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Liability and Remedies for School Segregation in the United States and the European Union

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Introduction

In 1954, the United States Supreme Court decided *Brown v. Board of Education*, a case that is known throughout the US and around the world for its strong statements about equality and about the importance of education.¹ The sixty years since the *Brown* decision have been filled with many changes in US law and society. From the perspective of civil rights advocates, many of those changes have resulted in great progress, but others have fallen far short of *Brown's* lofty ambitions.² Today, if Americans who are committed to achieving more integrated schools and broader access to quality education look only inside our own law and our own borders, the situation is discouraging.³ At first glance, however, recent developments in Europe seem to pursue

¹ *Brown v. Board of Education*, 347 U.S. 483 (1954); MARTHA MINOW, IN *BROWN'S WAKE* 169-190 (Oxford University Press 2010).

² See, e.g., KRISTI L. BOWMAN, ED., *THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS* (MSU Press 2015); Kristi L. Bowman, *A New Strategy for Racial and Ethnic Equality in Public Schools*, 1 DUKE FORUM FOR L. & SOC. CHG. 47, passim (2009); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 133 (2007); Derrick Bell, *Desegregation's Demise*, CHRON. OF HIGHER EDUC., July 13, 2007 at B11.

³ See, e.g., MINOW, *passim*; see also Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911 (2010).

one road not taken by the US Supreme Court. In 2007, the European Court of Human Rights, the most influential international human rights court in the world, decided what some commentators have referred to as “Europe’s *Brown v. Board of Education*.”⁴ This case, *D.H. and Others v. the Czech Republic*, was not a unanimous decision.⁵ Some justices focused on the Czech Republic’s pattern of incorrectly labeling many Czech Roma students as students with disabilities and educating them separately from students without disabilities.⁶ Other justices praised the Czech Republic for enrolling a greater percentage of Roma students in public schools than most other European countries, despite the erroneous classification.⁷ To this day, the Czech Republic remains involved in an extensive remedy designed to correct the harms identified by the European Court of Human Rights.⁸

Through the *D.H.* case and other subsequent cases, European states are currently creating much of their own school desegregation remedial scheme under the Council of Europe’s European Convention on Human Rights. By contrast, in the US, the contours of school desegregation litigation are fairly well-established in large part

⁴ See, e.g., Diane Orentlicher, “Europe’s *Brown v. Board of Education*,” Nov. 17, 2007, available at: <http://www.intlawgrls.com/2007/11/europes-brown-v-board-of-education.html>.

⁵ See *infra*.

⁶ European Court of Human Rights, *D.H. and Others v. The Czech Republic*, Application No. 57325/00, Judgement of the Grand Chamber of November 13, 2007.

⁷ *Id.*, Jungwiert, J. (dissent).

⁸ Government of the Czech Republic, Report on Implementation of the Consolidated Action Plan for the Execution of the Judgement of the European Court of Human Rights in the Case of *D.H. and Others v. The Czech Republic*, Letter of the Government Agent to the European Court of Human Right to the Council of Europe dated June 18, 2013 (unpublished, on file with the authors).

because the law is mostly settled; recent and remaining debate is at the margins of the issue or about the related issue of voluntary integration as opposed to intentional segregation.⁹ Accordingly, informed by the contours of what constitutes illegal discrimination under different legal regimes' statutes and judge-made law, in this article the authors will analyze school desegregation liability and remedies available in the US and the EU (specifically the Czech Republic). Considering the US, we learn from sixty decades of court-ordered desegregation and a litigation movement now in its twilight years. Turning to the EU, we see how an international human rights court is redefining the way national remedies against discrimination are construed.

Before beginning this discussion, however, it is important to acknowledge some similarities and differences between US and European conceptions of race and ethnicity. Only a minority on either continent would contend that one's race (indicated by physical features such as skin color) is a meaningful measure of his or her ability, personality, or other characteristics. Interestingly, though, US conservatives employ a color-blind approach to race and ethnicity similar to the color-blind approach common in European countries, while US progressives employ a color-conscious approach focused on acknowledging differences in lived experiences. Thus, plaintiffs in US school desegregation litigation even today seek to recognize racial and ethnic disparities and eliminate them by bringing them to light.

⁹ For example, the Supreme Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), did not discuss liability or remedies for de jure school segregation, but rather examined the limits of school districts' voluntary attempts to create more racially and ethnically diverse schools within their districts. For a brief discussion of the core concepts in school desegregation law, see *infra*, and see also Bowman, *A New Strategy*, *supra* note 4, 49-53.

The Evolution of School Desegregation Remedies in the United States

Over eighty years ago, in 1931, a state (provincial) court in California issued the first ruling in favor of school desegregation plaintiffs in the United States.¹⁰ This case, *Alvarez v. Owen*, is known as “the Lemon Grove case” in reference to its town of origin.¹¹ The Lemon Grove decision held that, under California law, Latino and white children could not be segregated from one another in public schools and thus ordered the school district to educate the children together.¹² Fifteen years later, in 1946, the first federal case won by Latino plaintiffs, *Mendez v. Westminster School District*, echoed the Lemon Grove case’s result, although *Mendez* was based on a federal constitutional claim.¹³ Throughout the 1940s and 1950s, school desegregation cases initiated by civil rights advocacy groups increased in number and became more coordinated with one another. These cases focused on contesting state-sanctioned segregation between whites and African-Americans (blacks) and plaintiffs brought their claims under the Equal Protection Clause in the US Constitution’s Fourteenth Amendment.

¹⁰ Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1770 (2001).

¹¹ *Id.* at 1770-1771.

¹² *Alvarez v. Owen*, No. 66625 (Cal. Sup. Ct. San Diego County filed Apr. 17, 1931), (decision available as the Appendix in Bowman, *The New Face*, *supra* note 12); Kristi L. Bowman, *Pursuing Equity at the Intersection of School Desegregation, English-Language Instruction, and Immigration*, 31 in BOWMAN, *THE PURSUIT*, *supra* note 4. Specifically, the court held that under state law, Latinos and Anglos were both racially white and thus some white students could not be segregated from other white students.

¹³ *Mendez v. Westminster*, 64 F.Supp. 544 (S.D. Cal. 1946); Bowman, *The New Face*, *supra* note 12 at 1772-1776; Bowman, *Pursuing Equity*, *supra* note 14.

These shifts were all reflected in one of the most significant events of 1954: the US Supreme Court’s canonical decision in *Brown v. Board of Education*, declaring that “separate educational facilities are inherently unequal.”¹⁴ Although many think of the 1954 decision as “the” *Brown* decision, the 1954 decision in fact was the first of the Court’s two *Brown* decisions. When deciding *Brown I*, the US Supreme Court determined that a constitutional harm had been done, but reserved the question of remedy for further argument. After additional briefing and argument, in 1955 the US Supreme Court issued the memorable and, as it would turn out, not particularly helpful directive in *Brown II* that states and schools eliminate their segregatory practices “with all deliberate speed.”¹⁵

Societal resistance to *Brown I* and *Brown II* was substantial in some parts of the US, especially across the American South. State laws and local policies intending to perpetuate single-race schools remained common throughout the 1950s and 1960s.¹⁶ “All deliberate speed” did little to deter many communities from continuing to segregate their schools, so statutory and common law changed in response to societal inertia, becoming stronger in pursuit of the goal of ending segregation. In 1964, Title IV of the federal Civil Rights Act gave the US Attorney General, the highest-ranking attorney in the federal government, authority to bring school desegregation cases on behalf of parents and children—rather than requiring individuals to hire their own

¹⁴ 347 U.S. 483, 495 (1954).

¹⁵ 349 U.S. 294, 301 (1955). For an interesting history of the origins and significance of this phrase, see Jim Chen, *Poetic Justice*, 28 *Cardozo L. Rev.* 581 (2006).

¹⁶ JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART* 22-24 (2010); Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 *N.C. L. REV.* 787, 798-99 (2010).

attorneys to contest school segregation.¹⁷ Additionally, Title VI of the Civil Rights Act of 1964 granted federal agencies the power to withhold federal funding if school districts and other funding recipients would not cease their illegal discriminatory practices; much “voluntary compliance” was achieved under this regime.¹⁸

A few years later, in 1968, the US Supreme Court decided the first school desegregation case it had heard since it decided *Brown II: Green v. County School Board*.¹⁹ In many ways, *Green*—not *Brown II*—was the decision about desegregation remedies that gave *Brown I* teeth and ensured that successful school desegregation cases would be part of the category of cases known as institutional reform litigation.²⁰ First, the *Green* decision articulated a clear goal: to convert a “dual” public school system, in which white and black children existed in effectively parallel systems within one district, into “a unitary system in which racial discrimination would be eliminated root and branch.”²¹ Second, the *Green* decision dropped the poetic “all deliberate speed” directive in favor of the clear command that a school district that had resisted *Brown’s* mandate “come forward with a plan that promises realistically to work, and promises realistically to work now.”²² Third, the decision designated six specific criteria

¹⁷ 42 U.S.C. 2000c (2000); Pub. L. 88-352, Title IV, 407, 409-410, July 2, 1964, 78 Stat. 252; Allison R. Brown, *Equity in Education: The Present and Future of the Civil Rights Act of 1964*, 127, in BOWMAN, *THE PURSUIT*, *supra* note 4.

¹⁸ 42 U.S.C. 2000d (2000); Pub. L. 88-352, Title VI, 601-602, July 2, 1964, 78 Stat. 248-49.

¹⁹ 391 U.S. 430 (1968); Derek W. Black, *Defining Discrimination: Intent, Impact, and the Future of Title VI of the Civil Rights Act of 1964*, 143, in BOWMAN, *THE PURSUIT*, *supra* note 4.

²⁰ Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 726-727 (2012) (describing education institutional reform litigation).

²¹ 391 U.S. at 438.

²² *Id.* at 438-439.

that would become known as the “*Green* factors” and which courts still use to evaluate both whether a dual system existed (liability) and, if so, whether the dual system has been eliminated (remedy): disparities in student assignment, faculty, staff, transportation, extracurricular activities, and physical facilities.²³

In addition to considering the *Green* factors, today courts are also expected to broadly analyze disparities in academic inputs, opportunities, and outcomes experienced by students in different racial and ethnic groups.²⁴ To do this, courts first examine detailed factual evidence to determine whether liability exists. For example, in a relatively recent school desegregation case, *Johnson v. Board of Education*, a federal district court summarized disparities within a public school district including:

- The location of schools within the district in relation to the racial and ethnic demographics of neighborhoods, and the desirability of those schools;
- Discipline rates for students disaggregated by racial and ethnic group, age of student, and type of discipline;
- Student enrollment in special education, disaggregated by racial and ethnic group, age of student, and type of disability;
- Student attendance and student drop out rates, disaggregated by racial and ethnic group and age of student;
- Student enrollment in gifted education, disaggregated by racial and ethnic group and age of student;

²³ *Id.* at 435; *see also infra.*

²⁴ *Freeman v. Pitts*, 503 US 467 (1992).

- Student enrollment in various academic tracks, disaggregated by racial and ethnic group and by age of student;
- The availability of programs for students reading below grade level and the performance of students on standardized tests of reading ability, disaggregated by racial and ethnic group and age of student;
- Student enrollment in the alternative school program for students who are expelled or who have significant problems related to academics, attendance, or behavior, disaggregated by racial and ethnic group and by age of student; and,
- The racial and ethnic demographic profile of teachers and staff, and of the pool from which teachers and staff were hired.²⁵

The examination of detailed factual evidence to determine whether these sorts of disparities exist is fairly typical in contemporary school desegregation.²⁶ Of course, a

²⁵ *Johnson v. Bd. of Educ. of Champaign Unit School District #4*, 188 F.Supp.2d 944, 952-970 (C.D. Ill. 2002). The court's summary is taken from the parties' jointly agreed statement of facts that was the basis for a settlement agreement. The court did not weigh evidence and make factual findings in this case, although if the case had proceeded to trial, it would have made factual findings about these sorts of issues, had the specific relevant claims survived a motion to dismiss.

²⁶ *Id.* Additionally, in July 2013, a federal district court in Illinois issued an opinion after a bench trial regarding claims of intentional school segregation—an unusual occurrence, given that school segregation lawsuits are rare and seem to increasingly settle out of court. As the district court summarized the situation, the bench trial focused on four narrow questions: (1) plaintiffs' standing; whether (2) concentrating mobile classrooms at schools with disproportionately-minority student populations or (3) the significant underrepresentation of minority students in the district's gifted program constituted unconstitutional discrimination; (4) whether the district's program for English Language Learners violated federal statutory law. *McFadden v. Board of Educ. for Illinois Sch. Dist. U-46*, 2013 WL 3506010 (N.D. Ill. July 9, 2013).

remedy is only enacted if a court holds a school district liable for a particular harm or if the parties negotiate a settlement that the court approves and enforces.

Remedies are tailored to the violations they correct, and the *Green* factors plus a broader focus on academic quality form courts' foundation in the remedial phase of school desegregation. As is more and more often the case, however, the district described above negotiated a settlement with the plaintiffs before the case went to trial.²⁷ The court determined that it could approve the settlement agreement because the plaintiffs were likely to prevail.²⁸ The goals and changes articulated in the settlement, technically a "consent decree," are drawn from court-ordered remedies from other cases and thus are representative of contemporary school desegregation remedies.²⁹ The consent decree in the *Johnson* case required the school district to:

- Enroll students through a "controlled choice" system in which all students rank the schools at their grade level. Student enrollment should be plus-or-minus 15% of the district-wide racial and ethnic demographics.
- Involve the community in a task force to monitor the controlled choice plan.

²⁷ Johnson 188 F.Supp.2d 944.

²⁸ *Id.* at 970-980.

²⁹ *Id.* at 982, reprinting paragraph 23 of the Second Revised Consent Decree. Unlike many other situations, school desegregation remedies are often driven by the parties' negotiated agreements if acceptable to the court. Most of the execution and oversight of these remedies is overseen by a court-appointed monitor, who reports to the court on occasion. Bowman, *A New Face*, *supra* note 12, at 1794-95.

- Establish and maintain parent information centers to provide more information about educational opportunities in the district to parents, especially African-American parents.
- Establish magnet school programs in predominantly African-American schools to encourage white enrollment in those schools.
- Increase the seat capacity of schools in primarily African-American neighborhoods to lessen the transportation burden placed on African-American students.
- When closing schools, explicitly consider the impact on African-American students including how the closing would change the transportation burdens.
- Designate the district's school with an almost-exclusively African-American enrollment as a "special desegregation school" for five years. Create unique educational programs for students at that school, including a lower student-to-teacher ratio. Recruit students to increase racial and ethnic as well as income diversity, and allow 5 years for the school to attain the racial fairness guidelines (within 15% of district-wide demographics).
- Review and revise policies and practices for special education classification, disciplinary referrals, and the pipeline to alternative schools to eliminate hidden racial and ethnic bias.

- Attempt to reduce disparities in racial and ethnic minority students' enrollment in the gifted program by publicizing qualifying testing for the program to parents.
- Recruit and retain racially and ethnically diverse teachers at each school and across the district; train teachers about racial and ethnic diversity of students and their learning styles.³⁰

Additionally, just as if the remedy in that case had been ordered directly by the court rather than negotiated by the parties, the consent decree required the court to appoint a special monitor with expertise in school desegregation to oversee the details of implementing the remedy. The monitor's duties included providing written progress reports to the court and the parties on at least an annual basis and mediating implementation disputes between the parties.³¹

If US courts can impose remedies this comprehensive and detailed—and they can and do, in the case of a judgment of liability or a consent decree produced by the parties—it might seem as though racial and ethnic educational inequality in the US should be almost nonexistent. After all, even in 2000, close to 500 of the nearly 14,000 school districts across the country were in the remedial phase of school desegregation litigation, including some of the country's largest school districts.³² Sadly, however, substantial inequalities remain. Reasons for this are related to legal and social limitations on school desegregation remedies.

³⁰ *Id.*

³¹ *Id.*

³² US COMM'N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS (2007).

First, as courts acknowledge, the roots of racial and ethnic inequality in education are broad and deep, reflecting actions and choices by state governments; connecting to issues of housing access and housing patterns, language, poverty, and health; and beginning with prenatal care and influenced by family characteristics—level of education, attitudes about education, family size, and wealth.³³ School desegregation remedies are institutional reform remedies over which courts regularly have retained jurisdiction for decades, but courts overseeing these lawsuits have been limited to changing educational institutions alone, and limited to focusing on one aspect of inequality (racial and sometimes racial as well as ethnic) as though it can be easily divorced from the many other inequalities with which it often overlaps. Simply put, the school desegregation remedies that courts can order are not broad enough to interrupt the many policies and patterns that perpetuate vastly disparate educational experiences for students, often along racial and ethnic lines.

Second, the US Supreme Court has defined the legal harm of segregation by focusing on the intent of state actors. Specifically, school districts are liable for the intentional deprivation of students' Fourteenth Amendment rights (*de jure* segregation), but not for situations in which a policy or practice merely happens to operate in a way that disadvantages a racial or ethnic group of students, such as by creating schools that have students of mainly one racial or ethnic group (*de facto* segregation).³⁴ To be clear: *de jure* segregation is unconstitutional and illegal; *de facto* segregation is neither.

³³ *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073, 1077 (7th Cir. 2001); *Johnson v. Bd. of Educ.*, 188 F.Supp.2d 944, 973 (C.D. Ill. 2002).

³⁴ *Keyes v. School Dist. No. 1*, 413 U.S. 189, 198, 208 (1973).

However, in reality the end result of both *de jure* and *de facto* segregation is often the same: racially identifiable schools with better educational opportunities for students in some racial or ethnic groups, and lower-quality and -quantity opportunities for others. Thus, in the view of many, including former US Supreme Court justices, the distinction is not legitimate.³⁵ Even setting aside the question of legitimacy, however, it is clear that the *de jure-de facto* distinction has limited the reach of legal remedies by limiting school districts' liability.

Third, and relatedly, federal constitutional law applicable to public schools and to other contexts has prioritized colorblindness over color-consciousness.³⁶ Specifically, school districts are incredibly limited in the extent to which they can consider the race and ethnicity of individual students—even if a school district is acting in good faith to create more racially and ethnically diverse schools, a school district cannot assign students to particular schools based on their race or ethnicity.³⁷ Thus, school districts that want to create more diverse educational experiences for their students are largely restricted to individually-colorblind mechanisms for making that happen unless a district is under court oversight for past unconstitutional segregation.³⁸ To the extent this interpretation of *Brown* and the resulting outcome are at all defensible, it is only because the US Supreme Court's contemporary school desegregation cases are built on

³⁵ *Id.* at 215-217 (Douglas, J., concurring); *id.* at 219-236 (Powell, J., concurring in the decision).

³⁶ *See, e.g.*, *Fisher v. University of Texas*, 133 S.Ct. 2411, 570 U.S. ____ (2013); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1.*, 551 U.S. 701 (2007).

³⁷ *Id.*

³⁸ *Id.*; NAACP LEGAL DEFENSE FUND & THE CIVIL RIGHTS PROJECT, *STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION* (2008).

the cases and the social context of the US Civil Rights Movement, which contained both anti-subordination and anti-classification narratives.³⁹ Additionally, the legal focus on colorblindness has gained much political traction, and one way of viewing this dynamic is that resistance to the promises of equality in *Brown* has shifted forms.

Fourth, school districts in the remedial phase of desegregation litigation can be released piecemeal from court oversight if they have made substantial efforts towards creating a unitary school system, even if they have not in reality eliminated the disparities between students of various racial and ethnic groups.⁴⁰ This is the standard for releasing a district from court oversight that has been in place since the 1990s. At that point, many school desegregation cases had been in the remedial phase of litigation for decades and despite substantial good-faith compliance with court-ordered remedies including the supplemental expenditure of sometimes hundreds of millions of dollars in one district alone, achievement gaps and racial isolation remained due to the many factors mentioned in the previous paragraph.⁴¹ While the standard is pragmatic, it also may have led to some districts being released from court oversight prematurely.⁴² From 2000-2008, the Bush Administration pursued a policy of closing school desegregation

³⁹ Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, Issues in Legal Scholarship, The Origins and Fate of Antisubordination Theory: A Symposium on Owen Fiss's "Groups and the Equal Protection Clause," reprinted in 58 U. MIAMI L. REV. 9 (2004).

⁴⁰ Bd. of Educ. v. Dowell, 498 U.S. 237 (1991); Freeman v. Pitts, 503 U.S. 467 (1992); Missouri v. Jenkins, 515 U.S. 70 (1995).

⁴¹ Missouri v. Jenkins, 515 U.S. 70 (1995); Johnson v. Bd. of Educ., 188 F.Supp.2d 944, 972 (C.D. Ill. 2002) (discussing Rockford, Illinois desegregation litigation which continued for over thirty years and exceeded \$238 million).

⁴² Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equity in Public Schools*, 1 DUKE FORUM FOR L. & SOC. CHG. 47, 50-51 (2009).

cases to which the US was a party, reducing the number of open cases from 430 in 2001 to 266 in 2007.⁴³ According to the US Commission on Civil Rights, the districts that achieved unitary status during that time constituted over half the school districts that had achieved unitary status “over the last several decades.”⁴⁴

Thus, litigation in the pursuit of racial and ethnic educational equality in the US can be divided roughly into two parts. The first part, and the essence of *Brown I*, was to strike down different levels of governmental laws and policies that required segregated education. The next part—beginning with *Brown II* and continuing today—has been to examine and attempt to remedy other intentional practices and even some unintentional practices that have effectively created segregated educational experiences or denied equal educational quality to children based on their race or ethnicity. Initially, courts did this by asking more crude questions as in *Green*, then by asking more nuanced questions, and eventually by applying sophisticated knowledge of educational policy and demographics through the vehicle of court-oversight as court monitors do today. Much social science research has been important when courts have made determinations of liability, and also when districts (some under court oversight, some on their own) have enacted policies in an attempt to reduce inequality. Yet, for reasons with their roots in both law and in society, substantial educational inequalities remain. In Europe, where documented educational inequalities are traditionally more closely tied with social status than actually with race or ethnicity, the issue of fair

⁴³ US Comm’n on Civil Rights, *supra* note 27, at xii.

⁴⁴ *Id.* at xii.

educational access has increased in prominence, while the legal developments following World War II have brought new emphasis on human rights.

EU and Czech Republic Law Regarding School Desegregation

Across Europe, immigration occurring over the past few decades has caused many European countries to become more racially and/or ethnically diverse than they were a half-century ago. During this same time, the European Union has risen in power as a pan-national entity and has led European states in creating greater international legal protections for many minority groups.⁴⁵ Many European states import these protections into their domestic law.⁴⁶

It was, however, the Council of Europe—an intergovernmental organization of 47 member states as of today—that laid the groundwork for the international legal protection of human rights in Europe. Its most notable human rights covenant, the European Convention on Human Rights (ECHR, or “the Convention”), was drafted in 1950. Since 1952 the right to education has been legally protected under Article 2 of Protocol No. 1 to the Convention. From the very beginning of the then-European (Economic) Community, adherence of a prospective member state to the ECHR has been seen as a condition of membership, a principle the European Union maintains. Following

⁴⁵ See, e.g., Case relating to certain aspects on the use of languages in education in Belgium, Series A no. 6 (1979), 1 EHRR 252 (the “Belgian linguistic” case).

⁴⁶ England’s Human Rights Act, effective 2000, binds England to comply with the European Convention on Human Rights and Fundamental Freedoms and makes claims under that convention justiciable in English courts.

the enactment of the Treaty of Lisbon in 2009, moreover, the process of accession of the EU as a whole to the Convention has begun.

This undoubtedly has added to the complexity of the human rights legal regime in Europe. Alongside the Convention, the European Charter of Fundamental Rights (“the Charter”) has been a piece of primary law of the EU since 2000.⁴⁷ These do overlap partly: while the Convention is binding on individual states, the Charter extends over the actions of the EU institutions and authorities, and over the actions of EU member states whenever they apply the law of the EU. But with the extensive use of EU structural funds⁴⁸ in the field of education in a number of EU member states, the Charter’s Article 14 on the right to education may prove to be of increasing importance.⁴⁹

Additionally, there is a reciprocal influence between the two pan-European jurisdictions, as the Convention and its application have been setting the human rights standard of Europe for over 60 years while the European Court of Human Rights (ECtHR) has been regularly citing examples of relevant EU legislation in its reasoning. This was the case, too, in the *D.H. and Others v. the Czech Republic* proceedings, where the ECtHR included the EU law on equal treatment in its considerations. Furthermore, the

⁴⁷ European Charter of Fundamental Rights. Official Journal of the European Union, C 364/1, 18.12.2000.

⁴⁸ Structural funds are an instrument by large and far akin to US grants-in-aid. Under this scheme, a member state agrees with the European Commission on how to pursue EU policy objectives at national and regional level with the aid of EU budget. When administering this agreement (“operational programme”), a member state or its authorities act as agents of the EU, whose law governs this activity.

⁴⁹ The European Charter on Fundamental Rights is, however, not judicially enforceable in Poland and the United Kingdom under Protocol No. 30 to the Treaty of Lisbon. There has also been proposed but not agreed a similar rule exempting the Czech Republic from the enforceability of the Charter.

Convention has had significant influence not only on the application, but also on the very drafting of some national constitutions since the 1990s, after the fall of communist regimes in Central and Eastern Europe. For example, the then-Czechoslovak Charter of Fundamental Rights and Freedoms of 1991, which still forms an integral part of the constitution of the independent Czech Republic since 1993, was substantially drafted after the Convention (to which Czechoslovakia at the time was not yet a party).

The issue of school segregation in Europe is no less complex than legal rules under which it can be litigated. The situation varies from one country to another, but one common pattern that can be found in a large number of European countries involves the Roma minority. The Roma, a people of origin from the Indian subcontinent who arrived in Europe probably in thirteenth century, are now considered the largest set of minority groups in Europe.⁵⁰ They are often stereotyped by the majority population and subjected to prejudice. During World War II they were persecuted by the Nazis; in some parts of Europe including the territory of what now is the Czech Republic, they were nearly exterminated. The Roma have been recognized as a particularly vulnerable minority by the Council of Europe,⁵¹ and rulings concerning their access to rights represent an important share of ECtHR's jurisprudence in respect of right to education.⁵²

⁵⁰ COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS OF ROMA AND TRAVELLERS IN EUROPE, 11 (COUNCIL OF EUROPE, 2010).

⁵¹ Parliamentary Assembly of the Council of Europe, Recommendation No. 1203 (1993) on Gypsies in Europe.

⁵² European Court of Human Rights, *Sampanis and Others v. Greece*, Application No. 32526/05, Judgement of June 5, 2008; *Oršuš and Others v. Croatia*, Application No.

Exclusion of the Roma from formal schooling and/or mistreatments within the educational system are reportedly widespread problems across Europe. A whole range of discriminatory practices exists, from refusal of school admission in some countries, sometimes on the ground of non-compliance with age limits or of the lack of documents, to overrepresentation of the Roma in specific segments of educational systems such as the specialized schools system in the Czech Republic or vocational training in the Netherlands. But segregation practices can be found also in countries with a formally unitary school system, such as Croatia or Greece.⁵³

In the Czech Republic, and earlier in Czechoslovakia, the unequal access of the Roma to education had been recognized as a problem even before the case of *D.H. and Others v. the Czech Republic*. In fact, one of the first public statements by the most important dissident movement under the Czechoslovak communist regime, the *Charta 77* led by Václav Havel, addressed Roma rights in 1978.⁵⁴ The *Charta 77* statement pointed to the fact that following the near-extirpation of the Roma population in the Czech territory during World War II, new groups of Roma arrived from Slovakia, Hungary and sometimes even Romania. Those groups were not rooted in the Czech context, often not knowing the majority language and culture at all. Their children often were classified as unable to meet requirements of the mainstream curriculum, leading to their assignment to a special school (*zvláštní škola*).

15766/03, Judgement of March 16, 2010; *Horváth and Kiss v. Hungary*, Application No. 11146/11, Judgement of January 29, 2013.

⁵³ COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS OF ROMA AND TRAVELLERS IN EUROPE, 116-122.

⁵⁴ *Charta 77, O postavení Cikánů – Rómů v ČSSR, 1978*, available at <http://romea.cz/> (in Czech only).

The Czech system of specialized schools dates back to the post-World War I era. During the time relevant to the *D.H.* case the system was codified in the Schools Act of 1984.⁵⁵ This piece of legislation provided for specialized schools not only for pupils with actual (mild or severe) mental or physical handicap, but also for those simply failing to meet educational standards.

The educational reform initiated by the White Paper of 2001⁵⁶ and enacted as the Schools Act of 2004⁵⁷ became effective on January 1, 2005. This reform aimed *inter alia* at integrating schools so that there was a single type of a school in compulsory education attended by all children except those with severe health challenges. With the Schools Act of 2004, the former special schools as a type of institution were abolished and transformed into ordinary basic schools (*základní škola*). Curriculum (educational programme under section 7 of the Schools Act 2004), not the type of school, became defining.

However, although the legislature sought to eliminate distinctions among types of schools, many schools were still identifiable by the type of curriculum they offered. The state-approved curriculum for the basic school level included a specific part (annex) on education of the mildly mentally disabled that was based upon principles similar to those that used to govern educational standards for the former special schools. Furthermore, a ministerial decree provided for an optional use of specific

⁵⁵ Act on the System of Elementary and Secondary Schools, No. 29/1984.

⁵⁶ MINISTRY OF EDUCATION, YOUTH AND SPORT (CZECH REPUBLIC), NATIONAL PROGRAMME FOR EDUCATIONAL DEVELOPMENT (WHITE PAPER ON EDUCATION, 2001).

⁵⁷ Act on Pre-School, Basic, Secondary, Tertiary Vocational and Other Education, No. 561/2004.

denominations of schools focusing on education of handicapped children or those from disadvantaged backgrounds.⁵⁸ A large number (but not all) of the former special schools then opted for the title of basic practical school (*základní škola praktická*) to differentiate them within the system. To be clear: although the adoption of the title *základní škola praktická* has no legal effect or consequences, in reality by providing for this option, secondary legislation has allowed an opportunity for some institutions and some part of the teaching profession to keep the spirit of the former system the legislator sought to abolish.⁵⁹

Interestingly, when the *D.H.* case was eventually decided by the ECtHR, the educational system was at least *de jure* quite different from what it was when the case had begun. Alas, as the *D.H.* litigation reveals, the systemic problems had persisted in spite of the 2004 changes. The case *D.H. and Others v. the Czech Republic* originated in 1999 as an application of 18 pupils of special schools in Ostrava, a city in the northeast of the Czech Republic, to the Czech Constitutional Court.⁶⁰ Applicants claimed that they were misclassified as unable to follow curriculum of a mainstream school, which resulted in them being assigned to a special school. This assignment, however, required consent of their legal guardians under the legislation applicable at that time. The

⁵⁸ Decree on Education of Children, Pupils and Students with Special Education Needs, No. 73/2005.

⁵⁹ A professional organisation of teachers (Association of Special Education Teachers – *Asociace speciálních pedagogů*, <http://www.aspcr.cz/>, available in Czech only) mainly at basic practical schools was even founded in March 2010 with an aim to oppose some actions taken by the Czech government in implementation of the ECtHR judgement in the case *D.H. and Others vs. The Czech Republic*.

⁶⁰ Due to the very limited jurisdiction of administrative review at the time of the application at the national level, the case went directly to the Constitutional Court. Case I. ÚS 297/99, decided on October 20, 1999.

Constitutional Court declined to hear the case on its merits. It held the application inadmissible on the ground that as legal guardians gave the consent to the admission of pupils concerned into the special school, and because no appeal was made against that decision at that stage, the case was not admissible for judicial review.⁶¹

The subsequent proceedings in the ECtHR were not only lengthy (the application was filed in 2000, the case was initially decided in 2006, and then the Grand Chamber of the ECtHR issued its decision in 2007), but also dramatic. Initially the ECtHR decided by six votes to one in favor of the Czech government in 2006, but on appeal the Grand Chamber of the ECtHR found a violation of the ECHR (Article 14 and Article 2 of Protocol No 1, *i.e.* protection against discrimination and right to education) by thirteen votes to four in 2007.

In deciding *D.H.*, the ECtHR applied a concept of indirect discrimination: an enactment and use of formally colorblind or otherwise neutral criteria leads to disproportionately non-favorable effects onto a particular group of a society. Taking into account the practice in the field of antidiscrimination law of the Court of Justice of European Communities, the ECtHR reached its conclusion upon *prima facie* evidence of statistical data which revealed a “dominant trend” that Roma children were overrepresented in special schools both within the national system and particularly in the region, while the ECtHR did not find sufficient safeguards in practice that state

⁶¹ Constitutional Court of the Czech Republic, I. ÚS 297/99, October 20, 1999.

authorities would “take into account their special needs as members of a disadvantaged class.”⁶²

Contrary to a recent interpretation of the ruling by the Czech Supreme Court, the ECtHR laid out no concise guidelines as to what threshold constitutes illegal overrepresentation (or what safeguards must be provided against misclassification). In the recent case of a Roma former special school pupil claiming discrimination in the light of the *D.H.* principles, the Czech Supreme Court held that unless minority members constitute at least fifty per cent of the segment at a particular place, discrimination cannot be proven by statistical data alone as *prima facie* evidence.⁶³

Under the Council of Europe’s rules of human rights protection, the execution of the ECtHR judgment falls within the margin of appreciation of the member state concerned, and it is normally a matter of the executive authority of the government. In the Czech Republic, the International Courts Proceedings Act of 2011⁶⁴ mandates that competent departments and agencies “shall without unreasonable delay take all the necessary individual and general measures so as to ensure non-violation of the Convention, or of the law of the European Union, to the extent declared by a final decision of the Court, or of the Court of Justice of the European Union. . . .”⁶⁵

In the years following the *D.H.* judgment, important hindrances and setbacks to its implementation can, however, be identified:

⁶² European Court of Human Rights, *D.H. and Others v. The Czech Republic*, Judgement of the Grand Chamber of November 13, 2007, paragraph 207.

⁶³ Supreme Court of the Czech Republic, 30 Cdo 4277/2010, December 13, 2012.

⁶⁴ Act No 186/2011.

⁶⁵ *Id.*, Sec. 4(1).

- **Decentralization of educational governance.** Since the Schools Act of 2004 came into effect on January 1, 2005, schools are no longer agencies of the national government. Instead, each school became a separate legal entity, with the respective regional or municipal government as its founder. Initiatives for a national government-led overall restructuring of some segments of the schools system such as the basic practical schools will thus face important legal obstacles.
- Moreover, in the past thirteen years, regional governments have mostly been controlled by political parties who oppose the national government. Achieving cooperation and coordination to implement government policies may then be difficult, particularly when the issue appears controversial.
- **Low availability of relevant data.** Because of the somewhat unclear nature and structure of the segment to which the former special schools have been mostly transformed, reliable statistical data have long been unavailable. The last official statistics of children educated following educational standards for the mildly mentally disabled come from the school year 2004/2005, prior to the effective date of the Schools Act of 2004. The change comes with a ministerial decree of May 2013 that, effective beginning September 1, 2013, requires data to be submitted to the national government on a regular basis about the number of pupils

educated under the provisions of the national framework education program for basic education as mildly mentally disabled.⁶⁶

- **Difficulties with registering race and/or ethnicity.** After experience with communist regimes that often categorized and sometimes organized people into ethnic groups, most countries in the region adopted strictly color-blind and ethnically-neutral constitutions. Moreover, the mere reference to ethnicity can sometimes be controversial, even socially. In the Czech Republic, ethnicity is a matter of free choice of everyone under Article 3 (2) of the Charter of Fundamental Rights and Freedoms, which is part of the Czech Constitution. It is not legal for state authorities to determine someone's ethnicity and keep it in official registers.
- This has been long used as an argument against government-conducted research of Roma representation in various segments of the school system. But the argument overlooks that legal regulation is in fact more complex. While the Czech Constitution protects individuals from government interference into the determination of ethnicity, it does not prohibit gathering statistical data about individuals.⁶⁷ In fact, the Antidiscrimination Act of 2009 gave the Czech Public Defender of Rights

⁶⁶ Decree 131/2013.

⁶⁷ PAVLA BOUČKOVÁ, NESNESITELNÁ TĚŽKOST VÝKONU ROZHODNUTÍ, IN: MICHAL BOBEK ET AL. DVACET LET EVROPSKÉ ÚMLUVY V ČESKÉ REPUBLICE A NA SLOVENSKU, 199 (C.H.BECK, 2013).

(an ombudsman) explicit authority to conduct research with the aim of enhancing equal treatment.⁶⁸

- **Non-existence of judicial oversight.** Courts in the Czech Republic have consistently declined to hear cases of alleged discrimination resulting from school assignment, as the assignment can only be made upon consent of parents or other legal guardians of the pupil.
- In 2012 the Czech Republic Supreme Court effectively ruled out statistical data as *prima facie* evidence of discrimination when it held that there must be at least fifty percent of minority representation in a given segment of schools. The Ombudsman reported earlier in 2012 that on average schools that formerly had been special schools have an estimated thirty-five percent of their students who are Roma. The representation of Roma in the overall population of the Czech Republic is estimated between 1.4 to 2.8 %.⁶⁹

Change could, however, come from recent domestic antidiscrimination legislation. The Czech Republic implemented a set of EU Directives regarding equal treatment by adopting its own Antidiscrimination Act of 2009, a law that covers also access to education (section 1). For the first time, this legislation enables court intervention into cases of alleged discrimination in student assignment, although this expansion of the law is untested judicially.

⁶⁸ Act on Equal Treatment and Legal Remedies Against Discrimination, No. 198/2009.

⁶⁹ PAVLA BOUČKOVÁ, NESNESITELNÁ TĚŽKOST VÝKONU ROZHODNUTÍ, IN: MICHAL BOBEK ET AL. DVACET LET EVROPSKÉ ÚMLUVY V ČESKÉ REPUBLICĚ A NA SLOVENSKU, 199 (C.H.BECK, 2013).

Under section 10 (1) of the Antidiscrimination Act of 2009, a court may issue an order that can include both an injunction and provisions for a reparatory scheme. Under section 10 (2) of the same Act, a court may also provide for punitive damages to be paid by the respondent subject to circumstances. In 2012, the Czech Supreme Court decided a case concerning a period between 1985 to 1995, to which the Antidiscrimination Act and, for most of that period, even the ECHR, were not applicable. Czech courts have not yet applied this law in any case concerning education. But, in Slovakia, a country with both educational and antidiscrimination laws very similar to the Czech Republic, a district court decided in December 2011 on the basis of Slovak antidiscrimination law to desegregate a school in eastern Slovakia.⁷⁰ (That case was decided on the ground of witnesses' testimony rather than the statistical evidence as in the *D.H.* case.)

The Czech and Slovak antidiscrimination laws fulfill those countries' obligations as EU member states to implement and observe EU Directives including those on equal treatment. Subject to Article 258 of the Treaty on the European Union⁷¹ a member state may be held responsible before the Court of Justice of the European Union for failure to comply with this duty.

In July 2013, the European Commission, an institution of the EU that has standing for proceedings (standing to bring suit) against a member state under Article 258 of the EU Treaty, informed the Czech government about its preliminary assessment that Czech schools might be out of compliance with EU equal treatment law, namely

⁷⁰ District Court of Prešov (Slovak Republic), 25 C 133/10-229, decided on December 5, 2011.

Official Journal of the European Union, C 83/13, March 30, 2010.

Directive 2000/43/EC on racial equality, with respect to the persisting overrepresentation of Roma in the former segment of special schools, or educational programs similar to that under the existing national legislation. The European Commission requested that the Czech government present evidence to the contrary and, notably, held that in spite of EU law and the ECHR being enforced in two separate legal regimes, these systems are interconnected. Specifically, the Commission held that evidence gathered both during proceedings in the ECtHR and during the monitoring of the execution of the judgment can serve as *prima facie* evidence for assessment of compliance with relevant EU law.⁷² This suggests an interesting scheme that might work for enforcement of ECtHR judgments in EU member states, by which a policy principle of EU members' adherence to the European Convention on Human Right would become a justiciable legal rule.

But so far it has been a rather fuzzy history. European legislation and jurisdictions have largely provided a favorable approach to foster educational equality and fight even *de facto* segregation. But it is the lack of immediate enforcement powers of ECtHR that makes much of European rules implementation dependent on deliberations and actions of political branches of a national government. We can also see in the *D.H.* case developments that education's specific character, and the particular role of the profession in the development of the system, may present a hindrance, if government action is not sufficiently coherent and sustainable over time. For all that, an availability of court-ordered remedies that may arise under the recent

⁷² The response of the Czech government has not been completed at the time of this writing.

antidiscrimination legislation under EU law has the potential of bringing an important improvement.

Conclusion

This discussion has illustrated the many differences among the US, the EU, and EU member countries regarding school desegregation. Perhaps most importantly, the dynamic that is reshaping EU member countries' domestic law—the expansive scope of school desegregation liability and resulting remedies under regional international law—is completely absent from the US. As a general matter, US courts could but do not hear international law-based education rights claims, and the US educational system appears unlikely to respond to the litigation of educational rights claims in international courts. Thus, US school desegregation law is mature and unlikely to change much; furthermore, any changes in the foreseeable future seem most likely to come from US courts, not from regional or global international legal obligations.

On the other hand, antidiscrimination law in the EU is changing rapidly, both at the international and the domestic level. Until the past few years, domestic courts in some EU member states—the Czech Republic and the Slovak Republic, for example—have regularly refused to hear school segregation claims on the grounds that parents have consented to their children's assignment to a particular school or program. Thus, school desegregation liability findings have been few in EU member countries' domestic courts, and because a finding of liability must precede a remedy, remedies have been few as well. The school desegregation remedies imposed by US courts in the 20th

Century and by the ECtHR in the 21st Century have been expansive, though, and the latter is of increasing significance to EU member countries for the many reasons discussed above.

Furthermore, the ECtHR's *D.H.* decision, discussed extensively throughout this article, is a notable example of a decision that, on paper, is more plaintiff-friendly than US education antidiscrimination law, and much more plaintiff-friendly than the law in EU member countries such as the Czech Republic and Slovak Republic. Specifically, after *D.H.*, the same evidence that would lead a US court to conclude that a disparity constituted legal *de facto* segregation could support a finding of illegal discrimination under the ECHR. Unlike US federal courts, however, the ECtHR has no direct enforcement authority. Additionally, the lack of support for racial and ethnic integration across many EU countries is demonstrated by the almost complete lack of educational achievement data that can be disaggregated by race and ethnicity. Yet, because EU member countries must incorporate EU law into their domestic legal systems, the implementation of the *D.H.* decision could be the beginning of changes in at least some EU countries' domestic law, and perhaps the beginning of a new round of education rights litigation in EU member states' domestic courts as well as in the ECtHR. In this way and perhaps in others, *D.H.* truly may become "Europe's *Brown v. Board of Education.*"