



Right to education – national report for Hungary

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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.

QUESTIONNAIRE FOR CASE STUDY D3.6 (RIGHT TO EDUCATION)

PRACTICAL INSTRUCTIONS AND METHODOLOGICAL ISSUES FOR ALL CASE STUDIES.

The research for this particular deliverable consists primarily in what is known as ‘black-letter’, doctrinal legal research. We are focussed on ‘what the law says’ (the ‘law in books’), and how it is interpreted by those with interpretative authorities (essentially courts) and *not* whether it is applied (or not) in practice, or the kind of impact it has on society. The aim of analysis is to map out how justice is institutionalized in law, through a focus on selected rights/vulnerable groups.

The focus of the research is on hard law, that is legally binding norms (Constitution, legislations, regulations, decrees, authoritative court decisions, etc.), but to the extent that soft law instruments are relevant and influential in guiding practices, it would be important to include them in the review.

Although the focus is on substantive rights, procedural and institutional aspects matters, in particular in terms of understanding who can mobilise law and rights, when and how, in order to pursue justice claims. Therefore, information on ‘admissibility issues’ such as standing rights, judicial procedures and remedies, costs, etc is important. Moreover, any empirical information on who has actively sought to mobilize particular legal instruments in order to achieve justice (eg NGOs particular active in litigating certain rights, etc) is welcome.

To minimise unnecessary research work and focus efforts on looking for information not readily available in English, ‘national rapporteurs’ are encouraged to identify and exploit existing studies, reports, and other synthetic analyses and critical assessments on their country’s performance in relation to the selected right and the selected vulnerable groups or persons, which help address (some of) the questions, as much as possible, appropriately referencing them. Examples include: opinions of the Venice Commission; reports by the EU Fundamental Rights Agency, the European Committee on Social Rights; documents produced in the context of the Universal Period Review (UN Human Rights Council); Country and shadow reports in the context of the CRC, CESCR and CRPD, UN Special Rapporteurs reports; OSCE recommendations; NGOs reports, etc.

Where these do not provide for relevant or up-to-date answers, please try to identify relevant legal rules using legal textbooks and available legal databases/search tools.

Please follow the structure of the questionnaire for the presentation of national report, to make it easier for the task coordinators to understand the relevance of the findings and prepare the national report. Use cross-referencing between answers only when necessary, to avoid undue repetitions.

We do not impose a very strict time frame. The focus should however be on the recent period, and in particular the period starting with the economic and financial crisis (2008-2018), but if there were changes that were particularly significant and important prior to that, please mention them and provide some details.

Please provide lists of references, including a separate bibliography, list of legislation and list of cases (these will be integrated into a database). Use the [OSCOLA](#) reference style.

Special note on Turkey and EU law: As Turkey is not an EU member state, it is not bound by its law. However, in section of the report dedicated to EU law, the rapporteur for Turkey could provide information on whether Turkey has transposed/implemented in domestic law some of the EU instruments and legislation as part of the *acquis communautaire*, in the view of accession or within the context of special EU-Turkey agreements.

Not all country reports are required to focus on all groups of vulnerable persons. All country teams are to focus on the position of the disabled vis-à-vis all three rights (to vote, housing and education). In addition, there is a focus on one additional vulnerable group that is especially relevant (in terms of its vulnerability) for the particular right concerned (to housing, voting and education) in the particular country. This approach allows for a combination of data that is comparative and detailed while giving adequate attention for country-specific manifestations of (in)justice in the law. Collectively, the country reports will need to research each vulnerable group listed in the description of work for each right, so the choice over which vulnerable group to research additionally to disabled persons is not a free choice. Please check with the coordinators if you are unsure which additional vulnerable group you ought to focus on for each right. Please disregard parts of questions that are tailored to a vulnerable group that you are not researching for any particular right.

D3.6. RIGHT TO EDUCATION (CHILDREN WITH DISABILITIES, CHILDREN FROM MINORITY BACKGROUND AND THIRD COUNTRY NATIONALS, REFUGEES, ASYLUM SEEKERS AND UNDOCUMENTED CHILDREN)

This report focuses on the right to free/public/subsidized primary and secondary education and inclusive education.

Indicative list of relevant resources:

- United-Nations, Universal Period Review on right to vote for your country: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>
- United-Nations Human Rights Committee, Concluding Observations on your latest country report: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>
- United-Nations Committee on Economic and Social Rights, concluding observation on your last country report: <https://www.ohchr.org/EN/HRBodies/CESCR/pages/cescrindex.aspx>
- United-Nations Committee on the Rights of the Child, last country report: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>
- Committee on the Rights of People with Disabilities, Concluding Observations on your latest country report: <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>
- Committee on elimination of racial discrimination, latest country report: <https://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx>
- Council of Europe, Committee of Ministers' report on the execution of rulings: <https://www.coe.int/en/web/execution>
- European Court of Human Rights, case law database: https://www.echr.coe.int/Pages/home.aspx?p=caselaw&c=#n14597620384884950241259_pointer
- European Committee on Social Rights, latest country report: <https://www.coe.int/en/web/turin-european-social-charter/european-committee-of-social-rights>
- EU Fundamental Rights Agency, Current migration situation in the EU: education: <http://fra.europa.eu/en/publication/2017/current-migration-situation-eu-education>

- EU Fundamental Rights Agency, Education: The situation of Roma in 11 member states, <http://fra.europa.eu/en/publication/2014/education-situation-roma-11-eu-member-states>
- EU Fundamental Rights Agency, The situation of Roma citizens moving and settling in other member states, <http://fra.europa.eu/en/publication/2010/situation-roma-eu-citizens-moving-and-settling-other-eu-member-states>
- EU Fundamental Rights Agency, Together in the EU - Promoting the participation of migrants and their descendants, report: <http://fra.europa.eu/en/publication/2017/migrant-participation>

1. NATIONAL LEGAL FRAMEWORK

1.1 CONSTITUTIONAL PROTECTION

Does *national constitutional law protect the right to education* and if so, in which terms (as elaborated through judicial interpretation, where relevant). Are there any corresponding state obligations imposed under national constitutional law? If not protected under national constitutional law, which national legal framework (if any) affords protection to the right to education?

The FL has a general equal treatment and antidiscrimination clause which is worth citing here verbatim, since it provides the basis for segregation:

Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity.

(2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, *disability*, language, religion, political or other opinion, national or social origin, property, birth or any other status.

(3) Women and men shall have equal rights.

(4)¹ By means of separate measures, Hungary shall help to achieve equality of opportunity and social inclusion.

(5)² By means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities.

At least, that is the official translation provided by the Government. However, in the original, para. 4 does not refer to befogadás (inclusion), but felzárkózás, which means something like “closing up”, defined from the perspective of what those in need are supposed to do, not the majority. The majority is willing to help, but expects everyone to progress to the level of the majority, and if they do not manage, it is their fault. This language was introduced by the infamous 4th Amendment to the Fundamental Law of Hungary because the government wished to legalize segregated education, especially with regard to Roma children.³ In 2013, then minister responsible for education testified in court that he believes in benevolent or charitable segregation.⁴

On the other hand, according to the FL, every Hungarian citizen has a right to education, primary public education is free and mandatory, secondary education is free and accessible to all (Art XI FL).

Article XI

(1) Every Hungarian citizen shall have the right to education.

(2) Hungary shall ensure this right by extending and generalising public education, by providing free and compulsory primary education, free and generally accessible secondary education, and higher education

¹ Amended by Article 21(1)e) of the Fourth Amendment to the Fundamental Law (25 March 2013)

² Amended by Article 21(1)f) of the Fourth Amendment to the Fundamental Law (25 March 2013).

³ <https://hclu.hu/en/articles/hungarian-government-creates-the-legal-framework-for-segregating-roma-children-in-schools-1>

⁴ https://index.hu/belfold/2013/04/26/balog_a_szeretetteli_szegregacioban_bizik/

accessible to everyone according to his or her abilities, and by providing financial support as provided for by an Act to those receiving education.

(3) An Act may provide that financial support of higher education studies shall be subject to participation for a specific period in employment or to performing entrepreneurial activities for a specific period, regulated by Hungarian law.

The right to education is protected in the Fundamental Law only as a citizen's right, somewhat in tension with Art. 13 of the International Covenant on Economic, Social, and Cultural Rights.

1.2 NATIONAL LEGAL FRAMEWORK

Please summarise the *national legal framework* regulating access to public/free/subsidized primary and secondary education. As school places may come in short supply, please pay attention to any kind of eligibility or priority criteria (eg residence in the district, performance, etc)

Do national legal rules provide for/allow for inclusive education, special accommodation, etc?

There is no explicitly granted right to free choice of school in the FL, but the Act on Public Education⁵ states such a right: according to Art 72 (2), the parent shall – according to the capacities, interest and needs of the child – freely choose kindergarten, primary school and secondary school (from age 14 with the consent of the child, unless the child is incompetent).⁶

On the other hand, the Law on National Public Education does oblige the school to accept all pupils from the district of the school,⁷ and even requires that school districts⁷ be established

⁵ Act CXC of 2011.

⁶ It is, for some disabled minors, who are subjected to guardianship for reasons of their limited mental capacity.

⁷ Art 50 (6) of Act CXC of 2011 on national public education.

in a way that a “balanced proportion of disadvantaged pupils can be established,”⁸ the parents are not obliged to register their children in that particular school.

The freedom to choose a school is considered to be the weirdest general element of the Hungarian educational scene by scholars.⁹ Notably, according to near scholarly consensus, this right distorts the system and in fact allows for parents with high interest promotion potential to put their children into good schools, while leaving behind exactly the more vulnerable children in schools which necessarily become “bad” in the process, whether or not they had been “bad” before. Ironically, the FIDESZ-introduced overhaul of the educational system has not eliminated this right, even though the main justification for extreme centralization of the theretofore relatively decentralized system was to create more egalitarian and balanced schooling.

While the resulting inequalities affect first of all Roma children and children from vulnerable social strata, children living with disabilities are largely part of the second group, and thus suffer from the built-in distortions in any case.

The Law on National Public Education

While segregation is prohibited in the Act on Equal Treatment and Equality of Opportunities,¹⁰ it does exempt religious schools and nationality schools from the prohibition on segregation, and both of these contribute to the segregation of Roma children with all the resulting weak educational performance.¹¹

⁸ Id.

⁹ Eg KERTESI GÁBOR – KÉZDI GÁBOR, *Iskolai szegregáció, szabad iskolaválasztás és helyi oktatáspolitikai 100 magyar városban*, BUDAPESTI MUNKAGAZDASÁGTANI FÜZETEK, BWP – 2014/6, <http://real.mtak.hu/15371/1/bwp1406.pdf>.

¹⁰ Act CXXV of 2003.

¹¹ See eg the report of the ombudsman, AJB-3894/2012, <http://www.ajbh.hu/documents/10180/1117870/K%C3%B6z%C3%B6s+jelent%C3%A9s+a+nemz>

Pupils with disabilities are also prone to discrimination “on their own right” as well: Hungarian legislation – in accordance with the FL’s true wording – does not make inclusion of pupils with disabilities mandatory or even an aspiration, but institutes a complicated system which results in almost half of pupils with disability in segregated education (often in living homes or dormitory type “colleges” during the week) or even not receiving much institutional education, but staying at home. Thus, while the language (for the international audience) claims inclusion, the legal system in fact does not even aspire to integration of all children with disabilities, and maintains a mixed system of segregation and integration.

At the level of kindergarten (compulsory from age 3), children with special needs ought to be integrated “to majority kindergarten” in theory, unless an Expert Committee specialized in such matters considers the child cannot be properly educated in kindergarten.

The law on national public education obliges the kindergarten to provide special education for special needs children for 11 hours a week (Art. 8 (3)). This is a weirdly across-the-board solution, since it does not take into account the actual number and needs of special needs children in a given institution. In theory, already, it might therefore happen that in one kindergarten, 11 hours are spent on a single special needs child, while in another, 11 hours are spent on 20 special needs children (the size of kindergartens and the number of kindergarteners within an institution widely diverge in the country).

Art 8 para. (4) on the other hand seems to nullify even this weird rule: it simply states that the compulsory kindergarten education can also be fulfilled in “early development and care”. This is segregated special education, and children with more severe or hard to accommodate disabilities (eg physical disability) are directed to there.

What does not figure in the law at all, is the category of kindergartens where only special needs children are educated, even though it is a widespread practice. These kindergartens will

etis%C3%A9gi+k%C3%B6z%C3%A9piskolai+oktat%C3%A1s+helyzet%C3%A9r%C5%91l+3894_2012/a8f0b7a5-718f-44a0-b3d7-fe335490703f;jsessionid=6E2DF5F784609C76E20B436C1D832E00?version=1.0

have the concentrated expertise to “develop” children with special needs, an expertise which is usually not affordable if only a few of the children would need it.

What is also not in the law, but in lower level ordinances and instructions, is the specialization of kindergartens regarding special needs. Even there, it is rather implied. For instance, the ordinance on the guidelines of kindergarten education of children with special needs¹² does not spell out specifically the possibility of integrated and segregated education. It only says that integrated education of special needs children in the majority kindergarten requires individualized decision – based on the opinion of the expert committee – in every case depending on the needs of the child.¹³

In fact, this might mean the potential of the kindergarten: for instance, in a district, there might be one designated kindergarten accepting children with diabetes, another with respiratory diseases and so on. Then depending on the need in question, groups might be segregated (ie only children with asthma are accepted into one group, and children without asthma are put in other groups), which is explicable again first of all with scarcity of resources.¹⁴

At the level of primary education, the Act on National Public Education applies a similar system as in the case of kindergartens. Again, it is in the hands of the Expert Committee to decide whether a pupil can be taught together with majority students, and again, most schools are not equipped either physically or by human resources to include children with special needs (although some do). Children who go to segregated special education kindergarten will go to the same type of primary school from age 6 (or 7) to 14.

¹² 32/2012. (X. 8.) EMMI rendelet (guidelines on special needs education in kindergarten and primary education).

¹³ Id. 1.2.

¹⁴ For instance, access to salt room.

At the level of secondary education, the Act on National Public Education¹⁵ specifically allows for separate high schools in two formats: the so-called “professional school”¹⁶ is designed for those special needs children who – due to their special needs – cannot follow the regular school curriculum, and the so-called “skills development” school¹⁷ for persons with middle

¹⁵ It is not in fact education, but a word which is normally translated as upbringing, and has a much broader meaning than education, perhaps closest to a Rousseauian view. It was changed from education proper in the pre-2010 law, which was based on a view that upbringing belongs to parents, not to the state. Also, naturally, the „national” in the title was added by the Fidesz-regime, too, as in many other laws and names of institutions.

16 11/A. * SZAKISKOLA

13/A. § * (1) A SAJÁTOS NEVELÉSI IGÉNYŰ TANULÓK ISKOLAI NEVELÉS-OKTATÁSA CÉLJÁBÓL A SZAKISKOLA A TÖBBI TANULÓVAL SAJÁTOS NEVELÉSI IGÉNYE MIATT EGYÜTTHALADÁSRA KÉPTELEN TANULÓKAT KÉSZÍTI FEL SZAKMAI VIZSGÁRA.

(2) A szakiskolában az Országos Képzési Jegyzékben meghatározott szakképesítések körében - a sajátos nevelési igény jellegétől függően - a szakképzési kerettanterv vagy a speciális kerettanterv szerint folyhat szakképzés. A közismereti oktatás a szakiskolában a sajátos nevelési igény jellegéhez igazodó közismereti kerettanterv alapján folyik. A szakmai vizsgára történő felkészítésre vonatkozó további rendelkezéseket a szakképzésről szóló törvény határozza meg.

(3) A szakiskolában az évfolyamok száma a speciális kerettanterv szerint meghatározott.

(4) * A szakiskolában a nevelés-oktatás az enyhe értelmi fogyatékos tanulók előkészítő évfolyama kivételével szakképzési évfolyamokon folyik.

17 11/B. * KÉSZSÉGFEJLESZTŐ ISKOLA

13/B. § * (1) A készségfejlesztő iskola a középsúlyos értelmi fogyatékos tanulók részére biztosítja az életkezdéshez való felkészülést, a munkába állást lehetővé tevő egyszerű betanulást igénylő munkafolyamatok elsajátítását, továbbá a szakképzésben részt venni nem tudó enyhe értelmi fogyatékos tanulók számára nyújt a munkába álláshoz és az életkezdéshez szükséges ismereteket.

(2) A készségfejlesztő iskolának négy évfolyama van, amelyből

level intellectual disability, where they receive education enabling them to perform simpler manual tasks.

Finally, there are also so called Bridge Programs: the Public Education Bridge Program and the Vocational Training Bridge Program.¹⁸ Although it is not exactly clear from the law what their target audience are, these are programs to help those who have not completed elementary school to still enter further education.

Compulsory school age has recently been decreased to 16 years, for children with special needs compulsory education can be prolonged till age 23,¹⁹ but this is probably a provision which has tax or other benefit relevance rather than actual education.

1.3. SPECIAL RULES TARGETING SELECTED GROUP

Are there any *specific rules targeting our selected groups* (children with disabilities, children from minority background and third country nationals, 'ethnic and religious minorities, persons with disabilities, refugees, asylum seekers and undocumented migrants) with regard

a) kettő közismereti képzést folytató évfolyam,

b) kettő, az életkezdéshez való felkészülést, a munkába állást lehetővé tevő egyszerű betanulást igénylő munkafolyamatok elsajátítását célzó gyakorlati jellegű évfolyam (a továbbiakban: gyakorlati évfolyam).

(3) A közismereti oktatás a készségfejlesztő iskolában a sajátos nevelési igény jellegéhez igazodó közismereti kerettanterv alapján folyik. A készségfejlesztő iskola gyakorlati évfolyamainak képzése a készségfejlesztő kerettantervek szerint meghatározott.

(4) A készségfejlesztő iskola sikeresen teljesített gyakorlati évfolyamai eltérő készségfejlesztő kerettantervek szerinti oktatással megismételhetők.

¹⁸ Act on National Public Education, Art 14.

¹⁹ Art 15?

to access to public/free/subsidized primary and secondary education, and in matters of inclusive education? Do they provide for integrated education? Do they provide/require education in special schools or institutions? Do they allow for special accommodation in free/public/subsidized primary and secondary education? (prayer time, food requirements, exemptions from religious classes, mixed sport activities, etc). Do national rules require that the curriculum recognise the participation of selected vulnerable groups in society (eg history of the former colonies, pictures and course materials reflecting social, religious and ethnic composition of the society, etc.).

Churches can operate schools at all level of education according to the Act on Public Education, and nationality education is also allowed.

The Ombudsman found in 2012 (before government plans about benevolent segregation came to limelight) that the Roma nationality education quite clearly correlates with the weak school results.²⁰

In a major litigation, the Chance for Children Foundation (CFCF) tested the exception granted to churches for segregation and lost²¹. The National Public Education Act allows religious education to be exempted from the ban on segregation. In Nyíregyháza, a school was closed in 2007 because it was a segregated school – but in 2011, it was reopened as a school maintained by the Greek Catholic Church. Lower courts considered that the conditions for the exemption (voluntary, equal quality, etc) were not met, but the Curia overturned their decision²².

²⁰ Az alapvető jogok biztosa és a Magyarországon élő nemzetiségek jogainak védelmét ellátó biztoshelyettes jelentése a nemzetiségi középiskolai oktatás helyzetéről, AJB-3894/2012

²¹ Judgment of the Curia, Pfv.IV.20.241/2015/4, 22 April 2015.

²² See Adél Kegye, „Áldott szegregáció”, *Fundamentum*, 2015/1, 75,
<http://fundamentum.hu/sites/default/files/15-1-07.pdf>

1.4 CONSTITUTIONAL CHALLENGES

Have national rules on access to free/public/subsidized primary education and inclusion/institutionalization/segregation been challenged for incompatibility with national constitutional norms? If so, which ones, and with what effect? [If information is easily accessible, can you also indicate who were the parties challenging those rules? Have certain national rules contested by societal actors but not challenged before courts?]

There have been no constitutional challenges in school segregation cases, for procedural reasons. Ordinary courts have ruled in several cases segregated schools illegal²³ and in one case even provided financial compensation²⁴. These cases are mostly litigated by the Chance for Children Foundation, and are based on the Equal Treatment Act's public interest litigation procedure (Art 20 (1) c) of Act Nr CXXV of 2003), i.e. the party litigating is the Foundation only, and not the pupils or their parents. The Constitutional Court, however, in such cases do not find the conditions for constitutional complaint fulfilled.²⁵

²³ Most recently eg in the massive case handed down by the Metropolitan Tribunal, 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-I%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20_.pdf , but there are also cases which have gone up all to the Curia (Supreme Court), eg http://cfcf.hu/sites/default/files/Gypata_Kuria.pdf.

²⁴ News eg here <https://abcug.hu/pert-nyertek-a-gyongyospatan-szegregaltan-oktatott-romak/> 16 October 2018.

²⁵ Decision on inadmissibility, IV/3311-9/2012., of 17 June 2013.

In general, the Constitutional Court never decided a case, and interestingly, never pronounced racial discrimination in its jurisprudence at all in a country where racial discrimination is widespread.²⁶

The ombudsman is the most active from among the constitutional actors regarding educational opportunities of especially disabled pupils, since it is a NHRI for the purposes of the CRPD, but perhaps for other reasons as well. The ombudsman finds that children with severe and cumulative disabilities are the most segregated or even fully excluded at all levels of education. A report of the ombudsman, which was completed in June 2017 at the initiative of the Hungarian Civil Liberties Union, and for which the ombudsman consulted at length basically all stakeholders, found severe problems with access to education of this most vulnerable group.²⁷ The ombudsman relies extensively on Art 24 of the CRPD and General Comment Nr 4 on the Right to Inclusive Education,²⁸ and explains in detail what would follow from Hungary's international obligations.

Interestingly, the ombudsman does not mention the problematic ("closing up") part of the text of the Fundamental Law – which, as discussed above, does not refer to inclusion, and as such, could in theory be a basis for a different interpretation, which is contrary to international law. Nonetheless, the ombudsman also relies on (other) constitutional arguments, established case law of the (old) Constitutional Court on equal treatment, including the derived enhanced or special protection and concern for the rights of persons with disabilities; and on the 1998 act on the rights of disabled persons and the guarantee of their equality of chance.²⁹ This latter act grants equal access to education as a public service, including access to buildings, requires

²⁶ Kriszta Kovács, „Equality: The Missing Link” in Constitution for a Disunited Nation (ed. Gábor Attila Tóth, CEU Press, 2012) , 177-180.

²⁷ AJB 1672/2017.

²⁸ General Comment Nr 4 (2016).

²⁹ Act XXVI of 1998.

the inclusion of organizations of persons with disability into the process of adoption of a public education plan which should effectuate their right to access, etc.

The ombudsman found that the current system of public education is problematic in its various dimensions. There is a discrepancy between the Act on National Public Education and the Disability Act in that the former does not include disability organizations into planning and decisionmaking processes affecting access to education, which also violates Art 4 CRPD.³⁰ The National Public Education Act does not include in its list of special needs children those with severe and cumulative disabilities, and therefore it is unclear if they at all belong within this category.³¹

Furthermore, the law does not specify that the Expert Committee has to have members with expertise in the actual disability they are deciding about, and there is no diagnostic protocol which the committee can follow.³² According to professional estimates, the whole disability assessment process lacks at least 50% special education experts.³³

These contribute to the very strong suspicion that the Expert Committee does not assess the children according to their true disability and needs, but according to the available care and education places in the area. This way, the child might get at least some education, instead of none, which both parents and experts consider a better solution in the circumstances.³⁴

This both reacts to and contributes to the underdevelopment of the entire institutional network of disability education, which is not based on actual data (even scholars in the field can only give estimates about how many severely disabled children are in Hungary who would in theory be entitled to access to education). That the entire Expert Committee system lacks

³⁰ A/B 1672/2017., 43.

³¹ Id 45.

³² Id 46-47.

³³ Id

³⁴ Id 48.

the material-institutional preconditions of its proper operation was considered not simply a constitutional or human rights problem, but a severe one by the ombudsman.³⁵

In a similar vein, as the law allows for in home education if the Committee finds it better, and as there is in the majority of cases, simply no free place in any of the proper educational institutions (the segregated, but still functional ones), the Committee and the parents often agree that it is better to suggest in home education. This way, the child receives 6-8 hours education per week, which is more than zero, but significantly less than 20 hours which is what children with disability receive in segregated special education schools -- which is however also significantly less than what "majority" children receive (from 25 hours at age 6 till around 35 hours at age 16).³⁶

2. IMPACT OF INTERNATIONAL AND EUROPEAN LAW

2.1 CHALLENGES TO NATIONAL RULES BASED ON INTERNATIONAL INSTRUMENTS

Have national rules on access to free primary and secondary education been challenged by reference to *reference to international instruments* (notably the ICESR, CRPD, CRC, CAT, Refugee Convention, etc). If so, with what effect?

Have international monitoring bodies (HRC, CESR, CRC, CAT, CERD) adopted opinions/decision on the compatibility of those rules with international law? Did it produce any effect on national law? Please refer to background paper (Deliverable 3.3), section **Error! Reference source not found.** for relevant information.

As to racial segregation, it is not so much the rules, but the practices which have been regularly in the focus of international monitoring.

As to pupils with disability, the CRPD lists as issues prior to reporting the following, and requires the government to "explain in detail how the State party is working towards providing

³⁵ Id 48.

³⁶ Id at 55.

quality inclusive education at all levels of the education system with a view to fully replacing all forms of special education with inclusive education. In particular, please provide information about effective measures to: (a) ensure that an adequate level of funding is made available to provide reasonable accommodation to children with disabilities on the basis of the student's individual requirements, including with regards to school transportation; (b) provide students with disabilities with required support within the general education system, including with a view to ensuring that they do not leave school earlier than their peers without disability; (c) ensure the full inclusion of Roma children with disabilities into the mainstream education system; and (d) continue training teachers and all other educational staff to enable them to work in inclusive educational settings. Please inform the Committee about measures to implement targets 4.5 and 4 (a) of the Sustainable Development Goals.”³⁷

The government, in its responses, does not express an aim of fully replacing all forms of special education with inclusive education, but mentions data according to which in the case of mild disabilities, integrated education is increasing.³⁸

There was no education-related complaint at the CRPD.

2.2 CHALLENGES TO NATIONAL RULES BASED ON EUROPEAN (COUNCIL OF EUROPE) INSTRUMENTS?

Have national rules on access to free primary and secondary education and inclusive/institutionalized/segregated education been challenged by reference to Council of Europe's law, in particular Article 2 Protocol 1 ECHR, Article 7, 9-10, 15 and 17 of the RESC, the ECRML (notably Article 8), the FCPNM (Article 12 and 13).

Have any cases concerning on access to free primary and secondary education and inclusive/institutionalized/segregated education taken to/decided upon by the ECtHR? With what effect? Was national law adjusted to comply with the ECtHR decision(s)?

³⁷ Point 28 related to Art 24 CRPD, CRPD/C/HUN/QPR/2-3.

³⁸ See replies 208-210 in **2nd and 3rd Periodic Report on Hungary regarding the Convention on The Rights of Persons with Disabilities, CRPD/C/HUN/2-3.**

Has the Committee on Economic and Social Rights issued decision against your country for non compliance with the RESC? Was national law adjusted to conform to the RESC? Please refer to background paper (Deliverable 3.3), section 5 subsection: **Error! Reference source not found.** for relevant information.

The Committee's Conclusions object to the fact of segregated education of Roma³⁹ and the insufficient access of pupils with disability to education,⁴⁰ and consider that the situation in Hungary is not in conformity with Arts 15 and 17 of the RESC.

Not rules, but practices were challenged in *Horváth and Kiss v Hungary* at the ECtHR (see D3.3.).

A recent case concerning the monopolisation of the school textbook distribution market was not about the right to education, but about the right to property, and there are no news that the state wishes to change its stance.⁴¹

2.3 CHALLENGES TO NATIONAL RULES BASED ON EU LAW

Has EU law, in particular the EU Charter (Articles 14 and 24, and also 16), EU free movement of workers and EU citizenship rules, EU immigration and refugee law, EU non-discrimination law, EU internal market, competition and state aid law, EMU law, the European Pillar of Social Rights or relevant EU soft law), been invoked in domestic courts to challenge national rules concerning access to free primary and secondary education and inclusive/institutionalized/segregated education?

Has the EU Commission launched enforcement actions against your state for violation by national rules concerning access to free primary and secondary education and

³⁹ Conclusions 2015 to Art 17 (2) RESC <http://hudoc.esc.coe.int/eng/?i=2015/def/HUN/17/2/EN>

⁴⁰ Conclusions 2016 to Art 15 (1) RESC <http://hudoc.esc.coe.int/eng/?i=2016/def/HUN/15/1/EN>

⁴¹ *Könyv-Tár Kft and Others v. Hungary* (application no. 21623/13), judgment of 16 October 2018.

inclusive/institutionalized/segregated education? Did the Commission take your state to the CJEU? Was national law adjusted to comply?

Have they been referrals to the CJEU, and decisions, related to a violation of EU law by your member state's rules regarding access to free primary and secondary education and inclusive/institutionalized/segregated education? If yes, where they follow by any effect? Please refer to background paper (Deliverable 3.3), section 6) subsection **Error! Reference source not found.** for relevant information.

The Commission launched infringement proceedings claiming segregation of Roma children violate the racial equality directive, and sent a letter of formal notice to the Hungarian government in May 2016:⁴²

“The European Commission is requesting **Hungary** to ensure that Roma children enjoy access to quality education on the same terms as all other children and urges the government to bring its national laws on equal treatment as well as on education and the practical implementation of its educational policies into line with the Racial Equality Directive (Council Directive 2000/43/EC). This Directive prohibits discrimination on grounds of racial or ethnic origin in education. The Commission has a number of concerns in relation to both Hungarian legislation and administrative practices which lead to the result that Roma children are disproportionately over-represented in special schools for mentally disabled children and also subject to a considerable degree of segregated education in mainstream schools. The aim of the Commission's action is to ensure for Roma children an equal access to education which is a determining factor for employment opportunities and thus an indispensable component of working towards full Roma inclusion. The Commission has sent letters of formal notice to two other Member States, the Czech Republic and Slovakia, in relation to similar issues in the recent past. If Hungary fails to reply in a satisfactory manner within two months, the Commission may send to the Hungarian authorities a reasoned opinion.”⁴³ It was not possible

⁴² http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm

⁴³ Id, point 5.

to find whether the reasoned opinion has since been sent, even though two months have passed a long time ago.

3. RIGHT TO EDUCATION, JUSTICE AS RECOGNITION AND VULNERABILITY

3.1 RIGHT TO EDUCATION AND JUSTICE AS RECOGNITION

When reviewing the national legal framework and, where relevant, references to International and European norms, could you identify arguments engaging different conceptions of justice as recognition. Please specify whether these were part of court's reasoning or parties' arguments, and if the later, provide any relevant information that could help evaluate who mobilized the law to achieve greater justice (eg NGOs, etc.). Please refer to background paper (Deliverable 3.3), section 2) subsection **Error! Reference source not found.** for relevant information.

The right to access to education is not very easily categorizable in terms of justice conception. Surely a mainstream redistributive justice conception would do more to recognize the dignity of disabled persons through education than the current one. If there is any conception of recognitive justice recognizable here, it is the recognition of the non-responsibility for medical conditions. The Hungarian system, as historically and traditionally in accordance with modernist and "hard scientific" views of vulgar Marxism of the state socialist era, still has many traces of the development enthusiasm. It is the square opposite of "recognition of difference" or respect for diversity. Persons with disability are to be corrected, and only then to be included. On the other hand, this view is mixed with the problems of redistribution and the passivity of the general public: it is random, i.e. left to individual chance and circumstances, who gets the good service, because a general sense of poverty – we cannot afford proper inclusive institutions – permeates public sentiment, and the government can afford not to be bothered, since this is not an issue around which majorities will mobilize.

On the other hand, the segregation of Roma children apparently meets the wishes of the non-Roma majority, since it is them who take their children out of district schools or move away from Roma-populated areas if they are able to do so. Thus, here the state should fight majority

prejudices and proactively promote the integration of children of ethnic minority background. The state in the constitution expresses the view that segregation is not always bad, and while it has not directly implemented it in the law, the government (or at least the previous influential minister on human resources, including education) has promoted and welcome segregated church schools. It appears that this is not so much a conception of recognitive justice, but more a conception based on the idea that first ethnic minorities (practically, the Roma) need to be developed separately, and if and when they are developed enough, they can be integrated into the majority society (and workplace). On the other hand, non-Roma nationality schools also contribute to increased segregation as they provide better education than ordinary public schools, typically for the elite (see above the Ombudsman's report on this).

3.2 RIGHT TO EDUCATION AND VULNERABILITY

Does the concept of vulnerability play a role in the context of the right to education? Please explain how, and provide some representative illustrations. Please refer to background paper (Deliverable 3.3), section 2) subsection **Error! Reference source not found.** for relevant information.

As to ethnic minorities: vulnerability is less frequently used than the notion of disadvantage, since that is the traditional ("colour-blind") language of Hungarian law, also for reasons that ethnic data cannot be gathered and stored.

As to disabled pupils: As the ombudsman points out, the problem with the general approach of the Hungarian educational system is that persons with disability should receive a so-called development care-education, not inclusive education. This is problematic, since it is closer to a medical model of disability, and often results not only in segregation (separate educational institutions for the disabled, often very far from their family, with expensive and time consuming travel, whereby parents might end up putting their children into home facilities), but in fact exclusion from any education (in home care, no contact with other, not even only disabled, children, total isolation, with a fragment of time spent on education).

What is more, the Hungarian system does not even live up to the medical model: it is extremely underfinanced and understaffed, where the number of conductors, special education therapists, caretakers, medical personnel etc would need at least to be doubled even if we only wanted to follow the minimalistic medical model.