definitions of direct discrimination in most countries, including: the need to demonstrate less favourable treatment; the requirement for a comparison with another person in a similar situation but with different characteristics; the opportunity to use a comparator from the past or a hypothetical comparator; and the impermissibility of justifying direct racial discrimination.[177]

All EU Member States have introduced a definition of indirect discrimination that generally reflects that in the Racial Equality Directive. Indirect discrimination in education on grounds of racial or ethnic origin is prohibited in all the Member States. In a large proportion of states, justification is regulated within the limits of Article 2(2)(b) of the Racial Equality Directive, by a test that requires objectivity, proportionality and necessity. Separate or supplementary justification defences in the area of education are neither explicitly provided by, nor allowed by national laws.

Table 1 National legislation (anti-discrimination, education or other law) prohibiting racial discrimination in education[178]

Legislation	**Direct** discrimination			**Indirect** discrimination			**Harassment**		
Country	**ADL**	**EDL**	**OL**	**ADL**	**EDL**	**OL**	**ADL**	**EDL**	**OL**
AUSTRIA	YES	N/A	YES	YES	N/A	N/A	YES	N/A	YES
BELGIUM	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
BULGARIA	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
CROATIA	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
CYPRUS	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
CZECH REP.	YES	YES	N/A	YES	N/A	N/A	YES	N/A	N/A
DENMARK	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A

166 Estonia, Basic Schools and Upper Secondary Schools Act, Article 6.
167 Lithuania, Law on Education, Article 5 (1).
168 Poland, Education Law 2016 Preamble.
169 Portugal, Basic Law on the Education System, Article 2.
170 Slovenia, Organisation and Financing of Education Act, Article 2, Article 3 Kindergarten Act, Article 10 Elementary School Act, Article 7 Vocational and Technical Education Act, Article 9 High School Act, Article 7 Higher Education Act.
171 Slovakia, Act No. 245/2008 on Education (School Act), para. 3(d).
172 Finland, Criminal Code, Section 11.
173 Hungary, Act II of 2012 on Petty Offences, the Petty Offence Procedure and the Petty Offence Database, Article 248.
174 Ireland, Ombudsman Acts 1980-2012, Section 4, Ombudsman for Children Act 2002, Section 9.
175 Spain, Law 4/2000 on rights and liberties of aliens in Spain, Articles 9 and 23, Criminal Code, Article 512.
176 Latvia, Education Law, 1998.
177 These elements can be generally found in legislation in Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. For details see European Commission (2018), *A comparative analysis of non-discrimination law in Europe*, European network of legal experts in gender equality and non-discrimination.
178 In Table 1, the following abbreviations are used: ADL (anti-discrimination law), EDL (education law) and OL (other law).

Legislation	Direct discrimination			Indirect discrimination			Harassment		
Country	ADL	EDL	OL	ADL	EDL	OL	ADL	EDL	OL
ESTONIA	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
FINLAND	YES	N/A	YES	YES	N/A	YES	YES	N/A	YES
FRANCE	YES	YES	N/A	YES	YES	N/A	YES	YES	N/A
GERMANY	YES	YES	N/A	YES	YES	N/A	YES	N/A	N/A
GREECE	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
HUNGARY	YES	YES	YES	YES	YES	YES	YES	YES	YES
IRELAND	YES	N/A	YES	YES	N/A	YES	YES	N/A	N/A
ITALY	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
LATVIA	–	YES	N/A	–	YES	N/A	–	YES	N/A
LITHUANIA	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
LUXEMBOURG	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
MALTA	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
NETHERLANDS	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
POLAND	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
PORTUGAL	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
ROMANIA	YES	YES	YES	YES	N/A	N/A	YES	N/A	N/A
SLOVAKIA	YES	YES	N/A	YES	YES	N/A	YES	YES	N/A
SLOVENIA	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
SPAIN	YES	YES	YES	YES	YES	YES	YES	YES	YES
SWEDEN	YES	YES	N/A	YES	YES	N/A	YES	YES	N/A
UNITED KINGDOM	YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A

In summary, direct and indirect racial discrimination in education is prohibited in national anti-discrimination laws across the board, but the overwhelming majority of Member States do not prohibit these types of unequal treatment in their education laws, while the information available about secondary legislation is insufficient. Thus, even though national legislation complies with the RED in all the Member States, it requires education professionals and decision makers, parents and students to rely primarily on anti-discrimination law, rather than the sector-specific legislation.

Harassment, meaning an unwanted conduct relating to racial or ethnic origin with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment, has been prohibited by the large majority of Member States in line with the definition contained in the Racial Equality Directive.[179] In some states, however, the definition does not explicitly require the conduct to be unwanted, such as in **Denmark**, **France**, **Hungary**, the **Netherlands**, **Slovakia** or **Sweden**.[180]

In **Austria**, the definition refers to conduct that is 'unacceptable, undesirable and offensive (indecent)'.[181] Some ambiguity concerning the definition of harassment may be found in **Spain**, where 'hostile' and 'degrading' are not included in the national definition, which refers to the creation of an intimidating, humiliating or offensive environment only. In **Sweden**, the definition does not require that the behaviour

179 Directive 2000/43/EC, Article 2(3).
180 European Commission (2018), *A comparative analysis of non-discrimination law in Europe*, European network of legal experts in gender equality and non-discrimination.
181 European Commission (2018), *A comparative analysis of non-discrimination law in Europe*, European network of legal experts in gender equality and non-discrimination.

creates any specific type of environment, but only that it violates the dignity of a person.[182] In **Romania**, the anti-discrimination law refers only to the effect of the unwanted conduct, thereby excluding conduct with the purpose (but without the effect) of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.[183]

Harassment on grounds of racial or ethnic origin in the field of education is prohibited in all Member States by means of the anti-discrimination law. Provisions in other regulatory devices such as federal/autonomous province level regulations, the criminal code or petty offences law may be found in **Austria**,[184] **Finland**,[185] **Hungary**[186] and **Spain**.[187] Similar to direct and indirect discrimination, harassment as a concept does not form part and parcel of national education law, except in **France**,[188] **Hungary**,[189] **Latvia**,[190] **Slovakia**,[191] **Spain**[192] and **Sweden**,[193] which explicitly prohibit harassment in the education law.

2.3 Anti-discrimination and education law: segregation

Even though it is widely held that only coercive conduct amounts to segregation, national legislation that requires the showing of an element of force in order to establish segregation may not be compatible with Article 2 of the RED, because the EU concepts of both direct and indirect discrimination do not require that coercion be shown. What amounts to coercion is not straightforward, but it is likely that physical threats and psychological pressure from ethnic majority parents or public authorities, accompanied by the lack of real choice of education would amount to force in the sense of psychological duress.

Racial or ethnic segregation in education is not explicitly prohibited in the majority of the Member States. In the few national legal orders where they exist, the relevant dispositions show great variance, partly because they are not modelled on international norms that specifically prohibit segregation or contravene them by requiring the showing of coercion, such as legislation in **Bulgaria** and **Croatia**.

The European Commission on Racism and Intolerance has recommended that several states amend their national legislation so that segregation is explicitly prohibited as a form of discrimination by anti-discrimination law or other relevant laws. This is the case for **Austria**,[194] **Cyprus**,[195] the **Czech Republic**,[196] **Denmark**,[197] **Estonia**,[198] **Latvia**,[199] **Lithuania**,[200] **Luxembourg**,[201] **Malta**,[202] **Poland**,[203] **Portugal**,[204] **Spain**[205] and **Sweden**.[206]

182 European Commission (2018), *A comparative analysis of non-discrimination law in Europe*, European network of legal experts in gender equality and non-discrimination.
183 European Commission (2018), *A comparative analysis of non-discrimination law in Europe*, European network of legal experts in gender equality and non-discrimination.
184 Austria, Equal treatment provisions in federal provinces level.
185 Finland, Criminal Code, Section 11.
186 Hungary, Act II of 2012 on Petty Offences, the Petty Offence Procedure and Database, Article 248.
187 Spain, Law 4/2000, Art. 9 and 23; Criminal Code, Art. 512.
188 France, Law No. 2013-595, Article 2; Code of Education, Article L111-1 and L111-2.
189 Hungary, Act CXC of 2011 on National Public Education, Article 1.
190 Latvia, Education Law, Article 3^1 (1), 3^1 (8).
191 Slovakia, Act No 245/2008 on Education, Section 3(d), Section 29(1), Section 76(10), Section 145, Section 156(1); Act No 131/2002 on Higher Education, Section 55.
192 Spain, Law 2/2006 on Education, Articles 1, 84 and 124(2).
193 Sweden, Education Act (2010:800), Chapter 1 Section 8.
194 ECRI (2016), *Report on Austria, Findings and Recommendations*, p. 14, para. 18.
195 ECRI (2016), *Report on Cyprus, Findings and Recommendations*, p. 13, para. 15.
196 ECRI (2015), *Report on Czech Republic, Findings and Recommendations*, p. 13, para. 14.
197 ECRI (2015), *Report on Estonia, Findings and Recommendations*, p. 12, paras 9, 12.
198 ECRI (2017), *Report on Estonia, Findings and Recommendations*, p. 13, paras 14 and 15.
199 ECRI (2019), *Report on Latvia, Findings and Recommendations*, p. 13, paras 11 and 16.
200 ECRI (2016), *Report on Lithuania, Findings and Recommendations*, p. 12, paras 11 and 16.
201 ECRI (2016), *Report on Luxembourg, Findings and Recommendations*, p. 13, paras 10 and 17.
202 ECRI (2018), *Report on Malta, Findings and Recommendations*, p. 13, paras 12 and 15.
203 ECRI (2015), *Report on Poland, Findings and Recommendations*, p. 15, para. 21.
204 ECRI (2018), *Report on Portugal, Findings and Recommendations*, page 14, para. 11.
205 ECRI (2018), *Report on Spain, Findings and Recommendations*, p. 13, paras 15 and 22.
206 ECRI (2018), *Report on Sweden*, p. 12, paras 10 and 13.

In **Belgium**, both the anti-discrimination and the education law criminalise incitement to racial segregation,[207] without, however, defining segregation itself. The Constitutional Court in Belgium held that the offence contained in Article 20 of the Racial Equality Federal Act requires a special mens rea (*dolus specialis*), i.e. the intent of inciting or encouraging to discriminatory, hatred or violent behaviours.[208] Although this interpretation seems appropriate in the context of criminal law, under relevant international law, segregation is unlawful even if not a result of intentional or criminal conduct.

In a handful of countries, anti-discrimination laws contain relevant provisions, while elsewhere, segregation is outlawed in the education law or by ministerial ordinance. Segregation in education is explicitly prohibited by anti-discrimination acts in **Bulgaria**,[209] **Croatia**,[210] **Hungary**[211] and the **United Kingdom**, where segregation is outlawed as discrimination generally, not only in education.[212] In these countries, racial and ethnic segregation in education is defined as a particular form of discrimination.

In **Bulgaria**, the anti-discrimination law explicitly stipulates that racial segregation will be deemed discrimination and Section 1(6) of the Protection Against Discrimination Act (PADA) defines segregation as issuing an act, performing an action or omission to act, which leads to compulsory separation, differentiation or dissociation of persons based on their race, ethnicity or skin colour.[213] The Bulgarian Protection Against Discrimination Act's definition of segregation requires proof of *compulsory* separation,[214] which in the view of the authors of this report appears to be in violation of the directive and relevant international treaties. The compulsory nature of separation would imply that segregation may be chosen, i.e. that persons may waive their right not to be discriminated against, including not to be racially segregated. In contrast, the ECtHR has held in Roma segregation cases that no waiver of the right to non-discrimination in this context can be given, as that would conflict with an important public interest.[215]

In **Croatia**, the anti-discrimination act explicitly provides that segregation amounts to discrimination in the meaning of the law and Article 5 defines segregation as 'a forced and systematic separation of persons on any of the grounds referred to in Article 1 paragraph 1 of [the] Act.'[216] Similar to the Bulgarian legislation, these requirements beg the question of compatibility with the EU Racial Equality Directive.

In **Hungary**, segregation is defined as conduct – an act or omission – that separates individuals or a group of persons from other individuals or another group of persons in a comparable situation, based on a characteristic defined in Article 8 of the Equal Treatment Act (ETA), without an express authorisation set out in an Act of Parliament.[217] Segregation is a violation of the requirement of equal treatment. According to Article 27(3) of the Equal Treatment Act, such a violation occurs if: a) a person or a group is unlawfully separated in an educational institution, or in a faculty, class or group established within such an institution; b) a person or a group is limited to education the quality of which does not comply with accepted professional requirements or does not comply with professional rules, and therefore does not ensure a reasonable opportunity to prepare and be prepared for exams required by the state or conduct studies in general; or if someone establishes or operates an educational institution the quality of which

207 Belgium, Racial Equality Federal Act 2007, Article 20, General Antidiscrimination Federal Act, Article 22, French Community ET Decree 2008, Articles 52 and 54, German Community ET Decree 2012, Articles 25 and 27, the Flemish Community Equal Education Opportunities Decree 2002, Article I.3,2°.

208 Belgium, Constitutional Court, decision no. 40/2009 of 11 March 2009 (European Commission (2018) *A comparative analysis of non-discrimination law in Europe*, European network of legal experts in gender equality and non-discrimination).

209 Bulgaria, Protection Against Discrimination Act 2003, Articles 4(1) and 5.

210 Croatia, Anti-Discrimination Act 2008, Articles 1, 5 and 8.

211 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities, Articles 4, 7, 8, 10, 27, 28.

212 United Kingdom: Equality Act 2010, Section 13(5); Race Relations (NI) Order 1997, Article 3(2).

213 Bulgaria, Protection Against Discrimination Act, Article 5 and Additional Provision Section 1.6.

214 Article 3 ICERD categorically prohibits segregation. The CERD Committee clarified Article 3 in General Recommendation No. 19: Racial segregation and apartheid (Art. 3): 08/18/1995. Gen.Rec.No.19. (General Comments).

215 ECtHR, *D.H.* v. *Czech Republic*, [GC] No. 57325/00, judgment of 13 November 2007; case of *Sampanis* v. *Greece*, judgment of 05.06.2008; case of *Oršuš* v. *Croatia*, judgment of 16.03.2010.

216 Croatia, the Anti-discrimination Act, Article 5(1) and (2).

217 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities, Article 10(2).

does not comply with accepted professional requirements or does not comply with professional rules, and therefore does not ensure a reasonable opportunity to prepare and be prepared for exams required by the state or conduct studies in general.

At the time of transposition in 2003, the definition of segregation in the ETA's general provisions provided for a more lenient justification than the specific provisions in the chapter on education.[218] Once a representative lawsuit shed light on the discrepancy, the Ministry of Justice proposed amendments, following which segregation was categorically prohibited, using the formula 'unless specifically permitted by law'.[219] The Equal Treatment Act's prohibition of segregation complies with CADE in theory, but has been problematic in practice since the Supreme Court's 2015 judgment in *Chance for Children Foundation v. the Greek Catholic Church et al*.[220]

The **United Kingdom** defines segregation simply as direct discrimination. According to Section 13(1) and (5) of the Equality Act 2010, 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. If the protected characteristic is race, less favourable treatment includes segregating B from others'.[221]

Education legislation including secondary legislation explicitly prohibits racial or ethnic segregation only in **Bulgaria**,[222] **Hungary**,[223] **Romania**[224] and **Slovakia**.[225] For example, in **Bulgaria** under the Pre-School and School Education Act, kindergartens and schools may not segregate children of 'a different' ethnicity in separate groups or classes. However, there is no ban under that act on segregating children in separate kindergartens or schools.[226] In **Slovakia**, the law on education stipulates that education is based on the principle of prohibiting all forms of discrimination, in particular segregation.[227]

In **Hungary**, a 2002 amendment inserted a prohibition of segregation in the Public Education Act, but desegregation was regulated chiefly in ministerial decrees that did not necessitate parliamentary approval.[228] Based on socio-economic background that was believed to sufficiently capture Roma children who were most in need of protection, legislation concerned: (i) integrated education programming and financing; (ii) zoning and admission; (iii) downsizing special schools and integrating children with special educational needs in mainstream education; (iv) free and mandatory schooling for impoverished children age 3 and up, and (v) the conditionality of EU funds on equality planning, a governance tool modelled on the statutory duty to promote equal treatment that requires planning on the basis of equality goals and timetables, with the involvement of minority representatives.

218 Until 2006, Article 10(2) ETA prohibited as unlawful 'a conduct that separates individuals or groups of individuals from others on the basis of [a protected ground] without an objective and reasonable justification'. ETA Article 27(3)(a), stipulated that the 'principle of equal treatment is especially violated if a person or group is unlawfully segregated in an educational institution, or in a division, class or group within such an educational institution. Pursuant to Article 28(2) The principle of equal treatment is not violated if, a) in elementary and higher education, at the initiation and by the voluntary choice of the parents, b) at college or university by the students' voluntary participation, education based on religious or other ideological conviction, or education for ethnic or other minorities is organised whose objective or programme justifies the creation of segregated classes or groups; provided that this does not result in any disadvantage for those participating in such an education, and the education complies with the requirements approved, laid down and subsidised by the State.

219 Since 2005, segregation in Article 10(2) ETA is defined as 'any conduct [or omission] that separates individuals or groups from other individuals or groups in a comparable situation on the basis of [race, ethnic origin, etc.], without a law expressly permitting such segregation'.

220 Hungary, Curia, Pfv.IV.20.241/2015/4, judgment of 22 April 2015.

221 Great Britain, Equality Act 2010, Article 13(1) and Article 13(5), Race Relations (NI) Order 1997, Article 3(2).

222 Bulgaria, Pre-School and School Education Act 2016, Articles 62(4), 99(4) and (6).

223 Hungary, Act CXC of 2011 on National Public Education, Article 1.

224 Romania, Ministry of Education, order no 1540/2007, Framework Order no 6134/21.12.2016.

225 Slovakia, Act No. 245/2008 on Education (School Act), para. 3(d).

226 Slovakia, Pre-School and School Education Act, Articles 62(4) and 99(4) and (6).

227 Slovakia, Act No. 245/2008 on Education (School Act), para. 3(d).

228 European Commission (2018), *Country Report, Non-discrimination: Hungary 2018*, European network of legal experts in gender equality and non-discrimination.

In **Romania** segregation in education is prohibited and defined by way of secondary legislation, namely a ministerial order.[229] This is an administrative act with a normative nature that is mandatory for educational establishments including teaching staff at all levels. Initially, a ministerial notification prohibited segregation of Roma children in preschool and primary education in 2004.[230] Given its weak legal force, the notification was substituted by a ministerial order in 2007 that not only prohibited school segregation of Roma children but also introduced a methodology for preventing and eliminating segregation.[231] Subsequently, Ministerial Framework Order no. 6134 of 2016 extended the prohibition of school segregation not only to ethnicity, but also to disability, the economic and social status of the child's family, residence and school performance.[232]

All ministry-level regulations explicitly stipulate that segregation is an egregious form of discrimination in **Romania**. Segregation is defined as 'physical separation of kindergarten children, pre-schoolers or pupils (in primary and secondary education) belonging to an ethnic group in the educational unit/group/classroom/building/last two rows/other facilities, so that the percentage of the kindergarten children, pre-schoolers or pupils belonging to the ethnic group from the total of the pupils in the educational unit/group/classroom/ building/last two rows/other facilities, is disproportionate when compared to the percentage of the children belonging to that ethnic group in the total population of that specific age in the educational cycle in that specific administrative-territorial unit.'[233] Framework Order no. 6134 defines ethnic segregation on the basis of numerical indicators, while the exception clause follows the logic of relevant international human rights law, permitting self-separation for the purposes of preserving ethnic identity.[234]

Table 2 National legislation explicitly prohibiting racial segregation in education[235]

Country		Prohibition of segregation in education			Definition of segregation in education			Justification defence for segregation in education		
		ADL	EDL	OL	ADL	EDL	OL	ADL	EDL	OL
BELGIUM		YES	YES	N/A	N/A	N/A	N/A	N/A	N/A	N/A
BULGARIA		YES	YES	N/A	YES	N/A	N/A	YES	N/A	N/A
CROATIA		YES	N/A	N/A	YES	N/A	N/A	YES	N/A	N/A
HUNGARY		YES	YES	YES	YES	N/A	N/A	YES	N/A	N/A
ROMANIA		N/A	N/A	YES	N/A	N/A	YES	N/A	N/A	YES
SLOVAKIA		N/A	YES	YES	N/A	N/A	N/A	N/A	N/A	N/A
UNITED KINGDOM	GB	YES	N/A	N/A	YES	N/A	N/A	N/A	N/A	N/A
	NI	YES	N/A	N/A	YES	N/A	N/A	N/A	N/A	N/A

Whether a country explicitly prohibits school segregation on the basis of race or ethnicity does not necessarily entail that jurisprudence on this issue will also arise, nor is the contrary true. National courts have adjudicated cases concerning the segregation of Roma children in **Bulgaria**, **Hungary**, **Romania** and **Slovakia**.[236] According to the Romanian equality body, segregation is the most egregious form of

229 Romania, Ministry of Education, Framework Order 6134/2016 prohibiting school segregation in primary and secondary education, definition in Articles 3 and 4.
230 Romania, Ministry of Education, Notification No 29323/2004, State Secretary, Pre-university Education Cabinet.
231 Romania, Ministry of Education, order no 1540/2007 prohibiting school segregation of Roma children and approving the methodology for the prevention and elimination of school segregation of Roma children.
232 Romania, Ministry of Education, Framework Order no 6134/21.12.2016.
233 Romania, Ministry of Education, Framework Order no 6134/21.12.2016.
234 Romania, Ministry of Education, Framework Order no 6134/21.12.2016.
235 Table 2 lists only countries that explicitly prohibit racial and/or ethnic segregation in national legislation. In Belgium, national legislation prohibits incitement to segregation only.
236 European Commission (2017), *Roma and the enforcement of anti-discrimination law*, European network of legal experts in gender equality and non-discrimination.

discrimination, regardless of whether it takes the form of direct or indirect discrimination.[237] In **Slovakia**, the ban on discrimination has been interpreted as covering segregation as well.[238]

Nonetheless, racial or ethnic segregation has been adjudicated as a form of direct or indirect discrimination by equality bodies or courts of law also in countries that do not – or did not at the material time – explicitly prohibit segregation in education, such as in **Croatia** and **Romania**. As reported by the Finnish expert of the European network of legal experts in gender equality and non-discrimination, in **Finland**, the National Discrimination Tribunal found segregation in education as a prohibited form of discrimination where classes were separated on the basis on the immigrant background of pupils.[239] In **Denmark**, a complaint before the Board of Equal Treatment – resolved out of court – led parties to publicly acknowledge that creating separate classes on the basis of the pupils' names (taken as a proxy for ethnicity) constitutes discrimination.[240] Interestingly, segregation in the **Greek** context was adjudicated and established not by domestic courts or authorities, but the European Court of Human Rights.[241]

Given that racial segregation is not explicitly prohibited in the national legislation of most EU Member States, specific justification defence for segregation in the education field is also not allowed in national anti-discrimination law or education law.

Exceptions in the education field are provided in **Hungary**,[242] where education is organised for students of one sex, provided that participation in such education is voluntary, and will not result in any disadvantages for the participants.[243] Similar to voluntary single sex education, voluntary religious education may be taken to conform to the principle of equal treatment if education based on religious or other ideological conviction is organised in a way that the curriculum justifies the creation of separated classes or groups, provided that this does not result in any disadvantage for those participating in such education, and the education complies with the requirements laid down by the state. Recent amendments, following the European Commission's infringement procedure against Hungary,[244] provide that religious education must not result in segregation based on race, colour, nationality or belonging to a national minority.[245]

In Hungary, following a 2014 amendment, the failure of the safeguard in Article 28 of the Equal Treatment Act to properly delineate exceptions between religious and ethnic minorities appeared to point to a conflation of these two grounds, permitting 'self-separation' in education law. The Public Education Act ('Special provisions on the operation of faith and private schools and on religious and moral education organised in the state education system') now governs ethnic minority, as well as catch-up education. Roma minority education can be organised for purposes other than the preservation of

237 In the *Glina* case, file 22A Bis/2006, the National Council for Combating Discrimination (CNCD) found that segregation amounted to direct discrimination.

238 The segregation of Roma children in mainstream education in Slovakia was found unlawful on December 2011 by the District Court in Prešov. The decision of the District Court was upheld by the Regional Court in Prešov in October 2012. For details see https://www.poradna-prava.sk/en/documents/judgment-of-the-regional-court-in-presov-in-the-case-of-segregation-of-roma-children-at-the-sarisske-michalany-school/.

239 Case file 2732/66/2004, National Discrimination Tribunal, 21 January 2006, the *Non-Discrimination Ombudsman* v. *Aurinkolahti Comprehensive School of the City of Helsinki*.

240 European Commission (2018), *Country Report, Non-discrimination, Denmark 2018*, European network of legal experts in gender equality and non-discrimination. The Danish Institute for Human Rights (DIHR) submitted a complaint claiming discrimination on account of ethnic origin at the Langkær upper secondary school. In September 2016 the school had divided its new students into three classes with a 50 % limit of non-ethnic Danes each, while the other four classes were comprised solely of pupils from ethnic minorities. Case settlement outcome, Danish Institute for Human Rights (DIHR), 15 March 2017, information available at: https://menneskeret.dk/nyheder/forlig-sag-fordeling-elever-paa-grund-etnicitet.

241 European Court of Human Rights, *Sampanis and Others* v. *Greece*, No.15766/03, judgment of 5 June 2008, *Sampani and Others* v. *Greece*, No. 59608/09, judgment of 11 December 2012, *Lavida and Others* v. *Greece*, No. 7973/10, 30 May 2013.

242 European Commission (2018), *Country Report, Non-discrimination: Hungary 2018*, European network of legal experts in gender equality and non-discrimination.

243 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities (Equal Treatment Act - ETA), Article 28(1).

244 Letter of formal notice, European Commission requests Hungary to put an end to the discrimination of Roma children in education, at http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm.

245 European Commission (2018), *Country Report, Non-discrimination: Hungary 2018*, European network of legal experts in gender equality and non-discrimination.

minority identity, while the same exception does not apply to other ethnicities,[246] which constitutes *de jure* discrimination.[247]

Exceptions are also provided in **Romania**[248] by the framework order prohibiting school segregation. Groups, classes, educational units (schools) enrolling 'mostly or only kindergarten children, pre-schoolers or pupils belonging to an ethnic group are permitted with the purpose of teaching in the mother tongue of that group or in a bilingual system.' No further requirements are set, which may result in situations whereby voluntary segregation leads to lower quality education in contravention of relevant international law and the domestic prohibition of direct discrimination.

The survey of domestic legislation shows that the failure to specifically prohibit racial segregation at the EU level reverberates in the domestic context. National legislation seems to comply with the Racial Equality Directive in relation to the forms of discrimination explicitly prohibited, both in the public and private sphere and throughout the educational process from admission to disciplinary proceedings. In contrast, the prohibition of segregation across the EU could not present a more confused picture: it is seldom explicitly outlawed and when it is, the disposition is either in violation of international treaties or unclear, so that it may give rise to interpretation that permits justification more broadly than that mandated by international treaties.

246 For a period in the late 1990s and early 2000s, the Minorities Act permitted Roma minority education for the purposes of catching up, reinforcing the misinterpretation that catch-up education was a legitimate aim for Roma minority education.

247 Amendments introduced by Act XCVI of 2017 on the amendment of the Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities and the Act CXC of 2011 on national public education, adopted on 27 June 2017 are seemingly in compliance with the RED. Nevertheless, Article 34/A of the National Public Education Act prohibits racial discrimination in line with the ETA only as long as denominational and national minority education are simultaneously provided by a denominational school. Consequently, this provision does not apply to denominational schools that educate Roma children without officially providing national minority education to them, which was curiously the case in a controversial legal dispute detailed below.

248 Romania, Ministry of Education, Framework Order no 6134/21.12.2016. Exceptions in relation to disability/or special educational needs are provided in Article 6, in relations to certain level of academic achievement in Article 7 and in relation to residential environment of the pupil in Article 8.

3 National jurisprudence on racial or ethnic discrimination in education

3.1 General context

Litigation can seek to ensure compliance with the rule of law on the books (revising laws, type one reform), strengthening key 'law-related' institutions (courts, equality bodies and school inspectorates, type two reform) and/or increase the Government's compliance with the law in action (type three reform) against the backdrop that ultimate success requires overcoming 'the fundamental problem of leaders who refuse to be ruled by the law.'[249] Importantly, resistance to comply must be toppled at the central and local levels as well, because even governmental initiatives can be resisted by local leaders (bureaucratic contingency)[250] and majority parents.

Racial minorities underutilise the avenues offered by anti-discrimination law in the field of education. Since the transposition of the RED, case law or legal action generating change on the ground has not been reported in **Belgium**, **Estonia**, **Lithuania**, **Malta**, **Germany**, **Spain**, **Portugal**, **Poland**, **Slovenia** and **Italy**. In various countries, more cases arise on the basis of disability than race, even though the scope of EU law extends to education on race, not disability. The Croatian expert in the European network of legal experts in gender equality and non-discrimination summarises this conundrum as follows: 'In its yearly reports the Croatian Ombudsperson in general refers to cases of discrimination, but most of the cases regarding discrimination in education are in connection to discrimination of pupils with disabilities. The Ombudsperson however continuously also points to the problem of discrimination of pupils of Roma origin, but there are no references to any specific cases.'[251] In **France**, there has been no specific civil case[252] concerning discrimination on the ground of origin or claiming damages against the state regarding racial discrimination in education. However, the Conseil d'Etat and administrative courts have condemned the state for the failure to provide access to education to disabled children, and have also imposed damages.[253]

The caution with which racial minorities approach the issue of discrimination in education may stem from unfavourable (*quasi*-)judicial approaches, from which parents wish to protect their children. For instance, in **Denmark**, 11 decisions by the Board of Equal Treatment in the period between 2010 and 2019 dealt with racial discrimination in education. Only three of these cases address discrimination in primary school education. In the other cases, adults complain about discrimination in various areas of vocational training. The board did not conclude that discrimination took place in any of the 11 cases.

Courts may be hesitant to overrule political decisions on educational policy, even if they disfavour minority interests. For instance, in **Estonia**, ethnic and linguistic discrimination was raised in the context of the minority school reform.[254] On 1 September 2011, the Russian-language upper secondary schools completed the transition to teaching mainly in Estonian (not less than 60 % of the study workload). Exceptions can be granted by the national authorities. The Estonian Government did provide an exception

249 Carothers, Thomas (1998) 'The Rule of Law Revival', *Foreign Affairs* 77 (2) (1998), p. 100.

250 This observation is taken from Joel F Handler's analysis of civil rights litigation in the US, Handler, Joel F (1978) *Social movements and the legal system: A theory of law reform and social change*, University of Wisconsin, Madison.

251 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Croatia'.

252 Damages have been granted in a criminal case however, by the Court of Appeal of Versailles after the previous decision was quashed by the Criminal Chamber of the Court of Cassation, see Court of Appeal of Versailles, 19/06/2019 n° 18/01049, further to the decision of the Court of Cassation, Criminal Chamber, 23 January 2018, n° 17-81369.

253 France, Administrative Court of Lyon, *M. & Mme Hebri*, No. 0403829, 29 September 2005, AJDA, 2005, 1874; Conseil d'Etat, *Annie Beaufils*, No. 31850, 16 May 2011; https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000025822118; Conseil d'Etat, No. 418702, 28 March 2018: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036765344.

254 Estonia, Tallinn Administrative Court, administrative case 3-15-2725, 26 August 2016, *J.M. and M. S.* v. *Government of the Republic*, language of instruction for children of national minority origin.

to the 60 % rule to the Tallinn German Upper Secondary School, but refused to make a similar exception for several Russian-language schools, despite the support of municipal authorities. This became a key argument for the complaint submitted by Russian-speaking parents. The Tallinn Administrative Court did not find discrimination, underlining that the exception related to the valid Estonian-German agreement and Estonian-language children from the Tallinn German Upper Secondary School were not in a comparable situation, because they 'have no problem of integration into society' (sic!). The case was dismissed by the Tallinn Circuit Court.[255]

The dominant European narrative about racial equality in education revolves around the segregation of Roma children in primary schools addressed in the Roma education cases. NGO advocacy has focused on the Grand Chamber judgment of *D.H. and Others* v. *the Czech Republic*, and to a lesser extent other Strasbourg verdicts – primarily *Horváth and Kiss* v. *Hungary*, a follow-up to D.H. While D.H. and Oršuš set out to reform the law – first and foremost to urge the adoption of national anti-discrimination legislation – other cases sought to spur compliance by Governments and local communities.

Importantly, national (desegregation) jurisprudence preceded the Roma education cases and has been more complex and extensive than Strasbourg litigation. While in several countries racial discrimination in education has not given rise to litigation, in many other Member States, access to school and desegregation have been sought from courts and equality bodies. In central and eastern European countries with sizeable Roma populations, national desegregation campaigns either facilitated the enforcement of legislation or buttressed NGO advocacy.

In general, the material scope of the Racial Equality Directive as concerns education provision is not disputed. Except in politically sensitive cases, the qualification of an impugned conduct as harassment seems rather straightforward, but complications often arise when it comes to distinguishing direct from indirect discrimination – particularly when less favourable treatment is based on categories that constitute an element of racial or ethnic origin ('proxies'), or when segregation is at hand and the law does not explicitly prohibit it. The qualification of less favourable treatment meted out against children of non-native ethnicity – particularly when linguistic barriers are concerned – presents a mixed picture, regardless of citizenship status.

3.2 The prohibition of discrimination

Access to education seems a straightforward matter to adjudicate, particularly because the right to education itself benefits from exceptionally strong guarantees in Member States – being the only social right safeguarded in the European Convention itself. Given the salience of the right to education in national legal orders, disputes are often resolved without explicit recourse to anti-discrimination provisions.

In **Croatia**, a case was initiated by two Roma students at the Varaždin Business School, who were denied access to training at the company Branka d.o.o., owned by B.J., (the training being an obligatory part of their education).[256] They filed a discrimination claim against the company and its owner before the Varaždin Municipal Court, which found discrimination based on Roma ethnicity. The municipal court forbade further discriminatory actions towards the applicants and awarded compensation of HRK 8 000 (EUR 1 066) to each applicant.

In **France**, as the national expert of the European network of legal experts in gender equality and non-discrimination emphasises, several court rulings have dealt with the refusal to grant access to school or school services for Roma, refugee and Traveller children.[257] The criminal chamber of the Court of

255 Estonia, Tallinn Circuit Court, Decision of 26 August 2016 in administrative case 3-15-2725 (*J.M. and M.S.* v. *the Government of the Republic*).

256 Croatia, Municipal Court in Varaždin, County Court in Varaždin, Gž-3684/12, 2 April 2013.

257 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, France'.

Cassation concluded that discrimination occurred when a mayor refused to register Roma children in school by reason of the precarious residence of their parents who were living in an illegal camp.[258] The Conseil d'Etat stated for the first time that illegal occupation of land does not justify a mayor's refusal of school registration to the children living therein.[259] The decision to refuse registration was annulled and an obligation to register the children was set, with a daily sanction in case of refusal to enforce the decision. The Administrative Appeal Court in Nancy declared illegal the refusal of a mayor to register a child to use the school canteen, on the ground that the parents lived in illegal camps.[260] It annulled the city bylaw and forced admission of the child to the canteen. These judgments may have a positive impact on the situation of children of Roma and Traveller origin, given the overrepresentation of their parents among the illegal camp dwellers.

In **Slovenia**, the Ombudsman recently assessed the situation of five Roma settlements in Šentjernej.[261] The Roma residents informed the Ombudsman about the problems they faced in relation to the transport of children to school. Free transport is not ensured, despite the distance and the precarious state of the road to the school (lacking pavements or public lighting). The Ombudsman reminded the municipality that, on the basis of the Elementary Schools Act, children from these settlements have the right to free transportation. It also found that the school bus stops in two non-Roma settlements, which are located less than four kilometres away from the school, which raises a suspicion of discrimination against Roma children. The Government is examining whether the duty to introduce special measures under the Roma Community Act has been enforced and will report back to the Ombudsman.[262]

As discussed above, the Strasbourg Court's case law is not readily transposable to disputes under the RED, partly because it conflates direct with indirect discrimination, but also partly because it is not sufficiently clear as concerns the protected ground. In *Oršuš*, ethnic minority language, and in *Biao*, – a case concerning family reunification – non-Danish ethnicity, were seen by the ECtHR as apparently neutral criteria in connection with ethnic origin. Similar considerations – although unspoken – may have inspired the Court to treat the Romani language speakers' 'deficiencies' in the official language as apparently neutral as concerns ethnic discrimination in *Oršuš.*

In the domestic context, issues arise in relation to qualifying less favourable treatment based on ethnic minority language or religion as direct or indirect racial discrimination, while establishing harassment seems rather straightforward. For instance, in a non-binding opinion issued in 2017, the **Swedish** Equality Ombudsman (DO) concluded that Botkyrka municipality committed indirect discrimination when a student, born in Sweden, was placed in a Swedish 2 class (a class for students who speak Swedish as a second language) on the basis of applying for mother-tongue language teaching as a separate topic in school.[263]

Still in Sweden, in a case involving a school employee, a settlement was reached in 2015 where the school admitted that harassment occurred, and provided compensation to a student. A dark-skinned student heard a caretaker of the school making derogatory comments related to his ethnic affiliation saying, "Are you going to come here and infect us with Ebola?" After investigating the incident, the DO stated that the comment constituted harassment and the school agreed to pay SEK 30 000 (EUR 2 750) in compensation to the student.[264]

258 France, Court of Cassation, No.17-81369, 23 January 2018, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036584795. The mayor was not condemned, while the case was remitted to the trial court.

259 France, Conseil d'Etat, No. 408710, 19 December 2018, https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000037834583&fastReqId=2123024625&fastPos=1.

260 France, Administrative Court of Appeal of Nancy, No. 18NC00237, 05/02/2019, individual and collective action (Human Rights League). https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000038134815.

261 Slovenia Human Rights Ombudsman, 6.3-2/2018, *ex officio* procedure.

262 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Slovenia'.

263 Sweden, DO opinion in GRA 2017/49 at http://www.do.se/lag-och-ratt/stallningstaganden/svenska-som-andra-sprak/.

264 Sweden, Diarienummer: ANM 2014/1965 at http://www.do.se/lag-och-ratt/diskrimineringsarenden/hogstadieskola-sollentuna/.

In a 2014 settlement, ethnic harassment and sexual harassment had taken place, raising the question of a school's failure to act in an adequate manner once it was informed of harassment by other students. The case arose in relation to derogatory comments escalating to physical violence among students, while the harassment continued. The DO considered that the school failed to live up to its duty to investigate and counter harassment. Following a lawsuit initiated by the DO against the municipality, a settlement was reached and SEK 70 000 (EURO 6 552) was paid to the students in compensation.[265]

A teacher in a **Finnish** vocational institution used offensive language and descriptions when referring to people from Estonia, a student's country of origin. The school sanctioned the teacher and the student complained to the Non-Discrimination Ombudsman, who mediated the issue with the institution, which then apologised to the student and agreed to pay EUR 2 000 in compensation.[266] The behaviour of the teacher was seen as harassment and discrimination prohibited in the Non-Discrimination Act, even though the Estonian student was not present when the teacher made her remarks about students of Estonian origin.

Less favourable treatment and/or the failure to accommodate the special ethno-religious needs of Muslim students has been reported in the **Netherlands**, where girls wearing the headscarf and ethnic minority boys face obstacles in finding internship placements, even though it constitutes a compulsory part of vocational training.[267] While the treatment of racial or ethnic minority boys seems to constitute straightforward discrimination under the RED, a *test case* may prove useful in establishing whether the less favourable treatment of Muslim girls wearing the headscarf could qualify as perception based racial or ethnic discrimination in breach of the Racial Equality Directive, whereby the ground is construed not on the basis of the victims' religious beliefs but the perpetrators' assumptions and prejudices held in relation to those identified as being followers of Islam.

The **Cypriot** equality body found indirect discrimination pursuant to a complaint against the decision of the Nicosia English School's parents' association to hold the 'prom' on the day of the international Turkish language examination.[268] Having an exam on the same day as the prom meant it would be extremely difficult for Turkish Cypriot students to participate in the prom because of exam stress and the travelling involved.

3.3 The explicit/implicit prohibition of segregation

The lack of explicit prohibition of segregation ties in with the uncertainties of qualification, because the dispositions of direct and indirect discrimination come to serve as default provisions. The dilemma of qualifying segregation as direct or indirect discrimination, or a separate form of less favourable treatment is most visible in the Roma education cases.

Segregation takes many forms and *D.H.* did not focus on the most widespread form, i.e. physical separation between mainstream classes/schools, but on the placement of a disproportionate share of Roma children in special school.[269] It was launched with the Czech Constitutional Court in 1999, and a year later, when the constitutional complaint failed, an application was filed with the ECtHR on behalf of 18 students seeking a finding of direct or indirect ethnic discrimination stemming from administrative

265 Sweden, Diarienummer: 2014/584 at http://www.do.se/lag-och-ratt/diskrimineringsarenden/kommun-skola/.

266 Finland, Non-Discrimination Ombudsman, March 2017, https://www.helsinginuutiset.fi/artikkeli/505380-opettaja-haukkui-virolaisia-oppitunnilla-opiskelijalle-2-000-euron-korvaukset.

267 The report is available online at http://www.kis.nl/publicatie/mbo-en-de-stagemarkt-wat-de-rol-van-discriminatie.

268 Report of the Anti-discrimination authority regarding the organisation of the school leavers' prom of the English School for 2015, 3 August 2016, Ref. No. AKR 30/2015 Education, in European Commission (2017), *Country Report, Non-discrimination, Cyprus 2017*, European network of legal experts in gender equality and non-discrimination.

269 See reports from the later 1990s onwards by the Council of Europe monitoring bodies and the EU Agency for Fundamental Rights. See, for instance, European Monitoring Center on Racism and Xenophobia (2006), *Roma and Travellers in Public Education: An overview of the situation in the EU Member States*, May 2006.

practice, and damages totalling EUR 396 000.[270] The chamber judgment (2005) found no violation, ultimately because of the lack of racist intent.[271] Upon referral to the Grand Chamber, the final judgment was delivered in November 2007, well after EU accession and the first wave of domestic litigation in the new Member States.

The *Oršuš* case has received less attention, even though it addresses a highly salient issue, the lack of additional provisions for minority language speakers. Legal action in this case rested on a complaint filed by Roma leaders to the Croatian Ombudsperson in 2000, alleging that the schools in question failed to cater for the special needs of Roma children whose mother tongue was not Croatian. The Deputy Ombudsperson in charge of children's rights investigated the complaint, finding discrimination. The Croatian Helsinki Committee conducted further research that involved experts on psychology and pedagogy. Fearful of victimisation, not all parents joined the litigation. Their concerns proved right, when the local schools and social services began to harass those who signed the petition and took part in the domestic legal challenge taken under an accelerated procedure available against abusive administrative decisions.[272] The domestic courts – including the Croatian Constitutional Court – decided against the Roma applicants, whose complaint was also met with a negative chamber judgment in Strasbourg. The Chamber grappled with the fact that at school level, ethnic disparities were not outstanding, and that even at class level, segregation was not absolute, meaning that even though there had been Roma-only classes, a few Roma children attended integrated classes as well. This was in the end overturned by the Grand Chamber in 2010, which found indirect discrimination, because the assignment practices were not consistent with the applicants' linguistic skills, or their needs for additional educational provisions.

Legal action and legislative/policy developments in **Romania**, **Hungary** and **Bulgaria** preceded and went beyond what the Strasbourg Court settled for in the Roma education cases. Domestic litigation and jurisprudence have been more extensive and diverse, because the dominant forms of segregation varied from country to country, and remedies not available under the Convention could be ordered under domestic law, but also because policies and projects have been – at least – partially implemented. In **Bulgaria**, segregated schools constituted the main form of discrimination, whereas in **Romania** and **Hungary**, segregated classes and school buildings/annexes were equally common. Misdiagnosis was not a priority for strategic litigation in these countries, unlike in the **Czech Republic** and **Slovakia**, where every second Roma child was educated in special schools.[273] In Bulgaria, Romania and Hungary, segregation occurred primarily in mainstream schools and classes, which inspired legal action against these scenarios.

In **Hungary**, the Roma Civil Rights Foundation initiated a civil suit on behalf of Roma children in Tiszavasvári, who were segregated from their non-Roma peers during a school leaving ceremony in 1997. The Hungarian courts upheld the claim and the Supreme Court stated that an alleged lice infection could not justify segregation.[274] Another signature education case started in 1998 in Tiszatarján, with

270 *D.H. and Others v. Czech Republic*, [GC] No. 57325/00, judgment of 13 November 2007, para. 213.

271 Goodwin, M. (2006) 'D.H. and Others v. Czech Republic: A Major Set-Back for the Development of Non-Discrimination Norms in Europe', *German Law Journal*, 7 421.

272 European Roma Rights Centre (2002), 'Racial Segregation in Croatian Primary Schools: Romani students take legal actions' *Roma Rights Journal* 3-4/2002: Segregation and Desegregation, Branimir Plese.

273 The overrepresentation of children from cultural and linguistic minorities in special education is endemic worldwide and CEE is no exception, but the ratio was 'only' 25 % in Hungary and less in Bulgaria and Romania. See, White, Julia M. (2012) *Pittfalls and Bias: Entry testing and the overrepresentation of Romani children in special education*, Roma Education Fund, April 2012. 60 % of children in special schools in Slovakia in the 2008–2009 school year were Roma. See, Eben Friedman, E., Gallová Kriglerová, E., Kubánová, M., Slosiarik, M. (2009) *School as Ghetto, Systemic Overrepresentation of Roma in Special Education in Slovakia*, Roma Education Fund, September 2009 and Gallová Kriglerová, E., Gažovičová, T., Kosová, I., (2012*) Disbursement of EU Funds for Projects: Increasing the Educational Level of Members of Marginalized Romani Communities from the Standpoint of (De-)Segregation of Romani Children in Education*, Roma Education Fund. For a more recent study reiterating previous findings, see, Slovakia Ministry of Finance (2019) *'Revision of expenses for groups threatened by poverty and social exclusion'*, available at https://www.finance.gov.sk/sk/financie/hodnota-za-peniaze/revizia-vydavkov/ohrozene-skupiny/ (in Slovak language only).

274 Hungary, Szabolcs-Szatmár Bereg County Court. 16.P. 25.191./1997./12. See, further 'Tiszavasvári separate school leaving ceremony' in Schiek, D., Waddington, L. and Bell, M. (eds.) (2007) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford, Hart Publishing.

the complaint of an incoming school director and local councillors who countered the mayor and the village notary for their complacency in relation to the out-going director's grossly illegal placement practices. The *Tiszatarján case*[275] provided ammunition for desegregation advocacy for some time.[276] The final judgment established the violation of the claimants' rights to human dignity under the Civil Code and ordered the payment of substantial compensation for the stigma suffered.[277] It was an important reference for the Minorities Ombudsperson, who published thematic reports about segregation and discrimination in education regularly after 1997.

With few exceptions, the **Bulgarian** desegregation cases did not yield effective change, which was coded in the domestic provision prohibiting segregation. In *European Roma Rights Center* v. *Ministry of Education et al*, the trial court in Sofia established segregation in the 103rd School in the segregated Filipovtsi district, finding that the absence of *de facto* free choice not to study in isolation in a ghetto school constituted *compulsion* for purposes of the definition of segregation under the PADA.[278] The appeal court repealed this judgment, finding that the students suffered indirect discrimination because the school did not positively secure them an equal opportunity by disregarding their ethnic and linguistic differences. It invoked the ECtHR's *Thlimmenos* judgment to declare that different treatment was required to accommodate minority language needs.[279] In *Romani Baht Foundation and ERRC* v. *the 75th school Todor Kableshkov, Sofia Municipality and the Ministry of Education and Science,* a case launched in 2003 regarding segregation and substandard education (not accommodating the students' Romani mother tongue), the courts ruled that the authorities did not *force* them to study in the given school.[280] In *Roma children from 1st school "Saint Kiril and Methodius"* v. *the Blagoevgrad Municipality*,[281] civil action was launched before the PADA entered into force, at the instigation of the Roma parents who had witnessed the gradual withdrawal of the non-Roma children from the previously mixed school. The Bulgarian courts found that the authorities had not actively segregated, nor could they curtail segregation, because the right to choose a school was absolute.

Bulgarian desegregation litigation had run its course by the time desegregation adjudication in Strasbourg picked up. New cases were not filed after project funding had run out, and the PADA's provision prohibiting segregation stands unchallenged, even though it is in flagrant violation of international/EU law. None of the Bulgarian cases proceeded to Strasbourg, most likely because the legal strategy failed to resolve the admissibility conundrum associated with representative standing.

275 White Booklet 1998, Minorities Commissioner report 2004 and Farkas L. (2008) *Elkülönítés az oktatásban: a törvényesség szempontjai Esélyegyenlőség – deszegregáció – integráló pedagógia: Egy stratégia elemei,* Educatio Társadalmi Szolgáltató Közhasznú Társaság, 2008, pp. 41-52.

276 Hungary, Borsod-Abaúj-Zemplén Megyei Bíróság 10.P. 21.080/2001-77.

277 Hungary, Fővárosi Ítélótábla 9. Pf.2931/2004.

278 Bulgaria, Sofia District Court, judgment in case N 11630 of 2004 delivered on 22 July 2005, Panel 41.

279 Bulgaria, Sofia City Court, judgment in case N 3139 of 2005 delivered on 27 February 2007. This was partly overturned on appeal with reference to *Thlimmenos v. Greece*, application No, 34369/97, judgment of 6 April 2000. The Supreme Court of Cassation upheld the appeal judgment. Decision No 723 of 01.08.2008, civil case No 6402 of 2007.

280 Bulgaria, Sofia District Court, judgment delivered in 11 November 2004. See DARE-Net project (2014) *Guide for Documenting and Monitoring School Segregation in Bulgaria*, Desegregation and Action for Roma in Education-Network.

281 Bulgaria, Decision No 139 of 01 December 2005 of the Blagoevgrad Regional Court in case 1154/2004, confirming a negative trial court ruling on appeal. The 1st school existed for 42 years and educated both Bulgarian and Roma children, but gradually became segregated. The Head Teacher alerted Romani Baht, petitioned the Municipality and organised 'silent marches' in front of the municipality. The School Board's president also petitioned the municipality. The Romani Baht Foundation petitioned the Ministry of Education, the regional school inspectorate and the City Council. The civil action was filed in 2004, seeking a finding against the Municipality and the City Council for ethnic segregation and an order to stop segregation and ensure integrated education. The local press and the national media were very active and regularly reported about the case. The first instance court dismissed the claim, because under the Education Act parental choice determines where the child will study, not the municipality's action. The judgment was upheld on appeal.

The equality body's interpretation is beneficial,[282] but this enforcement route is seldom used in the field of education.[283] In Bulgaria, few desegregation projects and minimal legal and policy advocacy continue.

In **Romania**, desegregation was also NGO-driven. Romani Criss initiated and contributed to desegregation developments at the policy and practical levels in collaboration with other Roma and non-Roma organisations, leading to an informal group liaising with the Ministry of Education with the support of the OSCE Contact Point for Roma and Sinti Issues to sign a memorandum of cooperation on desegregation. This coordinated work led the Ministry of Education to adopt a desegregation order banning segregation of Roma children and preventing school segregation.[284] Romani Criss played an important role in policy diffusion and stepping in for the state structure, implementing programmes on multi-ethnic education and launching a desegregation programme in collaboration with schools.[285]

By filing complaints about segregated education, Romani Criss successfully mobilised the National Council for Combating Discrimination (CNCD),[286] but the progressive Romanian case law is little known, because it emanates from a *quasi*-judicial forum, whose decisions are virtually inaccessible or difficult to find by the public, and also because desegregation advocacy has been limited to the Ministry of Education.[287] The first complaint was filed in 2003 and the CNCD found that segregation is 'a severe form of discrimination', while the material conditions of education must be adjudicated distinctly.[288] Following 2012, when Romani Criss's desegregation projects came to an end, complaints fizzled out.[289] Only in one case handed down in December 2012 did the equality body find indirect discrimination,[290] where Roma students were placed in a separate class allegedly for 'better care and motivating them in school', which appeared to be separation based on socio-economic conditions. One case has been brought before civil

282 In a misdiagnosis case instituted *ex officio,* the Bulgarian equality body ordered the Minister of Education to cease the admission of non-disabled Roma children in special schools. Decision No 80 of 16.10.2007 by PADC.

283 An exception is a case in which the Bulgarian equality body established the segregation of *Turkish* children in separate classes. Bulgaria, KZD decision No 91 of 08 November 2007 in case No 28/2007. In another case, the equality body established indirect discrimination against Roma children in special schools and instructed the Minister of Education to take measures to put an end to the practice. Buégaria, KZD decision No 80 of 16 October 2007.

284 Bhabha, J., Mirga, A. & Matache, M. eds., (2017) *Realizing Roma Rights* University of Pennsylvania Press; FXB Center for Health and Human Rights (2015) *Strategies and Tactics to Combat Segregation of Roma Children in Schools, Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria and Greece*, Harvard University, report available at http://www.dare-net.eu/cms/upload/file/strategies-and-tactics-to-combat-segregation-case-studies-english.pdf.

285 Romani Criss (2004), *Implementarea legislatiei anti-discriminare in Romania: Combaterea discriminării etnice prin proceduri judiciare*, Bucharest.

286 Gergely, D. (2009) 'Segregarea copiilor romi în sistemul educațional românesc şi protecția juridică împotriva discriminării', *Noua Revistă de Drepturile Omului* (New Journal for Human Rights), 1/2009, pp. 35-56.

287 It is important to note that notwithstanding the adoption of ministry-level norms in the meantime, the CNCD case law is still relevant, because it is based on the anti-discrimination ordinance, which remains in effect.

288 *Romani CRISS* v. *Cehei School*, Decision no. 218/23.06.2003. See, Andreescu, G. (2004) 'Report on Minority Education in Romania' in *Analytical Report Phare RAXEN_Minority Education*, Vienna. The CNCD emphasized that the grades obtained by the pupils could not justify segregation and issued a warning to the school to stop less favourable treatment.

289 In comparison with previous cases lodged before the CNCD such as *Romani CRISS* v. *Cehei School* (2003), *CRISS* v. *Dumbraveni High School*, *Dumbraveni Special School Group, Sibiu CSI and Ministry of Education* (2007), *CRISS and Amaro Suno* v. *Craiova Auto School Group and Dolj School Inspectorate* (2007), *Romani CRISS* v. *Auto School Group and School 3* (2007), *Romani CRISS and Amaro Suno* v. *School 19* (2007), *Romani CRISS* v. *Josika Miklos School* (2007), *Romani CRISS and Roma in Europe* v. *„Constantin Brailoiu" High School* (2007) in DARE-Net project: Desegregation and Action for Roma in Education-Network, Guide for documenting and monitoring school segregation in Romania.

290 Romania, *Romani CRISS* v. *Ionita Asan high school*, CNCD, decision no. 559 from 12 December 2012.

courts by a Roma parent concerning harassment,[291] and apart from Romani Criss, only one other NGO has brought a complaint before the equality body.[292]

Legal action focused primarily on class-level segregation. Romani Criss filed representative actions with the National Council for Combating Discrimination when its project team uncovered breaches or local monitors reported anomalies.[293] Later the CNCD also responded to press reports by launching *ex officio* investigations. The equality body's jurisprudence is mostly inspired by the Strasbourg Court's case law on equality and Roma education, while also being cognisant of international human rights law and the interpretation of treaty bodies. Given that the anti-discrimination law does not specifically prohibit segregation in Romania, the CNCD has interpreted cases with reference to direct and indirect discrimination, similar to the Strasbourg jurisprudence.[294]

In *Bobesti-Glina School No. 1* initiated *ex officio*, the CNCD held that *de facto* segregation amounted to unjustified direct discrimination[295] and issued an administrative warning.[296] It stated that the positive obligation to ensure compliance with the European Convention places a burden on the school leadership 'to make sure that pupils from a vulnerable ethnic group are not segregated in one classroom … it is the duty of the educational personnel to assign the children in classes in a proportional manner, without taking into consideration criteria (*such as the choice of the parents*) *which might infringe the right of the pupils*' (emphasis added).[297] In another school in Bobesti-Glina, no violation was found, because segregation was justified by education in the minority language based on parental consent. Investigations began to target the school inspectorate, to enlist this field-specific body for the enforcement of anti-discrimination law, but this mainstreaming strategy did not bear fruit.[298]

As the policy reform grew, the **Hungarian** desegregation jurisprudence that kept the public discourse alive over the past 15 years remained equally substantive. The Hungarian desegregation movement made impressive headway until 2011, when the policy changed and the NGO litigating for desegregation – the Chance for Children Foundation (CFCF) – found itself at the epicentre of debates. Desegregation activists supported by the Association of Free Democrats governing in coalition with the Hungarian Socialist Party between 2002 and 2008 constructed an explicit legislative and regulatory basis, while

291 In *Ciurescu Pompiliu* v. *Daba Lenuta* a teacher refused to allow a Roma student to join her classes so that she was unable to attend school for weeks and was severely traumatized. Only the interventions of the local school inspectorate and of the media normalised the situation. The father filed a criminal complaint, a tort claim under the Civil Code and a complaint with the CNCD. The Prosecutor of Strehaia levied a EUR 25 fine for abuse in service damaging the individual interest under Art. 246 of the Criminal Code. The equality body dismissed the case due to lack of sufficient evidence. In the civil case, the Strehaia Court ruled in favour of the claimant in January 2009, ordering the defendant together with the local school inspectorate to pay EUR 360 in moral damages. In February 2010 the Mehedinti Court of Appeal increased the award to EUR 5 000. The Court of Appeal Craiova on judicial review increased the damages to EUR 10 000. István Haller who led the equality body's investigation believes that the Roma father's complaint succeeded mainly because of the local political context, including animosities between the teacher's husband, a local politician, the local mayor and deputies.

292 Court of Appeal Iasi, Administrative and Misdemeanours Section, Civil decision 90/2017 from 29 May 2017, *Centrul de Advocacy si Drepturile Omului* v. *Scoala Gimnaziala Bogdan Petriceicu Hasdeu and Inspectoratul Scolar Judetean Iasi*. Case history available at: http://portal.just.ro/45/SitePages/Dosar.aspx?id_dosar=4500000000024874&id_inst=45. The case is still pending.

293 Kegye A. and Morteanu, C. E. (2013), *Handbook on tackling the segregation of Romani children in nursery and primary schools: From investigation to decision making*, edited by Lilla Farkas, Budapest, CFCF.

294 In *Romani Criss* v. *Josika Miklos School* the equality body held that class level segregation constituted discrimination and ordered the school authorities to remedy it. In *Romani Criss* v. *Auto Professional School* and *Romani Criss* v. *Sports High School* direct and indirect discrimination were established, because of the segregation of Roma children in separate classes, and material differences. Decision 103/24.06.2007 and 338/03.09.2007.

295 It relied on the Strasbourg Court's non-discrimination jurisprudence pursuant to which less favourable treatment can be reasonably justified, citing *Fredin* v. *Sweden (1),* 18 February 1991, *Hoffman* v. *Austria,* 23 June 1993, *Spadea and Scalambrino* v. *Italy,* 28 October 1996 and *Stubbings and others v. U.K,* 22 October 1996.

296 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), file 22A Bis/2006, 27 August 2007.

297 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) Decision 559, file 52-2012, 12 December 2012.

298 In *Romani Criss* v. *Şcoala Bogdan Petriceicu Haşdeu and the Judeţean School Inspection in Iaşi* the CNCD found segregation between school buildings and imposed a fine of EUR 668 on the school and EUR 1 113 on the inspectorate. In a 2012 case, it fined the school and the inspection EUR 460 each, ordering the latter to desegregate classes and monitor the school. Decision 559, file 52-2012, 12 December 2012.

seizing control of EU funds within the Ministry of Education, where a Ministerial Commissioner was in charge of desegregation. Hungary is the only CEE country where social scientists assessed the impact of desegregation policies[299] and made desegregation a key building block in systemic education reform.[300] However, they have failed to trigger education-specific public enforcement and the country still lacks centralised school inspection.

School building and class level segregation was established in *CFCF* v. *Hajdúhadház,*[301] *Tiszavasvári* v. *Equal Treatment Authority (ex parte CFCF)*[302] and *CFCF* v. *Gyöngyöspata and Others*.[303] Damages for segregation were ordered in *Kolompár and Others* v. *Miskolc*.[304] Inter-school segregation was established in *CFCF v Kaposvár I*[305] and *CFCF* v. *Győr*.[306] Segregation between private and public schools was established in *CFCF and Roma Civil Rights Movement in Jászság* v. *Jászladány and Others*.[307] Damages were ordered for procedural failures leading to misdiagnosis in *Horváth and Kiss* v. *Szabolcs-Szatmár-Bereg County and Others*.[308] Liability for failing to stem misdiagnosis was established in *CFCF and ERRC* v. *Heves County and Others*. Liability for failing to stem segregation at school level was established in *CFCF* v. *Ministry of Human Resources*.[309]

Centred on civil courts and seeking to 'carve desegregation into stone', the legal strategy specifically sought to utilise enforcement opportunities unlocked by EU law.[310] Cases were designed with a view to a reference for a preliminary ruling in the hope that the CJEU would provide a robust interpretation of Article 15 RED on effective, proportionate and dissuasive remedies,[311] surpassing the limitations inherent in the Strasbourg system as concerns structural remedies. Hungarian desegregation litigation was preoccupied with enforcing, rather than reforming the law, seeking to mobilise national courts through supranational judicial dialogue.

The fact that trial courts consistently ruled in favour of the NGO and the Supreme Court refused to submit referrals for preliminary rulings countervailed the strategy, therefore CFCF began to involve individuals in representative actions in order to obtain standing before international tribunals. However, domestic courts have held that interventions by students and parents are obsolete, because judgments delivered in representative cases would necessarily bind members of the group on behalf of whom the NGO litigates (*res judicata*).[312] The Strasbourg Court came to a different conclusion in *Amanda Kósa* v. *Hungary*, holding the application inadmissible by reference to the applicant's individual circumstances in the context of *CFCF* v. *Nyíregyháza et al* (the *Nyíregyháza II* case).[313]

299 Havas-Liskó 2000 and 2004, Havas-Zolnay 2010, Kézdii-Surányi, Kertesu-Kézdi, Kertesi.

300 Fazekas Károly, Köllő János és Varga Júlia (2008) 'Zöld könyv A magyar közoktatás megújításáért, Oktatás és gyrmekesély', *Magyarország Holnap*, ECOSTAT, Budapest.

301 Hungary, Supreme Court judgment No. Pfv.IV.20.936/2008/4.

302 Hungary, Supreme Court judgment No. Kfv.VI.39.084/2011/8.

303 Hungary, Egri Törvényszék, judgment No. 12.P. 20.351/2011/47.

304 Hungary, *Borsod-Abaúj-Zemplén* County Court, judgment No. 13.P. 20.580/2008, Debrecen Appeals Court, judgment No. Pf.I.20.125/2009/4. Children who attended segregated schools during the period covered in *CFCF* v. *Miskolc* sued for damages. The Supreme Court found that 'in light of the fact that "disadvantage" is an element of the disposition' of discrimination, 'beyond showing [res iudicata concerning discrimination], there is no need to provide further evidence in this regard'. Supreme Court judgment No. Pfv.IV.20.50/2010/3. at p. 8. and Supreme Court, judgment No. Pfv. IV.20.510/2010/3. The Supreme Court ordered Miskolc to pay EUR 350 plus default interest to each child.

305 Hungary, Supreme Court judgment No. Pfv. IV. 21.568/2010/5.

306 Hungary, Supreme Court judgment No. Pfv.IV.20.068/2012/3.

307 Hungary, Supreme Court judgment Pfv.IV.20.037/2011/7.

308 Hungary, Supreme Court judgment No. Pfv.IV.20.215/2010/3.

309 Hungary, Budapest Appeals Court, *CFCF* v. *Ministry of Human Resources*, decision no. 2.Pf.21.145/2018/6/I, 14 February 2019. The first instance judgment went far beyond what was upheld on appeal. See, Hungary, Budapest Regional Court, *CFCF* v. *Ministry of Human Resources*, decision no. 40.P. 23.675/2015/84, 18 April 2018.

310 Von Bogdandy, A. (2017) 'The Idea of European Public Law Today – Introducing the Max Planck Handbooks on Public Law in Europe', Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2017-04.

311 Hungary, *CFCF* v. *Hungary*, Győr CC and ECtHR judgments.

312 Hungary, *CFCF and the ERRC* v. *Heves County* and *CFCF* v. *Ministry of National Resources*.

313 *Amanda Kósa* v. *Hungary*, inadmissibility decision of 21 November 2017, application No. 53461/15.

Desegregation experts and public institutions played a particularly significant role in the first and last cases filed by CFCF – *Miskolc I* and *Nyíregyháza II*. Following a defeat at trial level in *Miskolc I*, the Minorities Ombudsperson submitted an *amicus curiae* brief, in reference to which the Debrecen Appeals Court[314] established school level segregation. CFCF organised an enrolment action bringing first graders from segregated to integrated school and took the town back to court, when it refused to close down the Roma-only schools. The city complied before the trial court delivered judgment in *Miskolc II*. Litigation did not yield results in *Nyíregyháza II*, as detailed below.

In the **Slovak Republic**, the non-governmental organisation, Poradna (the Centre for Civil and Human Rights), has addressed country-specific segregation patterns in a less favourable institutional, policy and legal context. The Slovak equality body does not engage in desegregation action and the prohibition of segregation in the Education Act is neither detailed, nor aligned with the Anti-Discrimination Act, making it necessary to frame cases as direct or indirect discrimination with the concomitant dilemma of justification. Desegregation is project based and implemented by NGOs. Amnesty International Slovakia advocates for desegregated education, but development NGOs tend to work in segregated settings without challenging the *status quo*.

Class level segregation was established in *Poradna* v. *Elementary School in Šarišské Michaľany,*[315] in which the trial court dismissed the justification based on white flight – that majority parents would take their children to other schools – and ordered the school to publish an anonymised version of the ruling in a special professional periodical and mix students in classes. It emphasised that the obligation to integrate was inherent in the compulsory nature of education. The Regional Court in Prešov upheld the ruling, addressing the wider social context, the breach of human dignity, the importance and benefits of inclusive education and representative action.

Poradna has subsequently launched cases concerning misdiagnosis, school level segregation and segregation in 'container schools', i.e. makeshift buildings constructed near Roma districts to avoid the integration of Roma children in perfectly well-equipped schools situated in majority neighbourhoods. The first challenge against container schools was lost in 2017,[316] but other cases are still pending. Similar to her Hungarian colleague, the Slovak Ombudsperson – who regularly reports about and advocates against segregated education – submitted an *amicus curiae* brief in *Poradna* v. *Stara Lubovna*, a case concerning segregation between schools and still pending trial.[317]

In an administrative case litigated by the NGO Poradna, the first instance court held that state authorities have no obligation to take measures to eliminate the segregation of Roma children in a local primary school in the village of Terna where there is no proof that Roma children have been placed in separate classes due to their ethnic origin. The court disregarded the fact that the decisions of the state authorities on the school catchment area had a negative impact on the situation at the given school, which was overcrowded and so, instead of splitting and mixing classes in order to avoid segregation, had chosen to place Roma children in segregated classes. The case is pending appeal and a request was submitted to the court to refer the case to the Court of Justice of the EU for a preliminary ruling on the interpretation of the RED.[318]

314 Hungary, Debrecen Appeals Court judgment no. Pf.I. 20.683/2005/7.

315 Regional Court in Presov, judgment of 30 October 2012 (ref. No 20Co 125/2012, 20Co 126/2012). The Roma and the non-Roma classes were separated physically and segregation was not justified by pedagogical considerations. The school sought to justify segregation with reference to the Roma children's' socially disadvantaged backgrounds' and 'white flight'.

316 Slovakia: Obligation to consider public interest in a building permit proceeding does not include considering impact of a potential building on segregation of racial minorities, 24 October 2017.Supreme Court of the Slovak Republic from 20 June 2017, delivered on 18 August 2017, file no. 10Sžo/53/2016.

317 Slovakia – District Court: Education of Roma children in segregated Roma only school does not constitute discrimination based on ethnic origin, 1 February 2017. District Court Bratislava III from 6 October 2016 delivered on 12 December 2016, file n. 11 C 351/2015 – 387.

318 Durbáková, V. (2019) 'Flash Report Slovakia – District Court: State authorities have no obligation to take measures on the elimination of segregation of Roma children in local primary school', 22 March 2019. Decision of the Presov District Court delivered on 13 March 2019, file no.29C/14/2016.

Recently, in **Denmark**, the Danish Institute for Human Rights (DIHR) raised the issue of school segregation before the Board of Equal Treatment, claiming discrimination on account of ethnic origin at the Langkær upper secondary school.[319] In September 2016 the school divided its new students into three classes with a 50 % limit of ethnic non-Danes, while the other four classes were comprised solely of pupils from ethnic minorities. On 15 March 2017, the DIHR published a statement that it had agreed with Langkær school on a settlement. In the statement, the DIHR stated the following: 'You cannot divide classes according to ethnicity as the Langkær school has done. That is illegal discrimination, no matter what the underlying intent has been.' Langkær school stated: 'Langkær school agrees that it cannot use names of pupils as a criterion for dividing its classes in the future. We have had no intention to discriminate anybody and we don't think that anybody has been put in a bad position compared to others by this practice. However, because of the complaint from the Institute for Human Rights, we take note that it constitutes discrimination and we will therefore not reiterate this procedure in the future.'[320] The statement from the DIHR and Langkær school does not publish the actual settlement and it does not describe the efforts to combat future ethnic segregation in the school.

The case is an important example of race making in the education context and the handling of ethnic data without the consent of the data subjects – the children – themselves. The school's 'profiling' practice was based on an allegedly objective criterion, i.e. the names of the students, and the non-Danish sounding names were attributed to a group created by the school itself, to which students of diverse ethnic backgrounds were assigned in order to create an artificial group of ethnic non-Danes. The statements published in the settlement attest to the fact that ethnicity in this case was constructed by the school, without the consent of the students or their guardians. It is important to note that while mishandling sensitive data is problematic, it constitutes standard practice in the course of race making. It cannot in practice be prevented, but it should be sanctioned as part and parcel of discrimination, which is obviously the greater wrong.

3.4 The use of ethnic data (statistical evidence) and assumed racial origin

The lack of ethnic data collection renders it more difficult to justify racial or ethnic discrimination than to establish facts from which it may be presumed that it is taking place. The question is not whether ethnic data can be collected and if so, how, but whether it is available and reliable. With a recent exception in a not-yet-final case in Romania,[321] no defendant has ever succeeded in court in showing that ethnic data was not available either through self-identification, third party identification or proxies.

In the Romanian case – discussed below – the requirement of self-identification-based data collection seems to run counter to the fact that in the original proceedings before the equality body, the defendant school did not dispute ethnic disparities. More importantly, however, requiring that ethnic data based on self-identification be collected would render a finding of assumed segregation/discrimination impossible, which would in turn be in breach of the Racial Equality Directive and relevant international law and jurisprudence.

It is important to note here that by requiring that ethnic data be based on self-identification, courts may in fact seek to preserve the autonomy of the Roma children and their parents. While this is commendable, it is also counter-intuitive in the context of anti-discrimination law, where less favourable treatment is regularly meted out on the basis of ascription, assumption and treating individuals 'together with' racial minorities without their consent or knowledge.

319 Denmark, Board of Equal Treatment, 15 March 2017, Complaint filed by the Danish Institute for Human Rights, settlement, use of ethnic data.

320 Danish Institute for Human Rights (DIHR) statement regarding an out-of-court settlement between DIHR and Langkaer school (*Forlig i sag om fordeling af elever på grund af etnicitet*), 15 March 2017, available at: https://menneskeret.dk/nyheder/forlig-sag-fordeling-elever-paa-grund-etnicitet.

321 Romania, Court of Appeal Iasi, Civil decision 90/2017 from 29 May 2017, *Centrul de Advocacy si Drepturile Omului* v. *Scoala Gimnaziala Bogdan Petriceicu Hasdeu and Inspectoratul Scolar Judetean Iasi*.

Segregation can be based on real, assumed, ascribed or even misconstrued racial or ethnic origin. While in order to establish a *prima facie* case it is enough to show that the children are assumed or are commonly held/known to be of minority origin, the data brought forward during justification must pertain to each child in question, otherwise the courts cannot be satisfied that the evidence is indeed relevant.

The **French** Constitutional Council declared that studies relating to diversity of origin such as nationality of parents, discrimination and integration could only be based on objective information, but that ethnic origin and race are not objective concepts and are contrary to Article 1 of the Constitution.[322] Simultaneously, however, the Court of Cassation held in an employment case brought by an individual that statistical evidence is permitted by national law in order to establish indirect discrimination.[323] No case has yet been brought before the courts using such data in matters relating to education.

In *Oršuš* v. *Croatia*,[324] statistical data on the number of Roma and non-Roma children in each class in four schools in **Croatia** obtained by the People's Ombudsperson's Office was an important piece of evidence.[325] The Constitutional Court ignored it[326] and concluded that data on the number of Roma children in separate classes 'is not in itself sufficient to establish discrimination'.

In **Ireland**, the Supreme Court[327] overturned a decision of the Equality Tribunal[328] and found that a school admission policy that prioritised former pupils' children did not constitute indirect discrimination on the Traveller community ground under the Equal Status Acts 2000-2018 (ESA). It determined that the evidence presented by the complainant did not demonstrate that the school's policy placed Travellers in a situation of particular disadvantage. In effect, the Court held that statistical evidence was *required* to establish a *prima facie* case. In its *amicus curiae* submission, the Equality Authority argued that the indirect discrimination test should conform to that of the Racial Equality Directive.[329] The Supreme Court, however, applied a test formulated with reference to the provisions of the domestic statute (ESA) and did not consider whether Travellers constitute an ethnic group for the purposes of EU law.

In a representative action before the CNCD in **Romania**, brought by the Center for Advocacy and Human Rights (CADO) against the BP Hasdeu School and the Iasi School Inspectorate, it was alleged that Roma children were disproportionately placed in one school building (building C) in classes 0-4.[330] Building C has reduced educational resources, unqualified teachers and lower educational quality compared to other buildings teaching ethnic majority children. Pursuant to a finding of direct discrimination, harassment, and a violation of the general prohibition of discrimination in education and the right to dignity, the school was sanctioned with a fine of approximately EUR 650, the Iasi inspectorate with a fine of approximately EUR 1 100 and both defendants were asked to produce a desegregation plan.[331]

322 France, Constitutional Council, No. 2007-557 DC, 15 November 2007, *ex officio* procedure challenging the constitutionality of a provision authorizing data collection taking into account origin, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html.

323 France, Court of Cassation, No. K 10-15873, 15 December 2011, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024993730.

324 European Court of Human Rights (ECtHR), *Oršuš and Others* v. *Croatia* [GC], No.15766/03, 16 March 2010.

325 Croatia, Ombudsperson (2000), *Report on the activities of the Ombudsperson in 2000* (not available online).

326 Croatia, Constitutional Court, No. U-III-3138/2002, 7 February 2007.

327 Ireland, Supreme Court, *Stokes* v. *Christian Brothers' High School Clonmel*, [2015] IESC 13, 24 February 2015, http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument.

328 *A Mother (on behalf of her son)* v. *A School and the Department of Education and Skills*, DEC-S2010-056, 07.12.2010, https://www.workplacerelations.ie/en/Cases/2010/December/DEC-S2010-056-Full-case-report.html.

329 Ireland, *Christian Brothers High School Clonmel* v. *Mary Stokes (on behalf of John Stokes a minor) and the Equality Authority*, Legal submission on behalf of the Equality Authority, 13 December 2012, https://www.ihrec.ie/app/uploads/download/pdf/mary_stokes_v_christian_brothers_high_school_clonmel_ors__13_dec_2012_.pdf.

330 Romania, Court of Appeal Iasi, Administrative and Misdemeanours Section**,** Civil decision 90/2017 from 29 May 2017, *Centrul de Advocacy si Drepturile Omului* v. *Scoala Gimnaziala Bogdan Petriceicu Hasdeu and Inspectoratul Scolar Judetean Iasi.*

331 Romania, CNCD decision 769 from 7 December 2016.

The school and the inspectorate challenged the decision, as a result of which it was annulled on the basis of reasonable and objective justification concerning the management of the situation in building C.[332] The Court of Appeal judgment was appealed and the case is presently pending before the High Court of Cassation and Justice.

A key issue in the case is third party identification conducted during the registration process of the children with the support of the Roma educational mediator prior to enrolment in building C, which used to function as a *de facto* Roma school before it was attached through re-organisation to the main school. Before the CNCD, the school argued that it lacked information about the children's ethnicity, while the inspectorate stated that the proof about (self-identified) Roma ethnicity was inconclusive. According to the claimant, CADO, in building C, 50 % of the children are Roma. The Court of Appeal held that self-identification is the only scientific and relevant criterion and desegregation cannot be achieved *in lieu* of official data on the students' ethnicity.

Although the parties and the equality body all mentioned the disproportionate presence of Roma children in another building, this was the only building for which the actual ethnic proportions were provided (of 30 % self-identifying as Roma) out of the school's total of six buildings. During the investigation, the CNCD team assessed only three of the buildings and interviewed parents without providing detailed information on findings, which was criticised by the court. The defendants denied ethnic segregation, but admitted that segregation on grounds of socio-economic status might occur given the poverty of the community in the neighbourhood.[333] The case is pending before the High Court of Cassation and Justice with the first hearing set for 5 December 2019.[334]

3.5 Justification defences

Debates dovetailing litigation have addressed residential segregation, the genuine nature of alleged positive action measures, the child's best interest and parental choice. The European Court of Human Rights has dismissed justification defences put forward by Member States, revealing the flaws of arguments and measures that allegedly served the interests of minority children.

The interpretations rendered by domestic and European courts and quasi-judicial bodies of the key principles are vested in conflicting interests that manifest themselves during legal proceedings, direct action and public debates. This section of the report demonstrates the enduring significance of the Strasbourg Court's assessment of these interests in *D.H.* It should be noted that conflicts between individual, community and public interest have not undermined racial equality advocacy in Europe, because desegregation has been based on legislation or voluntary participation, while in general, individual clients have not been solicited to mount legal challenges that could run counter to other groups within the minority community.[335]

3.5.1 Parental choice of school

Racial discrimination in education may arise from parental choice, but contrary to popular belief, neither international human rights treaties, nor EU law ensure unfettered freedom to choose a school, an education, a class or a specific teacher. An absolute free choice would instantly cripple public education

332 Romania, Court of Appeal Iasi, decision 90/2017.

333 The superior interest of the child was used as justification for the differential treatment leading to the segregation of children with the argument that the residential proximity and the custom of sending Roma kids to this school serve the best interest of the child. The custom referred to is that in the case of some families, the parents also studied in the C building and some of them even asked for their children to be enrolled in the same school.

334 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Romania'.

335 This is different from developments in the US. See, Crenshaw, K., Gotanda, N., Peller. G. and Thomas, K. (eds.) (1995) *Critical race theory: The key writings that formed the movement*, The New Press, New York.

systems, by undermining any other rule for mediating disputes. The assignment of school districts and the public duty to safeguard the child's best interest are mechanisms through which parental choices can be limited if and when necessary.

In the implementation of the RED in respect of the prohibition of racial discrimination in education, and during adjudication, the EU Charter may become relevant, given that it provides a narrowly defined right to ensure the education of children in conformity with religious, philosophical and pedagogical convictions. Article 14(3) of the Charter focuses on religion and other beliefs, therefore it does not explicitly guarantee a right to education in conformity with the parents' ethnic origin, culture and language. Ethnic majority parents do not enjoy a right under EU law to choose an education for their children based on ethnic origin. Where racial discrimination in education concerns discrimination relating to minority education – introduced in pursuance to treaties, such as the FCNM – or religious education, the RED may be applicable due to its provisions on positive action measures that can justify distinctions, but also due to its provisions prohibiting racial discrimination even as concerns minority and religious education (Articles 5 and 2).

However, even in contexts where EU law is enforced and the Charter is applicable, minorities do not enjoy a fast and ready entitlement to educate their children in conformity with their culture and language, because the entitlements for accommodation under Article 22 are programmatic in nature. The Member States have made slow progress in bridging the language gap and generally offer one option from the following: tuition in the national language in kindergartens, zero grade classes or catch-up education in lower grades and the teaching of the minority language for a few hours per week. More progress has been made in relation to adapting the curriculum, although stereotypes still occur in schoolbooks.

The EU Charter can be invoked in a straightforward manner in cases where the RED applies, such as disputes over racial discrimination in connection with minority education. Its approach is identical to the relevant international treaties that guarantee a right to educate a child in conformity with the parents' religious, philosophical or pedagogical convictions. However, there is no corresponding obligation on the state to establish or fund schools that cater for such parental choice. An obligation to enable the establishment of such schools is not augmented with a corresponding duty to fund or subsidise them, or automatically permit their operation if it would run counter to democratic values.

At times, domestic jurisprudence seems to be in breach of the Racial Equality Directive, for example, in a **Bulgarian** case brought by Roma students placed in exclusively or predominantly Romani classes in school.[336] The courts in effect found that the authorities had done nothing to create this situation, and could do nothing about it, because the ethnic majority parents' right to choose a school was absolute and could not be interfered with.

In **Austria**, the Federal Administrative Court[337] petitioned the Constitutional Court about the Compulsory Education Act,[338] according to which children with a need for additional language training in German are to be admitted to public schools or private schools with public endorsement.[339] The complaint was filed by parents of Turkish origin intent on sending their children to a private Protestant school without public endorsement. While the Federal Administrative Court saw discrimination and an unconstitutional deprivation of parental choice, as well as an indirect racial discrimination linked to the German language, the Constitutional Court found no breach of the equality principle. It stated that aiming for success in language proficiency as a basis for further schooling was at the heart of the provisions in question, and therefore they were in line with the Constitution.

336 Bulgaria, Decision No 139 of 01 December 2005 of the Blagoevgrad Regional Court in case 1154/2004 (confirming a negative trial court ruling on appeal).
337 Austria, Federal Administrative Court (*Bundesverwaltungsgericht*).
338 Austria, Constitutional Court, G377/2018, 06 March 2018.
339 *Schule mit Öffentlichkeitsrecht*.

The Austrian national expert in the European network of legal experts in gender equality and non-discrimination points out that public schools are bound by stricter rules and procedures, which makes the decision reasonable. Moreover, additional language tuition is intended to last two years maximum, following which the parents can choose any school type. While this is certainly true, private schools may also serve as sites of segregation – where ethnic majority children are generally overrepresented[340] – therefore refusing access may indeed be discriminatory.

The **German** Constitutional Court ascertained that the parental rights provided by Article 6(2) of the Basic Law encompass the choice of the form of schooling.[341] This right is not violated if the system of public schooling is reformed to modernise it according to reasonable pedagogic standards. In **France**, the Administrative Court of Paris held that the right of parents to choose public, private or home schooling does not give them the right to decide to which school their child will be admitted.[342]

In **Hungary**, in the *Hajdúhadház* case, the Supreme Court interpreted the ETA as permitting justification as long as segregation emanated from positive action measures.[343] Given that 70 % of the Roma in Hungary are linguistically assimilated and that neither teaching materials, nor teachers are available in the minority languages, the Hungarian Minorities Ombudsperson has repeatedly held that the conditions of minority education are inadequate[344] and courts have established that minority education cannot justify segregation.[345]

Romanian and **Hungarian** case law diverge in respect of minority education, because the level of linguistic assimilation and the linguistic component of the curriculum vary in the two countries. Unexposed to mass resistance by ethnic majority parents, the Romanian equality body has followed the Strasbourg Court's logic, curtailing parental consent to segregated schooling unless given in the context of education in the minority language.[346]

The debate has been more complex in **Hungary**. As a rule, justification defences based on parental choice are dismissed, but in the *Győr* case, the Supreme Court held *obiter dicta* that free choice could not be curtailed by compelling Roma parents to select integrated schools. The argument was instrumental in refusing an injunction against the town to suspend admissions as long as the school remained segregated.[347] It was not clarified whether finding segregation on the one hand was reconcilable with the

340 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Austria'.

341 Germany, Federal German Constitutional Court (BVerfG), 22. June 1977, 1 BvR 799/76.

342 France, Administrative Tribunal Paris (constant jurisprudence), n° 01.14182/9, 5 October 2001.

343 The relevant passage reads as follows: 'discrimination based on race or ethnic origin may only be justified by positive action measures (legal acts) that take into account the interests of the children, the conscious parental conduct and are aimed at ensuring equal opportunities.' Para. 6.1. of Supreme Court judgment No. Pfv.IV.20.936/2008/4, p. 15

344 Jelentés az AJB 6010/2014 sz. ügyben az oktatási elkülönülésre vonatkozó szabályokról (Report on legal provisions regarding school segregation).

345 In *Kaposvár I* the children belonging to four ethnic subgroups and three different language groups – Hungarian, Beash and Romanes – were offered language classes in Beash. The trial court held that the minority curriculum did not necessitate spatial segregation, which was also upheld by higher courts. 'In the material case the voluntary nature of segregation – capable of rendering it lawful – could not be established, having regard to Article 43(4) of Act No 77 of 1993 on the rights of national minorities and Article 28(2) ETA. Neither the parental consent to education in [Romani culture and of the Beash language], nor the parental choice of school, neither the fact that in view of the reasoning now 66 out of the 157 children reside outside the school district can be conceived as a *conscious manifestation of parental will* regarding segregation … the defendant [local government] failed to fulfil its obligation to integrate: it has tolerated and maintained a situation that resulted from spontaneous segregation in the school. This omission … served as a basis of its liability [under civil law].' (emphasis added) Hungarian Supreme Court judgment No. Pfv. IV. 21.568/2010/5, pp. 5. & 9. In the *Győr* case the school did not offer a language component.

346 See the *Bobesti-Glina* case, supra.

347 'A court order that complied with the claim concerning this particular sanction would, however, not be executable without endangering the operation of the school concerned by the lawsuit, nor without violating the parental right to the free choice of school as laid down in Article 13(1) of the public education act. Hence, the claim cannot be satisfied.' Hungarian Supreme Court judgment No. Pfv.IV.20.068/2012/3., p. 9.

implication on the other that Roma parents could not be denied the choice of an unlawfully segregated school.[348]

The *Nyíregyháza II* case[349] was brought against the local council and the Greek Catholic Parish of Hajdúdorog (GCPH).[350] In 2007, while *Nyíregyháza I* was pending, the town closed down the segregated school in the biggest Roma district, Huszártelep. Four years later, at the request of the newly elected mayor, the GCPH that hitherto taught a handful of Roma children in its inner-city school opened a branch in Huszártelep, ostensibly to conduct a *Roma mission*.[351] The case focussed on parental choice and the purpose of education in the branch, which became an independent faith school in the following academic year.

Documentary evidence showed that the overwhelming majority of parents chose the denominational school because of its proximity and witnesses testified that geographic proximity, financial hardship – in particular, following the termination of the school bus service in 2007 – and harassment in other schools constrained Roma parental 'choice'. The trial court found segregation and the judgment was upheld on appeal, but the Supreme Court dismissed the appeal verdict with reference to the religious exception to segregation, but without an inquiry into the quality of education. Moreover, the Supreme Court short-changed parental choice for that of the elected Roma representatives despite the fact that they lack a mandate in religious matters and obviously cannot make decisions on behalf of other Roma parents. The verdict is published as a *principle opinion,* being *quasi*-binding on lower courts.[352]

In **Hungary**, CFCF's standing as a representative of the public interest – and implicitly of the child's best interest amounting to freedom from racial discrimination – has been upheld by courts, despite challenges by majority politicians, parents, teachers and co-opted minority leaders alike.[353] Courts have regularly dismissed petitions concerning CFCF standing not only because they did not satisfy procedural requirements, but also because in court the Roma parents supported integrated education.

In *Nyíregyháza I*, the elected leaders supported the local government's decision to close the segregated school, while a new set of leaders in *Nyíregyháza II* stood behind the decision to re-segregate. The significance attributed by the Supreme Court to their 'consent' served to legitimate the majoritarian decision, which was in line with the new public policy that questioned CFCF's status as a representative of the public interest. The Court did not examine this aspect, keeping the test for standing procedural.[354] As before, the Roma interest was equated with the public policy in effect and the Roma leaders' political legitimacy was construed as co-extensive with legal representation, while their consent to religious education was construed as being beyond dispute.

348 It is interesting to note that a former Hungarian ECtHR judge presided over the bench at this point.

349 In *CFCF* v. *Nyíregyháza and Others* (*Nyíregyháza II*) the Supreme Court found that the choice of religious education justifies ethnic segregation. Supreme Court judgment No. Pfv.IV.20.241/2015/4.

350 The Greek Catholic Church was established in 1909. According to the 2011 census, approximately 180 000 Hungarians declared themselves Greek Catholic.

351 Although the meaning of the Roma mission remained vague throughout the proceedings, it did include proselytization and the prevention of illiteracy among the Roma.

352 According to EH 2015.07.P6: 'Segregation cannot be found in relation to the establishment and maintenance of a faith school that teaches overwhelmingly Romani children if the choice of school is based on the parents' voluntary and informed decision and if the students do not suffer disadvantage due to the quality of education [Act No 125 of 2003 (ETA) §§ 10(2), 19 and 28]'.

353 In *Kaposvár I*, the president of the Roma Minority Self-Government, designed the curriculum and taught the minority language classes elected by half of the children in lower grades. The local representatives supported the segregated school, but their children and grandchildren attended integrated institutions. In *Győr,* the local Roma leader testified in support of the defendant, but the fact that his son attended an integrated denominational school undermined his credibility.

354 Compare with Bulgarian provision and the ACCEPT ruling after CJEU judgment.

Even though this interpretation stands in contrast with the Equal Treatment Act,[355] it is consistent with the Hungarian Supreme Court's jurisprudence on parental choice.[356] Rather than assessing the conduct of defendants and majority parents, the Hungarian Supreme Court has focused on the minority parents' choice without considering the child's best interest. The Court has never actually defined free choice, nor has it invoked a legal provision expressly guaranteeing it. Rather, it has interpreted parental choice in a colloquial sense. The judge-made 'parental right' and the children's very real right to equal treatment converged as long as the latter were constrained to schools under the obligation to enrol.[357] In *Nyíregyháza II*, however, the two competing rights diverged, because the school of 'choice' was not under the obligation to admit children from the segregated Huszártelep, where it 'happened to be' situated.

In situations of 'white flight', liability for segregation arises from a complex web of actions of hundreds or thousands of parents, teachers and public officials. Regardless of these actors' conduct, states are liable for segregation. The ECtHR held this in *Sampanis* and *Sampani* and the Hungarian courts have repeatedly held that public authorities are liable for segregation by omission, i.e. by not taking measures to stem *de facto*/spontaneous segregation.

In *Sampani*, the ECtHR did not find it an adequate justification defence that non-Roma parents chose not to register their children at the school with an obligation to enrol – choosing other schools – and that **Greece** had no power to stop this trend; however, the ECtHR did not elaborate its reasons.[358] Member States are liable for ethnic segregation, regardless of its root cause. In order to avoid liability for ethnic segregation, they need to take action. Naturally, the longer they have been aware of ethnic segregation, the stricter the test through which their inaction is scrutinised. Retrospectively, this logic seems to emerge from the Greek education cases, especially from *Sampani* and *Lavida*, in which the ECtHR listed the general measures for the state to take in order to avoid segregation.

In **Romania**, the issue of parental consent has been implicitly and incoherently addressed by the CNCD.[359] In a case where Roma children coming from a different school were placed in a segregated class in the school, with inferior educational conditions on the basis of a standard procedure,[360] the school sought to justify segregation by alluding to the parents' wish to place the children together. The CNCD considered that the class was maintained on the basis of French language study, that parents did not request integration, and that when they finally did, they subsequently withdrew their requests. The CNCD therefore rejected the complaint, without discussing informed consent or vulnerability. In a somewhat similar case, the equality body decided otherwise,[361] relying on the firm opposition of the Roma parents to have their children separated into Roma-only classes.

In 2008, the CNCD addressed the issue of parental consent in an *ex officio* case relating to school and kindergarten segregation whereby Roma parents opted to enrol the children in the school situated in the

355 Article 5 CADE expressly prohibits this choice and so does *D.H. and Others* v. *Czech Republic*, [GC] No. 57325/00, judgment of 13 November 2007.

356 The voluntary nature of parental choice was highlighted in relation to minority education in the *Hajdúhadház, Győr* and *Kaposvár* judgments. In *CFCF et al v. Jaszladany et al* mentioned above, the argument served a good cause, but it was flawed partly because of the emphasis on free choice rather than equal treatment, and partly because of neglecting to discuss racial intent for which the case was notorious.

357 The term 'judge-made law' refers to the controversy that has for some time concerned the role of both supranational and national judges as law-makers, not simply arbiters of legal disputes. Literature on the changing function of judges problematises the fact that unlike legislation adopted in response to pressing societal demands, judge-made law is retrospective, particularly in relation to the dispute at hand. See: Lord Reid (1972) 'The Judge as Law Maker', *Journal of the Society of Public Teachers of Law* (New Series) 12, no. 1 (January 1972), pp. 22-29 and Scaccia, G. (2017) 'Constitutional Values and Judge-Made Law', *Italian Law Journal* 3, no. 1, pp. 177-192.

358 ECtHR, *Sampani and others* v. *Greece,* Judgment, 11 December 2012, paras 103-104.

359 Romania, European Roma Rights Center, *Romani CRISS* ş*i Fundaţia Umanitar*ă *Hochin* v. Ş*coala 'Ion Creanga'*, CNCD, decision no. 256 from 14.03.2006.

360 Schools generally relied on the argument that on the basis of the school principle of continuity when a higher class is to be formed it will comprise the same children enrolled in the previous level of the class. Therefore, children from various classes at the same level will not be mixed in classes at higher level but follow the same composition of children, e.g. from 1st grade to 4th grade or from 5th grade onwards.

361 Romania, ex officio investigation v. *Scoala Macin*, CNCD, decision no. 75 from 02.03.2006.

Roma district, because of its proximity and the availability of hot meals. While taking note of the pressing social needs of the Roma families and their consent to segregation, the equality body considered that the best interest of the child needs to be counterbalanced with the non-discrimination principle and the provision of quality education for vulnerable groups and found that the separation of children in separate facilities, classes or groups amounts to direct discrimination on the basis of ethnicity.[362] In a similar case, it was considered that the needs of the children from the perspective of the family situation could not justify segregation.[363] The most evident example of parental consent[364] was addressed in relation to education for children with intellectual disabilities,[365] where, the CNCD applied the *D.H*. test and reasoned that grounds outside the law or pressing social and economic needs cannot justify the placement of children without special educational needs into segregated schools.

Many education systems are now motivated by the idea that choice and competition increase efficiency and educational outcomes, while public funding should still guarantee equal access and quality for all students. For example, recently, **Sweden** has moved from a system with virtually no choice and no private alternatives to a voucher-based system with choice between public and so-called independent, publicly funded, schools.[366] The Swedish voucher system seeks to guarantee equal opportunities to all pupils: the voucher follows the pupil to enter the chosen school. In theory, schools are neither permitted to select pupils by ability nor to charge tuition fees on top of the voucher.

However, according to recent research,[367] children with advantaged backgrounds are more likely to attend independent schools. Furthermore, segregation has increased on the basis of ethnicity (both native and immigrant background) and socio-economic conditions (high/low education background). Neighbourhood segregation has also increased, becoming the most important factor in explaining school segregation. Secondly, in regions where choice has become more prevalent, segregation on the basis of ethnicity and socio-economic conditions has also increased above what should be expected from already existing neighbourhood segregation. The estimates indicating a strong correlation between choice and ethnic segregation are robust throughout a number of empirical specifications. These patterns correspond to white flight and have already raised concerns about growing school segregation and brain drain from schools in disadvantaged areas.[368] In light of the relevant UN treaties discussed above, the failure to effectively prevent and/or counter these trends engages the state's responsibility for segregation in education.

In *D.H.*, the Strasbourg Court equated the education of minority children without racial or ethnic discrimination to a public interest that should prevail over parental choice, by holding the following:

> '203. In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed

362 Romania, ex officio investigation, *CNCD*, decision no. 306 from 13 May 2008.

363 Romania, *CRISS* v. *Josika Miklos School*, in Atid, CNCD, decision no 330 from 27 March 2008.

364 Particularly *D.H. and Others* v. *Czech Republic*, [GC] No. 57325/00, judgment of 13 November 2007.

365 Romania, *CRISS* v. *Scoala Dumbrăveni*, CNCD, decision no 733 from 11 June2008.

366 Magnússon, G. (2019) 'Inclusive education and school choice lessons from Sweden', *European Journal of Special Needs Education,* available at: https://doi.org/10.1080/08856257.2019.1603601.

367 Böhlmark, A., Holmlund, H. and Lindahl, M. (2016) 'Parental choice, neighbourhood segregation or cream skimming? An analysis of school segregation after a generalized choice reform', *Journal of Population Economics*, Col.29, Issue 4, pp. 1155-1190, available at https://doi.org/10.1007/s00148-016-0595-y.

368 Böhlmark, A., Holmlund, H. and Lindahl, M. (2016) 'Parental choice, neighborhood segregation or cream skimming? An analysis of school segregation after a generalized choice reform', *Journal of Population Economics*, Col.29, Issue 4.

> decision or were aware of the consequences that giving their consent would have for their children's futures. It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism, and special schools where the majority of the pupils were Roma.
>
> 204. In view of the fundamental importance of the prohibition of racial discrimination … no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest.'

While generally welcomed, *D.H.* has been perceived by some as unnecessarily limiting the free choice of minority parents.[369] The limitation of majority parental choices prevalent in the Court's case law – particularly in the Greek cases – seems to refute the suspicion of unjustifiable insensitivity *vis-a-vis* the Roma only.[370] The criticism put forward on behalf of the minority parents resonates with concerns about CADE's integrationist rationale that imposes stringent conditions on ethnic self-separation.[371] *D.H.* may, however, also be read as a recognition of the many facets of vulnerability and an attempt to address the situation of the socio-economically disadvantaged Roma. Called on to rule about discriminatory administrative practices, the ECtHR grappled with the power imbalance between impoverished Roma parents and majority institutions, recognising that perfect choices are not available to the former, because poverty-stricken Roma children are either segregated or regularly harassed in mainstream schools.

The either-or dynamics of precedents like *D.H.* are blurred in national advocacy spaces, where critical voices are often outflanked by ethnic majorities and dominant minorities. Both majority and minority interests are represented by competing actors, while racial or ethnic minority interests are themselves multi-layered and parents speak, but do not necessarily act on behalf of their children, because a family's interests may be contrary to an individual child's.

Parental choice has also been addressed by the European Court[372] in relation to philosophical convictions seeking to justify a decision to educate children at home. The Court noted that while some countries permit home schooling, others require compulsory attendance at state or private schools. As a result, the Court accepted as falling within the state's margin of appreciation the view that not only the acquisition of knowledge but also integration into, and first experiences of, society are important goals in primary education and that these objectives cannot be met to the same extent by home education, even if the latter allows children to acquire the same standard of knowledge. In the ECtHR's view, the domestic courts' reasoning stressing both the general interest of society in avoiding the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society was in accordance with its own case law on the importance of pluralism in democratic societies.

In the same line of reasoning, in *Wunderlich* v. *Germany*, the European Court held that parental choice must yield to the best interest of the child manifest in attending compulsory schooling aimed at preventing social isolation and ensuring integration into society. In this context: 'a fair balance must be struck between the interests of the child and those of the parent and, in striking such a balance,

369 Rostas, I. (2012) *Ten Years After A History of Roma School Desegregation in Central and Eastern Europe*, Central European University Press (15 April 2012).

370 In the Greek cases the majority parents protested against integration. By finding segregation in violation of the Convention and imposing general measures on Greece and requiring its compliance as a matter of positive obligations, the Court curtailed the right of majority parents to choose segregated education for their children.

371 Thornberry argues that the UNESCO Convention Against Discrimination in Education does in fact favour a 'majoritarian view' of integration over ethnic separation in schools. See, Thornberry, P. (2016) *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, OUP, pp. 378-383.

372 ECtHR, *Konrad* v. *Germany*, no. 35504/03, Decision as to the admissibility, 11 September 2006. See also *Dojan and Others v. Germany*, nos. 319/08, 2455/08, 7908/10, 8152/10 and 8155/10, 13 September 2011.

particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent.'[373]

3.5.2 The child's best interest

The child's best interest can be threatened by a variety of actors: schools and teachers, public bodies, and majority and minority parents. In general, domestic law and jurisprudence accord prime significance to the best interest of the child, but case law on conflicting principles in education is scarce and at times runs counter to Strasbourg jurisprudence. Even though jurisprudence on the best interest of minority children is scarce, given the pivotal role of the principle in the Strasbourg Court's case law –concerning children's rights in general – it will probably come to occupy a central place in domestic adjudication once litigation against racial discrimination in education becomes more widespread. Similar to parental choice, the child's best interest comes to the fore once a *prima facie* case of racial discrimination/segregation is established, i.e. during the justification defence following the qualification of less favourable treatment.

In a **German** case, the permissibility of imposing an obligation on a parent to have contact with his or her child, including coercive measures was at issue.[374] In this child protection context, the Federal German Constitutional Court underlined that the duty to care for and bring up their child in the child's best interest imposed on parents by Article 6(2), sentence 1 of the Basic Law, is not owed exclusively to the state but also to the child. The child's right to parental care and upbringing corresponds with the parental duty to foster the child's wellbeing. The Court held that it was for the legislature to elaborate the right and the duty.

Parent and guardian organisations in a collective action applied to the **Greek** Council of State for the annulment, inter alia, of a decision of the Minister of Education, Research and Religious Affairs on the designation of school units of the Primary and Secondary Education Departments of Central Macedonia, Attica and Sterea Ellada for the school year 2016-2017, in whose jurisdiction the reception structures for refugee education operate. They claimed that refugee children might pose a health risk to their children because they have not been vaccinated. The Council of State (the Supreme Administrative Court) found that the integration of refugee children is largely accomplished through education and their attendance in public schools does not affect in any way the interests of other pupils and their parents.[375] The Court found that in the absence of a vested interest, parent and guardian organisations had no legal standing as they were acting by virtue of racist motives, advocating personal opinions or individual perceptions that cannot constitute the public interest.

The Court stated that a regulation introduced on matters relating to the organisation of public education can only concern specific persons when their personal situation is affected by the adoption and application of the relevant legislative act. This was not the case here, since the contested acts (preparatory classes for refugees) were not of direct and individual concern to the applicants and their children. The health concern was considered unfounded since the Ministry of Education and the Ministry of Health were collaborating in the proper vaccination of refugee children. Basically, the interests of applicants and their children were not affected in any way. The Court clarified that a measure adopted for the integration of refugee children in Greece could not be contested before the courts based solely on opinions and perceptions.

In an individual claim supported by the NGO GISTI as concerns the conditions of admission of a small child from the Comores in Mayotte, the **French** Conseil d'Etat stated as a general principle that the

373 ECtHR, *Wunderlich* v. *Germany*, Judgment, 10 January 2019, para. 46 and 51.
374 Germany, Federal German Constitutional Court (BVerfG), 01.04.2008 – 1 BvR 1620/04.
375 Greece, Greek Council of State, Decision No. 470/2018 of the Third Section of the Council of State, 01 March 2018.

administrative authority must, in all its decisions pay the utmost attention to the impact of the decision on the best interest of the child.[376]

In **Spain**, the ability to qualify as a private school ('*escuela concertada*') funded entirely by the state was withdrawn by the regional public administration on the ground that it offered separate education for boys and girls.[377] The association of parents argued for a breach of the constitutional right to education and the option to choose an educational establishment. In its decision, the Constitutional Court underlined that the right to establish educational institutions and to choose the educational, religious or moral formation of the children, like any 'fundamental right', allows for 'restrictions' that respond to a 'constitutional legitimate purpose' and are necessary and adequate 'to achieve that objective'. However, the Court held that differentiated education (for boys and girls) cannot be considered discriminatory, as long as the conditions of comparability between the schools are fully met.[378]

The **Spanish** Constitutional Court has addressed the issue of segregation (referred to as 'radical separation') in school in reference to difficulties stemming from relevant legal provisions in the context of the students' transfer from a specific form of education – such as, for instance, from vocational training – to another form – such as mainstream education, regardless of their ethnic or racial origin.[379]

The child's best interest amounting to racial equality in education prevails over the choices of all, because the Strasbourg Court elevated racial equality in education to the level of public interest and held that even in the event of conflict between minority children and parents, the protection from racial/ethnic discrimination prevails over parental consent to education that is eventually discriminatory.[380] It is important to note here that consent and choice are not identical, which is borne out by the Court's recognition of the illusory nature of free choice in the context of discriminatory administrative practices *vis-a-vis* a vulnerable group.

D.H. has been criticised by educationalists[381] as excluding Roma parents from policy making and implementation, while being insensitive to the psychosocial needs of Roma children, whose individual development may require instruction in separate institutions.[382] Importantly, *D.H.* dealt with misdiagnosis, rather than the positive action measures envisaged by the critics, leaving open the possibility of justifying segregation in cases where it did indeed serve the child's best interest.[383] The claim is that 'the autonomy of the Roma that the ECHR seeks to secure is threatened by their exclusion from the conversation in which their interests and identity are determined', rendering both policy making and implementation

376 France, Conseil d'Etat, No. 359359, 25 June 2014, http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEX T000029170300.

377 Spain, Constitutional Court, 74/2018, 3 July 2018, (Asociación de Padres de Alumnos Torrevelo, Association of parents of students Torrevelo, Cantabria, Spain). No sanctions, but the regional public administration must reopen the procedure to enable the Torrevelo School as an '*escuela concertada*' http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2018-11272.pdf.

378 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Spain'.

379 Spain, Constitutional Court Decision 68/2018, 21 June 2018 http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2018-10510.pdf.

380 *D.H. and Others* v. *Czech Republic*, [GC] No. 57325/00, judgment of 13 November 2007, para. 203 and 204.

381 New, William S. and Merry, Michael S. (2010) 'Solving the "Gypsy Problem": D.H. and Others v. the Czech Republic', *Comparative Education Review*, Volume 54, Number 3, August 2010. 'In absentia, Roma parents and children continue to be represented either as victims of violence and domination that they are powerless to resist or even understand or as witless perpetrators of ethnic parochialism who prefer their children to grow up like them, as Roma, rather than to enjoy the (promised) benefits of mainstream Czech society.' New, W. (2013) 'Litigating exclusion, inclusion and separation: dilemmas of justice in Roma education reform' in Miskovic, M. (ed) *Roma Education in Europe: Practices, policies and politics*, Routledge, London and New York, pp. 181-191.

382 Ethnographic research has also supported the assertion that the attitudes among Roma children and adults who come into contact with a school that strives to open up educational opportunities higher than they had originally hoped for positively changes. Timmer, A. D. (2017) *Educating the Hungarian Roma: Non-governmental organisations and minority rights*, Lexington Books, Lanham, Boulder, New York and London.

383 Incidentally, this is also an objective for which segregation is permitted, as long as achievements are really higher. See, Farkas, L. (2014) *Report on Discrimination of Roma Children in Education*, European Commission.

'manifestly undemocratic'.[384] The question is, whether the court, legal action and ultimately the law can ensure access to political decision making, when the majority is unwilling to hear the minority. While the law may seem powerless in this regard, it can certainly provide the minority a day in court and a say in policy decision, which seems more than that which political processes alone can achieve, for if they were successful, there would be no need to use the law in the first place.

That parental right is not absolute and should therefore be subjected to a proportionality test when conflicting with the child's best interest (the right to equal treatment) was spelt out in a recent **Hungarian** trial judgment.[385] Under the present circumstances, this approach is perhaps more equitable than subjecting Roma parental choice to political processes in which the Roma are outnumbered by the majority or are subjected to decidedly illiberal governance. The *D.H.* critique stops before this stage, failing to explicate why it is right to dispute the legitimacy of the Strasbourg verdict in relation to the reasons, but not the finding, particularly when the Court holds that the standard of what a 'reasonable person' would do in a particular situation may not readily apply to socio-economically deprived Roma parents and their choices. This seems to be a recognition of the Roma parents' precarious positionality, rather than a failure to take their specific circumstances into account.

3.6 Sanctions

Article 15 of the Racial Equality Directive stipulates that remedies against racial discrimination must be adequate, proportionate and dissuasive, but other than damages it does not explicitly require Member States to provide specific remedies, such as injunctions that, incidentally, appear more appropriate in the context of racial discrimination in education. The Luxembourg Court held in *Feryn* – in relation to structural discrimination in access to employment – that 'sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.'[386] Given that many legal challenges against racial discrimination in education take the form of representative action, it is important to note that sanctions 'must be effective, proportionate and dissuasive, even where there is no identifiable victim'.[387]

While damages seem to constitute the core sanctions at the moment, their effectiveness, proportionality and dissuasiveness is doubtful. For example, the average compensation as non-pecuniary damage awarded by the European Court of Human Rights is around EUR 1 763[388] per applicant in the Roma education cases, while the minimum compensation is EUR 1 000[389] per child. This falls below the level in the *D.H* and *Sampanis* cases, where the just satisfaction awarded was EUR 4 000 and EUR 6 000 per applicant.

384 New, William S. and Merry, Michael S. (2010) 'Solving the "Gypsy Problem": D.H. and Others v. the Czech Republic', *Comparative Education Review*, Volume 54, Number 3, August 2010, p. 190.

385 Hungary, Budapest Regional Court, *CFCF* v. *Ministry of Human Resources*, decision no. 40.P. 23.675/2015/84, 18 April 2018. See European network of legal experts in gender equality and non-discrimination (2018), 'News Report, Hungary, 6 July 2018', at https://www.equalitylaw.eu/downloads/4641-hungary-education-ministry-found-to-be-in-breach-of-its-non-discrimination-obligations-for-failing-to-take-effective-action-against-segregation-in-28-elementary-schools-pdf-164-kb.

386 European Court of Justice, judgment 10 July 2008, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV* C-54/07, ECLI:EU:C:2008:397.

387 European Court of Justice, judgment 10 July 2008*Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV* C-54/07, ECLI:EU:C:2008:397, para. 40.

388 In the Roma education cases before the ECtHR there have been 209 children and the total compensation awarded amounts to EUR 368 500.

389 *Lavida and Others* v. *Greece*, No. 7973/10 (2013), 23 applicants have been granted in total EUR 23 000 as non-pecuniary damage. Similarly, in *Sampani and Others* v. *Greece*, No. 59608/09 (2012) 140 applicants have been granted in total EUR 140 000 as non-pecuniary damages.

In a few Member States, courts are hesitant to impose damages or keep the level of damages unnecessarily low, although there are countries where particularly dire situations inspire the judiciary to mete out higher levels of compensation when discrimination in education is concerned. In the **Czech Republic**, the lack of awareness among the general public limits the number of complaints by Roma individuals. The Czech national expert of the European network of legal experts in gender equality and non-discrimination points out that as litigation against discrimination is rare, the institutions are also cautious about sanctions. The only sanction imposed by the trial court in the 2016 *Ostrava* case, which is now pending appeal, was a written apology,[390] while in another case the School Inspectorate ordered that the school put an end to segregation.[391] The Public Defender of Rights (the Ombudsperson) does not have sanctioning powers.[392]

In a **Croatian** case detailed above (Section 3.2),[393] upon the appeal of the defendants, the county court reduced the awarded compensation to HRK 5 000 (EUR 666) to each applicant. The court held that, having regard to all the circumstances of the case, lack of any serious consequences, the gravity of the violation and the purpose of compensation, the sum awarded was reasonable. In the view of the Croatian national expert of European network of legal experts in gender equality and non-discrimination, the sanction was not effective, proportionate or dissuasive.[394]

In an **Irish** case, the complainant was subjected to direct discrimination on the Traveller community ground in the course of contact with the principal of a 'special needs' school about her son's application for admission.[395] In effect, the school principal had ignored the admission request, which was based as standard on a psychologist's assessment, while being rude to the complainant. The Equality Officer ordered that the respondents pay EUR 4 000 to the complainant 'for the suffering and hardship experienced.'[396] The Irish national expert in the European network of legal experts in gender equality and non-discrimination notes that the 'sanction imposed was at the higher range of applicable compensation levels, but the ceiling (since raised to EUR 15 000) is arguably inadequate in cases such as this which entail grave consequences'.[397]

In another Irish case, the total amount of redress awarded was EUR 5 850, close to the then maximum of EUR 6 500,[398] because the 'complainant was unable to complete his primary education' and was also victimised. The school was also ordered to put in place a system facilitating early identification of students who have disabilities or learning difficulties.[399] The aforementioned Irish expert is of the view

390 Czech Republic, District Court Ostrava, 1 March 2017, file 26 C 42/2016.

391 Czech Republic, School Inspection, Decision No. ČŠIU-1358/15-U of 19. 1. 2016, ex officio procedure, https://docs.google.com/viewerng/viewer?url=http://www.romea.cz/dokumenty/inspekcni-zprava-krasna-lipa.pdf.

392 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Czech Republic'.

393 Croatia, Municipal Court in Varaždin, County Court in Varaždin, Gž-3684/12, 2 April 2013.

394 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Croatia'.

395 Ireland, Equality Tribunal, *Faulkner* v. *St Ita's & St Joseph's School*, Tralee, DEC-S2006-037, 24.06.2006, https://www.workplacerelations.ie/en/Cases/2006/May/DEC-S2006-037-Full-Case-Report.html, complainant represented by an NGO, the Kerry Traveller Development Project.

396 At the time, the maximum level of compensation available was EUR 6 348.69. The maximum award payable under the Equal Status Acts is linked to monetary limits on the jurisdiction of the District Court and is now set at EUR 15 000 (with effect from 04 February 2014 pursuant to section 15 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, 24 July 2013).

397 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Ireland'.

398 Ireland, Equality Tribunal, *Two Complainants (a mother and her son)* v. *A Primary School*, DEC-S2006-028, 06.04.2006, https://www.workplacerelations.ie/en/Cases/2006/April/DEC-S2006-028-Full-Case-Report.html.

399 Boards of management are charged, under Section 23 of the Education (Welfare) Act 2000, with ensuring that a code of behaviour is drawn up, applied in the school and kept under review to prevent harassment and bullying among others. The code must adhere to the guidelines produced by the National Education Welfare Board (2008) *Developing a Code of Behaviour: Guidelines for Schools*, https://www.tusla.ie/uploads/content/guidelines_school_codes_eng.pdf. Anti-bullying procedures were published in 2013, which include a template for schools to record incidents. See further: http://www.education.ie/en/Schools-Colleges/Information/Bullying/Anti-Bullying-Procedures-in-Schools.html.

that the Tribunal missed an opportunity to direct the school to revise its code of behaviour and address harassment in a proactive and appropriate fashion.[400]

In certain cases, injunctions are not ordered, despite their dissuasiveness. For instance, in an **Irish** case, the complainant challenged a university regulation that set down a residency requirement for a certain number of years in order to avail of an EU tuition fees rate.[401] Ms Tsourova, a woman of Chechen origin and a recognised refugee, was charged the higher rate. The residency requirement applied to EU nationals and third country nationals, and the regulation was indirectly discriminatory because fewer refugees than non-refugees could comply with it and the criterion could not be objectively justified. In considering whether the college could avail itself of the objective justification defence the Equality Officer had regard to Section 3 of the Refugee Act 1996, which provides that refugees should have the same access to education as Irish citizens. Redress of EUR 4 000 compensation was ordered. However, the sanction could have been augmented by directing the respondent to revise its fees policy.[402]

In yet another **Irish** case, the complainant, a Somali national, was a student on an educational programme offered exclusively to unaccompanied minors.[403] He referred a discrimination complaint on the race ground when the college held a separate graduation ceremony for his programme. The respondent argued that the decision was based on the unique age profile of the complainant's class, all of whom were aged between 16 and 18. Since alcohol was available at the main graduation ceremony, it decided that the venue was not appropriate. However, the equality officer noted that '68 % (17 out of 25) of them were 18 or over at the time of the ceremony', concluding that age 'cannot be given as a reason for the differential treatment nor used to justify the need for a separate graduation ceremony.' The Equality Tribunal held that the failure to invite the student to the main graduation ceremony constituted indirect discrimination on grounds of race. The condition of age that the college imposed was one that the student's class, being perceived to be minors, was unable to comply with. 'As this condition was only applied to the [complainant's] class (non-Irish) it is clear that a substantially larger number of people enrolled in other classes (Irish) were able to comply with the condition.' EUR 3 000 compensation was ordered as redress for the discriminatory treatment.

In Hungary, as mentioned above, compensation for segregated education was ordered to be paid to groups of children in the *Tiszavasvári*, *Tiszatarján* and *Kolompár et al* v. *Miskolc* cases. In September 2019, the Debrecen Appeals Court ruled in favour of 62 claimants who had previously attended the segregated school of Gyöngyöspata and brought action for compensation against the school, the local government and the centralised education agency.[404] While the quantum of damages ranges between HUF 350 000 (EUR 1 100) and HUF 3 500 000 (EUR 11.000), the total sum payable to the claimants amounts to approximately EUR 330 000. The appeal judgment is not yet final, because the defendants sought judicial review from the Supreme Court. It is important to note that the Chance for Children Foundation, which represents the claimants, has incurred over EUR 50 000 in costs in connection with preparation and client contact.[405] Similar to the costs incurred by the pro bono law firms – Lengyel Allen and Overy, and Gárdos Füredi Mosonyi Tomori – the NGO's financial contribution and its legal representative's wages could not be recovered. Should the litigation fail, the claimants –whose court fees have been waived – will nonetheless have to foot the legal costs of the defendants that are all funded

400 European network of legal experts in gender equality and non-discrimination (2019) 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Ireland'.

401 Ireland, Equality Tribunal, *Tsourova* v. *Trinity College Dublin*, DEC-S2004-162, 05 November 2004, https://www.workplacerelations.ie/en/Cases/2004/November/DEC-S2004-162-Full-Case-Report.html, litigation costs funded by the NGO Free Legal Advice Centres).

402 European network of legal experts in gender equality and non-discrimination (2019),' Questionnaire on Racial Discrimination in education and EU law, response from country expert, Ireland'.

403 Ireland, Equality Tribunal, *A Student* v. *City of Dublin Vocational Education Committee*, DEC-S2007-089, December 2007, https://www.workplacerelations.ie/en/Cases/2007/December/DEC-S2007-089-Full-Case-Report.html, complainant hired a private solicitor.

404 Hungary, Debreceni Ítélőtábla, judgment no. Pf.I.20.123/2019/16.

405 The information was obtained from András Ujlaky, chair of the CFCF Board, 4 November 2019.

from the central budget. The litigation has already lasted four years, which is considerably longer than the length of court proceedings in *actio popularis* cases that also require less financial investment.

In Ireland, injunctive relief under Section 27(1)(b) of the Equal Status Act has been ordered in cases dealing with the refusal of access to education. A case involving a complaint of direct discrimination was upheld where the respondent board of management took over four months to process an enrolment application from a member of the Traveller community. The Tribunal found that the boy was not allowed to commence school following an offer of a place, not because of discrimination, but because of failure to comply with school regulations. EUR 3 500 redress was ordered, and the respondent was further directed to put in place a system to facilitate timely compliance with its statutory obligations to deal with applications for enrolment.[406]

In **Romania**, the CNCD applied administrative sanctions, including in some recent cases fines imposed both on the schools and the school inspectorates. A feature that might lead to increased effectiveness is that when finding segregation, the CNCD requested the schools and the inspectorates to report back with the desegregation plans that they had adopted. The overturning of the CNCD decision by the Court of Appeal in a recent case is worrying in this regard.[407]

In the context of a decade-long litigation campaign, **Hungarian** courts responded positively to ending segregation and jurisprudence has become more robust since 2011. The trial court in the *Hajdúhadház* case ordered the schools to end segregation, and the local government to refrain from interference.[408] The Supreme Court retracted in the *Győr case* and CFCF asked the Constitutional Court to review the judgment, but the latter sidestepped the task at hand, finding that the representative claimants lacked standing following the 2010 constitutional reform.[409] The NGO petitioned the Strasbourg Court to find a violation of the right to fair trial and equal treatment in education, but the application was found inadmissible due to the lack of a direct link between the alleged violation and the applicant CFCF (victim status).[410] Simultaneously, in the *Tiszavasvári* case, the Equal Treatment Authority's desegregation order was upheld on judicial review, leading to the outcome that a junior civil servant had powers that a civil judge did not.[411]

In *Kaposvár II,* the Appeals Court[412] made an order to enforce a desegregation plan drafted by the claimants' expert and the verdict was upheld by the Supreme Court.[413] In *CFCF* v. *the Ministry of Human Resources*,[414] the trial court ordered the defendant to: 1. prohibit new admissions in segregated schools; 2. instruct Government Offices to place new students in integrated schools; 3. instruct maintainers to draft desegregation plans and rezone school districts; 4. publish desegregation plans on the internet; 5. monitor implementation and publish results; 6. amend the inspection protocol to permit the handling of ethnic data based on third party identification; 7. pay a public interest fine of EUR 159 000 earmarked for the NGO monitoring desegregation programmes. The Budapest Appeals Court struck down the sanctions that would have required immediate and structural changes (points 1-2 and 5-6).

Hungarian desegregation litigation has mobilised the judiciary, but it has not succeeded in mobilising field-specific public enforcement and this country remains the only one in Europe without centralised

406 Ireland, Equality Tribunal, *Mrs K (on behalf of her son)* v. *A Primary School,* DEC-S2011-003, 18 January 2011, https://www.workplacerelations.ie/en/Cases/2011/January/DEC-S2011-003-Full-Case-Report.html, complainant represented herself.

407 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Romania'.

408 Hungary, Hajdit-Bihar County Court, Judgment No. 6.P. 20.341/2006/50. The Supreme Court held that a date for ending segregation could not be specified. Supreme Court, Judgment No. Pfv.IV.20/936/2008/4.

409 Hungary, Constitutional Court decision no. IV/03311/2012, delivered on 17 June 2013.

410 Application no. 786/14, *Esélyt A Hátrányos Helyzetű Gyerekeknek Alapítvány* v. *Hungary*, (Second Section), inadmissibility decision of 25 March 2014.

411 However, implementation has faltered upon the Authority's reticence. Supreme Court judgment No. Kfv.VI.39.084/2011/8 *Tiszavasvári* v. *ETA* (CFCF intervening).

412 Hungary, Appeals Court, Pf.III.20.004/2016/4.

413 Hungary, Supreme Court, Judgment no. Pfv. IV. 20085/2017 of the Curia.

414 Hungary, Metropolitan Court, 18 April 2018, judgment No. 40.P. 23.675/2015/84.

school inspection. The first victory and CFCF's very existence as a quasi-enforcement agency meant that segregation – on the rise since the political transition[415] – substantially decreased in urban hubs[416] to then stagnate in the years preceding re-segregation. CFCF also played a significant role in magnifying the views of experts and policy makers in public debates.[417] Its Strasbourg complaints have created opportunities for broadening the scope of the *D.H.* campaign and flag systemic shortcomings concerning collective enforcement.[418]

415 Havas, Gábor and Liskó, Ilona, (2005) *Szegregáció a roma tanulók általános iskolai oktatásában*, (Segregation of Roma students in primary schools), Felsőoktatási Kutatóintézet Budapest, 2005.

416 Havas, Gábor and Zolnay, János, (2011) *Sziszifusz számvetése*, Beszélú, 2011. június, 16. évfolyam 6. Szám.

417 Zolnay János, (2016) *'Túl késõn jöttünk' – Beszélő-beszélgetés Ujlaky Andrással az Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány (CFCF) elnökével*, 3 November 2016.

418 OSJI and the ERRC submitted third party observations in *Kósa v. Hungary* and started a debate about collective enforcement under the European Convention.

4 The enforcement of racial equality in education

Literature on the usefulness and effectiveness of legal action against racial discrimination sprang up in the wake of groundbreaking legislation and jurisprudence in the United States that pioneered this field, and also in the United Kingdom, albeit on a much smaller scale. Litigation against segregated education was prevalent in the US for decades,[419] even before the civil rights movement emerged in the wake of the iconic *Brown* judgment,[420] in which the US Supreme Court reformed constitutional doctrine on equal treatment, holding separate but equal education unconstitutional. Lawyers were not the first to assess the impact of desegregation litigation, nor perhaps the most influential.

An early account of post-*Brown* enforcement litigation[421] concluded that the Federal Executive and state governments struggled with enforcement, because implementing a 'social revolution' ran into difficulties and the angle that assessments have taken since has not changed much. In response to massive resistance in the Southern states to *Brown's* enforcement, guidelines were developed, but shortly afterwards Congress moderated them, leaving the free choice option intact and curtailing the enforcement powers of the Office of Education.[422] Even though the Federal Government remained involved in litigation through the Department of Justice, the legislative responses passed in the shadow of the Black political movement and direct action on the streets stalled the implementation of the federal desegregation policy, which in turn yielded to local power and influential politicians in Congress, who were determined to maintain racial inequalities.

4.1 The European context

While much of these dynamics must be at play in Europe as well – both at the Member State and EU level – little has been written about the way they play out. Even though the EU has passed guidelines on desegregation, actual enforcement is relegated to the Member States, because the guidelines are soft-law instruments. These shortcomings are exacerbated by the interordinal nature of European equality law and the complexity of high judicial instances that have the final word over disputes. The European context is equally complex when it comes to the legal mobilisation of racial minorities. First, on account of their diversity, a dominant group whose efforts could drive policy change and establish models and templates for others to follow is missing, and secondly, legal means are fragmented at the Member State level.

It is important to note that despite the diversity of racial or ethnic minorities in the European Union and the widely held view that sizeable groups in the west and the east – i.e. groups of (non-western) migration background and the Roma – face fundamentally different problems, minority students share a common need for accommodation as speakers of minority languages and as being overrepresented among the socio-economically vulnerable. Both aspects require special measures to overcome the marginalisation of minority parents in decision making on school management and educational policies.

Few studies have attempted to take stock of the impact of litigation from the side of the lawyers and NGOs involved. The general impression points to the inability of the *law alone* to effect a 'social revolution' in education. National experts providing data for this report stress that the impact of litigation cannot be estimated, and even in countries where litigation has been more extensive, the assessment is that 'there is no evidence that any of the cases led to broader changes in practice on the part of educational establishments'.[423]

419 Tushnet, M.V. (1994) *The NAACP's legal strategy against segregated education, 1925-1950*.
420 US Supreme Court, *Brown* v. *Board of Education*, 347 U.S. 483 (1954).
421 Orfield, G. (1969) *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act*.
422 Orfield, G. (1969) *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act*.
423 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Ireland'.

Racial inequality in access to, attainment in and exclusion from education has been recorded across the EU.[424] It is generally accepted that the problems are structural, caused by organisational practices that feed institutional racism. While few in Europe claim that segregation and inequality result from active policies, such as the Jim Crow laws in the southern US states in the first half of the 20th century or the local legislation adopted after 1955 to 'massively resist' the enforcement of the *Brown* ruling,[425] research is yet to uncover the role that weak political will, local bureaucratic contingency and majority resistance play in producing and maintaining educational inequalities in Europe. As it is, many direct criticism towards the law, rather than politics, and towards lawyers, rather than politicians, for the overall failure to deliver on the promises of racial equality in education and beyond. Anti-discrimination law is seen by certain social scientists as a rhetorical endeavour 'unable to marshal governmental or institutional will' for enforcement[426] and this critique ties in with the general reflections of some legal theorists.[427]

Education within the broader context of racial discrimination has attracted attention due to the *D.H.* campaign, which addressed the Committee of Ministers[428] and the European Commission, with the latter launching infringement proceedings against the Czech Republic, Slovakia and Hungary on account of non-compliance with the RED. In the meantime, legal action following the 2007 *D.H.* ruling has been extremely limited in the **Czech Republic**.[429] An enrolment campaign was conducted in 2014 in Ostrava – the town where *D.H.* originated from – that finally led to a new challenge against exclusion on behalf of children whose admission to mainstream schools was refused. The 2016 Ostrava case was victorious at trial level and is now pending appeal.[430]

Desegregation campaigns have been conducted in central and eastern European states, but not in western Europe. Domestic campaigns have contributed to the European campaign by an NGO coalition spearheaded by the Open Society Foundations, and the Strasbourg Court has also actively bolstered enforcement, as its interests align with the NGOs promoting complaints.[431] While the Convention limits its powers to establishing a violation and providing just satisfaction,[432] the ECtHR has used the binding nature of judgments to impose individual and/or general measures[433] and broadened desegregation remedies in two ways: by prescribing general measures and imposing positive obligations.

Research conducted by the Harvard FXB Center (the Matache report) suggests that in **Romania**, for instance, EU accession exerted more leverage than strategic litigation, policy advocacy and community action.[434] There is, however a severe data shortage and NGO staff are of the view that legal action is

424 Parsons, C. (2009) 'Explaining sustained inequalities in ethnic minority school exclusions in England—passive racism in a neoliberal grip', *Oxford Review of Education*, Vol. 35, Issue 2.

425 Klarman, M.J. (1994) 'Brown, Racial Change, and the Civil Rights Movement', *Virginia Law Review*, Feb., 1994, pp. 7-150.

426 Parsons, C. (2009) 'Explaining sustained inequalities in ethnic minority school exclusions in England—passive racism in a neoliberal grip', *Oxford Review of Education*, Vol. 35, Issue 2. See, also to this effect Fox and Fox, Jon and Vidra, Zsuzsanna (2013) *Applying Tolerance Indicators: Roma School Segregation*, European University Institute.

427 'The neoliberal predicament exposes the truth about anti-discrimination law. As a medium of social policy, it is powerless. Or, more adequately put, it stands for social policy in the state of disempowerment.' Somek, A. (2011) *Engineering Equality*, Oxford University Press, p. 177.

428 Lambert-Abdelgawad, E. (2008) *The Execution of Judgments of the European Court of Human Rights*, Volume 88.

429 Czech Republic, Supreme Court judgment No. 30 Cdo 4277/2010 of 13 December 2012, *J. Suchy* v. *the Czech Republic – the Ministry of Education, Youth and Sports*.

430 Czech Republic, Judgment of the District Court in Ostrava of 1 March 2017, File No. 26 C 42/2016-124.

431 The implementation of judgments by states parties reinforced its authority and alleviated the caseload, whose incessant increase weakened the Court's bargaining power on its budget.

432 Just satisfaction is available pursuant to Article 41 of the Convention. The Court has carved out further remedial powers under Article 46 that prescribes the binding nature of judgments on states.

433 Colandrea, V. (2007) 'On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases', *Human Rights Law Review*, Volume 7, Issue 2, 1 January 2007, pp. 396-411.

434 FXB Center for Health and Human Rights (2015) *Strategies and Tactics to Combat Segregation of Roma Children in Schools, Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria and Greece*, Harvard University, p. 25. Matache observed that the EU accession criteria were 'the engine for the development and adoption of progressive Roma related institutions and policies' in the Romanian education sector.

more influential than advocacy, despite the lack of effective remedies.[435] The Matache report depicts litigation as partly successful[436] and often the only available tool,[437] demonstrating at the same time that massive resistance and governmental disengagement can render illusory any social change tool,[438] while positive results arise from teacher training in **Greece**, advocacy in the **Czech Republic** and litigation in **Hungary**.

Commissioned by the Open Society Justice Initiative (OSJI), a 2015 report (the Zimova report) found 'ground-breaking judicial rulings and significant changes in policy and practice', as well as 'disillusionment with the courts and new manifestations of discrimination.' It concluded that strategic litigation was but one tool to generate social change. Importantly, however, the Zimova report focuses on international litigation[439] and the impact of judgments rendered by the European Court of Human Rights.[440]

4.2 Private enforcement in courts

Even if initiated by private individuals, legal challenges against racial discrimination in education regularly involve collective actors and public bodies that are not only more resourceful financially, but also possess specialised legal knowledge about both equal treatment and education laws. However, while equality bodies are financed from the central budget – even if sometimes inadequately – NGOs find it hard to raise funds for litigating against racial discrimination. For instance, Romani Criss in Romania and the Chance for Children Foundation in Hungary, have recently resolved not to launch new cases due to the scarcity of funds, while other NGOs struggle to stay afloat or refrain from litigation altogether.[441]

4.2.1 Individual applicants

Various cases have been brought before courts and equality bodies by minority claimants across the EU, as detailed above in Section 3. Several of these cases concern access to education, placement in classes and harassment. Where legal actions concern access to school and placement, they are regularly granted, while in relation to harassment, apology and the payment of moral damages are the most common consequences. However, these incidents are handled on an individual basis, meaning that legal action by a private individual seldom triggers systemic change in the way in which admission, placement, harassment and bullying are handled by schools.

Individual applications can still be surprisingly effective in certain aspects of education. For instance, in **France**, a score of cases mentioned in Section 3.2, brought before the courts with the support of NGOs and the Defender of Rights, to sanction refusal to register children in school, has ensured the universal right of access to education. The criminal chamber of the Court of Cassation concluded that

435 'Overall, according to the Romani CRISS representatives we interviewed, research initiatives have not been as instrumental to anti-segregation advocacy efforts at the national level as much as legal actions have been. According to Romani CRISS, political will is lacking to understand the issues, consider data, and address them. Institutions tend to react mostly to pressure from the international community or from legal actions' (C. David, FXB Interview, 27 February 2013). Ibid.

436 'We thought we could remake the education system in different countries, and we really couldn't. We could do a few valuable things, like try to make sure that the Roma weren't excluded from the education system, but we couldn't play a transformative role. There was a degree of hubris about some of the activities.' Outsiders, in the end, can have only limited impact, a lesson that all foundations, governments, and armies eventually learn. 'Basically an outside donor doesn't make a revolution,' Feffer, Helping from Outside, interview with former OSF executive director, Aryeh Neier, 16 September 2013.

437 OSF Public Health Program, Advancing Public Health through Strategic Litigation, June 2016 and The International Human Rights Funders Group (2016), *Being Strategic about Strategic Litigation: Four Things We've Learned from a Public Health Context*, 28 July 2016.

438 Timmer, A. D. (2017) *Educating the Hungarian Roma: Non-governmental organisations and minority rights*, Lexington Books, Lanham, Boulder, New York and London.

439 As the Matache study shows, NGOs use all available tools to tackle segregation, without relying only on strategic litigation, legal or policy advocacy, community action or multicultural education.

440 Zimová, A. (2016) *Strategic Litigation Impacts: Roma School Desegregation*, OSJI, March 2016.

441 The information was obtained by the authors from the organisations in question.

discrimination occurred when a mayor refused to register Roma children in school,[442] while the Conseil d'Etat stated that illegal occupation of land does not justify a mayor's refusal of school registration.[443] The Tribunal of Montreuil declared illegal the refusal of a mayor to register a child to use the school canteen[444] and the Administrative Appeal Court in Nancy also declared illegal the refusal of a mayor to register a child to use the school canteen.[445]

4.2.2 Collective action

The impact of collective action – whether initiated by a group of claimants or organisations – is more likely to be structural. The Greek Helsinki Monitor (GHM), which pursues a regional advocacy agenda and plays a gap-filling function as the only litigating NGO in **Greece**, has been a key partner for the Strasbourg Court. In the Greek cases, the Court's activism was instrumental with respect to admissibility and remedies. The Greek cases were admitted with reference to the obscurity of national law and both the Greek section's lawyer and the Greek judge agreed with the view that *ex post* remedies would be ineffective as concerns segregated education. Their activism made a fortunate alliance with the complaints that requested the implementation of the Greek Ministry of Education's desegregation plan – abandoned in the face of protest by majority parents. The Court did not admit experimental complaints from **Hungary**. Nonetheless, positive *obligations* were imposed in *Horváth and Kiss*, in which the Chamber indicated that measures had to be taken to put an end to misdiagnosis in order to comply with the Convention.

The Roma education cases led to tangible developments at the national level. In **Croatia**, following the Grand Chamber judgment in *Orsus*, the Ministry of Education issued six measures in compliance with the *National Programme for Roma*, the *Decade Action Plan for Roma Inclusion 2005-2015*[446] and other strategic documents. The Primary and Secondary School Education Act was amended in July 2010 so that schools are under an obligation to provide special assistance to children with insufficient command of the Croatian language. Secondary legislation was adopted in May 2011 on the procedure for initial placement in a class. A panel of experts, composed of a physician, a psychologist and a teacher, is responsible for preliminary assessment prior to enrolment. For children with insufficient knowledge of the Croatian language, a Croatian-language teacher and/or language/communication expert verifies the command of the Croatian language by way of tests specifically designed for this purpose. The panel should indicate the form of assistance required and provide a curriculum tailored to the child's specific needs. The regional education authority makes a final decision on placement, assistance and the curriculum in each individual case, which is subject to appeal to the Ministry of Science, Education and Sport.

The authorities recruited 25 teaching assistants of Roma origin. They were trained to help Roma children overcome difficulties at school. Roma children were included in pre-school activities otherwise subject to fees, with a significant number participating during the extension of the period from three to 12 months before enrolment in primary school. *Oršuš* led to positive legislative changes and positive efforts in practice have also been noted, however segregation still persists.

The *D.H.* ruling triggered discussions about measures in the field of education in the Czech Republic,[447] but segregation is far from resolved, despite positive changes implemented in pursuit of the *D.H.* judgment

442 France, Court of Cassation, No.17-81369, 23 January 2018, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036584795. The case is pending appeal.

443 France, Conseil d'Etat, No. 408710, 19 December 2018, https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000037834583&fastReqId=2123024625&fastPos=1.

444 France, Administrative Tribunal of Montreuil, No. 1808272, 12 September 2018, individual and collective action (Human Rights League), https://www.gisti.org/IMG/pdf/ldh_cantines.pdf.

445 France, Administrative Court of Appeal of Nancy, No. 18NC00237, 05/02/2019, individual and collective action (Human Rights League). https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000038134815.

446 https://mzo.gov.hr/UserDocsImages/dokumenti/Obrazovanje/NacionalneManjine/Mjere%20i%20aktivnosti%20za%20izvršenje%20presude%20Europskog%20suda%20za%20ljudska%20prava%20u%20predmetu%20Oršuš%20i%20dr.%20protiv%20Hrvatske.pdf.

447 Revised Action Plan for the Execution of the Judgment of the ECHR in the case of D. H. and others v. The Czech Republic, 10 February 2017 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806f7a97.

still supervised by the Committee of Ministers.[448] There is slow progress that involves multiple entities and measures, such as:

- Strategy for Education Policy until 2020 focusing on desegregation,[449]
- amendment to the Education Act (Inclusion Act), guaranteeing free support to all children with special educational needs in mainstream education,[450]
- second amendment to the Education Act making it compulsory for all children aged five and over to attend a year of pre-school,[451]
- abolition of the educational programme for children with 'mild mental disability' as of 1 September 2016 and its gradual replacement by a unified curriculum,[452]
- extension of the School Inspectorate's powers to assess the quality of the work of the school

The three Roma education cases in **Greece**,[453] led to some change in practice. On 22 February 2011, the Deputy Prosecutor of the Greek Supreme Court received a letter from the 'Coordinated Organisations and Communities for Roma Human Rights in Greece (SOKADRE)' asking him to investigate cases of exclusion and marginalisation of Roma children in schools. The Prosecution Service repeatedly denounced segregation before and issued several circulars and other instructions, including an urgent written order (Protocol Number 720/22-02-2011) to all local prosecutors. This order requests local prosecutors to 'put an end to the exclusion of Roma from the public educational system of Greece, in a way that Romaphobia should be eliminated and that unhindered integration to all structures of the State should be ensured'.

In order to support the integration of Roma children in primary schools: a) Article 70 of Law 4485/2017[454] introduced a measure for hiring psychologists and social workers at specific school units of general and professional education, where necessary for the support of vulnerable groups or for providing psycho-social and emotional support, and b) Ministerial Decision No. 144073/Δ1/1-9-2017[455] appointed at 42 primary schools, 30 social workers for the 2017-2018 academic year.

Since 2016, a growing number of municipalities have established Roma annexes to their community centres.[456] The Roma annexes aim to provide specialised services for the Roma to improve their living standards, their full social integration, support students and combat dropout. The Roma annexes were integrated into Thematic Objective 9 for the promotion of the European Social Fund's aim of social inclusion and the fight against poverty and discrimination – included in the regional operational programmes.[457] The Roma annexes also offer counselling and legal advice on discrimination. They operate in nine municipalities in the Attica region[458] and a total of 254 centres were originally announced to operate in municipalities throughout the country.[459]

448 Council of Europe, Ministers' Deputies Meeting, CM/Notes/1288/H46-12, June 2017 https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168070ec4f.

449 Strategy for Education Policy of the Czech Republic until 2020: www.vzdelavani2020.cz/images_obsah/dokumenty/strategy_web_en.pdf.

450 Council of Europe, Ministers' Deputies Meeting, CM/Notes/1288/H46-12, June 2017.

451 Council of Europe, Ministers' Deputies Meeting, CM/Notes/1288/H46-12, June 2017.

452 Council of Europe, Ministers' Deputies Meeting, CM/Notes/1288/H46-12, June 2017.

453 Namely, ECtHR, *Sampanis and Others v. Greece*, 2008, App. No. 32526/05, *Ioanna Sampani and Others v. Greece*, 2012, App. No. 59608/09, *Lavida and Others v. Greece*, No. 7973/10, 2013.

454 Greece, Law 4485/2017 'Organization and operation of higher education, arrangements for research and other provisions' (O.G.A114/04-08-2017).

455 Greece, Ministerial Decision No. 144073/Δ1/1-9-2017 on the Appointment of PE30 Social Workers at School Units (O.G. B 3084/01-09-2017).

456 Greece, Ministry for Employment, Social Security and Social Solidarity (2018) *Guide for the Application and Functioning of the Community Centres*, Athens, May 2018, available in Greek at: http://www.mou.gr/elibrary/Guide_KentraKoinothtas2016.pdf.

457 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, Greece. The Greek Special Secretariat for the Social Inclusion of Roma has published the Regional Operational Programmes on its official website at: https://egroma.gov.gr.

458 Greece, Roma Annexes Operating in the Area of Attica are presented in Greek at: http://www.socialattica.gr/eidi-domis/kentro-koinotitas-me-parartima-roma.

459 CNN Greece (2018), 'ASEP: A total of 1 450 appointments at community centres', 19 January 2018, available in Greek at: https://www.cnn.gr/news/ellada/story/63494/asep-synolika-1-450-proslipseis-se-kentra-koinotitas.

In **Hungary**, where desegregation formed part of a Government programme between 2003 and 2010 and misdiagnosis was tackled in the framework of the reform of special education for disabled students, collective action bolstered policy objectives. It has also been instrumental in closing down segregated mainstream schools in big cities, where the local bureaucracy did not otherwise comply with central policies.

Arguably, the large number of *actio popularis* complaints brought by Romani CRISS before the **Romanian** equality body in 2007-2008 led to the adoption of the Ministerial Order 1540/2007 and subsequently to Notification 28463/2010 regarding Segregation of Roma in Education. The notification is also the result of advocacy by UNICEF and other Roma NGOs. Currently, in the context of the 2016 Order on prohibiting school segregation,[460] the National Commission for Desegregation and Inclusive Education has been set up. The commission was established by the Ministry of Education Order 3141/2019.[461] The commission consists of the ministry's specialised departments,[462] students and parents' associations, university representatives, teachers' unions and NGOs.[463]

In **Bulgaria**, desegregation litigation has not been successful, due partly to the unfavourable legislative provisions on segregation. Recently, pro-majority legal action resisting positive action measures was taken as a sign of backlash against racial equality policies. The case is still pending, therefore it is too early to speculate on the final outcome, however, it shows the comparatively easy access of pro-majority claimants to justice and the Bulgarian Administrative Court's shortcomings in giving full effect to the Racial Equality Directive, including Article 5 on positive action measures—shortcomings that follow concerns brought to the fore in *CHEZ*.[464]

The Sofia City Administrative Court (SCAC) repealed a decision by the Protection Against Discrimination Commission (KZD) to the effect that the Minister of Education was not liable for ethnic discrimination on grounds of having provided for scholarships exclusively for Roma school students.[465] The complainant association had alleged that non-Roma students were discriminated against as the Centre for Educational Integration of Children and Students from Ethnic Minorities (the Centre) granted scholarships only to Roma students with a view to preventing dropout in the framework of a targeted project. The Centre is a public body designated to help implement the ministerial strategy for educational integration of children and students from ethnic minorities. The Centre operated the contested scholarships as a positive action measure designed to compensate for Roma disadvantage. The KZD found the measure lawful.

SCAC, however, considered that it constituted direct ethnic discrimination against non-Roma. The court compared the Roma scholarships to generally available scholarships for academic achievement, and noted that as opposed to the general scheme, Roma scholarships were not dependent on a high academic record. Moreover, students were required to demonstrate socio-economic need, which was not the case for the Roma scholarships. General scholarships were considerably lower than Roma scholarships. The court concluded that ethnicity-based scholarships were not the only means to promote the education of Roma students, while they disproportionately disadvantaged the non-Roma. The lack of motivation, as well as the lack of funds lead to school dropout among the Roma, while the measure failed to address

460 School segregation is prohibited on the ground of ethnicity, disability or special educational needs, socio-economic status of the family, residence and school performance.

461 Romania, Order 3141 of 8 February 2019 for establishing, organizing and functioning of the National Commission for Desegregation and Inclusion in Education and Rules relating to functioning of the Commission, published in the Official Journal no.154 from 27 February 2019.

462 Romania, Department relating to the schooling in the language of national minorities, General direction for early education, primary and secondary education, General direction for secondary superior education and permanent education, Direction for minorities, Romanian Agency for Ensuring Quality of Education, National Institute for Science.

463 UNICEF, European Centre for Human Rights, Community Development Agency "Impreuna", and Amare Romenza Association.

464 For details, see, Farkas, L. (2017) 'NGO and Equality Body enforcement of EU anti-discrimination law: Bulgarian Roma and the electricity sector', in Muir, E., Kilpatrick, C., Miller, J and de Witte, B. (eds.) *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum*, EUI Working Paper Law 2017/17.

465 Sofia City Administrative Court, *A. Association* v. *Minister of Education*, Decision No. 7471 in case No. 9628/ 2018, 10 December 2018, http://search.admincourtsofia.bg/Acts/GetActContent?BlobID=226654.

the needs of indigent non-Roma students. The KZD decision was repealed and the case is now pending before the Supreme Administrative Court. If the ruling is confirmed, the Roma scholarships scheme would be terminated.[466]

In the **Slovak** case brought by the NGO Poradna, *Poradňa* v. *Elementary school in Šarišské Michaľany*,[467] the defendant school was ordered: 1. to remedy discrimination and place Roma children in a classroom together with non-Roma children and 2. to publish the court's judgment in newspaper for teachers as a paid advertisement (this was overturned by the appeal court). When the court decision became final, the school transferred some Roma children to the 'majority' classrooms, but without giving them sufficient support. Desegregation was spearheaded by the Office of the Plenipotentiary for Roma Communities in cooperation with Roma NGOs, but it waned without the long-term and sustainable support of the state authorities, especially when the percentage of Roma children began to grow.

The Plenipotentiary facilitated access for Roma children in classes 1-4 to lunch in the canteen. Following the appeal court ruling, the school introduced limited measures to implement the verdict. It started cooperating with the NGO EduRoma, founded in February 2013, as a reaction to the reluctance of the Government institutions to support the school in the implementation of the decision. Limited support has been provided to the teachers, while volunteers ran after-school classes for the Roma children and mediated between Roma and non-Roma children.

The European Commission, in its press release on the reasoned opinion it sent to Slovakia in October 2019, stated that, since the beginning of the pilot infringement proceedings in 2015

> 'Slovakia has undertaken several measures intending to tackle [segregation]. However, after carefully assessing the measures and monitoring the situation on the ground, the Commission concluded that they are not yet sufficient to resolve the problem'.[468]

Rather than supporting desegregation, the authorities approved the establishment of a new school near the Roma district in Ostrovany, a village neighbouring Šarišské Michaľany, with Roma-only classes that may become a segregated school. The Ostrovany school was founded in 2016/2017 with two zero-grade classes for 31 children.

Legal action has led to minimal change in Slovakia, but it has triggered public debate about desegregation, challenges, white flight, and the lack of sufficient financial, personal and methodological support. This served as a basis for NGO advocacy *vis-a-vis* the Government. In January 2019, the Ministry of Finance published a comprehensive analysis and evaluation of public expenses on policy measures impacting social inclusion of Roma communities concluding that the Slovak educational system remains unable to provide sufficient inclusion of socially disadvantaged Roma children. It emphasises that Roma children are underrepresented in pre-school education, overrepresented in special schools, and as such excluded from mainstream education. Transferring Roma children within mainstream education into separate classes and schools is more widespread than in other EU countries with sizeable Roma populations.[469]

In the **Czech Republic**, public opinion has supported special teachers, whose job security has been jeopardised by the *D.H.* campaign and subsequent reforms. Domestic debates have been dominated by

466 European network of legal experts in gender equality and non-discrimination (2018), *Country report, non-discrimination: Bulgaria*, European Commission, 2018.

467 The first instance decision has been confirmed by the decision of the Regional Court in Prešov, file number 20 Co 126/2012 from 30 October 2012.

468 European Commission (2019), 'October infringements package: key decisions, Brussels, 10 October 2019, Anti-discrimination: Commission sends reasoned opinion to Slovakia urging the country to comply with EU rules on equal treatment of Roma schoolchildren', press release, p. 7.

469 Ministry of Finance of the Republic of Slovakia (2019), 'Interim Report, Revision of expenses for groups threatened by poverty and social inclusion', January 2019 available at https://www.finance.gov.sk/sk/financie/hodnota-za-peniaze/revizia-vydavkov/ohrozene-skupiny/ (Slovak language only).

the special teachers' lobby group and have focused on the inclusion of disabled children, perhaps more than on the segregation of Roma children. Although establishing an important precedent, the judgment rendered by the District Court of Ostrava in 2017[470] has not fundamentally redrawn the map.[471]

4.3 Public enforcement

Equality bodies, national human rights institutions and sometimes also school inspectorates play an important role in enforcement, mainly by (*ex officio*) investigating, mediating and intervening in on-going cases.

4.3.1 Equality bodies

The **French** Public Defender of Rights received a complaint from a group of parents and the Mayor of St-Denis concerning the failure of the National Education authorities to provide sufficient teaching staff and preschool classes for the 2015/2016 school year in the underprivileged suburb of St-Denis. It was found that the insufficient resources allocated to the area resulted in direct and indirect discrimination on the ground of residence and origin.[472] It was recommended that measures be taken to correct the situation, prevent it from reoccurring and report about progress – which produced results.

In the **Netherlands**, two opinions of the former Equal Treatment Commission (ETC) dealt with local policies to promote integration and counter the development of so-called 'black schools'.[473] The ETC concluded in both cases that the policies resulted in discrimination on the ground of race. The reasoning suggests that policies to prevent or eradicate segregation need to be carefully designed.

In the first case, an association of 14 primary schools developed a policy to counter the development of 'black schools' by safeguarding the quality of education and promoting integration.[474] The policy maximised the admission of pupils who speak Dutch as a second language or have poor command of Dutch at 15 %; and another 15 % of Roma pupils. If these percentages are reached, pupils were to be referred to other schools. The Equal Treatment Commission qualified the policy regarding Roma pupils as direct discrimination on the ground of race, as the anti-discrimination law did not allow for any exceptions. The policy regarding pupils from a foreign language background was considered to constitute indirect discrimination on grounds of race, as it was not directly based on race, yet mainly affected 'allochthonous' pupils, i.e. pupils from outside of western Europe.

In the second case, a local policy developed by common agreement between the local authorities and several schools maximised the admission rate of pupils with a non-western migrant background at 40 %.[475] If this percentage was reached, new applicants were referred to other schools. As a result, the pupils were at times compelled to go to a school in another neighbourhood instead of the one close to home. The Equal Treatment Commission qualified the policy as direct discrimination on the ground of

470 Czech Republic, District Court Ostrava, judgment 26 C 42/2016 of 1 March 2017 https://www.ochrance.cz/fileadmin/user_upload/ESO/5202-2014-BN-rozsudek_OS_Ostrava.pdf.

471 Following an enrolment campaign to integrated schools, two Roma claimants whose enrolment was refused brought civil action, requesting a written apology and compensation of CZK 50 000 (EUR 2 000) each. The District Court in Ostrava confirmed that there was direct discrimination in the admission process, in the headmaster's attitude and the entrance tests. The court ordered the school to provide a written apology, nevertheless, it rejected the claim for damages, underlining that the claimants were later admitted to the school; therefore, the psychological damage was insignificant.

472 France, Defender of Rights, No. 2015-262, 9 November 2015, https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=16299&opac_view=-1.

473 The ETC was the equality body supervising the Dutch anti-discrimination legislation until 2012, when its function was integrated into the newly established Netherlands Institute of Human Rights (NIHR). The latter has a much broader mandate. Under the legislation, the ETC/NIHR can hear discrimination complaints on all the grounds covered by the EU equal treatment directives. Its opinions are not legally binding.

474 Netherlands, Equal Treatment Commission, Opinion 2003-115, 29 July 2003, local policy to promote integration and prevent the development of 'black schools'. https://www.mensenrechten.nl/nl/oordeel/2003-105.

475 Netherlands, ETC 18 February 2005, Opinion 2005-25; https://www.mensenrechten.nl/nl/oordeel/2005-25.

race, as the distinction referred directly to and exclusively affected 'allochthonous' pupils. Even though the ETC opinions were legally non-binding, at the time they generated widespread public debate about the acceptable means of preventing segregation in education.[476]

The **Czech** Public Defender of Rights launched an *ex officio* investigation into the admission process in the schools of Ostrava.[477] Two Roma children intended to enrol in the first grade in the local school in Ostrava. During the admission process, the headmaster tried to convince them to enlist to an overwhelmingly Roma school. He mentioned he was scared of the possibly growing number of Roma pupils in the school, which would, according to his opinion, deter the parents of non-Roma children from choosing his institution. Moreover, according to the claimants, there was an entrance test for the upcoming pupils, which was discriminatory towards Roma. The children were rejected at first, however later they were unexpectedly accepted. The ombudsperson noted that the headmaster's statements constitute direct discrimination on grounds of ethnic origin. Moreover, the requirements of the admission test were not equal for all children. She invited the school to amend the admission process and adopt more inclusive measures, including Roma teaching assistants and cooperation with NGOs. The civil case discussed above was launched after this evaluation.

4.3.2 Field specific agencies

Widely discussed in the **Slovakian** media was a case of discrimination against Roma children in a private special school in a village called Rokycany. In September 2015, the State School Inspectorate established that 13 randomly selected Romani pupils, who were first tested by the public diagnostic centre and found not to have a intellectual disability, were re-tested by a private diagnostic centre shortly afterwards, misdiagnosed as having mild intellectual disabilities and transferred to a special school.[478] The Inspectorate and the Government Plenipotentiary for Roma Communities requested that the Ministry of Education remove the private special school and the private diagnostics centre from the list of registered school facilities. The latter's registration was cancelled in early 2016 and that of the former in 2018. However, a new mainstream primary school was established at the time, which also means that children from the Roma district will probably continue their studies in a segregated school.

The **Czech** School Inspectorate launched an *ex officio* investigation into class level segregation.[479] In the 2016-2017 academic year, the elementary school in Krásná Lípa established a class only for Roma pupils. The school argued that the class was meant for children with problematic behaviour or those who had to repeat a grade and that ethnic origin was not taken into consideration. This quickly became a reason for public criticism and after the Roma parents filed complaints, the School Inspectorate investigated the situation, establishing that the criteria for assigning children to classes were not fair, leading to segregation on the ground of ethnic origin, and that the quality of teaching in the segregated class was low. The Inspectorate recommended systematically redressing these deficiencies by improving the quality of education and focusing on pupils with higher risk of failure and dropout.

Finally, mention must also be made of NGO initiatives, because in various Member States the civil sector is a key player not only in triggering policy change, but also in implementing model projects. This is the case, for instance, in **Bulgaria**, where desegregation was initiated by NGOs in 2000 and has remained largely in their care. Consequently, Bulgarian desegregation is based on projects and voluntary participation by both the Roma communities and the schools. In **Central and Eastern Europe**, NGOs

476 European network of legal experts in gender equality and non-discrimination (2019), 'Questionnaire on Racial Discrimination in education and EU law, response from country expert, the Netherlands'.

477 Czech Republic, Public Defender of Rights, decision 5202/2014/VOP, 16 April 2015 https://eso.ochrance.cz/Nalezene/Edit/2812.

478 Detailed information about this case is available in the report of Amnesty International and European Roma Rights Centre (2017), *A Lesson in Discrimination: Segregation of Romani Children in Primary Education in Slovakia*, pp. 36-40.

479 Czech Republic, Czech School Inspection, decision no. ČŠIU-1358/15-U of 19. 1. 2016, ex officio procedure https://docs.google.com/viewerng/viewer?url=http://www.romea.cz/dokumenty/inspekcni-zprava-krasna-lipa.pdf, http://www.romea.cz/dokumenty/inspekcni-zprava-krasna-lipa.pdf.

have played a crucial role in influencing change and implementing projects (co-)financed by the EU. In the **Czech Republic**, for instance, several NGOs led projects to empower the Roma community in the area of education.[480]

480 The most significant projects include: the fund for NGO video project 'Everything you have ever wanted to know about the education of Roma children, but were afraid to ask' (2017, Roma Media and Educational Organization (Romea): Roma scholarship fund for high school and university students (since 2016), Romea (2019): Support of Roma students. Available at: http://www.sdruzeniromea.cz/index.php/co-delame/podpora-romskych-studentu Organisation R-Mosty: courses for teachers on educating Roma children and Organisation Slovo 21: fellowship programme for Roma university students; educating future Roma professionals.

5 Conclusions

Education is a complex, lengthy and multi-actor process, in which the public interests (of societies and communities), the general interests of institutions (national, EU and international) and the self-interests of majority and minority children and parents interact, coincide or come into conflict, testing and probing principles, such as the pluralist democratic nature of public education and the best interest of the child.

Given that education is not only a right, but also an obligation in the European Union, unless the states eliminate racial discrimination, they necessarily *coerce* minority students into a situation whereby they must endure less favourable treatment. The only way to overcome this paradox may well be to curtail the free choice of both majority and minority parents, which is the approach that the European Court of Human Rights has taken with reference to the obligation of states to ensure equal and quality education to all regardless of racial or ethnic origin.

Important questions arise in relation to the coherent and consistent interpretation of racial equality in education. First, given that some Member States have not signed and ratified the UNESCO Convention Against Discrimination in Education (CADE), its general applicability is not straightforward. CADE is referenced in the preamble of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which in turn is ratified by all the Member States. ICERD and CADE provide identical protection, because even though the former categorically prohibits segregation, it permits – and in some instances requires – positive action measures (Article 2(2)). Consequently, its prohibition of segregation (Article 3) can be interpreted as permitting the minority specific exceptions contained in CADE.

Secondly, the CERD Committee interprets the meaning of racial or ethnic origin more broadly than either the Strasbourg or Luxembourg Courts. It is important to emphasise that, in the committee's view, discrimination based on geographic origin, nationality and Islamophobia fall under ICERD. Given that both the ECtHR and the CJEU have invoked ICERD Article 1 to define the ground, this broad interpretation should be taken into account.

ICERD has served as a reference text in European courts, but only as far as the definition of racial discrimination is concerned, thus its application to disputes concerning racial or ethnic discrimination, and more particularly segregation in education remains to be seen. The European Court of Human Rights has not accorded central place to either ICERD or CADE in its interpretation of racial or ethnic discrimination in education and the Strasbourg Court does not apply the tests set forth in these instruments, which renders its case law controversial.

Thirdly, the significance of CADE and ICERD is accentuated by the fact that the different forms of discrimination are not explicitly prohibited or defined in other international treaties ratified by EU Member States and EU law does not explicitly prohibit racial or ethnic segregation in education, although segregation is doubtlessly covered by the Racial Equality Directive, in accordance with the interpretation of discrimination made by the ECtHR in its settled case law. In addition, segregation is specifically and repeatedly mentioned in the 2013 Council Recommendation on effective Roma integration measures. Moreover, some instruments ensure the right to racial or ethnic equal treatment, while others safeguard the principle of equal treatment in relation to other substantive rights. Neither the European Convention, nor Protocol 12 specifically prohibit harassment and segregation. It is important to note that Protocol 12 is ratified by only 10 EU Member States. This partly explains why the Strasbourg Court adjudicates racial discrimination in education with reference to the right to education (Article 2, Protocol 1) and the principle of equal treatment (Article 14), rather than the right to equal treatment in the field of education (Protocol 12).

Fourthly, the European Commission against Racism and Intolerance defines racial or ethnic segregation as *de facto* discrimination that can amount to direct or indirect discrimination but this, unfortunately, is

not in line with ICERD, according to which segregation is a standalone form of less favourable treatment, nor with CADE, which explicitly prohibits segregation with specific exceptions. ECRI's conception also blurs distinctions between direct and indirect, intentional and unintentional segregation, although it does purport to prohibit *de facto* or spontaneous segregation.

The qualification of segregation as direct or indirect discrimination seemed significant in principle because the Strasbourg Court applies the reasonable justification test to direct discrimination, whereas under the RED, reasonable justification is permitted in cases of indirect discrimination, but direct racial discrimination is only justifiable by positive action measures or genuine occupational requirements. In practice, none of the justifications presented in the Roma education cases – which are typical in domestic litigation, too –have been permitted by the Strasbourg Court, and therefore segregation seems *de facto* unjustifiable. This is significant, because pursuant to the EU Charter, Strasbourg interpretation should be taken to constitute a minimum level of protection. Simultaneously, however, the Strasbourg test has been used by national courts to override national legislation that does not permit reasonable justification for segregation.

Interpreting segregation under the Racial Equality Directive may prove problematic in practice, because the RED fails to specifically prohibit it. This report suggests addressing the current challenges of racial discrimination and particularly segregation in education by spelling out, with reference to Strasbourg case law, that regardless of its qualification as direct or indirect discrimination, segregation can probably *de facto* not be justified.

Anti-discrimination law in all EU Member States prohibits the forms of discrimination explicitly spelt out in the Racial Equality Directive and the field of education is not an exception to this. Thus, both direct and indirect racial discrimination, as well as harassment are prohibited in domestic anti-discrimination laws in the field of education. Presumed/assumed and associative discrimination are covered by the jurisprudence of both the Luxembourg and Strasbourg Courts, but domestic jurisprudence is not yet fully settled.

However, the situation is different in Member States with respect to national education law, because few Member States prohibit explicitly direct discrimination, indirect discrimination and harassment in these field-specific norms. Segregation in education is not explicitly prohibited in the overwhelming majority of Member States. In a handful of countries, anti-discrimination laws contain relevant provisions, while elsewhere, segregation is outlawed in the laws on education or by ministerial ordinance. Segregation in education is explicitly prohibited by anti-discrimination acts in **Bulgaria**, **Croatia** and **Hungary**. In **Great Britain**, segregation is prohibited generally, therefore including the area of education. In these countries, racial and ethnic segregation in education is defined as a particular form of discrimination. Education legislation including secondary legislation explicitly prohibits racial or ethnic segregation in **Bulgaria**, **Hungary**, **Romania** and **Slovakia**.

In general, the material scope of the Racial Equality Directive as concerns education provision is not disputed. Except in politically sensitive cases, the qualification of an impugned conduct as harassment seems rather straightforward, but complications often arise when it comes to distinguishing direct discrimination from indirect discrimination – particularly when less favourable treatment is based on categories seen as 'proxies' of racial or ethnic origin, or when segregation is at play and the law does not explicitly prohibit it. The qualification of less favourable treatment meted out against children of non-native ethnicity – particularly as concerns linguistic barriers – presents a mixed picture, regardless of citizenship status.

Discrimination based on the lack of proficiency in the official language constitutes an important strand of practice and case law, particularly in western Europe, although it is a salient, even if seldom challenged issue in the east as well. Jurisprudence is not yet settled, alternating between findings of direct racial discrimination that recognises minority language as part and parcel of racial or ethnic

origin, and indirect racial discrimination, whereby minority language is perceived as apparently neutral in relation to minority origin. An important puzzle arises in relation to identifying the group subjected to less favourable treatment, because students may come from diverse ethnic backgrounds, even though constituting a homogenous group in terms of non-native ethnicity. Applying the constructivist approach during judicial interpretation – tracing 'race making' – rather than focusing on self-identification is of paramount importance in these cases.

The caution with which racial minorities approach the issue of discrimination in education may stem from unfavourable (*quasi*-)judicial approaches. Courts may also be hesitant to overrule political decisions on educational policy, even if those disfavour minority interests. Whether a country explicitly prohibits discrimination in education on the basis of race or ethnicity does not necessarily entail that jurisprudence on this issue will also arise, nor is the contrary true. While cases concerning direct discrimination and harassment have been adjudicated across the EU, desegregation litigation has been prevalent in **Bulgaria**, **Hungary**, **Romania** and **Slovakia**.

Racial minorities still underutilise the avenues offered by anti-discrimination law in the field of education. Since the transposition of the RED, legal action has not been taken in a third of the Member States. In various countries, more cases arise on the basis of disability than race, even though the scope of EU law extends to education on race, not disability. In several countries access to school, harassment and racial segregation have been pivotal issues brought before courts and equality bodies.

In **France**, **Finland**, **Ireland** and **Sweden**, the equality bodies have played an important role in facilitating legal action, elsewhere – such as in **Denmark**, or earlier in the **Netherlands** – they have played a significant role in settling disputes. In **France**, the **Czech Republic** and **Slovakia**, sector specific agencies – school inspectorates – have also engaged in enforcing the right to equal treatment, but elsewhere they have not embraced the cause of racial equality.

Various cases have been brought by minority claimants in relation to access to education, placement and harassment. Individual applications can be surprisingly effective in certain aspects of education, but collective action is more likely to address structural discrimination. Complaints have been lodged with equality bodies and sector specific agencies as often as before courts – perhaps even more so. The latter remain the turf of legally focused NGOs, which is hardly surprising, given that judicial proceedings require more material and expert resources and generally take longer than administrative ones. The lack of private resources mean that legal challenges tend to succeed if and when they involve collective actors and public bodies that are not only more resourceful financially, but also possess specialised legal knowledge about both equal treatment and education law.

Racial discrimination in education has attracted attention due to the *D.H.* campaign, connected to which the European Commission has launched infringement proceedings against the Czech Republic, Slovakia and Hungary on account of non-compliance with the RED. The dominant European narrative about racial equality in education revolves around the segregation of Roma children in primary schools addressed in the Roma education cases, seeking to spur compliance by Governments and local communities.

In countries where there are high numbers of Roma – except for the Czech Republic – legislative and policy developments preceded and went beyond what the Strasbourg Court settled for in the Roma education cases. Domestic jurisprudence is more extensive and diverse, because the dominant forms of segregation vary from country to country, and remedies not available under the Convention can be ordered under domestic law, but also because policies and projects are (at least partially) implemented. The impact of collective action is more likely structural, being spearheaded by equality bodies in western Europe and NGOs in central and eastern Europe.

Even though litigation has been partly successful and is often the only available tool, it does not enjoy general support even among NGOs and donors, let alone opponents. Despite data suggesting that other

social change tools do not yield better results, that massive resistance and governmental disengagement can render illusory political and development approaches,[481] and that majority populations have ample resources to frustrate desegregation efforts if they so wish,[482] lawyers are on the defence as their contributions to racial equality in education are left unimplemented or reversed.[483]

Enforcement opportunities specific to the EU shape legal action against racial discrimination in education. Symptomatic of initial caution in Europe *vis-a-vis* litigation as a tool of social change, it was questioned whether legal action could in fact befit the European context or whether less contentious methods would yield better results.[484] The emergence of strategic litigation roughly coincided with the establishment of public enforcement agencies and promotional bodies, which means that private enforcement did not play an important role in the EU, due partly to the limitations of access set out in this report. Importantly, enforcement by agencies and equality bodies is centred on administrative investigations, not courts and trials, while enforcement at the EU level is vested in soft governance tools and financial incentives, rather than legal action before the CJEU.

Given this hybridity, the seminal *D.H. case* represents an exception, rather than a European model of enforcement. The Racial Equality Directive offered key 'achievements' – the prohibition of indirect discrimination, reversing the burden of proof and permitting the use of statistical evidence – on a plate before the case came up for judgment in the ECtHR. In the end, legislation rather than litigation generated new and exciting legal opportunities that facilitate complaints in judicial and *quasi*-judicial legal forums. Strategic litigation has played a complementary – although highly visible role – with lawyers and NGOs investing in community empowerment, legal and policy advocacy as well.

It is difficult to estimate what may have happened had legal action not been taken, but the current report contains several examples of legal action achieving what other tools could not, particularly in relation to enrolment, access to bussing, lunch and better quality services, the recognition of wrongdoing, and in certain instances, even more structural changes, such as the closure of segregated schools. While many in Europe doubt that litigation alone is a useful or effective endeavour, the opposition to the idea that disputes should at times be fought out in court is an indication that litigation does in fact matter. This is an important lesson that this report can offer, and incidentally, this is also the major conclusion of a recent global study on strategic litigation.[485]

The impact of legal action can be straightforward, but more often than not, it is far too complex to be measured according to simplistic, binary values of positive and negative, anticipated or unexpected, direct or circumstantial, instant or protracted effect. A complex inquiry is necessary, which should not shy away from questioning the basic tenets of our understanding framed by the *D.H.* campaign and existing assessments, because in Europe a multitude of actors use a wide array of social change tools to achieve racial equality in education (from community organising, teacher training, direct action, campaigns and policy advocacy to litigation). Depending on the local context and political constraints, different tools come to the fore at different times and places, which demands inquiry into social intervention programmes in all their complexity, over extended periods of time.

481 Timmer, A. D. (2017) *Educating the Hungarian Roma: Non-governmental organisations and minority rights*, Lexington Books, Lanham, Boulder, New York and London, 2017.

482 Bhabha, J., Mirga, A. & Matache, M. (eds.), (2017) *Realizing Roma Rights* University of Pennsylvania Press; FXB Center for Health and Human Rights (2015) *Strategies and Tactics to Combat Segregation of Roma Children in Schools, Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria and Greece*, Harvard University.

483 Inside the Struggle: The U.S. Civil Rights Movement & the European Roma Rights Crisis, conference at the Central European University, Budapest, 7-8 December 2015. Mirga-Kruszelnicka, Anna (2018) 'Challenging Anti-Gypsyism in Academia: The Role of Romani Scholars', *Critical Romani Studies*, Vol. 1, No. 1, pp. 8-28.

484 Goodwin, M. 'White Knights On Chargers: Using The US Approach To Promote Roma Rights In Europe?', *German Law Journal*, Vol. 05 No 12, pp. 1431-1447.

485 OSJI (2018) *Strategic Litigation Impacts: Insights from Global Experience*, New York, Open Society Justice Initiative.

Legal action at the grassroots level lends a voice to the communities, but requires more resources than inter/supranational litigation, and importantly, it necessitates a focus on domestic enforcement—in courts, but also by equality bodies and sector-specific agencies. As the report has shown, racial or ethnic minority individuals and communities generally lack access to legal expertise and/or the expert resources necessary to litigate. In countries where equality bodies are easily accessible and possess broader powers than those set out in the Racial Equality Directive, legal action is more widespread. Similarly, in countries where private philanthropic or public budgetary resources have been made available to NGOs willing and able to assist litigants or litigate in their own name, anti-discrimination law has been used to further racial equality in education to a greater extent. Regrettably, these aspects have not yet received sufficient attention in the EU policies, which may partly explain why the potential of legal action to counter racial discrimination in education has not yet been fully realised.

The fact that little more than 19 years have elapsed since the Racial Equality Directive entered into force is important, because this time frame cannot yet yield insights into the long term. Using the courts to change discriminatory structures and practices is a powerful tool that often tips the balance in long-standing social conflicts over basic principles and offers 'essential lessons'[486] for the future, the most important lesson being that the law is a versatile tool that can and should be used in a variety of forums, in a variety of different ways. Nevertheless, individuals and communities seeking racial justice must prepare for a long-term battle in and outside of courts.

486 Strategic human rights litigation matters, but there is a need to shift from a binary to a multidimensional impact model that comprises three broad categories of impact: material, instrumental, and non-material (i.e. attitudinal, behavioural, discursive, and community empowerment). Strategic litigation is a process, during which litigators, potential plaintiffs, and social activists should act in ways that are mutually legitimizing and reinforcing. A strategy of filing mass or iterative cases is often more effective than seeking a single landmark judgment, while strategic value can often be derived from a case *ex post*. Strategic litigation is most effective when carried out for the communities, and together with, non-litigators. OSJI (2018) *Strategic Litigation Impacts: Insights from Global Experience*, New York, pp. 18-20.

Annex 1. Ratification date of international conventions

Country Type of instrument Accession (a) Acceptance (a) Succession (d) Ratification	Convention against Discrimination in Education (CADE)	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	Individual Communications Procedure under Article 14 of ICERD	Convention on the Rights of the Child (CRC)	International Covenant on Economic, Social and Cultural Rights (ICESCR)	Optional Protocol to the (ICESCR)	Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)	Protocol No. 12 to the ECHR	Additional Protocol to the European Social Charter Providing for a System of Collective Complaints
AUSTRIA	*Not ratified*	9 May 1972	20 Feb 2002	6 Aug 1992	10 Sep 1978	*Not ratified*	3 Sep 1958	*Not ratified*	*Signed. Not ratified*
BELGIUM	*Not ratified*	7 Aug 1975	10 Oct 2000	16 Dec 1991	21 Apr 1983	20 May 2014	14 Jun 1955	*Not ratified*	23 Jun 2003
BULGARIA	4 Dec 1962 a	8 Aug 1966	12 May 1993	3 Jun 1991	21 Sep 1970	*Not ratified*	7 Sep 1992	*Not ratified*	*Not signed*
CROATIA	6 Jul 1992 d	12 Oct 1992 d	*Not recognised*	12 Oct 1992 d	12 Oct 1992 d	*Not ratified*	5 Nov 1997	3 Dec 2003	26 Feb 2003
CYPRUS	9 Jun 1970 a	21 Apr 1967	30 Dec 1993	Feb 1991	2 Apr 1969	*Not ratified*	6 Oct 1962	30 Apr 2002	6 Aug 1996
CZECH REPUBLIC	26 Mar 1993 d	22 Feb 1993 d	11 Oct 2000	22 Feb 1993 d	22 Feb 1993 d	*Not ratified*	18 Mar 1992	*Not ratified*	4 Apr 2012
DENMARK	4 Oct 1963	9 Dec 1971	11 Oct 1985	19 Jul 1991	6 Jan 1972	*Not ratified*	13 Apr 1953	*Not ratified*	*Signed. Not ratified*
ESTONIA	*Not ratified*	21 Oct 1991 a	21 Jul 2010	21 Oct 1991 a	21 Oct 1991 a	*Not ratified*	16 Apr 1996	*Not ratified*	*Not signed*
FINLAND	18 Oct 1971	14 Jul 1970	16 Nov 1994	20 Jun 1991	19 Aug 1975	31 Jan 2014	10 May 1990	17 Dec 2004	17 Jul 1998
FRANCE	11 Sep 1961	28 Jul 1971	16 Aug 1982	7 Aug 1990	4 Nov 1980 a	18 Mar 2015	3 May 1974	*Not ratified*	7 May 1999
GERMANY	17 Jul 1968	16 May 1969	30 Aug 2001	6 Mar 1992	17 Dec 1973	*Not Ratified*	5 Dec 1952	*Not Ratified*	*Not signed*
GREECE	*Not ratified*	18 Jun 1970	*Not recognised*	11 May 1993	16 May 1985	*Not ratified*	28 Nov 1974	*Not ratified*	18 Jun 1998
HUNGARY	16 Jan 1964	4 May 1967	13 Sep 1989	7 Oct 1991	17 Jan 1974	*Not ratified*	5 Nov 1992	*Not ratified*	*Signed. Not ratified*
IRELAND	*Not ratified*	29 Dec 2000	29 Dec 2000	28 Sep 1992	8 Dec 1989	*Not ratified*	25 Feb 1953	*Not ratified*	4 Nov 2000
ITALY	6 Oct 1966	5 Jan 1976	5 May 1978	5 Sep 1991	15 Sep 1978	20 Feb 2015	26 Oct 1955	*Not ratified*	3 Nov 1997
LATVIA	16 Jun 2009 a	14 Apr 1992 a	*Not recognised*	14 Apr 1992 a	14 Apr 1992 a	*Not ratified*	27 Jun 1997	*Not ratified*	*Not signed*
LITHUANIA	Not ratified	10 Dec 1998	*Not recognised*	31 Jan 1992 a	20 Nov 1991 a	*Not ratified*	20 Jun 1995	*Not ratified*	*Not signed*

Country Type of instrument Accession (a) Acceptance (a) Succession (d) Ratification	Convention against Discrimination in Education (CADE)	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	Individual Communications Procedure under Article 14 of ICERD	Convention on the Rights of the Child (CRC)	International Covenant on Economic, Social and Cultural Rights (ICESCR)	Optional Protocol to the (ICESCR)	Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)	Protocol No. 12 to the ECHR	Additional Protocol to the European Social Charter Providing for a System of Collective Complaints
LUXEMBOURG	20 Jan 1970	1 May 1978	22 Jul 1996	7 Mar 1994	18 Aug 1983	3 Feb 2015	2 Sep 1953	21 Mar 2006	*Not signed*
MALTA	5 Jan 1966 d	27 May 1971	16 Dec 1998	30 Sep 1990	13 Sep 1990	*Not ratified*	23 Jan 1967	8 Dec 2015	*Not signed*
NETHERLANDS	25 Mar 1966	10 Dec 1971	10 Dec 1971	6 Feb 1995 a	11 Dec 1978	*Not ratified*	31 Aug 1954	28 Jul 2004	3 May 2006
POLAND	15 Sep 1964	5 Dec 1968	1 Dec 1998	7 Jun 1991	18 Mar 1977	*Not ratified*	19 Jan 1993	*Not ratified*	*Not signed*
PORTUGAL	8 Jan 1981	24 Aug 1982 a	2 Mar 2000	21 Sep 1990	31 Jul 1978	28 Jan 2013	9 Nov 1978	16 Jan 2017	20 Mar 1998
ROMANIA	09 Jul 1964	15 Sep 1970 a	18 Mar 2003	28 Sep 1990	9 Dec 1974	*Not ratified*	20 Jun 1994	17 Jul 2006	*Not signed*
SLOVAKIA	31 Mar 1993	28 May 1993 d	17 Mar 1995	28 May 1993 d	28 May 1993 d	7 Mar 2012	18 Mar 1992	*Not ratified*	*Signed. Not ratified*
SLOVENIA	5 Nov 1992 d	6 Jul 1992 d	10 Nov 2001	6 Jul 1992	6 Jul 1992 d	*Not ratified*	28 Jun 1994	7 Jul 2010	*Signed. Not ratified*
SPAIN	20 Aug 1969 a	13 Sep 1968 a	13 Jan 1998	6 Dec 1990	27 Apr 1977	23 Sep 2010	4 Nov 1979	13 Feb 2008	*Not signed*
SWEDEN	21 Mar 1968	6 Dec 1971	6 Dec 1971	29 Jun 1990	6 Dec 1971	*Not ratified*	4 Feb 1952	*Not ratified*	29 May 1998
UNITED KINGDOM	14 Mar 1962 d	7 Mar 1969	*Not recognised*	16 Dec 1991	20 May 1976	*Not ratified*	8 Mar 1951	*Not ratified*	*Not signed*

Annex 2. Main national legislation prohibiting racial discrimination in education

The information in this table is based on 28 country fiches elaborated by the European network of legal experts in gender equality and non-discrimination which contain information valid as at 26 April 2019.

ADL: anti-discrimination law, **ED-L**: education law, **OL**: other type legislation

Country	Prohibition of **direct** discrimination			Prohibition of **indirect** discrimination			Prohibition of **harassment**		
	ADL	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**
AUSTRIA	§ 42/1 Federal Equal Treatment Act § 31/3/3 Equal Treatment Act (ETA)	N/A	Equal Treatment law federal provinces	§ 42 Federal Equal Treatment Act §§ 17/1, 18, 31/3/3 ETA	N/A	ET law federal provinces level	§ 42 Federal Equal Treatment Act § 35 Equal Treatment Act	N/A	ET law federal provinces level
BELGIUM	Articles 16(1), 20,5° and 24(1) Framework Decree for the Flemish equal opportunities and equal treatment policy Articles 4,2° 5,1° and 16 ff. Decree of the French Community of 2008 on the fight against certain forms of discrimination Articles 4,2° and 5,1° Decree of the German Community of 2012 aiming at fighting certain forms of discrimination	N/A	N/A	Articles 16(2) and 20,5° Framework Decree for the Flemish equal opportunities Articles 4,2°, 5,2° and 16 ff. Decree of the French Community et. Articles 4,2° and 5,2° Decree of the German Community et.	N/A	N/A	Articles 17 and 20,5° Framework Decree for the Flemish equal opportunities Articles 4,2°, 5,3° and 16 ff. Decree of the French Community et. Articles 4,2° and 5,3° Decree of the German Community et.	N/A	N/A
BULGARIA	Articles 4 (1), 6 (1), 29-35 Protection Against Discrimination Act 2003	N/A	N/A	Articles 4 (1) and 6 (1) Protection Against Discrimination Act	N/A	N/A	Articles 4 (1) and 5 Protection Against Discrimination Act	N/A	N/A
CROATIA	Article 1, 2 and 8, Anti-Discrimination Act 2008	N/A	N/A	Article 1,2 and 8, Anti-Discrimination Act	N/A	N/A	Article 1, 3, and 8, Anti-discrimination Act	N/A	N/A

Country	Prohibition of **direct** discrimination			Prohibition of **indirect** discrimination			Prohibition of **harassment**		
	ADL	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**
CYPRUS	Article 4 (1) (d) and Article 5 (2) (a) Law on Equal Treatment irrespective of Race or Ethnic origin N. 59(I)2004	N/A	N/A	Article 4 (1) (d) and Article 5 (2) (b) Law on Equal Treatment irrespective of Race or Ethnic origin	N/A	N/A	Article 4 (1) (d) and Article 5 (2) (c) Law on Equal Treatment irrespective of Race or Ethnic origin	N/A	N/A
CZECH REPUBLIC	Section 1 (1) (i) and Section 2 (3), Act no. 198/2009 Coll. on equal treatment and on the legal means of protection against discrimination and on amendment to some laws	Section 2 (1) (a) Act no. 561/2004 Coll. of 24 September 2004, on Pre-school, Basic, Secondary, Tertiary Professional and Other Education	N/A	Section 1 (1) (i), Section 3 (1), the Anti-Discrimination Act	N/A	N/A	Section 4 (1), the Anti-Discrimination Act	N/A	N/A
DENMARK	Section 2(1) and 3(2) of the Act on Ethnic Equal Treatment 2003 Section 1 of the criminal Act on the Prohibition of Discrimination due to Race.	N/A	N/A	Section 2(1) and 3(3) of the Act on Ethnic Equal Treatment	N/A	N/A	Section 2(1) and Section 3(4) of the Act on Ethnic Equal Treatment	N/A	N/A
ESTONIA	Article: 2(1) 6, Equal Treatment Act 2008	N/A	N/A	Article: 2(1) 6, Equal Treatment Act	N/A	N/A	Article: 2(1) 6, Equal Treatment Act	N/A	N/A
FINLAND	Section 8, Non-Discrimination Act (1325/2014)	N/A	Sect.11 Criminal Code	Section 8, Non-Discrimination Act (1325/2014)	N/A	Sect.11 Criminal Code	Section 8, Non-Discrimination Act (1325/2014)	N/A	Sect.11 Criminal Code
FRANCE	Article 2, Law 2008-496 on the adaptation of the national law to Community Law in matters of discrimination; Article 225-2 of the Penal Code	Article 2, Law No. 2013-595; Article L111-1 and L111-2, Code of education	N/A	Article 2, Law 2008-496	Article 2, Law No. 2013-595; Article L111-1 and L111-2, Code of education	N/A	Article 2, Law 2008-496	Art 2, Law No. 595; Art L111-1 and L111-2, Code Edu.	N/A

Country	Prohibition of **direct** discrimination			Prohibition of **indirect** discrimination			Prohibition of **harassment**		
	ADL	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**
GERMANY	Sec. 2.1.7, 3.1, 19.1, 19.2 General Act on Equal Treatment 2006	Sec. 1.1 Baden-Württemberg School Act; Sec. 2.1 Berlin School Act; Sec. 3.1 Brandenburg School Act; Sec. 3.4 Bremen School Act; Sec. 1. sent. 2 Hamburg School Act; Sec. 2.2 no. 7 Hessen School Act; Sec. 1.1 North Rhine - Westphalia School Act; Sec. 1.1 Rhineland-Palatinate School Act; Sec. 1.1 Saarland School Rules Act; Sec. 1.1 Saxony-Anhalt School Act; Sec. 1.2 Thüringen School Act	N/A	Sec. 2.1.7, 3.2, 19.1, 19.2 General Act on Equal Treatment 2006	Similar provisions referred for direct discrimination	N/A	Sec. 2.1.7, 3.3, 19.1, 19.2 General Act on Equal Treatment	N/A	N/A
GREECE	Article 1, Article 2 (2) (a), Article 3(2)(c), Equal Treatment Law 4443/2016	N/A	N/A	Article 1, Article 2 (2) (b), Article 3(2)(c), Equal Treatment Law	N/A	N/A	Article 1, Article 2 (2) (c), Equal Treatment Law	N/A	N/A
HUNGARY	Articles 4, 7, 8, 27, Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities (Anti-discrimination law)	Article 1, Act CXC of 2011 on National Public Education	Article 248, Act II of 2012 on Petty Offences, Procedure and Database	Articles 4, 7, 8, 27, of Anti-discrimination law	Article 1, Act CXC of 2011	Article 248, Act II of 2012	Articles 4, 7, 8, 27 of Anti-discrimination law	Article 1, Act CXC of 2011	Article 248, Act II of 2012

Country	Prohibition of **direct** discrimination			Prohibition of **indirect** discrimination			Prohibition of **harassment**		
	ADL	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**
IRELAND	Section 3(1)*(a)-(b)*, Section 3(2)*(h)*, Section 5 and 7 Equal Status Acts 2000-2018	N/A	N/A	Section 3(1)*(c)*, Section 3(2)*(h)*, Section 5, Section 7, Equal Status Acts 2000-2018	N/A	Section 4, Ombud Acts 1980-2012 Section 9, Ombud for Children Act 2002	Section 11, Section 3(2) *(h)*, Equal Status Acts 2000-2018	N/A	N/A
ITALY	Article 2 Legislative Decree 215/2003 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial and ethnic origin	N/A	N/A	Article 2 Legislative Decree 215/2003	N/A	N/A	Article 2 Legislative Decree 215/2003	N/A	N/A
LATVIA	N/A	Article $3.^{1}$ (1), $3.^{1}$ (8) Education Law	N/A	N/A	Article $3.^{1}$(1), $3.^{1}$ (8) Education law	N/A	N/A	Article $3.^{1}$ (1), $3.^{1}$ (8) Edu. law	N/A
LITHUANIA	Article 2 (9) Law on Equal Treatment 2003	N/A	N/A	Article 2 (5) Law on Equal Treatment	N/A	N/A	Article 2 (1), (7) 6 (3) Law on Eq. Treat.	N/A	N/A
LUXEMBOURG	Article 1 and Art 2(g) General Discrimination Law 2006 (GDL)	N/A	N/A	Article 1 and Art 2 (g) GDL	N/A	N/A	Article 1 and Art 2(g) GDL	N/A	N/A
MALTA	Article 4 Equal Treatment of Persons Order 2007, Article 11 Equal Opportunities Act 2000, Article 8 Equality for Men and Women Act 2003 (EMWA)	N/A	N/A	Article 2 Equal Treatment of Persons Order 2007, Article 5 (4) Equal Opportunities Act 2000, Article 2 EMWA	N/A	N/A	Article 2 and 4 Equal Treatment of Persons Order 2007, Article 5 Equal Opportunities Act 2000	N/A	N/A
NETHERLANDS	Article 7, General Equal Treatment Act 1994	N/A	N/A	Article 7, General Equal Treatment Act	N/A	N/A	Article 1a (1), 7(1) General Equal T. Act	N/A	N/A

Country	Prohibition of **direct** discrimination			Prohibition of **indirect** discrimination			Prohibition of **harassment**		
	ADL	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**
POLAND	Article 7, Article 4.4) d Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (AIPEUET)	N/A	N/A	Article 7, Article 4.4) d (AIPEUET)	N/A	N/A	Article 7, Article 4.4) d (AIPEUET)	N/A	N/A
PORTUGAL	Articles 1 and 3 (1) (b) Law 93/2017 on the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race, ethnic origin, nationality et.	Article 2 Basic Law on the Education System (Law 46/86)	N/A	Articles 1 and 3 (1) (c) Law 93/2017	Article 2 Basic Law on the Education System	N/A	Articles 1 and 3 (1) (f) and (2) Law 93/2017	Article 2 Basic Law on the Education System	N/A
ROMANIA	Article 2 (1), Article 11 G.O. 137/2000 on preventing and sanctioning all forms of discrimination	Article 2 (4), 118 and 202 Education law 1/2011	Article 2 Ministry of Education Order 6134/2006	Article 2 (3), Article 11 G.O. 137/2000 anti-discrimination Law	N/A	N/A	Article 2 (5), Article 11 G.O. 137/2000 anti-discrimination Law	N/A	N/A
SLOVAKIA	Section 2a (2), Section 5(2)(c), Section 5(1) Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act)	Section 3(d), Section 29(1), Section 76(10), Section 145, Section 156(1), Act No 245/2008 on Education Section 55 Act No 131/2002 on Higher Education	N/A	Section 2a (3), Section 5(2)(c), Section 5(1) Anti-discrimination Act	Section 3(d), Section 29(1), Section 76(10), Section 145, Section 156(1) Act no 245/2008 Section 55 Act No 131/2002	N/A	Section 2a (4), Section 5(2)(c), Section 5(1) Anti-discrimination Act	Section 3(d), Section 29(1), Section 76(10), Section 145, Section 156(1) Act no 245/2008 Section 55 Act No 131/2002	N/A

Country	Prohibition of **direct** discrimination			Prohibition of **indirect** discrimination			Prohibition of **harassment**		
	ADL	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**
SLOVENIA	Article 6 (1), Article 1 (1) and 2 (1), Protection against Discrimination Act 2016	N/A	N/A	Article 6 (2), Article 1 (1) and 2 (1), Protection against Discrimination Act	N/A	N/A	Article 8 (1), Article 1(1) and 2 (1), Protection against Discrimination Act	N/A	N/A
SPAIN	Article 28.1 and 29.1, Law 62/2003 on Fiscal, Administrative and Social Measures	Article 1, 84 and 124.2, Law 2/2006 on Education	Article 9 and 23, Law 4/2000 on rights and liberties of aliens in Spain Art. 512 Criminal Code	Article 28.1 and 29.1, Law 62/2003 on Fiscal, Administrative and Social Measures	Article 1, 84 and 124.2, Law 2/2006 on Education	Art. 9 and 23 Law 4/2000 Art. 512 Criminal Code	Article 28.1 and 29.1, Law 62/2003 on Fiscal, Administrative and Social Measures	Article 1, 84 and 124.2, Law 2/2006 on Education	Art. 9 and 23 Law 4/2000 Art. 512 Criminal Code
SWEDEN	Chapter 1 Section 4:1, Discrimination Act (2008:567)	Chapter 1 Section 8, Education Act (2010:800)	N/A	Chapter 1 Section 4:2, Discrimination Act (2008:567)	Chapter 1 Section 8, Education Act (2010:800)	N/A	Chapter 1 Section 4:4, Discrimination Act (2008:567)	Chapter 1 Section 8, Education Act (2010:800)	N/A
UNITED KINGDOM	GB Section 13, Art 84-99, Equality Act 2010	N/A	N/A	Section 19, Art 84-99, Equality Act 2010	N/A	N/A	Ss 85 (5), 91 (5) Equality Act 2010	N/A	N/A
	NI Art.3, 18-20, Race relations Order 1997	N/A	N/A	Art.3, 18-20, Race relations Order 1997	N/A	N/A	Art.4A, 18-20, Race relations Order 1997	N/A	N/A

Annex 3. Legislation explicitly prohibiting ethnic/racial segregation in education

The information in this table is based on 28 country fiches elaborated by the European network of legal experts in gender equality and non-discrimination which contain information valid as at 26 April 2019.

ADL: anti-discrimination law, **ED-L**: education law, **OL**: other type legislation

Country	Prohibition of **segregation** in education			Definition of **segregation** in education			Justification defence for **segregation** in education		
	ADL	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**
AUSTRIA	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
BELGIUM	Article 20 Racial Equality Federal Act 2007; Article 22 Antidiscrimination Federal Act, Articles 52 and 54 French Community ET Decree 2008, Articles 25 and 27 German Community ET Decree 2012 (incitement to segregation)	Article I.3,2° of the Flemish Community Equal Education Opportunities Decree 2002	N/A	N/A	N/A	N/A	N/A	N/A	N/A
BULGARIA	Articles 4 (1) and 5 Law on Protection Against Discrimination Act 2003	Article 62 (4), 99 (4) and (6) Pre-School and School Education Act 2016	N/A	Article 5 and Additional Provision §1.6 Law on Protection Against Discrimination Racial segregation [...] shall be deemed discrimination, [and] shall mean issuing an act, performing an action or omission to act, which leads to compulsory separation, differentiation or dissociation of persons based on their race, ethnicity or skin colour.	N/A	N/A	Additional Provision §1.6 conditionality of compulsory nature of separation	N/A	N/A

Country	Prohibition of **segregation** in education			Definition of **segregation** in education			Justification defence for **segregation** in education		
	ADL	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**
CROATIA	Article 1, 5 and 8, Anti-Discrimination Act 2008	N/A	N/A	Article 5, (1) and (2) Anti-Discrimination Act Segregation shall […] deem to be discrimination […] meaning […] a forced and systematic separation of persons on any of the grounds referred to in Article 1 paragraph 1 of [the Anti-discrimination Act]	N/A	N/A	Article 5 (1) and (2) conditionality of forced and systematic separation	N/A	N/A
CYPRUS	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
CZECH REPUBLIC	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
DENMARK	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
ESTONIA	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
FINLAND	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
FRANCE	N/A	Article L111-1 and L111-2, Code of education (inclusive education)	N/A	N/A	N/A	N/A	N/A	N/A	N/A
GERMANY	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
GREECE	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
HUNGARY	Articles 4, 7, 8, 10, 27, 28 Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities (Anti-discrimination law)	Article 1, Act CXC of 2011 on National Public Education	Article 248, Act II of 2012 on Petty Offences	Article 10 (2) and 27 (3) Anti-discrimination law. Segregation is a behaviour aimed at separating individuals or a group of persons from other individuals or another group of persons in a comparable situation, based on a characteristic defined in [the anti-discrimination law].	N/A	N/A	Article 28 (1) and (2), (2a), (2b) Anti-discrimination law	N/A	N/A

Country	Prohibition of **segregation** in education			Definition of **segregation** in education			Justification defence for **segregation** in education		
	ADL	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**	**ADL**	**ED-L**	**OL**
IRELAND	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
ITALY	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
LATVIA	–	N/A	N/A	–	N/A	N/A	–	N/A	N/A
LITHUANIA	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
LUXEMBOURG	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
MALTA	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
NETHERLANDS	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
POLAND	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
PORTUGAL	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
ROMANIA	N/A	N/A	Ministry of Education Framework Order 6134/2016 prohibiting school segregation	N/A	N/A	Article 3 and 4 Ministry of Education Framework Order 6134/2016 Segregation is a serious form of discrimination [...] consisting in physical separation of kindergarten children, pre-schoolers or pupils (in primary and secondary education) belonging to an ethnic group in the educational unit, group, classroom, building, last two rows, other facilities, so that the percentage of the [...] children belonging to the ethnic group from the total of the pupils in the educational unit [...] , is disproportionate when compared to the percentage of the children belonging to that ethnic group in the total population of that specific age in the educational cycle [...]	N/A	N/A	Article 4 (2) Ministry of Education Framework Order 6134/2016

Country	Prohibition of **segregation** in education			Definition of **segregation** in education			Justification defence for **segregation** in education		
	ADL	ED-L	OL	ADL	ED-L	OL	ADL	ED-L	OL
SLOVAKIA	N/A	N/A	Act no. 245/2008 on Education, para 3 (d), Section 29(1), 6(10), Section 145, 156(1)	N/A	N/A	N/A	N/A	N/A	N/A
SLOVENIA	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
SPAIN	N/A	Article 1 and 84.3 of Law 2/2006 on Education	Articles 9 and 23 of Law 4/2000 on the Rights and Liberties of Aliens in Spain and their Social Integration	N/A	N/A	N/A	N/A	N/A	N/A
SWEDEN	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
UNITED KINGDOM	GB Equality Act 2010, Section 13 (5)	N/A	N/A	Section 13 (1) and (5) Equality Act 2010 A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. If the protected characteristic is race, less favourable treatment includes segregating B from others.	N/A	N/A	N/A	N/A	N/A
	NI Race Relations Order 1997, Art. 3(2)	N/A	N/A	Article 3 (2) Race Relations Order Segregating a person from other persons on racial grounds is treating him less favourably than they are treated.	N/A	N/A	N/A	N/A	N/A

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