



Comparative report on the right to education: An assessment of the legal framework of six countries from the perspective of recognitive and redistributive justice

Orsolya Salát

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About ETHOS

ETHOS - Towards a European Theory Of Justice and fairness, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinate the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019

Executive Summary

This report deals with the right to education of some selected categories of vulnerable minorities. National reports from six countries form the empirical basis of this study, all of them having examined the right to education of persons with disabilities, and next to it, each of them having examined another vulnerable group (ethnic and religious minorities, refugees and asylumseekers).

The report focuses on the legal framework of the six countries, which necessitates an overview of international and European frameworks as well. However, it does not analyse in detail the realization of the legal frameworks, neither policy implications, since those questions are reserved for other work packages. The legal framework is understood to include the constitutional and legislative context of the right to education, and its judicial interpretations whenever possible.

The comparative legal inquiry is pursued against the background of a particular reconstruction of the tripartite Fraserian theory of justice, which was elaborated in the philosophical work package of the project. The original focus of the research with regard to education was on recognitive justice, but the research showed – in line with Fraser’s insights -- that not only recognition, but redistribution challenges are also present in this particular field of law, sometimes going hand in hand, other times pulling in opposite directions.

List of Abbreviations

CSER : Committee on Social and Economic Rights

CRC : Convention on the Rights of the Child

CRPD : Convention on the Rights of Persons with Disabilities

ECHR : European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR : European Court of Human Rights

EU : European Union

ICESCR : International Covenant on Economic, Social and Cultural Rights (UN)

RESC : Revised European Social Charter

UK : United Kingdom

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1) Introduction

The right to education is an important and structurally complicated, if not paradoxical right. Especially with regard to children at compulsory school age, education includes rights and obligations in a triangular relationship between the pupil, the parents, and the state, and is thus located at the border of the private and public (or testifies to the increasingly blurred line, if any, among those spheres). The exact contours of the triangle will depend on a wide range of factors, most of them of moral relevance, since it distributes the authority between the state and the family over the child's development. The regulation of the right to education is particularly apt to show concerns or disregard for social justice, especially whether a society strives to provide its members with equal opportunities and prepare for full participation. On the other hand, schooling also strives for excellence, which is by definition an exclusionary notion. Some perceive this as creating a "school syndrome"¹ instead of actual education, but even if the evaluation does not go so far, the tension between individualist and collectivist aspirations are present in every education system to some extent.

Human rights and fundamental rights law have a particular way of dealing with this tension: education is a right which appears to cut across every classic legal or even philosophical categorization: it is both a freedom right for it has a strong element of free choice and free exercise, and relates strongly to both freedom of religion, and freedom of expression. It is a social right in that the state is meant to provide in a democracy which values equal participation; a cultural right by which communities nurture and pass over their cultural heritage to new generations; it is an economic right in that it is essential from the

¹ David F. Laberee, School syndrome: Understanding the USA's magical belief that schooling can somehow improve society, promote access, and preserve advantage, *Journal of Curriculum Studies*, 2012, Vol. 44, No. 2, 143–163.

(footnote continued)

perspective of the labour market and integration into the market economy.² The right to education is the basis for the effective exercise of many if not almost all other rights not only according to current international understanding, but already according to Condorcet, who theorizes the right to education apparently as the only positive right in his otherwise classic negative liberty edifice.³

The following will examine these tensions from the perspective of justice and based on the examples of (some categories of) vulnerable minorities in the legal framework of six countries. The perspective of justice means a focus on whether the legal framework of the right to education shows some (even if maybe hypocritical – a matter to assess for the sociologists) aspiration toward a coherent conception of justice. In this regard, the project and this deliverable start out of the tripartite framework of Nancy Fraser seeing representation, recognition and redistribution as the main aspects of justice,⁴ nonetheless first of all only in the analytical (and not necessarily normative)⁵ sense.⁶ While originally (when designing the ETHOS project) it was assumed that education would first of all affect issues of recognitive justice, the research shows more and more that the three aspects are not or cannot be meaningfully separated

² In more detail and for further references see the overview by Klaus Dieter Beiter, *The Protection of the Right to Education by International Law Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*, Martinus Nijhoff, Leiden, 2006, 17-86.

³ Marie Jean Antoine Nicolas de Caritat, marquis de Condorcet, *Esquisse d'un tableau historique des progrès de l'esprit humain* (1795).

⁴ Nancy Fraser, *Scales of Justice: reimagining Political Space in a Globalizing World* (Columbia University Press, 2009)

⁵ See Trudie Knijn, Tom Theuns and Miklos Zala, *A Multidisciplinary Perspective on Justice in Europe*, deliverable 2.3 of the ETHOS project (2018) https://ethos-europe.eu/sites/default/files//docs/d2.3_website_report_complete.pdf

⁶ Although surely a relevant aspect, this project is not based on the idea of reproductive justice. It will thus not be discussed in this deliverable either, despite the fact that Nancy Fraser briefly mentions it in relation to education in another work: Nancy Fraser, *Behind Marx's Hidden Abode*, *New Left Review*, Mar/Apr 2014, Issue 86, 55-72, <https://newleftreview.org/issues/1186/articles/nancy-fraser-behind-marx-s-hidden-abode>. Thanks for the reference to Pier-Luc Dupont.

(footnote continued)

alongside rights, or at least in a rights framework. With regard to education, the country reports revealed in particular that concerns for redistribution alongside recognition cannot be disregarded.

The report will not systematically deal with policy implications, since that is reserved for other deliverables in the project. Furthermore, it is a comparative law piece within the philosophical framework elaborated in previous deliverables,⁷ but does not in itself engage with philosophical debates. As all examined countries are party to most relevant international and European human rights treaties, domestic legal frameworks will also necessarily be analyzed against that background. In this sense, the report will not individually justify the standards evolved in human rights law, and takes for granted for instance that racial segregation in schools is a human rights violation, and is thus to be avoided, or that accommodation for persons living with disabilities is a human rights requirement, and so on.

Accordingly, the following section will provide an overview of the international and European human rights protection of the right to education as a common framework within which national legal orders ought to operate. Section 3 will overview the textual bases and the nature of the right in the national orders. Thereupon the degree of parental liberty will be compared as a necessarily specific feature of education regimes. Sections 5 and 6 discuss the legal frameworks applicable to persons with disabilities (regarding all countries examined) and ethnic and religious minorities or refugees and asylum-seekers, respectively (this latter one depending on the choice of the country rapporteurs). Section 7 will provide a concluding reassessment of the results with regard to recognition, redistribution, and representation.

⁷ In particular, Bert van den Brink, Simon Rippon, Tom Theuns & Miklos Zala , Report on the workshop “Ideal and Non-Ideal theories of Justice”: Towards a Non-Ideal Theory of Justice in Europe, deliverable 2.2. of the ETHOS Project (2018) https://ethos-europe.eu/sites/default/files//docs/d2.2_loaded_website_version.pdf and Knijn et al (n 5).

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2) Education in the international and European human rights regime

Deliverable 3.3. on ‘Justice in Europe institutionalized’⁸ gives a detailed overview about the international and European human rights protection. This paper therefore only highlights the most important characteristics of the right to education. Education is codified as a fundamental human right in Art 13 of the International Covenant of Economic, Social and Cultural Rights (ICESCR). The right to education is considered a subjective right, which specifically aims at promoting ‘the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.’⁹ The ICESCR obliges states to provide compulsory and free primary education accessible to all children, independent of status or any characteristic,¹⁰ which is interpreted by the Committee on Social and Economic Rights (CSER) that “education, in all its forms and levels, should be available, accessible, acceptable and adaptable”.¹¹

This specific right to education is to be understood in the context of other applicable international norms and rights, especially that of non-discrimination in various conventions, in general and in special contexts like in the Refugee Convention, the Convention of the Rights of the Child (CRC), and so on.¹²

The European protection of the right to education is similarly multifaceted. The central or most efficient norm, which is accompanied by a judicial supervision, is Article 2 of Protocol No 1 of the European Convention of Human Rights (ECHR). The text confers a subjective right to education to everyone and the right of parents that the state

⁸ Marie-Pierre Granger, Barbara Oomen, Orsolya Salát, Tom Theuns & Alexandra Timmer, Justice in Europe Institutionalized: Legal Complexity and the Rights of Vulnerable Persons, ETHOS deliverable 3.3. (2018).

⁹ Id. 46.

¹⁰ Granger et al refers in this regard also to art. 14 of the ICESCR and UN Committee on Economic, Social and Cultural Rights, General Comment No. 11: Plans of Action for Primary Education (Art. 14) Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 10 May 1999 (Contained in Document E/1992/23), Granger et al, 46.

¹¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 13: The right to education (article 13 of the Covenant, Adopted at the Twenty-First Session of the Committee on Economic, Social and Cultural Rights, on 15 November-3 December 1999 (Contained in Document E/C.12/1999/10), as cited by Granger et al, 46.

¹² See the overview in Granger et al, 47-50.

(footnote continued)

ensures 'such education and teaching in conformity with their own religious and philosophical convictions.'¹³ Other European instruments with weaker enforcement and supervisory mechanism guarantee educational rights in a more detailed fashion. The Revised European Social Charter (RESC) for instance requires states to 'encourage' regular attendance, in order 'to encourage the full development of their personality and physical and mental capacities (Article 17), prohibits the employment of persons in compulsory education, and grants the right to integrated education of persons with disabilities wherever possible.¹⁴

The European Court of Human Rights developed a complex case law in relation to the right to education. The text of the Convention itself does not oblige the states to establish schools, but it obliges them to provide access to those schools which were established.¹⁵ In line with general interpretation, the right to education is to be read in conjunction with Art 14 prohibiting discrimination. Similarly to other (legal and philosophical) interpretations, the ECtHR also considers the right to education "indispensable to the furtherance of human rights."¹⁶ The particular institutional details of the education system though fall within the margin of appreciation of the state, the Court exercises strong supervision and requires states to "pay particular attention to the *special needs of vulnerable persons* (be they ethnic or religious minorities, persons living with disabilities, etc)."¹⁷

As to pupils with disabilities, the Court increasingly emphasizes that inclusive education is considered the most appropriate means to guarantee universality and non-discrimination in education, and that European and international law developments point in the direction of such an emerging consensus.¹⁸

¹³ As cited by Granger et al, 61.

¹⁴ Arts 7, 15, and 17 of the RESC as cited by Granger et al 61.

¹⁵ Belgian Linguistic Case, § 4.

¹⁶ *Velyo Velez v. Bulgaria*, no. [16032/07](#), § 33, ECHR 2014 [extracts], cited by *Cam v Turkey*, § 52.

¹⁷ Granger et al, 63.

¹⁸ *Çam v. Turkey*, Application no. [51500/08](#), judgment of 26 February 2016. Internal references omitted as cited by Granger et al, 63.

(footnote continued)

As to ethnic minorities, ECtHR jurisprudence has stated positive obligations, as well as procedural and substantive requirements with regard in particular to segregated schools.¹⁹ These include the duty to ensure that parental consent is informed and given without any constraint, that schooling arrangements are surrounded by safeguards which are sensitive to the special needs of ethnic minorities, and a positive obligation to undo a history of racial segregation in special schools.”²⁰

3) Education in the constitutional regime of the compared member states

A. Textual bases and norms of reference

All examined countries have some rules related to education in their constitution, except the United Kingdom which does not have a written document entitled “constitution”. The constitutional context of the right to education differs significantly from country to country, but technically all operate within a general non-discrimination framework at least on the surface, and all are influenced by both EU equality law and international human rights instruments such as the Convention on the Rights of Persons with Disabilities (CRPD), and perhaps most strongly the European Convention on Human Rights (ECHR).

¹⁹ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV, *Oršuš and Others v. Croatia* [GC], no. 15766/03, ECHR 2010, *Horváth and Kiss v Hungary*, Application no. [11146/11](#) judgment of 29 January 2013 for further discussion see Granger et al, 63-64.

²⁰ *Horváth and Kiss v Hungary*, § 127.

(footnote continued)

1. Austria

In Austria, the ECHR – and thus, Art 2 of Protocol 1 – has constitutional rank,²¹ it is the central “rights” norm. The Federal Constitution (B-VG) does not have a rights catalogue, but regulates issues of competence between the federal and provincial level, and the basic principles of the constitution. Among these, Art. 14 discusses the basic progressive goals and values of education in a long and solemn paragraph,²² spells out compulsory schooling, or that rules governing the relation of schools and churches can only be adopted by two-third majority of members present in Parliament.²³

2. Hungary

In Hungary, the Fundamental Law spells out the right to education and the right not to be discriminated against, which also applies to education. However, the text of the provision is

²¹ Apostolowski 2.

²² Art 14 5a) Democracy, humanity, solidarity, peace and justice as well as openness and tolerance towards people are the elementary values of the school, based on which it secures for the whole population, independent from origin, social situation and financial background a maximum of educational level, permanently safeguarding and developing optimal quality. In a partnership - like cooperation between pupils, parents and teachers, children and juveniles are to be allowed the optimal intellectual, mental and physical development to let them become healthy, self-confident, happy, performance-oriented, dutiful, talented and creative humans capable to take over responsibility for themselves, fellow human beings, the environment and following generations, oriented in social, religious and moral values. Any juvenile shall in accordance with his development and educational course be led to independent judgement and social understanding, be open to political, religious and ideological thinking of others and become capable to participate in the cultural and economic life of Austria, Europe and the world and participate in the common tasks of mankind, in love for freedom and peace. As cited by Apostolowski and Möstl n 21, 7.

²³ Art 14 (10) as cited by Apostolowski and Möstl, 8.

(footnote continued)

problematic since it allows for special measures which aim at “closing the social gap” or “catching up” disadvantaged pupils, which in the intention of the government means the authorization to segregated education of especially Roma children,²⁴ but it also applies to pupils with disabilities.

3. Netherlands

In the constitution of the Netherlands, the right to education is the “most detailed social right”²⁵. The eight-paragraph-long provision in Art 23 sets out the framework for the “dual” educational regime, whereby the state funds not only state schools, but also “special” schools based on a religion or philosophical view.²⁶

4. Portugal

In Portugal, the constitution deals with education in ten different articles, and is thus by far the most detailed and elaborate constitutional framework. It guarantees separately the freedom to learn and to teach (Art 43) and the right to education (Art 74). It declares the philosophical, aesthetic, political, ideological or religious neutrality of the state with regard to education (Art 43 (2)), and the right to create private and cooperative schools (Art 43 (3) and the corresponding duties of operation and recognition of the state (Art 75). The state is obliged to “promote and support disabled citizens’ access to education and support special education when necessary.” (Art 74 (2) g) and “ensure that immigrants’ children receive adequate support in order to enable them to effectively enjoy the right to education” (Art 74 (2) j). A recurring aspiration in the Portuguese constitutional text is democratising education, including the right of teachers and students “to take part in the democratic management of schools” (Art 77).

²⁴ Salát 9.

²⁵ Heringa, Van der Velde, Verhey & Van der Woude, *Staatsrecht* (Deventer, Twelfth Edition, Wouters Kluwer 2015) p. 485 as cited by Henderson 7.

²⁶ Henderson 7.

5. Turkey

If the Portuguese text is exceptional in its richness in granting rights to pupils, parents, and teachers and transferring wide-ranging positive duties on the state, the Turkish constitution applies an almost opposite, instrumental and top-down approach.

Art 42 of the constitution spells out the right “not to be deprived of education”, but apart from that the provision contains obligations, prohibitions and state goals, such as that the education shall be conducted along the lines of Atatürk reforms, or the freedom of education does not relieve from the duty of loyalty to the Constitution, or that only Turkish can be taught as mother tongue. Compulsory education shall be free, and the state shall support the (further) education of those who are in financial need. Persons with special educational needs are to be supported (“rehabilitated”) by the state in order to “render them useful for society,”²⁷ i.e. not on their own right. On the other hand, Art 10 (the equality clause) was amended in 2010 so as to authorize positive measures for the disabled, and Art 61 obliges the state to “take measures to protect the disabled and secure their integration into community life.”²⁸

While the grounds of discrimination in Art 10 cover race and religion, too, other provisions of the Turkish constitution appear to weaken this guarantee in the field of education. Art 24 states that “religious and moral education and instruction shall be conducted under state supervision and control.”²⁹

6. United Kingdom

The United Kingdom regulates education first of all in laws enacted by Parliament, such as the 1996 and 2002 Education Acts and the 1998 School Standards Act.³⁰ On the other hand, even though without an explicit constitutional guarantee, the European Convention of Human Rights’ right to education

²⁷ Art 42 of the Turkish constitution, as cited by Karan, 4.

²⁸ Art 61 of the Turkish constitution, as cited by Karan, 5.

²⁹ As cited by Karan, 6.

³⁰ Dupont 7-9.

guarantee exerts influence especially since the 1998 Human Rights Act, incorporating the Convention rights in to domestic law, was adopted.

B. The nature of the right

As mentioned in the introduction, the right to education is difficult to categorize, or falls into many if not all of the traditional rights categories. The examined countries are no exception in this regard, while the labelling by different country rapporteurs (different domestic legal scholarships) show that it is not only the right to education but categories of rights themselves are not unequivocal.

1. Austria

In Austria, due to the structure of the legal system, the ECtHR's interpretation of the right to education is the main human rights guideline for it has constitutional status. While the ECHR is not a social rights document and Art 2 Protocol 2 is formulated in explicitly "negative liberty" terms, the Court did spell out positive obligations³¹ regarding the right to education in its jurisprudence which directly apply in the Austrian context. The right to education in Austria is at the same time a right for the pupils and a duty for the state.³²

³¹ See Marie-Pierre Granger, Barbara Oomen, Orsolya Salát, Tom Theuns and Alexandra Timmers, 'Justice in Europe Institutionalized: Legal Complexity and the Rights of Vulnerable Persons' (Deliverable 3.3, 2018)

³² Apostolowski and Möstl 2.

(footnote continued)

2. Hungary

In Hungary, the right to education is limited to Hungarian citizens,³³ which is problematic from a human rights perspective, since it does not grant the right to everyone. Otherwise, the right includes both negative and positive aspects, although the negative aspects are more apparent in legislation than in the constitutional text (see below on parental liberty) and the positive aspects might be more problematic than as it appears in the English translation, as was explained above.

3. Netherlands

In contrast to Hungary, Dutch law grants the right to education to everyone, including illegal migrant children. In that regard, the Dutch system is clearly welcoming and strives for inclusion.³⁴ As to the specific doctrinal status of the right to education, the constitutional guarantee of public funding for religious or worldview based (“special”) schools does not result in the state’s obligation to promote religious or philosophical pluralism or otherwise encourage and facilitate the founding of special (religious or philosophical) schools. Even though the right is understood to be a “social” right, the state’s obligation regarding religious education is understood to realize non-interference. As Henderson puts it, the right to education is best described “as a right of parents to collectively provide religious or philosophically-inspired education for their children *without interference* from the State.”³⁵ Groups which are “already sufficiently organized so as to provide this education”³⁶ are entitled to public funding, but no group can

³³ Art XI Fundamental Law of Hungary, as cited by Salát 10.

³⁴ Henderson 17.

³⁵ Henderson (n 25) 9

³⁶ Henderson (n 25) 9

(footnote continued)

require the state to organize the special school. In contrast, the state has a positive obligation to guarantee sufficient access to (secular) public schools.³⁷ The underlying political approach to this legal solution is the result of the so-called “school struggle” in which secular and denominational groups of society managed to reach a compromise, which however has ever since been contested.³⁸

4. Portugal

In Portugal, the right to education is spelled out as both a strong liberty right and a strong social right with explicit equal opportunities to everyone, as discussed above in relation to the textual bases.

5. Turkey

In Turkey, the right to education is located among social and economic rights, but it is formulated explicitly as a negative right (“no one shall be deprived”). The Turkish constitution’s general fundamental rights guarantee in Art 5 includes positive obligations³⁹ that are however weakened in the case of socio-economic rights by a reference to the state’s financial capacity in art 65, giving “a wide discretion to the state to prioritize its social policies and a pretext for non-fulfilment of social rights including right to education.”⁴⁰ As mentioned above, Art 61 spells out positive obligations with regard to the rights of the disabled.

³⁷ Henderson (n 25) 9

³⁸ Henderson 10.

³⁹ “The fundamental aims and duties of the State are [...]to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law...” as cited by Karan 13

⁴⁰ Karan 14.

(footnote continued)

6. United Kingdom

In the United Kingdom, the nature of the right is hard to discern, since it is based on statutory law, but the national report clearly categorizes it as “subjective right”⁴¹. The main piece of legislation, the Education Act 1996, obliges the Secretary of State to “promote the education of the people of England and Wales”⁴² and also obliges the parents to cause their child to receive “efficient full-time education suitable to [their] age, ability, aptitude and special educational needs, either by regular attendance at school or otherwise”⁴³.

An important element of the right is certainly the obligation of the state to take into account the wishes of parents as much as possible. More precisely, “as far as compatible with efficient education and reasonable public expenditure, pupils should be educated in accordance with the wishes of their parents.”⁴⁴ Thus, in the UK, the freedom of choice element appears strong in the first place, and many rules aim to cater for its broadest possible realization. In addition, the law imposes a lot of positive duties on providers of education – especially local authorities – as well: to secure diversity in the schools offered, to provide free travel, meals and milk for those who need it and so on.⁴⁵ UK law also regulates in much detail the conditions and procedures of admissions, exclusions, and gives a right to appeal in such matters.⁴⁶ Thus, education is not conceived as a system of rules derived from a single (though multifaceted) right granted in a constitutional provision, but in fact the law displays parallel (negative, positive, liberty, and social) aspects in a perhaps even more legally conscious or rule-of-law observing fashion than elsewhere.

⁴¹ Dupont 27.

⁴² Art 10 Education Act 1996 as cited by Dupont 7.

⁴³ Art 7 Education Act 1996 as cited by Dupont 7.

⁴⁴ EA 1996, Section 9 as cited by Dupont 8.

⁴⁵ Dupont 9.

⁴⁶ Dupont 10.

4) Degrees of centralization and parental liberty in the school system

Although the perspectives of centralization and parental liberty are conceptually distinct, legal systems examined in this report tend to show a reverse correlation. Generally, centralized education systems claim to promote equality better, but they might also be less prone to innovation, accommodation and individual assessment.

1. Austria

In Austria, the school system is regulated by federal-level laws and ordinances, but there is some room for provincial difference. A 2017 reform increased school autonomy by giving heads of schools more leeway in the design of education. However, this is a one-way autonomy increase aiming at enhancing “education chances for all children, regardless of origin, gender, language, religion or disabilities.”⁴⁷

Parental liberty is granted in Austria in the possibility to send children into non-public schools. Apart from “general public compulsory schools” (*allgemein bildende Pflichtschulen*, § 5(1) Compulsory Schooling Act), there are “middle or higher schools (including agricultural schools (§ 5 (1) Compulsory Schooling Act), schools not in line with any legally formulated kind of school form (§ 12 Compulsory Schooling Act), schools abroad (§ 13 Compulsory Schooling Act), private schools without public authority (11 (1) Compulsory Schooling Act) or home schooling (§11 (2) Compulsory Schooling Act).”⁴⁸

On the other hand, general public schools are obliged to accept pupils from their school district, unless the child is not ready for school for reasons of not speaking German well enough (in this case, the child is

⁴⁷ Bundesministerium Bildung, Wissenschaft und Forschung, Informationen zum Schulrecht – Handbuch Erweiterung der Schulautonomie durch das Bildungsreformgesetz (2017), preface, as cited by Apostolowski and Möstl 4.

⁴⁸ Apostolowski and Möstl 7.

(footnote continued)

registered for German classes) or would otherwise be still physically or psychologically overburdened in school (in this case, the child is registered for pre-school).⁴⁹

While parental liberty is formally wide in the choice among non-public school, it is somewhat limited in the choice between public schools: admission of a school-aged child *not belonging to the school district* can be denied, unless the child has special needs status, or was excluded from their district school.⁵⁰ This means that Austrian law does not incentivize, but also does not prohibit parents from trying to “pick the best school”, which might result in “spontaneous” differentiation among public schools.

2. Hungary

In Hungary, the situation is more explicitly on the side of the parents with better opportunities (material resources, connections, level of education etc). Although the constitutional text does not know a specific right to choose a school, the Act on Public Education recognizes it explicitly. Accordingly, the parent shall “freely choose” education from kindergarten to secondary school according to the capacities, interest and needs of the child, to which the child’s consent is added from age 14.⁵¹

Hungarian scholarship is very aware of the distortions caused by this right, especially that middle-class, better-off or otherwise advantaged parents can then self-segregate their children from those who are less

⁴⁹ Apostolowski and Möstl 6.

⁵⁰ Basic Act on Maintenance of Compulsory Schools (Pflichtschulerhaltungs-Grundsatzgesetz) (AUT) as cited by Apostolowski and Möstl 8.

⁵¹ Act CXC of 2011 as cited by Salát 10.

(footnote continued)

fortunate, often and especially the Roma.⁵² This freedom of choice of the school is in contradiction to the otherwise heavily centralized school system⁵³.

On the other hand, the freedom of choice of the parent does not mean that the school is obliged to accept whoever applies, to the contrary, it is obliged to accept pupils from the district,⁵⁴ and schools districts are to be drawn with a view to establish “balanced proportion of disadvantaged pupils.”⁵⁵ In practice, however, school segregation seems high in Hungary both for reasons of violation of the law by public schools, and by other types of outsourced segregation (especially to churches) or spontaneous segregation processes discussed below.

3. Netherlands

In the Netherlands, the system appears more decentralized but there is no explicit “freedom of choice of school” as in Hungary. The general rules are very keen on providing free and accessible education to all without distinction as to religion or belief,⁵⁶ and that publicly funded schools, even if religiously or otherwise oriented, must ‘assume that students are growing up in a pluriform society,’ must ‘focus on

⁵² Eg Gábor Kertesi and Gábor Kézdi, *Iskolai szegregáció, szabad iskolaválasztás és helyi oktatáspolitikai 100 magyar városban*, BUDAPESTI MUNKAGAZDASÁGTANI FÜZETEK, BWP – 2014/6, <http://real.mtak.hu/15371/1/bwp1406.pdf> as cited by Salát 10.

⁵³ Cf also the ECtHR case on uniform school textbooks, *Könyv-Tár Kft and Others v. Hungary* (application no. 21623/13), judgment of 16 October 2018 as cited by Salát 21.

⁵⁴ Art 50 (6) of Act CXC of 2011 on national public education as cited by Salát 10.

⁵⁵ *Id.*

⁵⁶ Article 46(2) of the Primary Education Act and Article 42(2) Secondary Education Act as cited by Henderson 10.

(footnote continued)

promoting active citizenship and social integration’ and must ‘focus on students gaining knowledge about and encountering different backgrounds and cultures of their age mates.’⁵⁷

Dutch law interestingly does not prefer pupils from the neighbourhood, it is fully up to the school to decide, and some schools do prefer pupils from the neighbourhood.⁵⁸ This degree of parental and school liberty might contribute to segregation, and the national report confirms processes of “inadvertent segregation”, primarily depending on the educational level of parents, and while income-based segregation increases, ethnicity-based segregation decreases.⁵⁹

Parental liberty vis-à-vis the state is quite wide, but schools appear to be the ultimate decisionmakers about admissions in the Netherlands. Dutch law is also very explicit about parallel duties of the parents to secure, and from age 12, of the child, to attend school, independently of the legal (residence) status.⁶⁰ Exceptions to the duty to attend are however quite wide, and include the exception in case of “physical or psychological unsuitedness”; “serious objection to the religious or philosophical worldview of all schools within a reasonable distance from their place of residence”; or a traveling life (eg the parents work in a carnival or circus).⁶¹

⁵⁷ Primary Education Act (Wet op het primair onderwijs), Article 8 and Secondary Education Act (Wet op het voortgezet onderwijs), Article 17 as cited by Henderson 10.

⁵⁸ Henderson 10.

⁵⁹ Ministry of Education, Culture and Science, ‘Technisch Rapportage Onderwijskansen en Segregatie’ April 2018, p. 4 as cited by Henderson 11.

⁶⁰ Compulsory Education Act (Leerplichtwet 1969), Articles 2 and 3 as cited by Henderson 12.

⁶¹ Compulsory Education Act (Leerplichtwet) Article 5 as cited by Henderson 12.

(footnote continued)

4. Portugal

In Portugal, education was centralized during the dictatorship, and this remained so even after the regime change for some time. There have long been discussions on the need for decentralization, and some competences (management of the school transport system and primary school buildings) have been transferred to localities already in 1980s.⁶² It was however only in 2018 that the general competence over education was transferred to municipalities.⁶³ On the other hand, this decentralization appears to be “more associated with the continuity of the austerity measures and cuts in the State Budget. This process does not appear coupled with concerns for the worth of freedom of teaching and freedom of parents to decide about the educational needs of their child.”⁶⁴

As to parental liberty, the Portuguese system is ambivalent. The national report notably confirms the existence of a right to freedom to choose a school, but then discusses Portuguese law which prioritizes (firstly) pupils with special educational needs and (secondly) pupils living closer to the school.⁶⁵ Thus, parents “are advised to give preference to the schools of their residential district but they are not obliged to do so” according to the report.⁶⁶ The regulation of education strives to prevent segregation (the national report cites a regulation trying to combat fraud and enhancing transparency, promoting equal opportunities etc. in educational registration),⁶⁷ however parents with more resources are better able to

⁶² Brito and Morris 15.

⁶³ Art 11 Law nº50/2018 as cited by Brito and Morris 15.

⁶⁴ Brito and Morris 15.

⁶⁵ Art 13 of the Dispatch 5048B/2018 as cited by Brito and Morris 15

⁶⁶ Brito and Morris 15.

⁶⁷ Dispatch 6/2018 as cited by Brito and Morris 15.

(footnote continued)

move their children outside the school district, and there are signs of increased segregation of Roma children as a result of such processes.⁶⁸ It is to be seen whether the 2018 reforms will work on the long term, but they also do not address – like in the other countries – the issue of residential segregation.⁶⁹

5. Turkey

Turkey appears to have the most centralized system among the countries examined as the Ministry of Education is entitled to determine the curriculum in *all* schools, be they public, private or (Lausanne-)minority schools.⁷⁰ In Turkey there clearly is no right to choose a school, the school system is strictly address-based.⁷¹ The only way out of the system is to choose private school, which is usually not an option for minorities in the focus of the ETHOS project.

This centralization is however not accompanied by equality for all since the framework is discriminatory in many regards, especially in the case on non-Lausanne minorities who are considered part of Islam and as if they shared Turkish identity.⁷² The Basic Law on Education proclaims that “Primary education is the right of every Turkish citizen,” and states that “institutes of education are open to everyone regardless of language, race, gender, disability and religious affiliation. In education, no privileges shall be accorded to an individual, family, group or class,” but it only considers economically disadvantaged pupils as entitled to financial and other assistance. Thus, the notion of disadvantage notably does not extend to other types of disadvantage, for instance disadvantage flowing from being an ethnic or religious minority.⁷³

⁶⁸ Brito and Morris 14.

⁶⁹ Id

⁷⁰ Karan 8.

⁷¹ Karan 35.

⁷² Karan 8.

⁷³ Id. 011

Therefore, it seems that parental liberty is so limited that in fact non-majority parents have to endure the indoctrination of their children.

6. United Kingdom

The UK balance between parental liberty and efficient education is the most explicit and most detailed regulation among the examined countries. There are three types of schools in England, maintained schools are managed by the state and by local authorities, and state-funded “academies”, and independent schools, which operate on the basis of a contractual basis agreement with the state.⁷⁴ As mentioned above, the guiding principle of English education law is to respect the choice of parents as far as compatible with “efficient education” and “reasonable public expenditure.”⁷⁵ This parental liberty is taken so seriously that authorities even have a duty to increase the possibilities for parental choice by diversifying schools as much as possible.⁷⁶ This makes England the most parental choice-friendly among the examined countries at least as to the legal framework.

Limits to the parental liberty are the mentioned aims (effective instruction and avoidance of unreasonable public spending) and in schools allowed to select on the basis of ability, the lack of sufficient ability of the

⁷⁴ Dupont 8.

⁷⁵ EA 1996, Section 9 a s cited by Dupont 8.

⁷⁶ EA 1996, Section 14(3A). as cited by Dupont 8.

(footnote continued)

child,⁷⁷ but this is only a transitional possibility.⁷⁸ In fact, there is a duty on the schools to make sure that pupils admitted are representative of all levels of aptitude.⁷⁹ Apart from that, English law strives to halt segregation by requiring that oversubscribed schools rank admissions against publicly accessible criteria which are sent to the local authority.⁸⁰

All in all, the English legislator makes a clear effort, at least when it comes to state-funded schools, to provide parents with as much choice as possible, but still maintains a fair, transparent system disincentivising processes of segregation.

5) Pupils with disability – far from the CRPD

1. Austria

In Austria, school legislation applies the concept of “special educational needs” (*sonderpädagogischer Förderbedarf*)⁸¹ and not disability. Pupils with disability traditionally used to be educated in special schools depending on their disability. The idea of integration gradually emerged from the 1960’s on, and after some interesting bottom-up experiments in some provinces and initiatives and drafts prepared by school psychologists and special education teachers,⁸² a working group on integration (*Arbeitskreis Integration*)

⁷⁷ SSFA, Section 86 as cited by Dupont 9.

⁷⁸ “The only permitted forms of school selection by ability are those based on arrangements that were in force at the beginning of the 1997-1998 school year in designated ‘grammar schools’, on ‘banding’ or aptitude for a particular subjects.” Dupont 9, citing SFA, Sections 99-100.

⁷⁹ SSFA, Section 101 as cited by Dupont 9. For more details on the admission and exclusion processes see Dupont 9-11.

⁸⁰ Dupont 9.

⁸¹ For instance, § 8 Compulsory Schooling Act as cited by Apostolowski and Möstl 10.

⁸² See the story in Apostolowski and Möstl 10-12.

(footnote continued)

was established, and “a school experiment (*Schulversuch*) “social integrative school” (*Sozialintegrative Schule*)”⁸³ was planned, but not permitted in 1984. Another one actually started without authorization, which was then retroactively permitted in 1985.⁸⁴ This prompted several experiments in other places as well, and by 1986 a “fundamental decree on physically or sensory impaired children in the Austrian school system” officially introduced the idea of integration of children with disabilities into regular schools.⁸⁵ From then on, central (federal level) political and legislative reforms intensified showing increased political willingness and consensus for the cause of integration, and from 1992, a governmental “concept on disability” stated that “in no way can disability be equalled with a need for a special school.”⁸⁶ Shortly after, parents were granted the right to decide whether they want to school their (disabled) child in a special school or in a regular school, and the role of authorities got limited to examine and state whether the child has special needs.⁸⁷ At least that’s the legal principle which still directs the law. From a substantive justice perspective, this solution can hardly be properly judged: it is a competence division

⁸³ Otto Anlanger, *Behindertenintegration – Geschichte eines Erfolges* (Schulheft 70/1993) 28 et seq as cited by Apostolowski and Möstl 12.

⁸⁴ Otto Anlanger, *Behindertenintegration – Geschichte eines Erfolges* (Schulheft 70/1993) 42 et seq as cited by Apostolowski and Möstl 12.

⁸⁵ Otto Anlanger, *Behindertenintegration – Geschichte eines Erfolges* (Schulheft 70/1993) 59 as cited by Apostolowski and Möstl 12.

⁸⁶ Österreichische Bundesregierung, *Behindertenkonzept der österreichischen Bundesregierung* (1993) <http://bidok.uibk.ac.at/projekte/behindertenbewegung/docs/behinderten-konzept-oesterr-bundesregierung.pdf> as cited by Apostolowski and Möstl 13.

⁸⁷ § 8a Compulsory Education Act as of BGBl188/1993 as cited by Apostolowski and Möstl 13.

(footnote continued)

between parents and the state which leaves the ultimate authority about deciding what is best for their child with the parents.

Note that this choice between regular and special schools might be illusory in practice if schools are not able to accommodate pupils with disabilities. Inclusive education came only with the CRPD and its implementing National Action Plan, in Austria in 2008. The difference between the 1992 disability concept and the 2008 Plan is that the former concentrates on “care” while the second “is based on the concepts of equality and human rights, which is a clear shift of focus on how to design politics for persons with disabilities.”⁸⁸ On the basis of considering inclusive education a human right, the implementation process of the CRPD included the establishment of “so-called model regions for inclusive education” whose experiences can be later used in country-wide introduction of inclusive education. However, it seems that the process is not smooth, the CRPD Committee even considered it stagnant, confusing notions of integration and inclusion, and the need for greater efforts in all areas and levels of education.⁸⁹ Internal surveys on the implementation in the model regions also do not demonstrate unequivocal success, and it seems especially clear that an important obstacle to realize a well-functioning inclusive school is lack of resources in terms of finances, infrastructure, time, and personnel.⁹⁰

⁸⁸ Apostolowski and Möstl 14.

⁸⁹ Apostolowski and Möstl 14.

⁹⁰ Apostolowski and Möstl 15.

(footnote continued)

2. Hungary

In Hungary, lack of resources and personnel seems to be even more overwhelming, and Hungarian legislation is less unequivocal about the desirability of inclusive education for disabled pupils. While the Fundamental Law's equality provision is translated as mandating inclusion, in the Hungarian original the opposite of inclusion, i.e. catching up, figures, which authorizes segregation. While this provision is not exactly translated into the legal system, it allows for instituting a mixed system of integration and segregation.⁹¹

Hungarian law does not use the concept of reasonable accommodation (except in the translation of the law promulgating the CRPD), but some parts of the legal system might in fact imply such an obligation, and the Equality Body does refer to it in its jurisprudence.⁹²

The legal provisions do not spell out a preference for inclusive education. Regarding kindergarten the law requires the provision of special education for 11 hours a week,⁹³ but this appears to be set independently of the number of special needs children in a given kindergarten,⁹⁴ which surely results in unequal quality of education in different kindergartens. Furthermore, lower level norms also only say that integrated education of special needs children in majority kindergarten requires individualized decision – based on the opinion of the expert committee – in every case depending on the needs of the child.⁹⁵

⁹¹ Salát 13.

⁹² EBH 504/2013. <http://www.egyenlobanasmod.hu/hu/jogeset/ebh5042013> as cited by Salát 12.

⁹³ Art. 8 (3) of the National Public Education Act as cited by Salát 12.

⁹⁴ Art 11/A and Art 13/A of National Public Education Act as cited by Salát 12.

⁹⁵ Ordinance on the guidelines of kindergarten education of children with special needs, 32/2012. (X. 8.) EMMI rendelet as cited by Salát 12.

(footnote continued)

The law allows for “early development and care” outside of the system of regular kindergartens, presumably (but not explicitly) in cases where the expert committee does not advise the child to be taught together with “majority” children.⁹⁶

A similar system exists at the level of primary education as well, and the Committee decides whether a child is suited for the “majority” school. Special needs children thus in theory might all be sent to special, segregated schools. At the level of secondary education, two types of special school exist: “professional school” for those unable follow the regular school curriculum, and “skills development” school for middle intellectual disability and with the purpose of preparation for simpler manual tasks.⁹⁷

3. Netherlands

In the Netherlands, children exempted from school attendance duties for reasons of physical or psychological condition are not automatically provided with *any* other type of education or care. A government investigation has been launched to improve this state of affairs, by especially establishing a so far missing “right to learn” in the Dutch legal system.⁹⁸

Problematic as it is, most children with disabilities are not considered unsuitable for attending schools in the Netherlands. For them a so-called “tailored education” was introduced in 2014. The principle behind the legislation is that “each student who needs extra support will receive education within the general

⁹⁶ Art 8 para. (4) of the National Public Education Act as cited by Salát 12.

⁹⁷ Salát 13.

⁹⁸ [No author], ‘Vertrouwen in de toekomst: Regeerakkoord 2017-2021,’ p. 9

<<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2017/10/10/regeerakkoord-2017-vertouwen-in-de-toekomst/Regeerakkoord+%27Vertrouwen+in+de+toekomst%27.pdf>> accessed 27 November 2018 as cited by Henderson 14.

(footnote continued)

school system, to the extent this is possible. If such extra support cannot be provided within the general school system, the student can attend a specialized school (*speciaal onderwijs*) where this support can be offered.”⁹⁹ Thus, Dutch law, unlike for instance Hungarian, explicitly strives to grant inclusive education, but it still leaves open the possibility for specialized – segregated – schools for disabled pupils. Furthermore, the law establishes a complex system of institutional cooperation and duties on the schools, which among others, obliges the school to provide “effective accommodations”.¹⁰⁰ If however accommodation would pose an “unreasonable burden,” the school itself needs to seek out another school that the pupil can attend, although this may be a specialized school.¹⁰¹ In case of such non-acceptance, parents have a right to appeal to a body called “Dispute Committee Tailored Education” (although its decisions are not binding).¹⁰²

Similarly to other EU members, equal treatment of disabled students is mandated by legislation implementing the 2003 EU Directive on Equal Treatment in Employment and Occupation, and Dutch law specifically extends to discrimination based on disability or chronic illness in education.¹⁰³ The Act obliges all providers of goods and services (including education) to effectively accommodate persons with

⁹⁹ Henderson 16 referring to Huisman et al., *Basisboek onderwijsrecht: Een inleiding op de onderwijswet- en regelgeving in primair en voortgezet onderwijs* (The Hague, Sdu Publishers 2017) p. 170.

¹⁰⁰ Henderson 16.

¹⁰¹ Huisman et al., *Basisboek onderwijsrecht: Een inleiding op de onderwijswet- en regelgeving in primair en voortgezet onderwijs* (The Hague, Sdu Publishers 2017) p. 177 as cited by Henderson 16.

¹⁰² Huisman et al., *Basisboek onderwijsrecht: Een inleiding op de onderwijswet- en regelgeving in primair en voortgezet onderwijs* (The Hague, Sdu Publishers 2017) p. 173 as cited by Henderson 16.

¹⁰³ Henderson 17.

(footnote continued)

disabilities unless it represents an unreasonable burden.¹⁰⁴ The Netherlands Institute for Human Rights is the competent equality body to decide on such cases (again in a non-binding manner).¹⁰⁵

4. Portugal

The Portuguese legal system, similarly to others in the report, aims to integration or even inclusion of pupils with disabilities, but still maintains parallel to this a system of special schools. Art 74 of the Constitution obliges the state to promote “disabled citizens’ access to education and support... special education when necessary.”¹⁰⁶ Legislation also specifically aims at “the recovery and social-educational integration of individuals with specific educational needs due to physical and mental disabilities” and the integration of activities related to pupils, their families, teachers and their communities.¹⁰⁷ Integrated education is preferred, and thus special education is to be organized within regular schools “taking into account the needs of specific care, and with the support of specialized educators.”¹⁰⁸ However, Portuguese law also allows for segregated special education institutions “when it is proven necessary by the type and degree of the student's disability”.¹⁰⁹

¹⁰⁴ Huisman et al., Basisboek onderwijsrecht: Een inleiding op de onderwijswet- en regelgeving in primair en voortgezet onderwijs (The Hague, Sdu Publishers 2017) p. 185 as cited by Henderson 17.

¹⁰⁵ Henderson 17.

¹⁰⁶ Constitution of the Portuguese Republic Seventh Revision [2005] . as cited by Brito and Morris 16

¹⁰⁷ Art 17 of Law n°46/86 as cited by Brito and Morris 17.

¹⁰⁸ Art 18 of Law n°46/86 as cited by Brito and Morris 17.

¹⁰⁹ Art 18 of Law n°46/86 as cited by Brito and Morris 17.

(footnote continued)

Portuguese law is detailed and programmatic as to the accommodation of pupils with disabilities. It requires the curricula to be adapted to the type and degree of disability,¹¹⁰ and supports special education initiatives from any level of government, parents' and residents' and other civic or religious organizations, trade unions and even enterprises, while it reserves the competence to define the general norms of special education to the ministry.¹¹¹

Portuguese law is also very keen on providing equal opportunities for economically disadvantaged, by positive discrimination and by making various social welfare services (such as meals, canteen services, transport, accommodation, manuals and school materials and even scholarships) available in the school,¹¹² and specifically mandates school building to be designed in accordance with the special needs of pupils with disability.¹¹³

While Portuguese law specifically targets more obvious or severe cases of disability (such as deaf, blind and low vision students, autism spectrum disorders and multi-disability), less severe cases of disability are not specifically referred to in the law, and categories and notions of disability used in various laws and regulations are in general unclear.¹¹⁴

¹¹⁰ Law nº46/86, Article 18, 4 as cited by Brito and Morris 17.

¹¹¹ id

¹¹² Law nº46/86, Article 27, 2 as cited by Brito and Morris 17.

¹¹³ Law nº46/86, Article 39 (4) as cited by Brito and Morris 17.

¹¹⁴ Brito and Morris 17.

(footnote continued)

5. Turkey

As to children with disabilities in Turkey, there are statistics showing that only around one-third of them attends school¹¹⁵ and many of them are in special education.¹¹⁶

In contrast to these data, the law on persons with disabilities provides strong support for the right to education of children with disabilities. It spells out the possibility of lifelong education in an integrated setting, with necessary measures taken for inclusion, the operation of a counselling and coordination centre, and accessible teaching material.¹¹⁷

The concept of reasonable accommodation is also present in Turkish law, although from two different definitions. One of them is closer to the CRPD's understanding.¹¹⁸

Children with disabilities are assessed by counselling and research centres and placed in either public special education schools, in special education classes, in full-time inclusive/integration classes or in private special education institutions.¹¹⁹

¹¹⁵ Engelli ve Yaşlı Bireylere İlişkin İstatistik Bilgiler, Engelli ve Yaşlı Hizmetleri Genel Müdürlüğü, October 2018, p. 5 and ECSR, Conclusions 2016, Turkey, 2016/def/TUR/15/1/EN, Article 15-1, 09.12.2016. as cited by Karan 16.

¹¹⁶ CRC, Concluding observations of the Committee on the Rights of the Child, Turkey, CRC/C/TUR/CO/2-3, 20.07.2012, para. 50 as cited by Karan 16.

¹¹⁷ Law No. 5378 Art 15 as cited by Karan 16.

¹¹⁸ In Law No. 6701 the concept is defined as: "Proportional, necessary and appropriate modifications and measures which are required in particular situations within the boundaries of financial means in order to enable the persons with disabilities to exercise and enjoy rights and freedoms fully and equally as other individuals". In Art. 3/j of the Law on Persons with Disabilities uses "necessary and appropriate modifications and measures that do not place disproportionate or excessive burden" instead of "proportional, necessary and appropriate modifications and measures." See Karan 16.

¹¹⁹ Karan 17.

(footnote continued)

The realization of full inclusion is very far from reality in Turkey (also), but as the national report put it: “contrary to children belonging to minorities, the legal framework related [to children with disability] seems more inclusive and as a matter of fact enabling rather than restrictive.”¹²⁰

6. United Kingdom

Apart from general anti-discrimination provisions, there are specific rules for pupils with disabilities. Disability in schooling is seen by English law through the lens of special educational needs. The 2010 Equality Act gives a substantive disability definition which can be used by courts to assess discrimination claims, while the 2014 Children and Families Act defines disability with a view to direct processes of assessing and responding to special educational needs.¹²¹

The 1996 Education Act obliges local authorities to organize schooling that meets the needs of pupils with special educational needs, and authorizes “special schools”.¹²²

According to the 2010 Equality Act, a person has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.¹²³ A person discriminates against a disabled person if she treats her unfavourably because of something arising in consequence of her disability and cannot show that the treatment is a proportionate means of achieving a legitimate aim, except if the former did not know, and could not

¹²⁰ Karan 18.

¹²¹ Dupont 13.

¹²² EA 1996, Section 337 as cited by Dupont 13.

¹²³ Dupont 13.

(footnote continued)

reasonably be expected to know, that the person had the disability.¹²⁴ Similarly to other countries, English law also considers discrimination the failure to make reasonable accommodation (reasonable adjustments in the language of the law). Duties in this regard include physical accommodation, auxiliary aid, accessible information etc.¹²⁵

According to the Children and Families Act, special educational needs extend to learning difficulties and disability alike. Forms of support to be accorded on this basis might be a specialist teacher, access to a specialist teaching programme, specialist ICT equipment or a specialist job coach, and local authorities have the duty to identify those children in their care who may need such support. The law specifies the procedure in which the assessment is to be taking place, and strives to take into account the wishes of the parent or young person as to the designated educational institution where needs can be met. Another institution can be designated only if the needs would not be met in the desired school, or would be incompatible with the efficient education of others or efficient use of resources. For those reasons, a special school might also be designated.¹²⁶ If a child with special educational needs attends a regular school, the school is required to involve the child into the activities with other children, unless it is not “reasonably practicable”, meets the educational needs of the child, and does not “damage the education of others” or mean an “inefficient use of resources.” Clearly, these are rather indeterminate categories, and much depends on their interpretation. That explains why the law has introduced several institutional, procedural and informational guarantees such as a designated special education needs coordinator, mediation and appeal, and an active promotion of information of services available.¹²⁷

¹²⁴ Section 15(1) and (2) of the EA 2010 as cited by Dupont 13.

¹²⁵ For the exact subduties in this regard see Section 20 of the Equality Act 2010 or the description in Dupont 13.

¹²⁶ For the details, see Dupont 15-16.

¹²⁷ For the details see Dupont 18-20.

(footnote continued)

6) Religious and ethnic minorities, asylum-seekers and refugees in education – between recognition, segregation and invisibility

1. Austria

In Austria, asylum-seeking and refugee children fall under the general rules on compulsory education, and the district school is obliged to accept them if they stay in Austria permanently. A permanent stay means a wish to stay for at least one semester.¹²⁸ Those asylum-seekers who are in the initial phases of the procedure are entitled, but not obliged to attend school.¹²⁹ On the other hand, as asylum-seekers and refugees will likely not speak German sufficiently in order to follow the classes, they will be accepted as “extraordinary pupil” and attend language classes.

The duration of the language learning period is limited to one year extendable by another year should the child have not reached the sufficient level, but afterwards the child has to be admitted as an ordinary pupil, regardless whether language skills are sufficient to follow the class.¹³⁰

In 2016, in addition to existing programs, the language classes were extended to both primary and secondary schools for the period of 2016-19 due to the increased number of refugee children in the

¹²⁸ Bundesministerium für Bildung, Flüchtlingskinder und –jugendliche an österreichischen Schulen, Beilage zum Rundschreiben Nr. 15/2016 (BMB, 2016), 12 and Saskia Koppenberg, ‘Unaccompanied Minors in Austria, legislation, practices and statistics’ (EMN 2014), 64 as cited by Apostolowski and Möstl 18.

¹²⁹ Lisa Kogelnik, ‘Flüchtlingschule in Traiskirchen: Ein wenig Ruhe nach dem Sturm’, der Standard (Vienna, 25 September 2015) as cited by Apostolowski and Möstl 18.

¹³⁰ § 4 (3) School Teaching Act as cited by Apostolowski and Möstl, 19.

(footnote continued)

country.¹³¹ These take up eleven hours per week, and are either taught for “extraordinary pupils” at the time when “regular pupils” have their regular curriculum subjects, or in addition to those hours. Interestingly, “ordinary pupils” in vocational schools are also entitled to take part in such language classes but only for four hours.¹³²

In 2018, however, without going through the planned evaluation,¹³³ this system was changed again with the justification that it was insufficiently effective for reasons of underfunding, undersystematization, and especially that attendance was not mandatory.¹³⁴ The new system increased the hours of the German(-only) class to 15 hours if there were eight children in the school with insufficient level of German, while less than eight children are to be taught in the regular class and then taught German additionally for six hours per week.¹³⁵

¹³¹ Bundesministerium für Bildung, Wissenschaft und Forschung, ‘Deutschförderklassen und Deutschförderkurse’ <
https://bmbwf.gv.at/fileadmin/user_upload/Aussendung/BM_Fa%C3%9Fmann/Presseunterlage_Deutschf%C3%B6rderklasse_n.pdf> as cited by Apostolowski and Möstl 20.

¹³² Apostolowski and Möstl 20-21.

¹³³ Parlament, Erläuternde Bemerkungen, 107 der Beilagen XXVI. GP as cited by Apostolowski and Möstl 21.

¹³⁴ Apostolowski and Möstl 21, referring to Bundesministerium für Bildung, Wissenschaft und Forschung, ‘Deutschförderklassen und Deutschförderkurse’ <
https://bmbwf.gv.at/fileadmin/user_upload/Aussendung/BM_Fa%C3%9Fmann/Presseunterlage_Deutschf%C3%B6rderklasse_n.pdf> 2.

¹³⁵ 35. Bundesgesetz, mit dem das Schulorganisationsgesetz, das Land- und forstwirtschaftliche Bundesschulgesetz, das Schulunterrichtsgesetz und das Schulpflichtgesetz 1985 geändert werden, BGBl. I Nr. 35/2018 and 230. Verordnung des Bundesministers für Bildung, Wissenschaft und Forschung, mit der die Verordnung über die Lehrpläne der Volksschule und der Sonderschulen, die Verordnung der Lehrpläne der Neuen Mittelschule sowie die Verordnung der Lehrpläne für die allgemein bildenden höheren Schulen geändert werden as cited by Apostolowski and Möstl 22.

(footnote continued)

While this new system – applying to primary and secondary education -- remains controversial, it at least applies evenly to everyone without a sufficient level of German, and Austrian authorities make efforts to apply standardized tests and assessment. However, in one regard, Austrian education law disadvantages asylum-seekers over refugees: while everyone with a permanent status has to receive some sort of further education or training until 18 years of age after compulsory education, the former ones are not entitled to this for reasons of their residential status.¹³⁶

A further concern mentioned in the national report relates to the scope of application of the Equal Treatment Act.¹³⁷ While the Act (and analogous provincial acts) extend non-discrimination to the school context,¹³⁸ and applies to teachers and authorities, it does not cover relationship between pupils, “so factual discrimination between pupils does not fall within the area of applicability of the Equal Treatment Act.”¹³⁹

¹³⁶ Help.gv.at, ‘Ausbildungspflicht für Jugendliche bis 18’

(<https://www.help.gv.at/Portal.Node/hlpd/public/content/194/Seite.1940281.html>).

¹³⁷ Equal Treatment Act (Gleichbehandlungsgesetz) (AUT) as cited by Apostolowski and Möstl 24.

¹³⁸ Styrian Equal Treatment Act (Landes-Gleichbehandlungsgesetz) (AUT), as cited by Apostolowski and Möstl 24.

¹³⁹ Jisa, W., ‘Rechtsgutachten Überlegungen zum Diskriminierungsverbot aus ethnischen Gründen im Rahmen der schulischen (Aus)Bildung unter dem Aspekt des Gleichbehandlungsgesetzes’ <

https://www.bmgf.gv.at/cms/home/attachments/8/6/1/CH1609/CMS1467725713843/gbk_iii_ga_01.pdf> 7 et seq as cited by Apostolowski and Möstl 25.

(footnote continued)

2. Hungary

In Hungary, similarly, the Act on Equal Treatment and Equality of Opportunities¹⁴⁰ applies in the education context as well. Despite this fact, segregation in public schools have always been widespread in Hungary, although for lack of large immigrant communities, it is more pronounced in the case of Roma, and that was examined by the national report.

While public schools are under a clear prohibition of segregation, segregated schools have been the subject of successful litigation in numerous cases.¹⁴¹

Furthermore, the Act specifically exempts religious schools and nationality schools from the prohibition on segregation. According to the ombudsman and much litigation and literature, both of these contribute to the segregation of Roma children with all the resulting weak educational performance.

The Ombudsman found already in 2012 that the system of Roma nationality education contributed to low quality education for the Roma.¹⁴² More recently, a foundation tested the exception from segregation granted to churches.¹⁴³ In 2007, a public school was closed because it was segregated. In 2011, however, a school was opened in the same place, but this time operated by a church. Lower courts found that Roma families did not have the opportunity to properly consent to the segregated education, which is required

¹⁴⁰ Act CXXV of 2003 as cited by Salát 10.

¹⁴¹ See 40.P.23.675/2015/84, ordering the desegregation of 28 schools (at the initiative of CFC).

http://cfcf.hu/sites/default/files/23675-2015-84-!%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20_.pdf as cited by Salát 16.

¹⁴² See The report of the ombudsman on nationality education, AJB-3894/2012, as cited by Salát 10.

¹⁴³ Judgment of the Curia, Pfv.IV.20.241/2015/4, 22 April 2015 as cited by Salát 16.

(footnote continued)

for the exemption to apply, but their findings were overturned by the highest ordinary court,¹⁴⁴ and the Constitutional Court considers such cases inadmissible in the constitutional complaint procedure.¹⁴⁵

Unlike the Hungarian Constitutional Court, the European Court of Human Rights (ECtHR) spelled out that racial segregation violated the Convention in one of the most commented case with regard to Hungary, *Horváth and Kiss*.¹⁴⁶ The case is especially interesting for the purposes of the ETHOS project because disability rights NGOs objected that ‘the present judgement creates the impression that a segregated special education system is justifiable or even adequate for children with a disability, a system which clearly violates provisions of the CRPD.’¹⁴⁷ The case notably involved an instance of wide-spread practice of sending Roma children to special schools, and the Court -- at least according to the criticism -- underemphasized the fact that segregated education is not only problematic for racial minorities, but also for children with disability. This seems to have been rectified in later ECtHR jurisprudence.¹⁴⁸

3. Netherlands

In the Netherlands, a fundamental feature of the school system is the state funding of both public authority and religious or philosophically based schools (called special schools in contrast to specialized

¹⁴⁴ See Adél Kegye, „Áldott szegregáció”, *Fundamentum*, 2015/1, 75, <http://fundamentum.hu/sites/default/files/15-1-07.pdf> as cited by Salát 16.

¹⁴⁵ Decision on inadmissibility, IV/3311-9/2012., of 17 June 2013 as cited by Salát 16.

¹⁴⁶ *Horváth and Kiss v Hungary*, Application no. [11146/11](#) judgment of 29 January 2013, see in this regard also D3.3. 64-65.

¹⁴⁷ Challenging Discrimination at the Expense of Equality, 14 February 2013, Joint statement by [Inclusion International](#), [Inclusion Europe](#) and the [Mental Disability Advocacy Center](#).

<http://www.mdac.info/en/14/02/2013/challenging-discrimination-expense-promoting-equality>

¹⁴⁸ *Cam v Turkey*, see D3.3. 65.

(footnote continued)

schools mentioned above in relation to disability). This “dual system” resulting from the “school struggle” means that religious minorities have the possibility to attend religious schools, if such schools exist. The Dutch Supreme Court requires that such special schools be based on ‘a fundamental orientation, derived from a well-defined religious conviction or life philosophy.’¹⁴⁹ The Educational Council, on the other hand, requires also that the religion or life philosophy be “socially visible”, which appears to make state recognition dependent on social recognition in a rather problematic way. Buddhism for instance was not considered sufficiently visible in Dutch society in 2012 in order for it be authorized to found a school.¹⁵⁰

As to refugees and asylum seekers, the Dutch school system is inclusive in its legal framework: until 18 years of age, everybody has a right to attend school, even undocumented residents.¹⁵¹ However, adult non-Dutch citizens who do not have legal residence, including persons whose asylum request was denied, are not entitled to attend school, except if they started school before they turned 18.¹⁵² This now includes – as a result of litigation --- the possibility of doing an internship, if internship is a mandatory requirement for the degree.¹⁵³

¹⁴⁹ Supreme Court (Hoge Raad), 6 July 2010, ECLI:NL:HR:2010:BL6719 as cited by Henderson (n 25) 9.

¹⁵⁰ Education Council (Onderwijsraad), ‘Artikel 23 Grondwet in maatschappelijk perspectief: Nieuwe richtingen aan de vrijheid van onderwijs’ April 2012, p. 11. as cited by Henderson (n 25) 9.

¹⁵¹ Article 10(2) of the Foreigners Act (Vreemdelingenwet 2000) as cited by Henderson 17.

¹⁵² See Higher Education and Academic Research Act (Wet op het hoger onderwijs en wetenschappelijk onderzoek) Article 7.32(5)(e) and Education and Vocational Education Act (Wet educatie en beroepsonderwijs) Article 8.1.1(1)(d) as cited by Henderson 17.

¹⁵³ Henderson 17.

(footnote continued)

4. Portugal

In Portugal, ethnic minorities are not specifically recognized.¹⁵⁴ On the other hand, the constitution, laws, and regulations widely and repeatedly emphasize the importance of equal opportunities to all, and that applies to migrants and ethnic minorities (and it is likely the only constitution in the world that obliges the state to ensure that “that emigrants’ children are taught the Portuguese language and enjoy access to Portuguese culture;”¹⁵⁵). The constitution also ensures that “immigrants’ children receive adequate support in order to enable them to effectively enjoy the right to education.”¹⁵⁶

Specifically regarding ethnic minorities, the national report mentions two government measures. The earlier one is from 1991 establishing a Coordinating Secretariat of the Multicultural Educational Programs. The aim of this secretariat is coordinating efforts of the ministry of education relating to multicultural projects, such as “involving children of East Timorese, Cape Verdean and Roma and with children of Portuguese speakers residing in other countries.”¹⁵⁷

The second mentioned measure regarding education and ethnic minorities in Portugal is the National Strategy for Roma Integration at the call of the European Union in 2013.¹⁵⁸

¹⁵⁴ Brito and Morris 8.

¹⁵⁵ Art 74 (2)i Portuguese Constitution <http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf>

¹⁵⁶ Art 74 (2) j) of the Portuguese Constitution as cited by Brito and Morris 16.

¹⁵⁷ Despacho Normativo no. 63/91 1991. and Law nº63/91 de 18/2 DR. Nº60 I Série-B, de 13/3/91 as cited by Brito and Morris 17.

¹⁵⁸ Decreto-Lei n.º 51/2013 2013. As cited by Brito and Morris 17.

(footnote continued)

As to religious education and indirectly, religious minorities, Portuguese education law spells out that a ban on the State to issue “philosophical, aesthetic, political, ideological or religious guidelines in respect to public education and culture”; a ban on confessional public schooling, but allows in parallel the establishment of “private and cooperative schools” which can be religiously or otherwise committed.¹⁵⁹

5. Turkey

As to ethnic minorities, the Turkish framework is highly problematic: the 1923 Lausanne Peace treaty is the exclusive source of minority rights in the law. That treaty however only applies to Greek Orthodox Christians, Armenian Orthodox Christians and Jews (non-Muslim or “Lausanne-minorities”),¹⁶⁰ and thus leaves out a lot of minority religious groups like Alevis or non-recognized non-Muslim minorities living in the country.¹⁶¹ This narrow interpretation hinders the exercise of the right to education for them.¹⁶² The national report found in particular four aspects of this hindrances, relating to language, to the institutional context, to curriculum in general, and religious education in particular.

As to language, the Turkish system does not take into account the fact that many minority children do not speak Turkish when they enter primary education. Public schools do not have – and are even barred¹⁶³ – to teach in languages other than Turkish, except for Lausanne minorities who can receive education in

¹⁵⁹ Basic Law of the Educational System, Law n°46/86 as cited by Brito and Morris 8.

¹⁶⁰ Karan 2.

¹⁶¹ id

¹⁶² CRC, Concluding observations of the Committee on the Rights of the Child, Turkey, CRC/C/15/Add.152, 09.07.2001, para 10 as cited by Karan 2.

¹⁶³ According to Art. 42 of the Constitution of the Republic of Turkey, “no language other than Turkish can be taught and taught as a mother tongue to Turkish citizens in education and training institutions.” Cited by Karan 11.

(footnote continued)

their mother tongue. The other minorities are left with private language courses, elective courses in schools from age 10, or private schools providing education in mother tongue. However, the establishment of such private schools shall be determined by the President, and currently there are no such schools except for the Lausanne minorities.¹⁶⁴

As to schools itself, the situation is similar. The Lausanne Treaty provides for a right of non-Muslim minorities “[...]to establish, manage and control at their own expense, any charitable, religious and social institutions, any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion freely therein.” This is translated in the law as considering minority schools only the ones established by Greek Orthodox Christians, Armenian and Jewish minorities. Thus, again, non-Lausanne minorities are left out, with the exception of a single school for Arameans (Syriacs) in Istanbul following a 2013 court decision.¹⁶⁵ Furthermore, as mentioned, the entire school regime only applies to citizens, leaving non-citizens (regular or irregular migrants) in principle with no access to education.¹⁶⁶

In addition to the lacunae in the school structure, the curriculum is centralized in terms of textbooks approved in Ankara which cannot be changed. Although the syllabus can be changed by the individual teacher, it rarely happens for reasons of lack of training of the teachers.¹⁶⁷ The central curriculum is guided by a homogenizing aim of forming individuals to “adopting, protecting and developing the national, moral, humanitarian, spiritual and cultural values of the Turkish Nation; loving his/her family, homeland, nation

¹⁶⁴ Karan 11-12-

¹⁶⁵ Kaya, *Discrimination in the Turkish Education System*, p. 32, as cited by Karan 12.

¹⁶⁶ Law No. 5580 as cited by Karan 13.

¹⁶⁷ Kaya, *Forgetting or Assimilation?: Minorities in Turkey’s Education System*, p. 10 as cited by Karan 13.

(footnote continued)

and always trying to glorify them.”¹⁶⁸ Furthermore, schoolbooks do not convey information about minorities, or their history, ethnic and religious minorities are simply ignored, and the schoolbooks present “concepts such as citizenship, patriotism/nationalism and national values not within a universal/general framework but ethnically through Turkishness and religiously through Islam.”¹⁶⁹

Notably, with regard to religious education, the situation borders on the absurd from a human rights perspective. There are mandatory “religious culture and ethics classes” for everyone in every type of school. These classes are predominantly about Sunni Islam, and exemptions can only be granted to non-Muslim pupils and provided that the pupil discloses their religion. Neither non-Sunni Muslim, nor atheists can be exempted, and the classes – although not the curriculum – include the observance of Muslim rituals. These were of course found to violate Art 9 of ECHR by the ECtHR.¹⁷⁰

The national report cites the ECRI’s poignant criticism which is worth repeating here as well: “several sources have described these courses as instruction in the principles of the Muslim faith rather than a course covering several religious cultures. ECRI notes that only Muslim pupils are required to follow these courses, while pupils belonging to minority religious groups can be exempted. ECRI considers the situation unclear: if this is indeed a course on the different religious cultures, there is no reason to make it compulsory for Muslim children alone. Conversely, if the course is essentially designed to teach the

¹⁶⁸ Art. 2 of the Basic Law on National Education (Law No. 1737 as cited by Karan 13.

¹⁶⁹ Kenan Çayır, ‘Biz’ Kimiz?: Ders Kitaplarında Kimlik, Yurttaşlık, Haklar, Ders Kitaplarında İnsan Hakları III Projesi: Tarama Sonuçları (Who are ‘We’?: Identity, Citizenship, and Rights in Course Books - Human Rights in Course Books III Project, Research Results), History Foundation, Istanbul, 2014, p. 25 as cited by Karan 13.

¹⁷⁰ ECtHR, Hasan and Eylem Zengin v. Turkey, Appl. No. 1448/04, 09.10.2007; Mansur Yalçın and Others v. Turkey as cited by Karan 14.

(footnote continued)

Muslim religion, it is a course on a specific religion and should not be compulsory, in order to preserve children's and their parents' religious freedom.”¹⁷¹

Elective courses on religion also relate to Islam, especially that all elective courses are approved by the Ministry, thus they can easily become mandatory.¹⁷² Furthermore, religious education in private schools is also not free: as the Turkish Constitutional Court stated: “the state has a monopoly on the establishment of religious education-teaching institutions on the one hand and on the determination of compulsory and elective courses related to religious education and education in schools on the other hand.”¹⁷³

6. United Kingdom

In the United Kingdom, the 2010 Equality Act extends non-discrimination to the grounds of race, religion and belief, but regulates the former differently than the latter. In the case of religion, a series of exceptions and exemptions are present in order to preserve the autonomy of religious organizations, but at the same time limiting the claims of persons discriminated against.¹⁷⁴ Many maintained schools, i.e. public schools financed by the state and local authorities are religiously committed schools.

Considerations familiar from freedom of expression doctrine – for instance that ethnicity is immutable, while religion is a moral and intellectual endeavour -- and from the particular state church model employed in England might also be at play explaining these differences. Even if so, the exemption from harassment and the exemption from the duty to secure diversity with regard to religion and belief¹⁷⁵ are

¹⁷¹ ECRI, 3rd Report on Turkey, CRI(2005)5, 2005, para. 68 as cited by Karan 14.

¹⁷² Kaya, Discrimination in the Turkish Education System, p. 56 as cited by Karan 14.

¹⁷³ TCC, E. 2012/65, K. 2012/128, 20.09.2012 as cited by Karan 14.

¹⁷⁴ Dupont 20.

¹⁷⁵ Section 85(10)(b) of the EA 2010 and Schedule 3 para 6 of the Equality Act 2010 as cited by Dupont 20.

(footnote continued)

surprising to a continental reader. Similarly problematic appears the exemption of local authorities from not committing religious discrimination with regard to the curriculum, and not only in religiously committed schools. In general, faith-based admissions criteria are allowed in oversubscribed schools with a religious character,¹⁷⁶ which is a recipe for excluding religious or ethnic minorities (eg in Hungary, but even there the school is at least partially financed by the Church). Maybe that is why the legislator obliges newly established religiously committed schools to allocate at least half of their places without taking religious considerations into account.¹⁷⁷

Similarly to Turkey, religious education is mandatory in all state-funded schools in England.¹⁷⁸ The difference is that an act of collective worship on each school day is legally mandatory in England¹⁷⁹ while it is legally prohibited, but technically practiced in Turkey as discussed above. English law however grants exemptions from this duty in a less coercive and more plausible way, and the curriculum of religious classes are to mirror all religious traditions in the UK, even if this will mean proportionately way more emphasis on Christian religions than on others.¹⁸⁰

On the other hand, the Education Act does mandate some sort of accommodation for religious minorities or atheists, for instance, “attendance at a place of worship” cannot be required of pupils in a maintained school.¹⁸¹ Sex education has to be designed in a way that shields pupils from inappropriate material with regard to their religious and cultural background,¹⁸² even though this seems to be contrary to ECtHR interpretation. Further far reaching adjustments are required by law regarding transport¹⁸³ and out-of-school accommodation.¹⁸⁴

¹⁷⁶ Dupont 21.

¹⁷⁷ Department for Education (2014), School Admissions Code, 11, 16 as cited by Dupont 21.

¹⁷⁸ EA 2002, Section 80 as cited by Dupont 21.

¹⁷⁹ SSFA 1998, Section 70.

¹⁸⁰ SSFA 1998, Schedule 19 para 2(1)(2); EA 1996, Section 375 as cited by Dupont 21. The law again is detailed in procedural and institutional matters, and the regulation is decentralized. For the details see Dupont 21-23.

¹⁸¹ EA 1996, Section 398 as cited by Dupont 23.

¹⁸² EA 1996, Section 403 as cited by Dupont 23.

¹⁸³ EA 1996, Section 509AD as cited by Dupont 23.

¹⁸⁴ EA 1996, Section 514 as cited by Dupont 23.

7) Conclusion: conceptions of (in)justice

The right to education of minorities strongly differs in the examined countries in its theory, outset, structure, deficiencies, and actual impact. This report, just as the national reports, focused on the former questions, and left the actual realization to other, more empirical work packages in the project, as is the case with most research in work package 3, looking at the legal frameworks.

However, the law itself speaks volumes, and it also speaks through silences and omissions. A comparative inquiry is particularly apt to show lacunae and prejudices which might not be visible from the internal domestic perspective, therefore this deliverable is best read together with the national reports.

As was discussed in the introduction, the right to education is a multifaceted, and for that reason, ambiguous right, especially that it is – for the most part which affects minorities – also a duty for reason of the system of compulsory education. It is in this setting that every examined legal system approaches the right to education, but the emphases between rights and duties are radically different, depending on views on the role of parents-children and the state in education, the political regime (democracy or autocracy), the role of religion and the model of state-church relations, openness to international and European human rights law, and not least the particular fears and past injustices education policy seeks to calm or rectify.

As to children with disabilities, no system examined here fully realizes inclusive education or even sees it possible for everyone. All countries maintain the possibility of sending pupils with disability into segregated education, although the trends are different. Austria seems to undertake more legally than it can or is willing to perform in terms of finances, personnel and infrastructure, at least in the given time frame. The Netherlands and the UK report were the only ones which have not mentioned a serious lack of funding and expert personnel. While the Hungarian government(s) might have not found recognition and participation of persons with disabilities important, in Portugal the reason for cuts is austerity measures imposed after the crisis. Turkey, where most disabled students receive either no or segregated education, is aspiring to create a welcoming and inclusive legislative and regulatory framework. Still, the constitutional provision does not show concerns for recognition, but aspires “rehabilitation” for the disabled for the sake of enhancing their usefulness to society. Here therefore one can observe differing, even contrary conceptions of justice being present in different layers of the law: the constitutional

conception considers disability in strictly utilitarian terms and from the perspective of the society, while lower level norms in fact aim towards recognizing equal membership of persons with disabilities in society. The United Kingdom is interesting first of all for its tensions between providing as much liberty of choice to parents as possible, but still living up for justice concerns arising out of (“inadvertent”) segregation. The chosen solution seems to be strong intervention at the formal statistical level -- for instance in the duty that all levels of ability are to be represented in a given admitted class of pupils --, but if that is fulfilled, the choice is maximum. Nonetheless, the national report notes that the situation in the UK causes injustice by the parallel recent processes of marketization and centralization,¹⁸⁵ which thus might seriously weaken efforts to recognition. Furthermore, mandatory religious education and every day acts of collective worship would be considered severe violations of freedom of religion – and, thus, would mean a disregard for cognitive interests -- in other countries examined in this report. The UK however follows a state church model, although a reasonably soft one for it allows exemptions.¹⁸⁶ Still, non-Christian pupils’ full membership and recognition are hardly promoted by such a system.

The Netherlands comes close to the UK in terms of parental liberty granted, but it appears less segregation-inducing, at least in terms of ethnic minorities. As to religion, the Netherlands appears to follow a cooperationist model as a result of the school struggle, and while the system might work without severe injustices or coercive features, the criterion of “social visibility” required for a religion to be entitled to establish a school is hardly proof of cognitive concerns. State recognition made dependent on social recognition structurally disfavours minorities.

Hungarian law is contradictory in that it is centralized in terms of curriculum and organization, but also grants a specific right to freedom to choose a school. The regulation of public schools is formally egalitarian, although the practice is far from what is required by law. Anti-segregation litigation regarding general public schools is thus regularly needed in Hungary, but that does not solve the issue of segregation

¹⁸⁵ Dupont 29-30.

¹⁸⁶ For more details, see András Sajó and Renáta Uitz, ‘Freedom of Religion’ in Michel Rosenfeld and András Sajó eds, *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 909-930.

outsourced to schools maintained by the churches, the problem of segregation in “nationality schools”, and the middle class flight to private and church schools. The legal framework does not discourage these latter processes, and facilitates the former ones. Therefore, both maldistribution and malrecognition are manifest in Hungary.

Turkey is the most centralized, to the point of leaving almost no choice with minorities other than the Lausanne-minorities, and subjecting the entire education curriculum under strong state control. In this way, and exceptionally among the examined countries, the Turkish system demonstrates particularly strongly that redistribution without recognition, compulsory education without respecting freedom of conscience will not result in equal opportunities, but gets close to domination and oppression.

Portugal in theory has a legal system most open to justice concerns of both the redistributive and recognitive sort, but puts more emphasis on redistribution regarding ethnic minorities, and more emphasis on recognition regarding persons with disabilities. Shortcomings in Portugal appear to arise not so much from the legal framework, but from undercompliance for financial reasons, i.e. from a typical tradeoff between recognition and redistribution.

No country appears to institutionally treat the problem of residential segregation and resulting inequalities in the quality of education. Unequal access to quality education is at the same time a recognition and a redistribution problem, although equal access to quality education would in itself not entirely eliminate the Fraserian “redistribution-recognition”¹⁸⁷ dilemma either.

¹⁸⁷ See Knijn et al (n 5) 6-9.