İSTANBUL ÜNİVERSİTESİ YAYINEVİ

İstanbul Hukuk Mecmuası, 83 (1), 417-462

DOI: 10.26650/mecmua.2025.83.1.0014
https://dergipark.org.tr/pub/ihm
http://mecmua.istanbul.edu.tr/tr/_

İstanbul Hukuk Mecmuası

Submitted: 14.10.2024
Accepted: 24.02.2025

ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

"Discrimination Against Children" in the Light of Landmark Decisions of the European Court of Human Rights and the US Supreme Court

Peri Uran Murphy

Abstract

One of the most significant and convoluted issues regarding the international protection of human rights is the right to non-discrimination. Discrimination, which can be defined as less favourable treatment in a narrow sense, undoubtedly poses a threat to various social groups in society; however, it is particularly a threat to children, as they are disadvantaged in terms of the power structure of society and are more vulnerable than adults due to their age-related necessities. A violation of rights during childhood can lead to much more serious and even irreparable consequences than a violation of rights experienced during adulthood, because it prevents or delays the flow of developmental opportunities during this period. Children who cannot influence decision-makers due to their inability to vote and who cannot assert their rights due to limited rights of participation and association face significant difficulties in expressing their experiences. In light of these facts, States have a great responsibility to ensure that a child whose rights have been violated due to discrimination based on ethnic background, disability, age, birth, other grounds such as religion, language, etc., can claim their rights, to compensate for the damage caused by the violation, and to prevent the recurrence of similar violations.

Keywords

Discrimination, Children's Rights, Discrimination Against Children, ECtHR Landmark Decisions, US Supreme Court Landmark Decisions

Avrupa İnsan Hakları Mahkemesi ve ABD Yüksek Mahkemesi'nin Önemli Kararları Işığında 'Çocuklara Yönelik Ayrımcılık'

Öz

İnsan haklarının uluslararası korunmasına ilişkin en önemli ve bir o kadar da karmaşık konulardan biri ayrımcılığa uğramama hakkıdır. En dar anlamıyla daha dezavantajlı muamele olarak tanımlanabilecek olan ayrımcılık, şüphesiz toplumdaki çeşitli sosyal gruplara yönelik bir tehdit oluşturmakta; ancak toplumun güç yapısı açısından avantajlı olmadıkları ve yaşa bağlı gereksinimleri nedeniyle yetişkinlere göre daha savunmasız oldukları için özellikle çocuklar için bir tehdit oluşturmaktadır. Çocukluk döneminde yaşanan bir hak ihlali, bu dönemdeki gelişim fırsatlarının akışını engellediği veya geciktirdiği için, yetişkinlik döneminde yaşanan bir hak ihlalinden çok daha zor, hatta telafisi imkansız sonuçlar doğurabilmektedir. Oy kullanamadıkları için karar vericileri etkileme konusunda etkisiz kalan, katılım ve örgütlenme hakları sınırlı olduğu için haklarını arayamayan çocuklar, deneyimlerini ifade etmekte önemli sorunlarla karşılaşmaktadır. Bu hususlar karşısında etnik köken, engellilik, yaş, doğum ve din, dil gibi diğer temellere dayalı ayrımcılık nedeniyle hakları ihlal edilen bir çocuğun haklarını arayabilmesini sağlamak, ihlalin yol açtığı zararı tazmin etmek ve benzer ihlallerin tekrarlanmasını önlemek için devletlere büyük sorumluluk düşmektedir.

Anahtar Kelimeler

Ayrımcılık, Çocuk Hakları, Çocuklara Yönelik Ayrımcılık, AİHM'nin Önemli Kararları, ABD Yüksek Mahkemesi'nin Önemli Kararları

* **Corresponding Author:** Peri Uran Murphy (Doç. Dr. / Visiting Prof. Dr.), Trinity College Dublin's School of Law & TriCON; Legal Consultant, World Council of Peoples for the United Nations, New York, Amerika Birleşik Devletleri. E-posta: URANMURP@tcd.ie ORCID: 0000-0002-8039-3814

To cite this article: Uran Murphy P, "Avrupa İnsan Hakları Mahkemesi ve ABD Yüksek Mahkemesi'nin Önemli Kararları Işığında 'Çocuklara Yönelik Ayrımcılık' (2025). İstanbul Hukuk Mecmuası 417. https://doi.org/10.26650/mecmua.2025.83.1.00xx

This work is licensed under Creative Commons Attribution-NonCommercial 4.0 International License

Extended Summary

This paper first examines discrimination as a concept in general, defining its components and classifications as direct discrimination, indirect discrimination, positive discrimination, multiple (intersectional) discrimination, compound discrimination, structural discrimination. After emphasising that human rights cannot be understood only as adult rights and that every individual has human rights regardless of age, discrimination against children and international instruments that guarantee their rights against discrimination are evaluated in detail. In this context, the major international human rights conventions in which children are protected by anti-discrimination provisions are highlighted. In particular, the Convention on the Rights of the Child (CRC) is analysed as the most widely accepted and rapidly ratified international human rights treaty in history. The significance of the CRC as a unique international instrument that ensures children's rights, protects them from all forms of discrimination, imposes obligations on States to respect and fulfil the rights set out in the CRC is emphasised.

In the rest of this paper, discrimination against children on multiple grounds is discussed in a comparative perspective, in light of the various landmark decisions of the European Court of Human Rights and the US Supreme Court, to understand the approaches of these two judicial authorities in protecting children against discrimination. In the United States, where children's rights are not directly regulated in the US Constitution and the Convention on the Rights of the Child has not been ratified by the US Government, the US jurisprudence of the Supreme Court has significantly contributed to the recognition of children's rights. On the other hand, the European Court of Human Rights has been instrumental in promoting access to remedies for children in relation to their right to be free from discrimination. Article 14 of the European Convention on Human Rights provides for the prohibition of discrimination and ensures that the full exercise of the rights set out in the Convention without discrimination based on any factor. The Convention does not define the child; however, Article 1 of the Convention requires State Parties to guarantee the rights mentioned in the Convention to "*everyone*" under their authority. The European Court of Human Rights has adopted this approach in its judgement and has accepted the definition of the "*child*" of the UN Convention on the Rights of the Child (CRC). The European Court of Human Rights has recognised the significance of the CRC and has often referred to it in its rulings.

Both the European Court of Human Rights and the US Supreme Court have an extensive body of case law on discrimination against children, particularly based on ethnic background, disability, age, birth, other grounds as religion and language. In the light of these monumental decisions it is analysed how these Courts interpret and address the discrimination issues, whether they take into account the "best interests

of the child" when deciding cases related to discrimination against children, whether these Courts are receptive to achieve a beneficial outcome for a disadvantaged group, and finally, whether these Courts have adapted the interpretation of rights provisions to constantly evolving circumstances and situations when interpreting these provisions, in other words, whether these Courts have interpreted the instruments such as the US Constitution and the European Convention on Human Rights as living documents or not. Finally, in conclusion, evaluations are provided in line with the formulation and jurisprudence of both Courts on landmark cases of discrimination against children.

I. An Overview of the Concept of Discrimination

Discrimination, in its broadest sense, can be understood as treating similar people differently on the grounds that they are perceived as members of a marginalised or disadvantaged group. The most widely quoted definition of discrimination is that of the UN Human Rights Committee, defines the concept as '*any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*'.[1] In every aspect of society, including politics, education, employment, social or medical services, housing, the criminal justice system, law enforcement, discrimination can affect the way individuals are treated[2] and it occurs mainly on the grounds of race, gender, ethnicity, religion, disability, age, and minority status.[3]

Discrimination can be openly practised as "direct discrimination" which is defined as intentional discrimination against an individual or group. In this case, an individual or group is deliberately placed in a less favourable position and denied equal rights because of certain characteristics. In this respect, direct discrimination occurs, for instance, when a school refuses to admit a child from a particular ethnic group, or when a person is denied a job because of his/her disability or is treated unfairly because of his/her race. On the other hand, "indirect discrimination" occurs when a policy is applied equally to all, but unfairly affects some individuals. In other words, indirect discrimination focuses on a policy that appears to be impartial but in fact, consistently disadvantages members of a particular group compared to others. In summary, indirect discrimination occurs when a policy or rule is the same for all individuals but adversely affects some individuals due to protected characteristics such as disability, age, race, ethnicity, and religion.[4] For example, a fire department that imposes a minimum height requirement for firefighters will immediately disqualify several female and male applicants. A retail store that does not employ anyone wearing a hijab will immediately disqualify a large number of applications from women of a particular religion. Similarly, the requirement of a birth certificate

[1] The UN Human Rights Committee, 'General Comment 18: Non-discrimination*'* (10. 11. 1989) <https://ECtHR.refworld.org/legal/general/hrc/1989/en/6268> parag 7, Date of Access January 16, 2024.

[2] UN Office of The High Commissioner for Human Rights in Cooperation with The International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Chapter 13: The Rights to Equality and Non-Discrimination in the Administration of Justice* (Professional Training Series No. 9, New York and Geneva, 2003) 636.

[3] UN Human Rights Office of The High Commissioner, 'Gender Discrimination, Racial Discrimination and Women's Human Rights*'* (29 September 2017) <https://ECtHR.ohchr.org/en/stories/2017/09/gender-discrimination-racial-discrimination-and-womens-human-rights> Date of Access January 16, 2024.

[4] Colin Campbell and Dale Smith, 'Distinguishing Between Direct and Indirect Discrimination' (2022) 86(2) The Modern Law Review 307-330.

for school enrolment may discriminate against non-citizens or individuals of a particular ethnic origin without such documentation.[5]

As a form of discrimination, "positive discrimination" refers to the deliberate favouring of a particular group of people who have historically and consistently faced discrimination and is enshrined in the constitutions of many countries to fight discrimination. The purpose of positive discrimination is to ensure equality for disadvantaged individuals and groups.[6] Giving preferential treatment to individuals with protected characteristics such as age, gender, race, disability, etc., rather than their qualifications, is considered positive discrimination. For instance, setting aside a specific quota for women in parliament ensures that women are represented in parliaments. Similarly, promoting an ineligible worker who is significantly older than the other workers can be considered an example of positive discrimination.

It is a well-known fact that discrimination against an individual or a group is usually not based on a single factor alone, but it occurs in relation to different factors, such as gender, disability, age and ethnicity. This situation, known as "multiple or intersectional discrimination", magnifies the negative effects.[7] For example, a man may be gypsy, a gypsy man may be gay, a gay man may be blind, a blind man may be old; but if this man is gypsy, gay, blind, old at the same time, he may be subject to extremely complex categories of discrimination.

When several grounds of discrimination come together to create an additional burden in one particular situation, it is known as "compound discrimination". In other words, compound discrimination occurs when more than two types of discrimination exist in a given situation. Discrimination based on one ground intensifies discrimination based on another. For example, certain jobs may be seen as primarily for men, and only some may be specifically for immigrants. In such cases, compound discrimination significantly reduces the chances of an immigrant woman finding a job that matches her qualifications.[8] Multi-discrimination can be characterised as a multifaceted social problem that requires constant attention, especially for vulnerable groups such as children.

---

5 UN Committee on Economic, Social and Cultural Rights (CESCR), 'General comment No. 20: Non-discrimination in economic, social and cultural rights, Article 2, parag 2 of the International Covenant on Economic, Social and Cultural Rights)' (02. 07. 2009) <https://ECtHR.refworld.org/legal/general/cescr/2009/en/68520> parag 10/b, Date of Access January 18, 2024.

6 Elisabeth Strasser, August Gächter and Mariya Dzhengozova, 'International Centre for Migration Policy Development (ICMPD)- On behalf of the European Union Agency for Fundamental Rights (FRA): The 'Benefits of Positive Action' (Venice, 2008) 6 <https://fra.europa.eu/sites/default/files/fra_uploads/220FRA_thematicpaper_positiveaction_ICMPD_en.pdf.> Date of Access January 18, 2024.
Positive discrimination relates to policies that legitimise the application of measures that explicitly consider an individual's group status in determining the allocation of jobs, contracts and university admissions, etc., to help those groups that are disadvantaged and have suffered historically suffered from discrimination. See, Daniel Disalvo and James W. Ceaser, 'Affirmative Action and Positive Discrimination' (2004) 25 (1) The Tocqueville Review 77.

7 Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore* (Finland: Åbo Akademi University Institute for Human Rights 2002) 9.

8 European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.4, *Tackling Multiple Discrimination Practices, Policies and Laws* (EU Publications 2007) 16-17.

"Structural discrimination" is used to describe intentional or unintentional institutional discrimination against individuals with a particular protected characteristic, such as race, social class, gender. It occurs when the norms of a society's major institutions consistently produce disproportionately adverse consequences for individuals belonging to certain social groups or classes and these consequences are unfair.[9] An example of structural discrimination would be the fact that Indian women, especially those who carry out their duties of fetching water in public areas, are subjected to various forms of harassment and violations of their rights, including rape, by those from higher castes. In this case, these women are positioned to bear the brunt of caste discrimination because of their gendered responsibilities. Structural discrimination is also defined as a form of structural violence that can take the extreme form of genocide.[10]

Since the 1950s, the significance of the principle of non-discrimination has been recognised in major international human rights instruments.[11] Provisions on the interrelated human rights of non-discrimination and its positive effect, equality, have been included in these human rights conventions. Non-discrimination laws require that people in similar situations should be treated similarly and that different groups should be treated differently.[12] This means that individuals in similar situations should be treated similarly, but they should not be subjected to less favourable treatment simply because they have a particular protected characteristic. Individuals in different situations should be treated differently only to the extent necessary to enable them to benefit from certain opportunities in the same way as other individuals.

II. Discrimination Against Children and International Instruments Ensuring Their Rights Against Discrimination

Increasing recognition of children's rights has questioned the traditional conception of children as "*becoming or mini-adults*", and has been steadily changing the perception of children as "*social actors, rights-holders, competent beings and*

9 Elisabeth Veronika Henn, *International Human Rights Law and Structural Discrimination: The Example of Violence Against Women* (Heidelberg: Springer 2019) 1.

10 Manfred Liebel, 'Adultism and Age-Based Discrimination Against Children' in Dagmar Kutsar and Hanne Warming (eds), Children and Non-Discrimination Interdisciplinary Textbook (University Press of Estonia 2014) 120.

11 The Universal Declaration of Human Rights (Art.1, 2, 7), UN Covenant on Civil and Political Rights (Art. 2, 14, 15, 24, 26), The International Covenant on Economic, Social and Cultural Rights (Art. 2/2), The European Convention on Human Rights (Art. 14), Protocol 12 to the European Convention on Human Rights (Art. 1), Convention on the Rights of the Child (Art. 2), the Convention on the Elimination of All Forms of Discrimination Against Women (Art. 2, 3, 4, 15), the UN Convention on the Elimination of All Forms of Racial Discrimination (Art. 1, 2, 4, 5), ILO Convention No 111 (Art. 1, 2, 3, 4, 5) the Convention on the Rights of Persons with Disabilities (Art. 3, 5, 7, 12), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

12 European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-discrimination Law* (Luxembourg: Publications Office of the European Union 2018) 42.

capable agents".[13] Human rights cannot be understood only as the rights of adults. Every individual has human rights, regardless of age. The conception that children are "*mini human beings with mini human rights*",[14] implying that children have either no rights or limited rights, is incompatible with contemporary human rights discourse. The Universal Declaration of Human Rights sets out this approach: "*All human beings are born free and equal in dignity and rights*" (Art. 1). Given that children are more vulnerable and dependent due to their age-related needs, authorities are required to be more conscientious in protecting their rights, and all children should be able to enjoy these rights without facing any form of discrimination.

There is no doubt that discrimination poses a threat to different social groups. However, discrimination against children is a particular threat because they are not advantaged in terms of the power structure of society and are more vulnerable than adults. In addition to the reasons that lead to discriminatory treatment of adults, children may also be discriminated against due to conditions related to education and discipline, being born out of wedlock, being under state protection, or being orphans. Avoiding and protecting children from discrimination is an essential human right. Children who experience discrimination face more obstacles to integration into society as adults. Discrimination has a long-term intergenerational impact, because its effects are often passed on to subsequent generations. It is essential that children are protected from discrimination.

In theory, children, like adults, are protected by the anti-discrimination provisions of the major international human rights conventions.[15] However, it is difficult to determine whether children are effectively protected by these anti-discrimination provisions or not. Given that children are vulnerable not only to the State but also to their families and other people, special measures are often necessary to protect them. Some international human rights instruments have included specific provisions to prevent discrimination against children. In this regard, the International Covenant on Civil and Political Rights[16] states that *"every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State"* (Art. 24/1). However, this provision is limited to envisaging the possibility of regulating special protective measures to assist children and the necessity to ensure that these special measures

[13] Ursula Kilkelly and Ton Liefaard, 'International Children's Rights: Reflections on A Complex, Dynamic, and Relatively Young Area of Law' in Ursula Kilkelly and Ton Liefaard (eds), International Human Rights of Children (Springer 2018) 617-627.

[14] Benyam Dawit Mezmur, 'Based Solely on Their Date of Birth? Rethinking Age Discrimination Against Children Under the Convention on the Rights of the Child' (2023) 36 (2) Harvard Human Rights Journal 261.

[15] Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford: Oxford University Press 2005) 26.

[16] United Nations General Assembly, 'International Covenant on Civil and Political Rights' <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.> Date of Access January 24, 2024.

exclude discrimination.[17] This particular approach is also found in the International Covenant on Economic, Social and Cultural Rights.[18] International human rights instruments have not been sufficient to develop anti-discrimination provisions that would effectively fight all forms of discrimination against children. Therefore, it has become necessary to create a unique international instrument that ensures children's rights and protects them from all forms of discrimination. Such a comprehensive international instrument that fully recognises children's rights was adopted in 1989. This Convention, known as the UN Convention on the Rights of the Child[19] (hereinafter, CRC), is considered to be the cornerstone of children's rights throughout the world[20] and is based on four guiding principles namely, non-discrimination, the best interests of the child, the right to survival, and development and respect for the views of the child.[21] The child's right to non-discrimination is the first step in the realisation of children's rights. The provision on the protection of children against discrimination grants children a wide range of rights and underscores the obligations of the states: "*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status…. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the*

[17] Samantha Besson, 'The Principle of Non-Discrimination in the Convention on the Rights of the Child' (2005) 13 (4) The International Journal of Children's Rights 444.

[18] According to Article 10/3, *"Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law."* See, International Covenant on Economic, Social and Cultural Rights <https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf.> Date of Access January 24, 2024.

[19] UN Convention on the Rights of the Child (20. 11. 1989) <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.> Date of Access January 25, 2024.

[20] The CRC provides regulations that apply to every aspect of a child, such as the family (Art.3, Art.5, Art.12, Art.18), school (Art. 28, Art. 29), alternative care (Art. 20, Art. 21), youth justice and detention (Art. 37, Art. 40), well-being (Art. 6, Art. 24, Art. 27) disability (Art. 23), separated parents (Art. 3, Art. 9), abuse and exploitation (Art. 19, Art. 30, Art. 37), immigration (Art. 7, Art. 8, Art.10), identity (Art. 7, Art. 8), family support (Art.18), right to play, rest and leisure(Art. 31), freedom of expression (Art.13), freedom of religion (Art. 14), freedom to access information (Art.17).

[21] Laura Lundy and Bronagh Byrne, 'The Four General Principles of the United Nations Convention on the Rights of the Child: The Potential Value of the Approach in Other Areas of Human Rights Law' in Eva Brems, Ellen Desmet and Wouter Vandenhole (eds), Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration? (Routlage 2017) 52-70.
The legitimacy of separating these four provisions from the others in the CRC has not been truly questioned, but it is obvious that these principles are both central in nature and comprehensive enough to be understood in conjunction with the other more elaborated provisions. In summary, the four provisions represent the core obligations that states must meet in order to implement the Convention as a whole. See, Ursula Kilkelly, 'Using the Convention on the Rights of the Child in Law and Policy: Two Ways to Improve Compliance' in Antonella Invernizzi and Jane Williams (eds), The Human Rights of Children: From Visions to Implementation (Routledge 2016) 181.

child's parents, legal guardians, or family members" (Art. 2).[22] The primary message embedded in this provision is "equality of opportunity". According to the CRC, every child is entitled to the protection of the CRC against all forms of discrimination, and every state has an obligation to uphold these rights. This provision imposes obligations on states to respect and fulfil the rights enumerated in the CRC. "Duties to respect" are negative duties that require states to refrain from violating, restricting, impeding any of the rights enumerated in the Convention. On the other hand, "duties to fulfil" are positive duties that require states to facilitate and promote the exercise of human rights and to provide services.[23]

The European Convention on Human Rights, which is the supreme international treaty legally binding on 47 European states, including 28 member states, protects human rights in Europe and the European Court of Human Rights, established under the Convention, considers the Convention as the basic guide for its operation. The European Convention on Human Rights does not specifically refer to children's rights,

[22] The Convention puts forward in its Article 23/1 that children with disabilities should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. The Preamble of the Convention addresses to non-discrimination against children in general as well. According to its 3rd paragraph which reasserts the principle of non-discrimination as parallel to other fundamental universal human rights instruments as "*Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in* the *International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*" See, <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.> Date of Access January 25, 2024.

[23] Samantha Besson and Eleonor Kleber, 'Article 2: The Right to Non-Discrimination' in John Tobin and Philip Alston (eds), The UN Convention on the Rights of the Child: A Commentary (United Kingdom: Oxford University Press 2019) 50; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Germany: NP Engel Verlag 2005) 37.
A key body for the protection of children's rights is the "Committee on the Rights of the Child", a committee of eighteen independent experts that monitors the application of the Convention on the Rights of the Child and deals with safeguarding and promoting children's rights throughout the world. The Committee investigates whether the Convention has been complied with and examines the reports of the State parties. General Comment No. 7 has addressed the application of Article 2 of the Convention, which prohibits discrimination against children. The Committee stresses that young children should not be discriminated against on any grounds, including those where laws do not provide equal protection. The Committee may also examine individual complaints concerning violations of the Convention on the Rights of the Child and its first two Optional Protocols "OPAC and OPSC" by States parties to OPIC, as well as conduct investigations into allegations of systematic violations of rights under the Convention and its two Optional Protocols. In this regard, see; UN Committee on the Rights of the Child, 'Introduction to the Committee' <https://ECtHR.ohchr.org/en/treaty-bodies/crc/introduction-committee> Date of Access January 25, 2024. It is noteworthy that the Committee on the Rights of the Child pays special and continued attention to discrimination against children. In this regard, see; Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005) 170-172. The main focus of the Committee's jurisprudence on non-discrimination is often on children in "marginalised or vulnerable situations" (CRC Committee, Concluding Observations, Sri Lanka, U.N. Doc. CRC/C/LKA/CO/5- 6, parag.16(b) (Mar. 2, 2018) or those in "disadvantaged situations" (CRC Committee, Concluding Observations, Switzerland, U.N. Doc. CRC/C/CHE/CO/ 5-6, parag.17 (Oct. 22, 2021), "children with disabilities" (CRC Committee, Concluding Observations, Poland, U.N. Doc. CRC/C/POL/CO/5-6, parag.18(b), 19(a) (Dec. 6, 2021), "illegitimate and out-of-wedlock children" (CRC Committee, Concluding Observations, Oman, U.N. Doc. CRC/C/OMN/CO/3-4, parag. 25 (Mar. 14, 2016); CRC Committee, Concluding Observations, Iraq, U.N. Doc. CRC/C/IRQ/CO/2- 4, parag.19 (Mar. 3, 2015); CRC Committee, Concluding Observations, Japan, U.N. Doc. CRC/C/JPN/ CO/4-5, parag.17 (Mar. 5, 2019), "children who are victims of lascivious behaviour" (CRC Committee, Concluding Observations, Jordan, U.N. Doc. CRC/C/JOR/CO/4-5, parag. 16 (July 8. 2014), "children belonging to minority groups" (CRC Committee, Concluding Observations, Russia, U.N. Doc. CRC/C/RUS/CO/4-5, parag.22 (Feb. 25, 2014); CRC Committee, Concluding Observations, Croatia, U.N. Doc. CRC/C/HRV/CO/5-6, parag. 15(a) (June 22, 2022), "children subjected to caste-based discrimination" (CRC Committee, Concluding Observations, Nepal, U.N. Doc. CRC/C/15/Add.261, parag. 67 (September 21, 2005), "refugees and internally displaced children" (CRC Committee, Concluding Observations, Croatia, U.N. Doc. CRC/C/HRV/CO/5-6, parag.15(a) (June 22, 2022), and "lesbian, gay, bisexual, transgender children" (CRC Committee, General Comment No. 20 on The Implementation of the Rights of the Child During Adolescence, U.N. Doc. CRC/C/GC/20, parag. 33–34 (December 6, 2016); Concluding Observations, Croatia, supra note 20, parag. 15(b).

but it does mention that the rights it deals with apply to everyone. Non-discrimination is one of these rights. On the other hand, the Charter of Fundamental Rights of the European Union is based on the European Convention on Human Rights and imposes new obligations on Member States. In this respect, Article 24 of the Charter provides that children have the right to such care and protection as necessary for their well-being and that their opinions on matters affecting them should be respected and taken into account. The best interests of the child should be a primary consideration in any decision affecting the child.[24] Child labour is also prohibited under Article 32 of the Charter.[25] Article 21 of the Charter of Fundamental Rights of the European Union prohibits discrimination on the grounds of age.[26]

The Convention on the Rights of Persons with Disabilities clarifies discrimination based on disability and has included a provision allowing positive discrimination for children on the basis of disability, as well.[27] Positive discrimination enables children with disabilities to have the same opportunities as other children. Positive discrimination and equal opportunity share the same objective; however, positive discrimination is proactive whereas equal opportunity is a non-active policy that aims to ensure that discrimination is not accepted once it comes to light.[28] The obligation of State Parties to take all necessary measures to ensure that children with disabilities can fully enjoy all human rights on an equal basis with other children requires States to take appropriate action.

The European Council Recommendation 1596 (2003) "*Situation of Young Migrants in Europe*" focuses specifically on the young migrants, including children. In this

[24] Article 24 of the Charter of Fundamental Rights of the European Union sets out the rights of the child as "*the right to such protection and care as is necessary for children's well-being, the right to express their views freely and have those views considered in accordance with their age and maturity, the need to make the child's best interests a primary consideration in all action relating to that child, the right for the child to maintain a regular personal relationship, and direct contact, with both parents, unless that is contrary to the child's interests*." See at <https://ECtHR.europarl.europa.eu/charter/pdf/text_en.pdf.> Date of Accession January 26, 2024.

[25] Article 32 of the Charter of Fundamental Rights of the European Union provides that "*the employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogation. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education*." See at < https://ECtHR.europarl.europa.eu/charter/pdf/text_en.pdf> Date of Accession 26 January 2024.

[26] Article 21 of the Charter of Fundamental Rights of the European Union states that "*any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited……..* " See at <https://ECtHR.europarl.europa.eu/charter/pdf/text_en.pdf.> Date of Accession January 26, 2024.

[27] Article 7 of the Convention on the Rights of Persons with Disabilities stipulates that "*States parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children……In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration…… States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right*". See at <https://ECtHR.un.org/disabilities/documents/convention/convoptprot-e.pdf.> Date of Accession January 26, 2024.

[28] Paul Burstein, *Equal Employment Opportunity: Labour Market Discrimination and Public Policy* (New York: Aldine de Gruyter 1994) 87; Faye J. Crosby, Aarti Iyer and Sirinda Sincharoen, 'Understanding Affirmative Action' (2006) 57 (1) Annual Review Psychology 587.

document, Member States are advised to ensure unhindered enrolment in compulsory education for children of ethnic minorities, regardless of their immigration status. Member States are also advised to ensure that educational materials and textbooks do not promote racist or discriminatory interpretations of the history and culture of other nations or communities.[29] These migrant children are also referred to in the "*Explanatory memorandum to the Recommendation CM/Rec (2007) 9 of the Committee of Ministers to Member States on Life Projects for Unaccompanied Migrant Minors*".[30] This document stipulates that the minor must be considered a child in difficulty, entitling them to protection, information, non- discrimination and access to essential social services such as health, education, etc. Similarly, "*Recommendation CM/Rec(2008)4 of the Committee of Ministers to Member States on Strengthening the Integration of Children of Migrants and of Immigrant Background*"[31] suggests that governments and non-governmental organizations should work directly with the private sector to raise awareness of the need to take appropriate measures to eliminate the potential discriminatory effects of recruitment procedures against young migrant school dropouts.[32] According to a survey on discrimination in Europe, confirmed by the "*international PISA research*", discrimination targets children from immigrant families and manifests itself as a gap in students' motivation and academic performance.[33]

Another universal instrument regulating discrimination against children is the "Declaration of Commitment on HIV/AIDS" adopted by the UN General Assembly in 2001. This document recommends that states adopt policies to enhance the capacity of public authorities and communities to provide a supportive environment for children affected by AIDS, including psychosocial assistance, therapy, access to school, housing, nutritious food and health on equal basis with other children and to protect them from discrimination. It also mentions that States should support an effective policy of de-stigmatisation of children orphaned and disadvantaged by AIDS to ensure non-discrimination and equal enjoyment of rights.[34]

---

[29] Parliamentary Assembly, 'The European Council Recommendation 1596 (2003): Situation of Young Migrants in Europe' (Strasbourg, 31. 01. 2003) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17086&lang=en.> Date of Accession January 27, 2024.

[30] Council of Europe, 'Explanatory memorandum to the Recommendation CM/Rec (2007)9 of the Committee of Ministers to Member States on Life Projects for Unaccompanied Migrant Minors' (Strasburg: Council of Europe, 2007<https://ECtHR.coe.int/t/dg3/migration/archives/Source/Recommendations/Recommendation%20CM%20Rec_2007_9%20-%20Explanatory%20memorandum_en.pdf.> Date of Accession January 27, 2024.

[31] Council of Europe, 'Recommendation CM/Rec (2008) 4 of the Committee of Ministers to Member States on Strengthening the Integration of Children of Migrants and of Immigrant Background' (Strasburg: Council of Europe, 2008) <https://ECtHR.coe.int/t/democracy/migration/ressources/recommendations-resolutions_en.asp.> Date of Accession January 27, 2024.

[32] Council of Europe, (n 29) 2.

[33] OECD, *Untapped Skills: Realising the Potential of Immigrant Students*, (Paris: OECD Publishing 2012), 202.

[34] UN Human Rights Office of the High Commisioner (General Assembly Resolution S-26/2), 'Declaration of Commitment on HIV/AIDS' (27. 06. 2001) <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/declaration-commitment-hivaids.> parag 65-66, Date of Accession January 27, 2024.

III. "Discrimination Against Children" in Landmark Decisions of The European Court of Human Rights (ECtHR)

A. Introduction

The European Convention on Human Rights, recognised by the European Court of Human Rights as the main reference for its operation, defines the prohibition of discrimination as "*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*".[35] This provision ensures that the rights enshrined in the Convention are fully exercised without discrimination on any ground. In this regard, in Schwizgebel v. Switzerland case,[36] which concerned a 47- year-old woman who was denied the "right to adopt" due to her age at the time of application, the ECtHR emphasised that the State had a responsibility to ensure that the individual selected for adoption was the right one and that the best interests of the child had to be taken into account.[37]

The European Court of Human Rights considers applications from or on behalf of children regardless of age. For instance, the ECtHR ruled in Marckx v. Belgium,[38] a landmark case in family law, in which Paula Marckx applied to the ECtHR on behalf of her daughter who was only six years old at the time. Similarly, in C. v. Croatia case,[39] the applicant, who was the child of a divorced couple, filed an application to the ECtHR alleging that his right "to respect for his family life" had been violated, and the Court considered his application and delivered a judgement in the light of the best interests of the child.

The Convention does not define the child; however, Article 1 of the Convention requires States Parties to guarantee the rights set forth in the Convention to "everyone" under their jurisdiction.[40] The ECtHR adopted this approach and introduced it in A. v. The United Kingdom case[41] that "*the Court considers that the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention*, …. "[42].

---

35 Article 14 of European Convention on Human Rights <https://ECtHR.ECtHR.coe.int/documents/d/ECtHR/convention_ENG> Date of Accession January 29, 2024.

36 Schwizgebel v. Switzerland App no 25762/07 (ECtHR, 10. 06. 2010).

37 European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-discrimination Law* (Luxembourg: Publications Office of the European Union 2018) 103.

38 Marckx v. Belgium App no 6833/74 (ECtHR, 13. 06. 1979).

39 C. v. Croatia App no 80117/17 (ECtHR, 08. 10. 2020).

40 Article 1 of the European Convention on Human Rights provides that "*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*." See at <https://ECtHR.ECtHR.coe.int/documents/d/ECtHR/convention_ENG> Date of Accession January 29, 2024.

41 A. v. The United Kingdom App no 25599/94 (ECtHR, 23. 09. 1998).

42 Ibid § 22.

Furthermore, in X and ECtHR v. the Netherlands case,[43] the Court has emphasised the vulnerability of children and the necessity for States parties to protect "*children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.*"[44]

The ECtHR has also adopted the definition of the "child" in the UN Convention on the Rights of the Child (CRC) and has accepted the concept of "under 18 years of age". In this respect, the Court referred to Article 1 of the CRC in Güveç v. Turkey and Çoşelav v. Turkey cases, which define a child as "*every human being below the age of eighteen years, unless the age of majority is attained earlier under the law applicable to the child.*"[45] Given that the European Convention on Human Rights is to be interpreted in accordance with the general principles of international law, the liabilities of the States parties under the Convention with regard to the rights of the child should be considered in the context of the CRC. In fact, in Harroudj v. France case,[46] the Court has clearly mentioned this approach as *"…the positive obligations which Article 8 imposes on the Contracting States in this matter, they must be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989*."[47] In parallel with this view, the Court has underlined the significance of the CRC and has referred to it in its rulings. For instance, in Şahin v. Germany case,[48] the Court has stated that "*the human rights of children and the standards to which all States must aspire in realizing these rights for all children are set out in the United Nations Convention on the Rights of the Child.*"[49]

The ECtHR considers non-discrimination to be a fundamental principle of democracies and has ruled on several landmark cases concerning discrimination against children based on ethnicity, disability, age, birth and other grounds such as religion, language, etc.

B. Landmark Decisions

Different rules and practices based on whether a child is born in or out of wedlock have come before the ECtHR in the context of non-discrimination against children. Since its early years, the ECtHR has been firm in its refusal to tolerate differences in

[43] X and ECtHR v. the Netherlands App no 8978/80 (ECtHR, 26. 03. 1985).
In this case, the inability of a 16-year-old girl with a mental disability to initiate criminal proceedings against the perpetrator of her asexual assault raised a question under Article 8 para. 1. See, Ursula Kilkelly, *The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention of Human Rights* (Directorate General of Human Rights, Council of Europe 2001) 14.

[44] See also, Stubbings and Others v. the United Kingdom App no 22083/93; 22095/93 (ECtHR, 22. 10. 1996) § 64.

[45] Güveç v. Turkey App no 70337/01 (ECtHR, 20. 04. 2009) §58, 64; Çoşelav v. Turkey App no 1413/07 (ECtHR, 09.10. 2012) §36, 61.

[46] Harroudj v. France App no 43631/09 (ECtHR, 04.10. 2012).

[47] Ibid § 42.

[48] Şahin v. Germany App no 30943/96 (ECtHR, 08.07. 2003).

[49] Ibid § 39.

treatment based solely on marital status and has laid down definite principles in this respect.[50] In this regard, some cases are remarkable. For example, Marckx v. Belgium case[51] has played a role in the development of a "child-centred approach" to the legal recognition of family ties.[52] This case concerned a Belgian law that required single mothers to take certain steps in order to have their relationship with their children legally recognised. The applicants claimed that this requirement violated both the non-discrimination clause regulated in Article 14 of the European Convention on Human Rights and their right to respect for private and family life under Article 8 of the Convention. The ECtHR, noting that respect for family life required "*the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family*",[53] held that the applicant's obligation to take certain steps in order to obtain legal recognition of her daughter was incompatible with the right to respect for family life, since it effectively hindered and impeded the development of a family life.[54] It has been argued that the Court's decision was ahead of its time, as it came 10 years before the ratification of the CRC, which for the first time recognised the "right of the child to respect for family ties".[55]

Inze v. Austria[56] is another ECtHR case concerning discrimination against children based on "birth". In this case, the applicant was not entitled to inherit his mother's farm when she died without leaving a will because he was born out of wedlock. Although the applicant was entitled to an equal share of his mother's property under the Austrian Civil Law, he could not inherit the farm due to the implementation of Section 7(2) of the "Carinthian Hereditary Farms Act", which gave priority to legitimate children. Therefore, although the applicant had worked on the farm until the age of 23, his half-brother was entitled to the entire property. Although, the applicant eventually obtained a small portion of the property from his half-brother through a judicial settlement, he was still disadvantaged.[57] The ECtHR emphasised that the applicant had to accept the judicial settlement because his position was vulnerable during the negotiations and he had no expectation of receiving more from his mother's inheritance.[58] The Court also rejected the claim that the applicant was no longer a "victim" of discrimination because he had agreed to the judicial settlement[59] and concluded that Article 14 of

[50] Ursula Kilkelly, 'Effective Protection of Children's Rights in Family Cases: An International Approach' (2002) 12 (2) Transnational Law & Contemporary Problems 341.

[51] Marckx v. Belgium App no 6833/74 (ECtHR, 13. 06. 1979).

[52] Ursula Kilkelly, 'Protecting Children's Rights under the ECtHR: The Role of Positive Obligations' (2010) 61 (3) Northern Ireland Legal Quarterly 248.

[53] Marckx v. Belgium App no 6833/74 (ECtHR, 13. 06. 1979) § 31.

[54] Ibid § 36.

[55] Kilkelly, (n 49) 249.

[56] Inze v. Austria App no 8695/79 (ECtHR, 28. 10. 1987).

[57] Ibid § 43-44.

[58] Ibid § 30,33.

[59] Ibid § 34.

the European Convention on Human Rights, together with Article 1 of Protocol No. 1[60] was violated[61] and the applicant was granted an equal share of the inheritance.[62]

Similarly, Mazurek v. France case[63] concerned Article 760 of the French Civil Code, which was in force at the time of the judgement anddistinguished between legitimate children (born in wedlock) and illegitimate children (born out of wedlock). The applicant, who was the illegitimate child of the deceased mother, claimed that Article 760 of the Civil Code, giving the illegitimate child the right to receive only half of the legitimate child's share of the inheritance, was discriminatory and asked the court to rule that he was entitled to the same rights as the legitimate child. However, The Appeal Court held that the purpose of the article in question was to protect the interests of both the spouse and the legitimate child rather than to punish the illegitimate child, and that the article in question did not discriminate against children born out of wedlock but protected the legitimate children who could be adversely affected in the distribution of their parents' inheritance due to the existence of an illegitimate child.[64] The applicant was deprived of some of his inheritance rights in favour of his brother due to his status as an illegitimate child. The ECtHR emphasised the meaning of Article 14 of the European Convention on Human Rights, stressing that treatment is considered discriminatory if it does not pursue "a legitimate aim" or if there is "no responsible relationship of proportionality between the means employed and the aim is sought to be achieved". In other words, if there is "no objective and reasonable justification", then this treatment is considered to be discriminatory.[65] The ECtHR found that it was not justifiable to discriminate against children by reducing their share of the inheritance because of circumstances beyond their control. The Court noted that while the protection of the traditional family might be a legitimate aim, the majority of the members of the Council of Europe had abolished this type of discrimination against illegitimate children. Finally, the Court held that there was "no responsible relationship of proportionality between the means employed and the aim pursued" and concluded that the fact that an illegitimate child received only half of the inheritance granted to a legitimate child violated Article 1 of Protocol No. 1 and

---

60 Article 1 of Protocol No 1 sets out that "*every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*" See, ECtHR, 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights (Protection of Property)' <https://ECtHR.ECtHR.coe.int/documents/d/ECtHR/Guide_Art_1_Protocol_1_ENG.> Date of Accession February 4, 2024.

61 Inze v. Austria App no 8695/79 (ECtHR, 28. 10. 1987) § 45.

62 Ibid § 56-57.

63 Mazurek v. France App no 34406/97 (ECtHR, 01. 02. 2000).

64 Ibid § 14.

65 Ibid § 48.

Article 14 of the European Convention on Human Rights.[66] In this case, the ECtHR also referred to Article 2 of the CRC.[67]

Another ECtHR case concerning discrimination against children "born out of wedlock" is Fabris v. France.[68] In this case, the applicant claimed that he did not benefit from the French law, which granted illegitimate children the same inheritance rights as legitimate children. The Law in question was enacted in response to the ECtHR's ruling in Mazurek v. France case.[69] The Court stated that "*the protection of the legitimate expectation of the deceased and their families must be subordinated to the imperative of equal treatment between children born outside and children born within marriage*."[70] According to the ECtHR, the applicant's claim to share in his mother's inheritance did not preclude the legitimate aim of protecting the inheritance rights of his half-sibling. Therefore, the difference in treatment disparity was discriminatory in the absence of a reasonable justification. Finally, the Court concluded that Article 1 of Protocol No. 1 and Article 14 of the European Convention on Human Rights were violated.[71]

In Camp and Bourimi v. The Netherlands,[72] another case of discrimination on the ground of birth, the first applicant, Mrs. Camp, the partner of Mr. Bourimi, who had died before he could legally recognise his child under the national law, had been forced to move out of their shared home since the man had died without leaving a will and his parents considered themselves to be heirs of the deceased.[73] Despite the fact that the second applicant, Sofian, acquired blood ties with his father, he was unable to have a legally recognised family relationship with his father and to inherit from him, unlike other children who were born in wedlock or recognised by their fathers, because the "letters of legitimation" did not have retroactive effect from the time of Sofian's birth.[74] This manifested as a difference in treatment based on birth between individuals in similar circumstances.[75] According to the established case law of the ECtHR, a difference in treatment between children based on birth out of wedlock cannot be considered compatible with the Convention unless "*very weighty reasons*"

66 Ibid § 55.

67 Ibid § 18.
The ECtHR often refers to the CRC as the primary legal instrument when the interests of children are at stake. The CRC serves as a tool for interpreting human rights provisions and as a "gap-filler" to fill gaps in national or international law. See, Ton Liefaard and Jaap E. Doek, 'Litigating the Rights of the Child: Taking Stock After 25 Years of the CRC' in Ton Liefaard and Jaap E. Doek (eds), Litigating the Rights of the Child (Springer 2015) 2-3.

68 Fabris v. France App no 16574/08 (ECtHR, 07. 02. 2013).

69 Ibid § 16.

70 Ibid § 68.

71 Ibid § 73.

72 Camp and Bourimi v. The Netherlands App no 28369/95 (ECtHR, 03. 10. 2000).

73 Ibid § 8-9.

74 Ibid § 13.

75 Ibid § 36.

are presented.[76] The Court noted that the deceased had not deliberately decided to conceal or not to recognise the child that the first applicant was expecting. In fact, he had planned to marry her; however, his sudden death made the marriage impossible, and the child was therefore declared illegitimate.[77] In this respect, the ECtHR rejected the Dutch Government's claims as to how the deceased could have avoided his son's current situation and found that it was "disproportionate" to exclude the illegitimate child from his deceased father's inheritance. Finally, the Court concluded that Article 14 of the Convention was violated in conjunction with Article 8 "*Right to respect for private and family life*".[78]

The ECtHR has established that treating parents differently depending on whether the child is born within or outside marriage also constitutes discrimination based on birth.[79]

Another ground on which children are often discriminated against is disability. The ECtHR has ruled on cases of discrimination against children with disabilities in access to education. Çam v. Turkey[80] is notable in this respect. In this case, a student who was eligible for admission to a music academy after passing a competitive examination was not accepted due to her visual impairment, although the enrolment regulations of the music academy did not contain any provisions aimed at excluding individuals with visual impairments.[81] After her appeal had been rejected by the domestic courts, the applicant claimed before the ECtHR that the rejection of her application for enrolment was discriminatory because it was based on her visual impairment.[82] The Court concluded that the State authorities had not provided any explanation as to why or how her visual impairment would prevent her from receiving a musical education and that, therefore, the applicant had not been given the opportunity to study at the music academy in question solely on the ground of her visual impairment, without any objective and reasonable justification. Finally, the Court found that Article 14 of the Convention was violated in conjunction with Article 2 of Protocol No. 1.[83]

---

[76] Ibid § 38. Also see, Sarah Cooper and Meryl Thomas, 'Inheritance Rights of Children Born Outside Wedlock in Jersey-The Event Horizon' (2010) 2 (1) Jersey & Guernsey Law Review 7.

[77] Ibid § 38.

[78] Ibid § 39.

[79] Sommerfeld v. Germany App no 31871/96 (ECtHR, 08.07. 2003) §78.

[80] Çam v. Turkey App no 51500/08 (ECtHR, 23. 02. 2016).

[81] Ibid § 59.

[82] Ibid § 39.

[83] Article 2 of Protocol No. 1, regulating the right to education, states that "*no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions*." See, ECtHR, 'Guide on Article 2 of Protocol No. 1 to the European Convention on Human Right: Right to Education' <https://ECtHR.ECtHR.coe.int/documents/d/ECtHR/guide_art_2_protocol_1_eng#:~:text=%E2%80%9CNo%20person%20shall%20be%20denied,own%20religious%20and%20philosophical%20convictions.%E2%80%9D.>Date of Accession February 6, 2024.

In some cases, additional measures are required to achieve equal treatment in addition to mere prevention of discriminatory treatment. Under such circumstances, measures can be adopted to eliminate existing inequalities. In the EU legal context, these measures are known as "specific measures" or "positive action".[84] In this respect, the ECtHR has referred in some of its cases to "positive obligations"[85] concerning discrimination against children. G.L v. Italy,[86] is one such case, in which the applicant, a non-verbal autistic girl, was not given the special assistance to which she was entitled by virtue of her disability during the first two years of her primary education.[87] Throughout this period, the applicant was deprived of the necessary special assistance, and due to the lack of such assistance, she was unable to participate in classes under the same conditions as her "non-disabled" peers, resulting in discrimination on the basis of disability. The state authorities' excuses and defences, which attempted to justify the difference in treatment on the grounds of limited resources and scarcity, were found insufficient by the ECtHR.[88] The State authorities failed to strike a reasonable balance between the applicant's needs and the administration's limited capacity to meet those needs.[89] Emphasising that the educational services provided to both non-disabled and disabled students should be equally affected by the restrictions on the educational services imposed by budgetary constraints,[90] the Court pointed out that the authorities had failed to investigate the applicant's needs and possible remedies which would enable him to attend classes under conditions similar to those enjoyed by other children. [91] As a reminder, it is the duty of the States parties to ensure that every child has access to education and to take necessary measures, as providing financial assistance to those who need it. This duty is emphasized in the CRC (Art. 28/b). The ECtHR found that discrimination against the applicant was even more serious as it occurred during primary education,

[84] Specific measures (positive action) provide for different treatment on the grounds of disability, ethnic origin, religion or sex to redress past inequalities or to compensate for present inequalities. They replace the requirement of "formal equality" with a requirement of "substantive equality". See, Olivier De Schutter, *The Prohibition of Discrimination under European Human Rights Law: Relevance for EU Non-discrimination Directives – Un Update* (European Commission Directorate-General for Employment, Social Affairs and Inclusion Publications Office 2005) 31. Substantive equality is based on the recognition that formal equality by itself is not sufficient to ensure real justice and fairness, as it does not address the underlying inequalities and structural disadvantages encountered by disadvantaged groups. For a detailed definition of the concept, see; Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 (3) International Journal of Constitutional Law 712-738.

[85] The positive obligation approach determines what States must do to ensure effective respect for the rights enshrined in the European Convention on Human Rights. In this regard, see; Kilkelly, n (52) 260.

[86] G.L v. Italy App no 59751/15 (ECtHR, 10. 09. 2020).

[87] Ibid § 56.

[88] Ibid § 47, 68.

[89] Ibid § 67.

[90] Ibid § 67.

[91] Ibid § 70.

which serves as the basis for both the education and social integration of children.[92] The ECtHR mentioned that the failure of the authorities to provide the applicant with a special assistant was to be regarded as discrimination on the ground of disability[93] and concluded that Article 14 of the Convention, in conjunction with Article 2 of Protocol No. 1 was violated.[94]

The ECtHR has also observed cases where "a parent's disability" has affected their ability to exercise parental rights or their relationship with their children[95] and also where a parent has suffered "discrimination by association" because of their children's disability.[96]

Children also face discrimination based on their ethnic origins or races, and the ECtHR has ruled on several landmark cases on this issue, such as the D.H and Others v. the Czech Republic case.[97] This case is a landmark case for the ECtHR in some respects. This is the first time that the ECtHR has explicitly recognised the principle of indirect discrimination. This case has made it clear that when a policy has a discriminatory effect, the existence of discriminatory intent is irrelevant.[98] In this case, 18 Roma/Gypsy children were placed in schools for children with learning disabilities without any objective reason and regardless of their intellectual abilities. They were given an education that exacerbated their difficulties and jeopardised their personal development instead of being given the opportunity to adapt to the mainstream education system and learn skills that would make their lives easier in the future. The ECtHR made it clear that "racial segregation", which in this case took the form of the disproportionate assignment of Roma children to special schools without an objective and reasonable justification in this case amounted to discrimination in violation of Article 14 of the Convention. The ECtHR stated that it was "*not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there was a reasonable relationship of*

---

92 Ibid § 71; In this regard also see, Ponomaryovi v. Bulgaria App no 5335/05 (ECtHR, 28.11.2011) §56-57.
G.L v. Italy cites the CRPD as the key reference and highlights the international recognition that inclusive education is the most effective means of ensuring equal opportunities. Inclusive education is therefore part of the international responsibilities of Member States in this field. The alleged infringement in primary education (as compared to the previous cases in higher education) is more serious because primary education is the foundation for educational and social integration and the initial exposure to society. In this regard, see; Marie Spinoy and Kurt Willems, 'G.L. v. Italy: The Ambiguous Role of Article 14 European Court of Human Rights in Inclusive Education Cases' (2022) 22 (4) International Journal of Discrimination and the Law 192.

93 G.L v. Italy App no 59751/15 (ECtHR, 10. 09. 2020) § 66.

94 Ibid § 72. For similar cases regarding discrimination against children based on disability, see; Sommerfeld v. Germany App no 31871/96 (ECtHR, 8/7/2003) § 78; Pla and Puncernau v. Andora, App no 69498/01 (ECtHR, 13. 07. 2004) § 63.

95 In this context, see; Cinta v. Romania Application no. 3891/19 (ECtHR, 18. 02. 2020); Kocherov and Sergeyeva v. Russia App no 16899/13 (ECtHR, 29. 03. 2016).

96 In this vein, see; Guberina v. Croatia App no 23682/13 (ECtHR, 22. 03. 2016).

97 D.H and Others v. the Czech Republic App no. 57325/00 (ECtHR, 13. 11. 2007).

98 Jennifer Devroye, 'The Case of D.H and Others v. the Czech Republic' (2009) 7 (1) Northwestern Journal of International Human Rights 81.

proportionality between the means used and the aim pursued".[99] In fact, the most significant aspect of this decision is that the ECtHR has adopted the concept of "*indirect discrimination*" which shifts the burden of proof to the state authorities in the case of a "*prima facie*" allegation of discrimination.[100] The interpretation that less stringent rules of evidence should be applied in cases of alleged indirect discrimination has been adopted to ensure effective protection of the right against discrimination. As a result, the ECtHR held that there was an indirect discrimination against the applicants within the context of education and that Article 14 "prohibition of discrimination" of the Convention together with Article 2 of Protocol No. 1 "right to education" was violated.[101] The Court also referred to the relevant articles of the Convention on the Rights of the Child in this case.[102] This landmark decision has been the first to address structural racial segregation in education.

In Oršuš and Others v. Croatia case,[103] 15 Croatian citizens of Roma origin claimed that they had been subjected to racial discrimination throughout their education by being segregated in classes with only Roma children, resulting in educational difficulties, psychological problems as well as stigmatisation.[104] Although this specific case was not identical to D.H and Others v. the Czech Republic case, in which Roma students in both schools were not automatically assigned to special classes, it was widely recognised that several European States faced significant challenges in providing adequate education for Roma students.[105] The Court noted that in this particular case, only Roma students were assigned to these special classes in the schools. The Croatian government claimed that the reason for the segregation was the Roma students' inadequate knowledge of the Croatian language, but the examinations used to place them in these classes did not specifically address language skills, the curriculum did not address language issues, the students' progress was not adequately monitored.[106] The ECtHR concluded that "Roma-only" classes were unjust and unreasonable and violated both Article 14 of the Convention and Article 2 of Protocol No 1.[107]

---

99 Ibid § 208.

100 Ibid § 185-190.
It is suggested that for children, indirect discrimination always reinforces direct discrimination, so some children experience multiple jeopardy. See, Elspeth Webb, 'An Exploration of the Discrimination-Rights Dynamic in Relation to Children' in Antonella Invernizzi and Jane Williams (eds), The Human Rights of Children: From Visions to Implementation (Taylor & Francis 2011) 301.

101 Ibid § 210.

102 Ibid § 100.

103 Oršuš and Others v. Croatia App no 15766/03 (ECtHR, 16. 03. 2010).

104 Sina Van den Bogaert, *Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters* (ZaöRV 71 2011) 740.

105 Ibid § 152, 180.

106 Ibid § 166, 173.

107 Ibid § 185.

Another case of discrimination against children based on ethnic origin is Sampanis and Others v. Greece,[108] which concerns a group of Roma children who were deprived of an entire school year of education because the State authorities failed to enrol them. These children were eventually placed in special classes (preparatory classes) in a facility built in addition to the main school building, which the applicants considered to be a measure related to their ethnic origin. The Court found that although the authorities were keen to enrol Roma children, the conditions of their enrolment and their placement in special preparatory classes in an annex to the main school building ultimately led to discrimination.[109] The Court concluded that the authorities had not previously used a single, precise criterion to determine which children would be placed in special classes.[110] The ECtHR held that Article 14 of the Convention, in conjunction with Article 2 of Protocol No. 1[111] and also Article 13 "right to an effective remedy" of the Convention,[112] were violated in that the applicants' children were denied education for the entire school year and were placed in segregated classes due to their ethnic origin.[113]

The ECtHR has also ruled on cases involving discrimination against children based on language, such as the Belgian Linguistic Case.[114] In this case, the applicants, who were the parents of more than 800 Francophone (French speaking) children residing in certain Dutch- speaking regions of Belgium, claimed that their children were not allowed to be educated in French.[115] Under the Belgian Act, the language of education in a unilingual region is the language used in that region.[116] Parents of the French-speaking children residing in Dutch- speaking regions claimed that their children's right to education and right to respect for private and family life were violated.[117] According to the ECtHR, in unilingual regions, there was a public interest in providing education in the language specific to that region in public schools to encourage students to have a thorough understanding of the regional language.[118]

---

[108] Sampanis and Others v. Greece App no 32526/05 (ECtHR, 05. 09. 2008).

[109] Ibid § 95.

[110] Ibid § 88.

[111] Ibid § 96.

[112] Ibid § 57, 104.

[113] For other cases regarding discrimination against children based on ethnic origin, see; Horvàth and Vadàzi v. Hungary, Lavida and Others v. Greece, Ádám and Others v. Romania, X and Others v. Albania, Elmazova and Others v. North Macedonia, Szolcsán v. Hungary.

[114] Belgian Linguistic Case App no 2126/64 (ECtHR, 23. 07. 1968). Another significant aspect of this case is that it the ECtHR has introduced the concept of "*margin of appreciation*" for the first time. The Court referred to the derogation in Article 15 of the Convention and recognised its "subsidiary nature", by stating: "……*in so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established for the Convention"* See, Belgian Linguistic Case App no 2126/64 (ECtHR, 23 July 1968) §10.

[115] Ibid § 1-3 (The Facts section).

[116] Ibid § 14 (The Laws on the use of Languages in Education in Belgium section).

[117] Ibid § 4 (The Facts section).

[118] Ibid § 7 (Decision of the court section).

The Court mentioned that the Article 8 "the right to respect for private and family life" of the Convention did not ensure that individuals would receive education from the state authorities in their native language. The ECtHR noted that it would be absurd to interpret the Convention and the Protocol to grant everyone under the jurisdiction of the state the right to be educated in the language of their preference.[119] The Court also pointed out that even in the absence of state funding for education, the establishment of private French language schools would continue unabated and that children who spoke Dutch and French had equal access to public and private school education in the regional language. Although, the ECtHR emphasised that the Belgian Act preventing French-speaking children from accessing French language schools in certain regions in the suburbs of Brussels on the grounds that their parents did not reside in those regions was incompatible with Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1, the Court concluded that there was no violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1, nor of Article 8 in relation to the other issues.[120]

The European Convention on Human Rights ensures that every individual living under the jurisdiction of a Member State, can exercise their rights regardless of their nationality. This includes those living outside of their country, in regions that a member state effectively controls. According to the ECtHR, discrimination occurs when individuals are treated differently based on their "immigration status" or "nationality". In this respect, the ECtHR has also ruled on cases regarding discrimination against children based on nationality. In a remarkable case, Ponomaryovi v. Bulgaria,[121] the applicants were Russian nationals who lacked permanent residence permits, and because they did not belong to a certain category of foreigners, were required to pay a fee for secondary school education that foreigners were required to pay under the Bulgarian Education Act. After mentioning that they were children at the time, the applicants claimed that they were discriminated against because they had to pay a fee, unlike Bulgarian children and other children within a certain category of foreign nationals.[122] They also argued that according to Article 28 of the CRC, it was the responsibility of the State to assist children in their efforts to become useful members of society. According to the ECtHR, the requirement to pay secondary education fees constituted discrimination that undermined the right to education ensured by the Convention if it was justified by the immigration status. In other words, although the States had a wide margin of appreciation as to the economic measures to be

[119] Ibid § 10-11 (Interpretation adopted by the Court section).

[120] Ibid § 42 (Decision of the Court section).
In the Belgian Linguistic case, the recognition that cultural diversity can raise serious constitutional issues has led the Court to hold that language policies are for the best to be left to the national authorities. See, John Merrills, Arthur Henry Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* (Manchester University Press 2001) 247.

[121] Ponomaryovi v. Bulgaria App no 5335/05 (ECtHR, 28/11/2011).

[122] Ibid § 44.

implemented, there had to be a substantial justification for a difference in treatment based solely on nationality to be considered compatible with the Convention.[123] Finally, the ECtHR concluded that requiring students to pay education fees solely based on their immigration status was discriminatory and therefore violated Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1.[124] In this case, the Court also referred to the Article 28 of the CRC.[125] Indeed, the ECtHR has recognised the significance of the CRC and has been referring to its articles since 2003. The Court noted the CRC for the first time in Sahin v. Germany case[126] in 2003 and stated that "*the human rights of children and the standards to which all States must aspire in realising these rights for all children are set out in the United Nations Convention on the Rights of the Child*."[127]

The CRC, the most comprehensive and global treaty on children's rights, has been ratified by almost every country in the world, with the exception of two, including the United States.[128]

IV. "Discrimination Against Children" in Landmark Decisions of The US Supreme Court

A. Introduction

According to the US Constitution, "…*all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land*… .".[129] Although the US Constitution does not particularly limit the authority to make international treaties, the US Supreme Court has consistently held that international treaties that are inconsistent with the US Constitution are invalid. In this respect, in the Cherokee Tobacco case,[130] the US Supreme Court stated that "*it could hardly*

[123] Ibid § 52. In this vein, also see; Koua Poirrez v. France App no 40892/98 (ECtHR, 31. 12. 2003) § 46; Luczak v. Poland App no 77782/01 (ECtHR, 27. 11. 2007) § 48; Zeïbek v. Greece App no 46368/06 (ECtHR, 09. 08. 2009) § 46 *in fine*; Fawsie v. Greece App no 40080/07 (ECtHR, 28 October 2010) § 35; Saidoun v. Greece App no. 40083/07 (ECtHR, 28. 10. 2010) § 37.

[124] Ponomaryovi v. Bulgaria App no 5335/05 (ECtHR, 28. 11. 2011) § 63.

[125] Ibid § 57.

[126] Sahin v. Germany App no 30943 /96 (ECtHR, 08. 07. 2003).

[127] Ibid § 39.

[128] The Convention on the Rights of the Child, as the most universally accepted and rapidly ratified international human rights treaty in history, has been ratified by 197 countries to date; however, only Somalia and the United States have not ratified the CRC. See, Congressional Research Service, 'The United Nations Convention on the Rights of the Child', 27. 08. 2015, p. 1 <https://crsreports.congress.gov/product/pdf/R/R40484/25#:~:text=Opponents%20argue%20that%20ratification%20would,educate%20or%20discipline%20their%20children> Date of Accession February 12, 2024.
Another significant aspect of this case is that the ECtHR has introduced the concept of "*margin of appreciation*" for the first time. The Court designated the derogation in state of emergency stated in Article 15 of the Convention and accepted its "subsidiary nature" by stating "……*in so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established for the Convention*" See, Congressional Research Service, "The United Nations Convention. "

[129] US. Constitution, Art. VI, parag 2.

[130] The Cherokee Tobacco, 78 US. (11 Wall.) 616 (1871).

be said that a treaty could not change the Constitution or be held valid if it was in violation of that instrument".[131] In the Reid v. Covert decision,[132] the US Supreme Court ruled that international treaties had to comply with the US Constitution since it superseded them.[133] The most common argument used by those who oppose international human rights treaties is that their ratification and recognition could threaten fundamental rights enshrined in the US Constitution and harm the US Legal System as a whole[134] and that these treaties could diminish the rights of American citizens.[135] In parallel with this approach, US policymakers have seen the CRC as a treaty in conflict with "family rights" and "privacy rights". According to them, the ratification of the CRC could enable the UN to decide what is in the best interests of American children. They also argued that the CRC could invade family privacy, particularly parental rights to discipline and educate their children.[136] Since the CRC has not been ratified, the treatment of children varies widely throughout the US. In other words, the promotion and protection of children's rights varies from state to state. As a result, the issues raised by the CRC are addressed at the state level rather than falling under the jurisdiction of federal law. On the other hand, the US has signed and ratified the "*Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict"*[137] and "*Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography".*[138]

Although children's rights are not directly included in the US Constitution, case law has a significant impact on the recognition of children's rights in the US. For this reason, the jurisprudence of the US Supreme Court, in particular, provides very important data on discrimination against children.

131 Ibid at 620.

132 Reid v. Covert, 354 US. 1 (1956).

133 Ibid at 17.

134 Natalie Hevener Kaufman, *Human Rights Treaties and The Senate: A History of Opposition* (Chapel Hill: The University of North Carolina Press 1990) 149-50, supra note 2.

135 Ann Elizabeth Mayer, 'Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?' (1996) 23 (3) Hastings Constitutional Law Quarterly 748-749, supra note 22.

136 Congressional Research Service, (n 127) 7-9.

137 UN Human Rights Office of the High Commissioner/ General Assembly Resolution A/RES/54/263, 'Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' 25. 05.2000 <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-involvement-children.> Date of Accession February 13, 2024.

138 UN Human Rights Office of the High Commissioner, 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' 25. 05. 2000 <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child.> Date of Accession February 13, 2024.

B. Landmark Decisions

As mentioned earlier, the famous ECtHR decision "Marckx v. Belgium" has had a major impact on the legal status of children born out of wedlock in Europe. The ECtHR's interpretation of Article 8 together with Article 14 of the Convention and the US Supreme Court's interpretation of the "*Equal Protection Clause*"[139] are very similar. Nevertheless, it has taken longer in the US than in Europe to improve the "patrimonial rights" of illegitimate children and the US Supreme Court had to issue a series of decisions, including contradictory ones, throughout the 1970s to reach a similar level. Both the ECtHR and the US Supreme Court have agreed that the protection and support of the family is a legitimate aim and have rejected the punishment of an innocent child to deter the parents. It has been underlined by both Courts that illegitimate children cannot be treated differently due to their status at birth. However; as mentioned earlier, the ECtHR has emphasised that treatment will not be considered discriminatory[140] if it pursues "*a legitimate aim*", an "*objective and reasonable justification*" or if there is "*a responsible relationship of proportionality between the means employed and the aim pursued*".[141] This formulation and approach is similar to the US Supreme Court's "*rational basis test*"[142] for equal protection issues. The ECtHR's approach that there should be a "substantial relationship" between the classification and the state's purpose is similar to the US Supreme Court's "*strict scrutiny*"[143] formulation.[144]

In a similar vein to the ECtHR, cases involving disputes based on whether a child is born in or out of wedlock have been before the US Supreme Court in the context of non-discrimination against children. In this respect, the landmark decision, Levy v. Louisiana[145] concerns the civil rights of children born out of wedlock, particularly their ability to initiate a lawsuit on behalf of their deceased parents. Louise Levy

---

[139] The Equal Protection Clause is defined in Section 1 of the Fourteenth Amendment: "*All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"* See, The US Constitution <https://constitutioncenter.org/the-constitution.> Date of Accession February 13, 2024.

[140] Ibid § 48.

[141] Mazurek v. France App no 34406/97 (ECtHR, 01.02. 2000) § 18.

[142] The rational basis test (the rational basis review) constrains the government from enforcing arbitrary and irrational restrictions on individual's rights or creating distinctions among individuals that are not justified by the constitution. The rational basis test along with "strict scrutiny" have been designed by the courts to examine equal protection claims. See, Justia US Supreme Court Cases, 'Equal Protection Supreme Court Cases' <https://supreme.justia.com/cases-by-topic/equal-protection/> Date of Accession February 15, 2024.

[143] Strict scrutiny, established by the courts to examine equal protection claims, is defined as "*the government must show that its action furthers a compelling government interest and is narrowly tailored to achieve that interest*" and is used primarily when a government action involves classifications such as "*race, religion, national origin, and lack of citizenship*." See, Justia US Supreme Court Center, 'Equal Protection Supreme Court Cases', <https://supreme.justia.com/cases-by-topic/equal-protection/.> Date of Accession February 15, 2024.

[144] Johan Meeusen, 'Judicial Disapproval of Discrimination Against Illegitimate Children: A Comparative Study of Developments in Europe and the United States' (1995) 43(1) The American Journal of Comparative Law 143-144.

[145] Levy v. Louisiana, 391 US 68 (1968).

was the mother of five illegitimate children, all of whom she raised herself and had a family relationship with them similar to that of any other average household. Louise Levy died in a hospital in New Orleans as a result of suspected negligence by her physician. The appellant, on behalf of five children, sought compensation for both Louis Levy's wrongful death and an unresolved case that she had not lived long enough to see resolved.[146] The case was dismissed by the district court, and the appeals court upheld the District Court's decision, citing the Louisiana Act that the term "child", as mentioned in the Louisiana Act and understood by the courts, referred only to children born in wedlock for the purpose of "*morals and general welfare because it discourages bringing children in the world out of wedlock*".[147] Levy v. Louisiana has been the first Supreme Court case to an out-of-wedlock birth law under the Equal Protection Clause. The Court stated that while states had to classify, they were not allowed to do so in a manner that would be considered "*invidious discrimination against a particular class*".[148] The Supreme Court ruled that the "Equal Protection Clause" of the Fourteenth Amendment would be violated if an individual's "right to recovery"[149] was restricted simply because they were illegitimate children of the deceased.[150] The Supreme Court did not specify the objective nature of the invidious discrimination test; but held that states had to make reasonable classifications. The Supreme Court critisized the Louisiana Act due to its unconstitutional nature and asserted that the legitimacy of the children had no bearing on their relationship with their mother. The Court invalidated the Act in question, which discriminated against individuals based on a factor unrelated to the purpose of the Act and deprived illegitimate children of their right to compensation for the sudden death of their mother.

After the validity of a statutory classification based on illegitimacy was first challenged before the Supreme Court under the Equal Protection Clause in 1968 in Levy v. Louisiana, the US Supreme Court has decided many other cases involving discrimination against children based on their birth in or out of wedlock.[151] In this vein, another significant case, Trimble v. Gordon,[152] concerns the inheritance rights of an illegitimate child whose father died without leaving a will. The issue arose

146 Ibid at 69-70.

147 Ibid at 70, citing the Louisiana Court of Appeal (192 So. 2d, 193, 195-1966).

148 Ibid at 71-72.

149 The right to recovery is defined in the US Supreme Court decision as "*the right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse*" See, Levy v. Louisiana, 391 US 68 (1968) at 76.

150 Ibid at 70-72.

151 Labine v. Vincent, 401 U.S. 532, 537 (1971); Weber v. Aetna Casualty Insurance Co., 406 U.S. 164 (1972); Griffin v. Richardson 409 US 1069 (1972); Gomez v. Perez, 409 U.S. 535 (1973); New Jersey Welfare Rights Organisation v. Cahill, 411 US 619 (1973); Beaty v. Weinberger, 418 US 901 (1974), Jimenez v. Weinberge, 417 U.S. 628 (1974); Mathews v. Lucas, 427 U.S. 495 (1976); Norton v. Matthews, 427 US 524 (1976); Fiallo v. Bell, 430 US 787 (1977); Trimble v. Gordon, 430 US. 762 (1977); Lalli v. Lalli, 439 US. 259 (1978); Mills v. Habluetzel, 456 US. 91 (1982); Clark v. Jeter, 486 US. 456 (1988).

152 Trimble v. Gordon, 430 US. 762 (1977).

from the "Illinois Probate Act", which limited the inheritance rights of illegitimate children to their mothers. According to this Act, children born out of wedlock could only inherit intestate from their mother. In other words, if the father of an illegitimate child died without leaving a will, the child could not inherit anything. On the other hand, the children of married couples were not subject to the same restrictions. In this case, the applicant, Deta Mona Trimble, was not entitled to inherit from her father's inheritance due to her illegitimate status, although her father had recognised paternity and continued to support her until his death. The Illinois Supreme Court rejected the equal protection claim, holding that the Illinois Probate Act was supported by legitimate state interests in strengthening family ties and in providing an accurate and efficient process for distributing property upon death that would prevent "spurious claims".[153] Trimble appealed the Illinois Supreme Court's decision to the US Supreme Court. The US Supreme Court analysed whether the Equal Protection Clause of the Fourteenth Amendment had been violated by the Illinois Act, which restricted the inheritance rights of children born out of wedlock. In doing so, The US Supreme Court weighed the purpose of the Act in question and its effect on illegitimate children and found that the scope of the act extended far beyond its alleged purposes.[154] In response to the Illinois Supreme Court's allegation on the difficulty of legally establishing paternity and the related problem of false claims of paternity, The US Supreme Court stated that illegitimate children whose fathers die intestate should not be completely disinherited by a law due to difficulties of establishing paternity in certain cases. The US Supreme Court considered that a more precise method could be established to protect against fraudulent claims by illegitimate children. The US Supreme Court argued that the state's interests in administering the property of the deceased individuals and preventing false claims on paternity could be achieved through more narrowly tailored legislation than the Illinois Probate Act. The Court emphasised the justification for not holding illegitimate children responsible for their parents' misconduct as follows: "*The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. However, visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong-doing. Obviously, no child is responsible for his birth and penalising the illegitimate child is an ineffectual as well as unjust way of deterring the paren*t."[155] The US Supreme Court disregarded the claim that a state could seek to

[153] Ibid at 766.

[154] Ibid at 733, citing Jimenez v. Weinberger, 417 U.S. 628, 637 (1974).

[155] Ibid at 770.

influence the behaviours of women and men by imposing sanctions on their children born out of wedlock.[156]

The US Supreme Court found that the Illinois Supreme Court had failed to consider the possibility of finding a "middle ground" between the extremes of completely disinheriting the illegitimate child and determining paternity on a case-by-case basis.[157] Finally, the US Supreme Court reversed the judgement of the Illinois Supreme Court, concluding that Trimble was entitled to inherit from his biological father and that the Illinois State Probate Act violated the Equal Protection Clause of the Fourteenth Amendment.[158]

Since Trimble v. Gordon, many states in the US have amended their Succession (Probate) Laws to include specific provisions regarding the inheritance rights of children born out of wedlock. The US courts have developed a more liberal approach to inheritance rights as the constitutional protection of illegitimate children has gradually increased.[159] However; some cases have shown how the US Supreme Court has interpreted and addressed the issues contradictorily. For example, only a year after the US Supreme Court had ruled that the Illinois State Probate Act was unconstitutional in Trimble v. Gordon case, it upheld the constitutionality of a similar New York Act that allowed an illegitimate child to inherit from his intestate father only if a competent court issued an order declaring paternity during the father's lifetime in "Lalli v. Lalli" case.[160]

Yet, in cases of discrimination against children cases based on birth, it can be accepted that the preference of both the US Supreme Court and the ECtHR has been to prioritise children's fairness over rigorous adherence to public ideals adopted by legislative bodies. Although both Courts have recognised that supporting and promoting the traditional family concept is a legitimate aim, they have explicitly condemned and refused to punish the defenseless child to deter the parents.

The US Supreme Court has also ruled on cases involving discrimination against children based on race. Brown v. Board of Education[161] has been a landmark decision of the US Supreme Court, holding that state laws that create racial segregation in

[156] Children raised by same-sex parents are not different from children raised by heterosexual parents, single parents, grandparents, or any other family structure in the United States today. In fact, children raised by same-sex parents exhibit many of the same characteristics as children born out of wedlock. Since the Supreme Court ruled in 1977 that it was unconstitutional to discriminate against children born out of wedlock, it is clear that denying children of same-sex parents the right to inherit from both of their parents also violates their constitutional rights under the Equal Protection Clause. In this regard, see; Carissa R. Trast, 'You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from Both Their Parents' (2006) 35 (2) Hofstra Law Review 878.

[157] Ibid at 771.

[158] Ibid at 776.

[159] Robert Horowitz, *Legal Rights of Children* (Michigan: Shepard's/McGraw-Hill 1984) 42.

[160] Lalli v. Lalli, 439 U.S. 259 (1978) at 275.

[161] Brown v. Board of Education, 347 US. 483 (1954).

public schools, including in cases where segregated public schools are "equal" in quality, are unconstitutional based on the Equal Protection Clause of the Fourteenth Amendment.

Linda Brown was an African-American student who had to walk across a railroad switch yard every day to reach the bus stop where she would catch a ride to her "all-black Monroe Elementary School". She tried to apply to the all-white summer school that was closer to her home, but the Topeka Board of Education rejected her application due to her race. At the time, a Kansas Act allowed, but did not mandate, cities with a population of more than 15.000 to maintain separate public schools for black and white students. Following the Act in question, the Topeka Board of Education decided to segregate its elementary schools. The Browns, along with a group of parents in the same situation, sued the Topeka Board of Education on the grounds that the segregated school system deprived Linda Brown of the equal protection guaranteed by the Fourteenth Amendment. Although the Federal District Court concluded that black students were negatively affected by segregation in public schools, it rejected the claim that Linda Brown's rights had been violated under the "*separate but equal doctrine*"[162] established by the US Supreme Court in the early Plessy v. Ferguson case[163]. Upon the Federal District Court's decision, the Browns appealed to the US Supreme Court. The US Supreme Court emphasised the importance of education by stating that it was the most important function of the states and underlined that a child's chances of success in life without a quality education were highly unlikely. Therefore, equal access to such education was a right that had to be granted to everyone.[164] The Supreme Court compared the opportunities offered by the Topeka Board of Education to black students with the opportunities offered to white students and decided that they were essentially equal in terms of tangible, physical factors such as curriculum, school building and teachers' qualifications. However; the Court stated that the intangible effects of segregation in public education system should be examined instead.[165] In this vein, the US Supreme Court found that segregating children solely on the basis of race made African-American children feel inferior, stating: "*To separate black children from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely*

[162] This doctrine, established by the US Supreme Court in Plessy v. Ferguson case, held that laws regarding racial segregation did not violate constitutional rights when facilities for each race were equal in quality. See, Plessy v. Ferguson, 163 US. 537 (1896).

[163] Plessy v. Ferguson, 163 US. 537 (1896). The US Supreme Court ruled that a state law requiring railroads to provide "*equal but separate accommodations for the white, and coloured races*" did not violate the Equal Protection Clause of the Fourteenth Amendment. See, Plessy v. Ferguson, 163 US. 537 (1896) at 540. The Supreme Court's interpretation of the adjustment of this doctrine to other contexts is that "*the distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court*." See, Ibid at 545.

[164] Brown v Board of Education, 347 U.S. 483 (1954) at 493.

[165] Ibid at 496, Footnote 11.

to ever be undone".[166] Although the physical characteristics of the separate facilities for black and white students were principally equal, the segregation of students in public schools created a perception that black students had a lower status than white students[167] and deprived black children of some of the advantages they would have had in a mixed school. The US Supreme Court concluded that "separate but equal doctrine" had no place in public education and that such segregation was a violation of the Equal Protection Clause of the Fourteenth Amendment.[168]

Brown v. Board of Education was a unanimous decision signed by all Justices of the US Supreme Court.[169] The ruling, which ordered the desegregation of public schools, was highly regarded by American citizens who supported the civil rights movement.[170]

In Brown v. Board of Education, the US Supreme Court has unanimously ruled that education "*must be made available to all on equal terms*".[171] However; 20 years later, in San Antonio Independent School District v. Rodriguez case, the US Supreme Court issued a decision that was diametrically opposed to Brown v. Board of Education.

The US Supreme Court ruled in San Antonio Independent School District v. Rodriguez[172] that Texas' system of funding education, which allowed notable differences among school districts, was constitutional. The State of Texas relied on local property taxes and basic state financial aid to provide additional funding to each school district. Compared to other districts, the "Edgewood School District" was financially disadvantaged and had a higher number of African-American and Mexican-American students. The "Alamo Heights School District", on the other hand, was wealthier and predominantly white. Spending per student at Alamo was almost twice as high as in Edgewood. The difference was due to the difference in property tax revenue between the districts.[173] Alex Rodriguez was an elementary school student in the Edgewood School District, and his parents opposed the Texas

166 Ibid at 494.

167 Ibid at 494.

168 Ibid at 495.

169 Brown v. Board of Education had been consolidated into a single, cohesive case with four other cases involving segregation in public schools by the time it was appealed to the US Supreme Court in 1954. Although these four cases of "Briggs v. Elliot", "Davis v. Board of Education of Prince Edward County (VA.)", "Bolling v. Sharpe", and "Gebhart v. Ethel" were different from each other, the fundamental issue was the unconstitutionality of segregation in public schools.

170 For other discrimination against children cases based on race, see; Cooper v. Aaron, 358 US 1 (1958); Green v. County School Board of New Kent County, 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Freeman v. Pitts, 503 U.S. 467 (1992); Missouri v. Jenkins, 515 U.S. 70 (1995); Grutter v. Bollinger, 539 U.S. 306 (2003); Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

171 Brown v Board of Education, 347 U.S. 483 (1954) at 493.

172 San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

173 Ibid at 12-14.

education funding system on the grounds that it disadvantaged Edgewood's students. Many parents followed this lawsuit by suing state officials. They claimed that the Texas education funding system violated the Equal Protection Clause under the Fourteenth Amendment. The plaintiffs believed that "wealth classifications", just like racial classifications, would be regarded as "suspect"[174] by the Court under "strict scrutiny".[175] The United States District Court for the Western District of Texas ruled that the Texas education funding system violated the plaintiffs' equal protection rights under the Fourteenth Amendment;[176] however, the state of Texas appealed to the US Supreme Court. The US Supreme Court held that for wealth classifications to be scrutinised, they had to result in the absolute deprivation of a constitutionally fundamental benefit to "an identifiable class of poor people".[177] According to the Court, the Texas education funding system did not intentionally discriminate against all poor individuals in Texas State and had not been shown to discriminate on the basis of household wealth in any district or to discriminate against an identifiable class of poor individuals.[178] The US Supreme Court also held that the education funding system at issue did not unlawfully interfere with the fundamental rights and liberties of individuals. The Court added that while education was an important function provided by the state, the right to education was not among the other fundamental rights "explicitly" guaranteed by the US Constitution.[179] Finally, the US Supreme Court argued that this case involved some of the most complex issues of local taxation, fiscal planning, education policy, federalism, and therefore it suggested a "restraint" judicial review. As a result, the Court concluded that the Texas education funding system could not be subjected to strict scrutiny.[180] As to the plaintiffs' claim that the system had violated their equal protection rights under the Fourteenth Amendment, The US Supreme Court held that the system in question, despite its stated imperfections, was rationally related to a legitimate state purpose and, while guaranteeing a basic education for every child in the state of Texas, it

[174] In US Constitutional Law, the suspect classification is defined as "… *a class or group of persons meeting a series of criteria suggesting they are likely the subject of discrimination. These classes receive closer scrutiny by courts when an Equal Protection claim alleging unconstitutional discrimination is asserted against a law, regulation, or other government action, or sometimes private action*". See, Selene C. Vázquez, 'The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants' (2020) 51 (2) University of Miami Inter-American Law Review 65.

[175] In US Constitutional Law, a strict scrutiny standard is applied by the Court when a law violates a fundamental right. It is defined as "*a form of judicial review that courts use to determine the constitutionality of certain laws. Strict scrutiny is often used by courts when a plaintiff sues the government for discrimination. To pass strict scrutiny, the legislature must have passed the law to further a compelling governmental interest, and must have narrowly tailored the law to achieve that interest*" See, Cornell Law School Legal Information Institute, "Strict Scrutiny," <https://ECtHR.law.cornell.edu/wex/strict_scrutiny.> Date of Accession February 23, 2024.

[176] Rodriguez v. San Antonio Indep. Sch. Dist. 337 F. Supp. 285 (ECtHR.D. Tex. 1971).

[177] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) at 20-22.

[178] Ibid at 25.

[179] Ibid at 35.

[180] Ibid at 40-44.
The US Supreme Court recognised that Rodriguez was nothing less than a direct challenge to the way in which Texas had established and disbursed state and local tax revenues, an area in which the Court has traditionally avoided interfering. In this regard, see; Daniel B. Hatzenbuehler, 'San Antonio Independent School District v. Rodriguez: Inequitable but Not Unequal Protection under the Fourteenth Amendment' (1973) 27 (4) Southwestern Law Journal 720.

allowed for and encouraged local participation in each district's schools.[181] Therefore, the Texas education funding system did not violate the Equal Protection Clause of the Fourteenth Amendment.[182]

San Antonio Independent School District v. Rodriguez decision has been one of the most criticised decisions of the US Supreme Court. It is argued that the US Supreme Court has played a significant role in the development of today's segregated and unequal school system in the United States by ruling that unequal funding of schools did not violate the Constitution, that discrimination against the poor was not unconstitutional, in other words that individuals discriminated against based on lack of wealth were not an "identifiable class" and that education was not a fundamental right for equal protection purposes.[183]

The landmark, Brown v. Board of Education decision has also provided the constitutional basis for parents of disabled children and "disability rights" activists to advocate for equal opportunities for all children in education, including those with disabilities.[184] In this regard, Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania case[185] is another landmark case as it is the first major case to guarantee equality for disabled children in the field of education. In 1971, "a class action lawsuit"[186] was filed on behalf of thirteen students with disabilities who had been denied access to public education in the State of Pennsylvania due to a Pennsylvania law that explicitly permitted public schools to reject students who were under the "*mental age of five years*"[187] at the time they were to be enrolled in the first grade. Attorney Gilhool, representing the "Pennsylvania Association for Retarded Citizens (PARC)", based the case on the landmark Brown v. Board of Education decision. The plaintiffs claimed that being denied access to public education on the basis of disability was a violation of their rights guaranteed

[181] Ibid at 49.

[182] Ibid at 17.

[183] Andrea Sachs, 'The Worst Supreme Court Decisions Since 1960' (06.10.2015) TIME <https://time.com/4056051/worst-supreme-court-decisions/> Date of Accession February 23, 2024; William J. Brennan, 'State Constitutions and the Protection of Individual Rights' (1977) 90 (3) Harvard Law Review 489- 491.

[184] Thomas K. Gilhool, 'The Uses of Litigation: The Right of Retarded Children to a Free Public Education' (1973) 50 (2) Peabody Journal of Education 122.

[185] Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 343 F. Supp. 279 (1972).

[186] A class action is defined as "*a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or class*." See, Cornell Law School Legal Information Institute, 'Class Action' <https://ECtHR.law.cornell.edu/wex/class_action> Date of Accession February 23, 2024 ; also see, Hansberry v. Lee, 311 US. 32, 41, 61 S. Ct. 115, 118 (1940).

[187] Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania at 283.

by the Equal Protection Clause and the "*Due Process Clause*"[188] of the Fourteenth Amendment.[189] The US District Court for the Eastern District of Pennsylvania ruled that the state of Pennsylvania had an obligation to provide free public education to all children, including disabled children, and added that the quality and standard of education provided to disabled children had to be equal to that of other students.[190]

The Court interpreted the Due Process Clause of the Fourteenth Amendment as giving specific rights to parents, struck down state laws that excluded disabled children from accessing schools, and held that disabled children had the right to education. (PARC) v. Commonwealth of Pennsylvania case, followed by many other federal cases[191] related to disability and education, prompted Congress to enact numerous laws, including the "Education for All Handicapped Children Act",[192] which requires the US states to provide equal access to education for disabled children at the federal level.

The US Supreme Court has also ruled on cases involving discrimination against children based on their immigration status. The landmark Pyler v. Doe case[193] is noteworthy in this regard, as it ensured that children living in the US without proper immigration documents could receive basic education.[194] The case concerned a challenge to a Texas Law that denied funding for children born outside the United States and not legally admitted to the country and granted local school districts the authority to refuse access to public schools.[195] In accordance with Texas Law, the "Tyler Independent School District" required children of unlawful residents to pay tuition to be admitted to its schools.[196] According to the school district's policy, children were considered legal if they had documents proving their legal status in the US or if federal immigration officials confirmed that they were in the process of

---

188 There are two due process clauses in the US Constituton. The first one is seen in the Fifth Amenment as "*no person shall be……deprived of life, liberty, or property, without due process of law*"; the second Due Process Clause is seen in the Fourteenth Amendment as "*No State shall make or enforce any law which shall…. deprive any person of life, liberty, or property, without du process of law*".
The due process clause of the Fifth Amendment is very similar to that of the Fourteenth Amendment's; however the Fifth Amendment only applies against the federal government. The "*substantive due process*" has been considered one of the most controversial areas of US Supreme Court jurisprudence, as the Court has found itself competent to apply the Due Process Clause of the Fourteenth Amendment to prohibit certain practices. For instance, the US Supreme Court has ruled that rights that are not explicitly mentioned in the Constitution are protected by the Due Process Clause. See, National Constitution Center, 'The Fourteenth Amendment Due Process Clause' <https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701> Date of Accession February 26, 2024.

189 Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania at 283.

190 Ibid at 302.

191 In particular, Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

192 Education for All Handicapped Children Act, 20 U.S.C. §1400-1461 (1982 & Supp. III 1985).

193 Pyler v. Doe, 457 US 202 (1982).

194 Plyler v. Doe is believed to be the Supreme Court opinion that comes closest to guaranteeing a right to education for vulnerable students, and the decision was based on an implicit recognition of a property interest in public education. In this regard, see; Rachel F. Moran, 'Personhood, Personhood, Property, and Public Education: The Case of Plyler v. Doe' 2023 (123) (1) Texas A&M University School of Law 1273.

195 Ibid at 205.

196 Ibid at 206 (footnote 2).

obtaining such documents.[197] Soon after, some Mexican students who were unable to prove that they were legally admitted filed a class action suit claiming that the mentioned Texas Law was unconstitutional.

The US Supreme Court based its decision on the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the Court held that if states provided free public education (K-12)[198] to American citizens and legal residents, they could not deny free public education to undocumented children unless they could demonstrate that doing so would serve a "substantial state interest".[199] The US Supreme Court concluded that the school district's denial of children's access to basic education on the basis of their immigration status lacked a rational basis, given the harm the policy would cause to both the children and society. "*By denying these children a basic education*" the Court added, "*we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our nation.*"[200] The US Supreme Court further stated that holding children responsible for the actions of their parents was inconsistent with basic principles of justice.[201]

The US Supreme Court struck down the Texas Law because it disproportionately disadvantaged the children of illegal residents by depriving them of their right to education and because the state of Texas failed to show that the Law in question was necessary to serve a compelling state interest. In Plyler v. Doe, the children's innocence has served as an armor against prejudice based on their parents' immigration status.

Children also face discrimination based on language. Lau v. Nichols[202] is a significant case in which the US Supreme Court has ruled on language-based discrimination against children. As a result of a decree issued by the Federal Court, the San Francisco (California) school system was united in 1971. There were about 2800 children of Chinese descent who were unable to speak English in the school system. While 1000 of these Chinese children were given additional English courses, 1800 of them were not.[203] The non-English speaking Chinese children who did not receive any additional English classes filed a class action lawsuit against the "San Francisco

---

197 Ibid at 206 (footnote 2).

198 In the US, K-12 education, which is funded for free by the government, includes "*primary education starting in kindergarten, and secondary education ending in grade 12.*" See, Peter G. Peterson Foundation, 'How Is K-12 Education Funded?' <https://ECtHR.pgpf.org/budget-basics/how-is-k-12-education-funde.> Date of Accession February 27, 2024.

199 Pyler v. Doe, 457 US 202 (1982) at 230.

200 Ibid at 223.

201 Ibid at 220.

202 Lau v. Nichols, 414 U.S. 563 (1974).
Unlike Brown vs. Board of Education decision 20 years ago, which held that school segregation was unconstitutional, Lau vs. Nichols decision addresses the unique education issue faced by millions of non-English speaking students, mostly Mexican Americans, Chinese Americans, Filipino Americans, Korean Americans, and others. See, Ling-chi Wang, 'Lau v. Nichols: The Right of Limited-English-speaking Students' (1974) 2 (2) Amerasia Journal 16.

203 Ibid at 564.

Unified School District". The plaintiffs claimed that the failure to provide remedial English classes violated the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, sex, religion, and ethnic origin, and the Fourteenth Amendment to the US Constitution and created unequal educational opportunities.[204] The District Court dismissed the case and the Court of Appeals affirmed.[205]

The US Supreme Court stated that "*there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum*"[206] and unanimously concluded that the San Francisco school system's failure to provide additional English classes to non-English speaking Chinese children constituted discrimination in violation of the "Civil Rights Act of 1964" by depriving Chinese children of the opportunity to participate in the public education program.[207]The US Supreme Court emphasised the need for schools to take affirmative steps to accommodate children's linguistic characteristics and ultimately overturned the Court of Appeals' decision.[208] Lau v. Nichols is a landmark case in highlighting the significance of "meaningful" access to a good education for every child.[209]

V. Conclusion

The American approach of not considering children capable of exercising adult rights until the mid-20th century led to legal consequences that discriminated against children and reinforced social perceptions that considered children as second-class citizens or inferior to adults. This approach has been severely criticised. However; the civil rights movement paved the way for the emergence of a new approach centered on the right of all individuals to be treated equally and to be protected from unjust interference by the state.[210] This approach is reflected in the US Supreme Court decisions on children's rights. In this vein, in "In re Gault" case,[211] the Court stated that "…*neither the Fourteenth Amendment nor the Bill of Rights is for adults alone*".[212] Similarly, in Tinker v. Des Moines Independent Community School Dist. Case,[213] in which children were given the status of "persons", the US Supreme Court held that

[204] Ibid at 564.

[205] Ibid at 565.

[206] Ibid at 566.

[207] Ibid at 566.

[208] Ibid at 569.

[209] Ibid at 568.

[210] Bruce C. Hafen, 'Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to Their Rights' (1976) 605 (3) BYU Law Review 631-632.

[211] In re Gault, 387 U.S. 1 (1967).

[212] Ibid at 13.

[213] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

"*...students in school as well as out of school are 'persons' under our Constitution. They possess fundamental rights which the State must respect just as they themselves must respect their obligations to the State*."[214]

In the United States, where children's rights are not directly regulated in the US Constitution and the Convention on the Rights of the Child has not been ratified by the US Government, the Jurisprudence of the US Supreme Court has significantly contributted to the recognition of children's rights. In the process of the evolution of the U.S. Supreme Court's jurisprudence in support of children's rights, the Court has demonstrated a sui generis jurisprudential approach, which is sometimes compatible with the principles of the children's rights movement and sometimes contrary to the demands of the children's rights movement.

The Supreme Court decisions, often by the narrowest margins, have had a significant impact on children. In this respect, "Brown v. Board of Education", decided by a unanimous Supreme Court in 1954, declared segregated schools unconstitutional and granted African-American children who had been compelled to attend insufficiently funded, discriminatory schools access to broader educational opportunities. However; almost twenty years later, in "San Antonio Independent School District v. Rodriguez" case, the Court ruled by a closely divided 5-4 majority that children did not have a constitutional right to education and that reassignment to insufficiently funded schools did not discriminate against them and did not violate the Constitution.

In "Trimble v. Gordon" case, an Illinois law allowed illegitimate children to inherit only from their mothers, while legitimate children could inherit from both their mothers and fathers. The US Supreme Court found this treatment unequal and discriminatory. However, the Court has not always ruled in favour of illegitimate children. In this sense, in "Lalli v. Lalli" case,[215] the Court supported a New York Law requiring a court order to establish paternity before an illegitimate child could inherit from his father.[216]

Some cases have demonstrated how inconsistently the US Supreme Court has interpreted and addressed these issues. For instance, the Court has been willing to disregard state interests for children who were discriminated against by their parents' marital status; however, it has been unwilling to do the same for children who were discriminated against by their parents' economic status.[217]

---

214 Ibid at 511.

215 Lalli v. Lalli, 439 U.S. 259 (1978).

216 Ibid at 275.

217 Susan Gluck Mezey, 'Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953-92' (1993) 27 (3) Family Law Quarterly 321.

In constitutional cases concerning children's rights, it is important for the Court to be receptive in order to achieve a beneficial outcome for a disadvantaged group. In this respect, it can be accepted that, with some exceptions, illegitimate children have significantly benefited from the decisions of the US Supreme Court; however, it is argued that after the Warren Court era,[218] the US Supreme Court has become increasingly reluctant to consider children's constitutional claims, except in cases of illegitimacy. Furthermore, during the "Burger Court "[219] *and the* "Rehnquist Court" eras,[220] the concepts of state control and parental power were increasingly valued, and the conflicting interests of the state and the parents were prioritised over the interests of the child.[221]

Adapting the interpretation of rights provisions to constantly evolving circumstances and situations in society is one of the major problems faced by courts when interpreting these provisions. This issue has led to intense debates in the US as to whether or not the US Supreme Court should interpret the Constitution as a living constitution. On the other hand, the ECtHR has always considered the European Convention on Human Rights as a living document and has taken the approach that its interpretation should change over time in line with changes in society.[222] This approach has enabled the ECtHR to develop a judicial methodology that considers the evolving interpretation of rights provisions. The judicial methodology of evolving interpretation is not as developed in the US as it is in Europe. However, in some cases, the US Supreme Court has used reasoning that is quite similar to that of the ECtHR, which provides a ground for comparative assessment.[223] One way to implement an evolving interpretation of a rights provision is to change an established perception of the provision that existed when the provision was drafted or an established interpretation of the provision in a previous court decision. In this sense, "Brown v. Board of Education" is such a favourable example. In this case, the US Supreme Court ruled that the "separate but equal doctrine" of segregated schools was unconstitutional by overturning its prior decision in "Plessy v. Ferguson", which had been in effect for more than 50 years.

---

218 The years during Earl Warren presided as "Chief Justice" of the US Supreme Court between 1953 and 1969 is known as the "Warren Court Era". The Warren Court has been the most liberal court in modern American history.

219 The years when Warren E. Burger presided as "Chief Justice" of the US Supreme Court between 1969 and 1986 is known as the "Burger Court Era". The Burger Court is defined as a "*transitional court*" as it transitioned from the liberal decisions of the Warren Court to the "conservative" decisions of the Rehnquist Court.

220 The years during William Rehnquist presided as "Chief Justice" of the US Supreme Court between 1994 and 2005 is known as the "Rehnquist Court Era". This Court is considered conservative.

221 Mezey, (n 214) 321.

222 Conor O'Mahony and Kanstantsin Dzehtsiarou, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the US Supreme Court' (2013) 44 (2) Columbia Human Rights Law Review 309; Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 (2) Human Rights Quarterly 313.

223 O'Mahony and Dzehtsiarou (n 221) 309.

The ECtHR has been more receptive than the US Supreme Court in referring to international treaties in its proceedings as supporting evidence for an evolving interpretation. For example, in Marckx v. Belgium case,[224] the ECtHR stated the following: "*It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the illegitimate and the legitimate family. However, the Court recalls that this Convention must be interpreted in the light of the present circumstances. In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim mater semper certa est.*"[225]

The ECtHR has been instrumental in promoting access to remedies for children in relation to the right to be free from discrimination. Article 14 of the European Convention on Human Rights regulates the prohibition of discrimination and ensures that the rights articulated in the Convention are fully exercised without discrimination based on any factor including age. The Convention does not define the child; however, Article 1 of the Convention requires States Parties to guarantee the rights mentioned in the Convention to "*everyone*" under their authority. The ECtHR has adopted this approach in its jurisprudence. The ECtHR has also adopted the definition of the "child" in the UN Convention on the Rights of the Child (CRC) and accepted the concept of "under 18 years of age". The ECtHR has recognised the significance of the CRC and has often referred to it in its decisions. When the ECtHR observes that children in similar positions receive different treatments, it examines whether this can be rationally and objectively justified.

Sometimes, additional measures are required to ensure equal treatment, above the mere prevention of discriminatory treatment. Under certain circumstances, measures may be taken to compensate for persistent inequalities. In the EU legal context, these are known as "specific measures" or "positive action".[226] In this context, the ECtHR has referred in some of its cases to "positive obligations" in relation to discrimination against children. By implementing special measures, states can ensure "substantive equality" which means equal access to social benefits. For instance, in G.L v. Italy case,[227] the ECtHR stated that "*states should promote the full social integration and participation of persons with disabilities in the life of the community in particular*

[224] Marckx v. Belgium App no 6833/74 (ECtHR,13 June 1979).

[225] Ibid § 41.

[226] For a detailed clarification of these terms, see; General Recommendation No. 25, on article 4, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures at III/B<https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf> Date of Accession February 29, 2024.

[227] G.L v. Italy App no 59751/15 (ECtHR, 10 September 2020).

through measures, including technical aids, aiming to overcome barriers to communication and mobility."[228] Similarly, in Oršuš and Others v. Croatia case,[229] the ECtHR indicates the effectiveness of the positive measure as follows: "*The Court finds it satisfying that .... the placement of the applicants in separate classes was a positive measure designed to assist them in acquiring the knowledge necessary for them to follow the school curriculum.*"[230] When States fail to consider the necessity for special measures, their policies and procedures may result in indirect discrimination.

The ECtHR has an extensive body of case law on discrimination against children, particularly based on "birth". The Court has examined many cases under Article 8 together with Article 14 of the Convention. The ECtHR's interpretation of Article 8 together with Article 14 of the Convention and the US Supreme Court's interpretation of the Equal Protection Clause under Section 1 of the Fourteenth Amendment are very similar. The Fourteenth Amendment ensures that there will not be a "*dominant race*" and a "*subordinate and inferior class of beings*".[231] Through judicial interpretation, the Fourteenth Amendment has become a constitutional basis for children's rights. Nevertheless, it has taken longer in the US than in Europe to improve the patrimonial rights of illegitimate children, and the US Supreme Court had to issue a series of decisions, including contradictory ones, throughout the 1970s to reach a similar level. Both the ECtHR and the US Supreme Court have agreed that the protection and support of the family is a legitimate aim and have disagreed with the punishment of an innocent child to deter parents. Both courts have emphasised that illegitimate children cannot be treated differently because of their status at birth. However; as mentioned earlier, the ECtHR has underlined that if a treatment pursues "a legitimate aim", has an "objective and reasonable justification" or there is "a responsible relationship of proportionality between the means employed and the aim pursued",[232] then that treatment is not discriminatory.[233] This formulation is similar to the US Supreme Court's "rational basis test" of equal protection issues. The ECtHR's approach is akin to the US Supreme Court's "strict scrutiny" approach, which requires a substantial relationship between the classification and the purpose of the state.[234]

Both the ECtHR and the US Supreme Court have ruled on several landmark cases concerning discrimination against children based on ethnic background, disability, age, birth, other grounds such as religion, language, etc. Article 14 of the European Convention on Human Rights and Article 1 of Protocol 12 to the Convention do

[228] Ibid § 69.

[229] Oršuš and Others v. Croatia App no 15766/03 (ECtHR, 16 March, 2010).

[230] Ibid § 68.

[231] Kenneth L. Karst, *Belonging to America: Equal Citizenship and The Constitution* (New Haven, CT: Yale University Press 1989) 49.

[232] Mazurek v. France App no 34406/97 (ECtHR, 1 February 2000) § 18.

[233] Ibid § 48.

[234] Meeusen, (n143) 143-144.

not explicitly mention "age" as a ground for discrimination. However, the ECtHR has considered age discrimination issues in relation to many rights protected by the Convention and, as a result, has recognised age under "other status".

As more people begin to see children as an important category of rights holders through a rights-based lens, the concept of children's rights will be more widely recognised within the system, and States will develop policies to promote children's rights. The judiciary plays a crucial role in upholding and reinforcing children's rights, and in parallel to this importance, courts should ensure that children are adequately informed and consulted about the proceedings in which they are involved, and that children should be able to express their opinions before the courts and that these opinions should be taken into consideration. More importantly, judicial authorities, including the ECtHR and the US Supreme Court, should consider the "best interests of the child" when making decisions concerning children's rights.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Grant Support: The author declared that this study has received no financial support.

Hakem Değerlendirmesi: Dış bağımsız.
Çıkar Çatışması: Yazar çıkar çatışması bildirmemiştir.
Finansal Destek: Yazar bu çalışma için finansal destek almadığını beyan etmiştir.

Bibliography/Bibliyografya

Besson S, 'The Principle of Non-Discrimination in the Convention on the Rights of the Child' (2005) 13 (4) The International Journal of Children's Rights 444.

Besson S and Kleber E, 'Article 2: The Right to Non-Discrimination' in John Tobin and Philip Alston (eds), The UN Convention on the Rights of the Child: A Commentary (United Kingdom: Oxford University Press 2019) 50.

Brennan WB, 'State Constitutions and the Protection of Individual Rights' (1977) 90 (3) Harvard Law Review 489- 491.

Burstein P, *Equal Employment Opportunity: Labor Market Discrimination and Public Policy* (New York: Aldine de Gruyter 1994) 87.

Campbell C and Smith D, 'Distinguishing Between Direct and Indirect Discrimination' (2022) 86(2) The Modern Law Review 307-330.

Congressional Research Service, 'The United Nations Convention on the Rights of the Child', July 27 2015, p. 1 <https://crsreports.congress.gov/product/pdf/R/R40484/25#:~:text=Opponents%20argue%20that%20ratification%20would,educate%20or%20discipline%20their%20children> Date of Accession 12 February 2024.

Cooper S and Thomas M, 'Inheritance Rights of Children Born Outside Wedlock in Jersey-The Event Horizon' (2010) 2 (1) Jersey & Guernsey Law Review 7.

Cornell Law School Legal Information Institute, 'Class Action' <https://ECtHR.law.cornell.edu/wex/class_action> Date of Accession 23 February 2024.

Council of Europe, 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property' (Strasburg: Council of Europe, 2022) <https://ECtHR.ECtHR.coe.int/documents/d/ECtHR/Guide_Art_1_Protocol_1_ENG> Date of Accession 23 February 2024.

Council of Europe, 'European Convention of Human Rights', <https://ECtHR.ECtHR.coe.int/documents/d/ECtHR/convention_ENG. > Date of Accession 23 February 2024.

Council of Europe, 'European Convention on the Exercise of Children's Rights, ETS No. 160', (Strasburg: Council of Europe,1996) <https://rm.coe.int/european-convention-on-the-exercise-of-children-s-rights> Date of Accession 23 February 2024.

Council of Europe, 'Explanatory memorandum to the Recommendation CM/Rec (2007) 9 of the Committee of Ministers to Member States on Life Projects for Unaccompanied Migrant Minors' (Strasburg: Council of Europe,2007)<https://ECtHR.coe.int/t/dg3/migration/archives/Source/Recommendations/Recommendation%20CM%20Rec_2007_9%20-%20Explanatory%20memorandum_en.pdf.> Date of Accession 27 January 2024.

Council of Europe, 'Recommendation CM/Rec (2008) 4 of the Committee of Ministers to Member States on Strengthening the Integration of Children of Migrants and of Immigrant Background' (Strasburg: Council of Europe, 2008) <https://ECtHR.coe.int/t/democracy/migration/ressources/recommendations-resolutions_en.asp.> Date of Accession 27 January 2024.

Crosby FJ, Iyer A and Sincharoen S, 'Understanding Affirmative Action' (2006) 57 (1) Annual Review Psychology 587.

De Schutter O, *The Prohibition of Discrimination under European Human Rights Law: Relevance for EU Non-discrimination Directives – Un Update* (European Commission Directorate-General for Employment, Social Affairs and Inclusion Publications Office 2005) 31.

Devroye J, 'The Case of D.H and Others v. the Czech Republic' (2009) 7 (1) Northwestern Journal of International Human Rights 81.

Disalvo D and Ceaser JW, 'Affirmative Action and Positive Discrimination' (2004) 25 (1) The Tocqueville Review 77.

European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.4, *Tackling Multiple Discrimination Practices, Policies and Laws* (EU Publications 2007) 16-17.

European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-discrimination Law* (Luxembourg: Publications Office of the European Union 2018) 42.

Fortin J, *Children's Rights and the Developing Law* (Cambridge: Cambridge University Press 2009) 49.

Fredman S, 'Substantive Equality Revisited' (2016) 14 (3) International Journal of Constitutional Law 712-738.

Gilhool TK, 'The Uses of Litigation: The Right of Retarded Children to a Free Public Education' (1973) 50 (2) Peabody Journal of Education 122.

Hafen BC, 'Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to Their Rights' (1976) 605 (3) BYU Law Review 631-632.

Hatzenbuehler DB, 'San Antonio Independent School District v. Rodriguez: Inequitable but Not Unequal Protection under the Fourteenth Amendment' (1973) 27 (4) Southwestern Law Journal 720.

Henn EV, *International Human Rights Law and Structural Discrimination: The Example of Violence Against Women* (Heidelberg: Springer 2019) 1.

Horowitz RM and Davidson HA, *Legal Rights of Children* (Michigan: Shepard's/McGraw-Hill 1984) 42.

Justia US Supreme Court Cases, 'Equal Protection Supreme Court Cases' <https://supreme.justia.com/cases-by-topic/equal-protection/> Date of Accession 15 February 2024.

Karst KL, *Belonging to America: Equal Citizenship and The Constitution* (New Haven, CT: Yale University Press 1989) 49.

Kaufman NH., *Human Rights Treaties and The Senate: A History of Opposition* (Chapel Hill: The University of North Carolina Press 1990) 149-50.

Kilkelly U, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 (2) Human Rights Quarterly 313.

Kilkelly U, *The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention of Human Rights* (Directorate General of Human Rights, Council of Europe 2001) 14.

Kilkelly U, 'Effective Protection of Children's Rights in Family Cases: An International Approach' (2002) 12 (2) Transnational Law & Contemporary Problems 341.

Kilkelly U, 'Protecting Children's Rights under the ECtHR: The Role of Positive Obligations' (2010) 61(3) Northern Ireland Legal Quarterly 248.

Kilkelly U, 'Using the Convention on the Rights of the Child in Law and Policy: Two Ways to Improve Compliance' in Antonella Invernizzi and Jane Williams (eds), The Human Rights of Children: From Visions to Implementation (Routledge 2016) 181.

Kilkelly U and Liefaard T, 'International Children's Rights: Reflections on A Complex, Dynamic, and Relatively Young Area of Law' in Ursula Kilkelly and Ton Liefaard (eds), International Human Rights of Children (Springer 2018) 617-627.

Liefaard T and Doek JE, 'Litigating the Rights of the Child: Taking Stock After 25 Years of the CRC' in Ton Liefaard and Jaap E. Doek (eds), Litigating the Rights of the Child (Springer 2015) 2-3.

Liebel M, 'Adultism and Age-Based Discrimination Against Children' in Dagmar Kutsar and Hanne Warming (eds), Children and Non-Discrimination Interdisciplinary Textbook (University Press of Estonia 2014) 120.

Lundy L and Byrne B, 'The Four General Principles of the United Nations Convention on the Rights of the Child: The Potential Value of the Approach in Other Areas of Human Rights Law' in Eva Brems, Ellen Desmet and Wouter Vandenhole (eds), Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration? (Routlage 2017) 52-70.

Makkonen T, Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore (Finland: Åbo Akademi University Institute for Human Rights 2002) 9.

Marks S and Clapham A, *International Human Rights Lexicon* (Oxford: Oxford University Press 2005) 26.

Mayer AE, 'Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?' (1996) 23 (3) Hastings Constitutional Law Quarterly 748-749.

Meeusen J, 'Judicial Disapproval of Discrimination Against Illegitimate Children: A Comparative Study of Developments in Europe and the United States' (1995) 43(1) The American Journal of Comparative Law 143-144.

Merrills J and Robertson AH, *Human Rights in Europe: A Study of the European Convention on Human Rights* (Manchester University Press 2001) 247.

Mezey SG, 'Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953-92' (1993) 27 (3) Family Law Quarterly 321.

Mezmur BD, 'Based Solely on Their Date of Birth? Rethinking Age Discrimination Against Children Under the Convention on the Rights of the Child' (2023) 36(2) Harvard Human Rights Journal 261.

Moran RF, 'Personhood, Personhood, Property, and Public Education: The Case of Plyler v. Doe' 2023 (123) (1) Texas A&M University School of Law 1273.

Nowak M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Germany: NP Engel Verlag 2005) 37.

O'Mahony C and Dzehtsiarou K, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the US Supreme Court' 2013 (44 (2) Columbia Human Rights Law Review 309.

OECD, *Untapped Skills: Realising the Potential of Immigrant Students*, (Paris: OECD Publishing 2012) 202.

Parliamentary Assembly, 'The European Council Recommendation 1596 (2003): Situation of Young Migrants in Europe' (Strasbourg, 31 January 2003) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML en.asp?fileid=17086&lang=en.> Date of Accession 27 January 2024.

Peter G. Peterson Foundation, 'How Is K-12 Education Funded?' (United States, 25 August 2023) <https://ECtHR.pgpf.org/budget-basics/how-is-k-12-education-funde.> Date of Accession 27 February 2024.

Sachs A, 'The Worst Supreme Court Decisions Since 1960' (06.10.2015) TIME <https://time.com/4056051/worst-supreme-court-decisions/> Date of Accession 23 February 2024.

Spinoy M and Willems K, 'G.L. v. Italy: The Ambiguous Role of Article 14 European Court of Human Rights in Inclusive Education Cases' (2022) 22 (4) International Journal of Discrimination and the Law 192.

Strasser E, Gächter A and Dzhengozova M, 'International Centre for Migration Policy Development (ICMPD)- On behalf of the European Union Agency for Fundamental Rights (FRA): The 'Benefits of Positive Action' (Venice, 2008) 6 <https://fra.europa.eu/sites/default/files/fra_uploads/220FRA_thematicpaper_positiveaction_ICMPD_en.pdf.> Date of Access 18 January 2024.

Trast CR, 'You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from Both Their Parents' (2006) 35 (2) Hofstra Law Review 878.

UN Human Rights Committee, 'General Comment 18: Non-discrimination*'* (10 November 1989) <https://ECtHR.refworld.org/legal/general/hrc/1989/en/6268> parag 7, Date of Access 16 January 2024.

UN Committee on Economic, Social and Cultural Rights (CESCR), 'General comment No. 20: Non-discrimination in economic, social and cultural rights, Article 2, parag 2 of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) <https://ECtHR.refworld.org/legal/general/cescr/2009/en/68520> parag 10/b, Date of Access 18 January 2024.

UN Convention on the Rights of the Child (CRC) (20 November 1989) <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.> Date of Access 25 January 2024.

UN General Assembly, 'International Covenant on Civil and Political Rights', (New York, 23 March 1976) <https://ECtHR.ohchr.org/sites/default/files/ccpr.pdf.> Date of Access 24 January 2024.

UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights', (New York, 16 December 1966) <https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf> Date of Access 24 January 2024.

UN General Assembly, 'Universal Declaration of Human Rights (1948)' <https://ECtHR.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf> Date of Access 24 January 2024.

UN Human Rights Office of the High Commisioner / General Assembly Resolution S-26/2, 'Declaration of Commitment on HIV/AIDS' <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/declaration-commitment-hivaids> Date of Access 24 January 2024.

UN Human Rights Office of The High Commissioner, 'Gender Discrimination, Racial Discrimination and Women's Human Rights (29 September 2017)' <https://ECtHR.ohchr.org/en/stories/2017/09/gender-discrimination-racial-discrimination-and-womens-human-rights> Date of Access 24 January 2024.

UN Human Rights Office of the High Commissioner, 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (25 May 2000) <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child> Date of Access 24 January 2024.

UN Human Rights Office of the High Commissioner/ General Assembly Resolution A/RES/54/263, 'Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict' (25 May 2000) <https://ECtHR.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-involvement-children> Date of Access 24 January 2024.

UN Committee on the Rights of the Child, 'Introduction to the Committee' <https://ECtHR.ohchr.org/en/treaty-bodies/crc/introduction-committee> Date of Access 25 January 2024.

UN Office of The High Commissioner for Human Rights in Cooperation with The International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Chapter 13: The Rights to Equality and Non-Discrimination in the Administration of Justice*, *Professional Training Series No. 9* (New York and Geneva 2003) 636.

US National Archives and Records Administration, 'US Constitution' <https://ECtHR.archives.gov/founding-docs/constitution-transcript.> Date of Access 16 January 2024.

Van den Bogaert S, *Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters* (ZaöRV 71 2011) 740.

Vandenhole ECTHR, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005) 170-172.

Vázquez SC, 'The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants'(2020) 51 (2) University of Miami Inter-American Law Review 65.

Wang L, 'Lau v. Nichols: The Right of Limited-English-speaking Students' (1974) 2 (2) Amerasia Journal 16.

Webb E, 'An Exploration of the Discrimination-Rights Dynamic in Relation to Children' in Antonella Invernizzi and Jane Williams (eds), The Human Rights of Children: From Visions to Implementation (Taylor & Francis 2011) 301.

Zick A, Küpper B and Hövermann A, *Intolerance, Prejudice and Discrimination: A European Report* (Berlin: Friedrich Ebert Stiftung 2011) 35.

Case Law

The European Court of Human Rights (ECtHR) Cases

A. v. The United Kingdom App no 25599/94 (ECtHR, 23 September 1998).

Belgian Linguistic Case App no 2126/64 (ECtHR, 23 July 1968).

C. v. Croatia App no 80117/17 (ECtHR, 8 October 2020).

Camp and Bourimi v. The Netherlands App no 28369/95 (ECtHR, 3 October 2000).

Cinta v. Romania Application no. 3891/19 (ECtHR, 18 February 2020).

Çam v. Turkey App no 51500/08 (ECtHR, 23 February 2016).

Çoşelav v. Turkey App no 1413/07 (ECtHR, 9 October 2012).

D.H and Others v. the Czech Republic App no. 57325/00 (ECtHR, 13 November 2007).

Fabris v. France App no 16574/08 (ECtHR, 7 February 2013).

Fawsie v. Greece App no 40080/07 (ECtHR, 28 October 2010).

G.L v. Italy App no 59751/15 (ECtHR, 10 September 2020).

Guberina v. Croatia App no 23682/13 (ECtHR, 22 March 2016).

Güveç v. Turkey App no 70337/01 (ECtHR, 20. 04. 2009).

Harroudj v. France App no 43631/09 (ECtHR, 4 October 2012).

Inze v. Austria App no 8695/79 (ECtHR, 28 October 1987) § 45.

Kocherov and Sergeyeva v. Russia App no 16899/13 (ECtHR, 29 March 2016).

Koua Poirrez v. France App no 40892/98 (ECtHR, 31 December 2003).

Luczak v. Poland App no 77782/01 (ECtHR, 27 November 2007).

Marckx v. Belgium App no 6833/74 (ECtHR, 13 June 1979).

Mazurek v. France App no 34406/97 (ECtHR, 1 February 2000).

Oršuš and Others v. Croatia App no 15766/03 (ECtHR, 16 March, 2010).

Pla and Puncernau v. Andora, App no 69498/01 (ECtHR, 13/7/2004).

Ponomaryovi v. Bulgaria App no 5335/05 (ECtHR, 28/11/2011).

Ponomaryovi v. Bulgaria App no 5335/05 (ECtHR, 28/11/2011).

Sahin v. Germany App no 30943 /96 (ECtHR, 08/07/ 2003).

Saidoun v. Greece App no. 40083/07 (ECtHR, 28 October 2010).

Sampanis and Others v. Greece App no 32526/05 (ECtHR, 05/09/2008).

Schwizgebel v. Switzerland App no 25762/07 (ECtHR, 10 June 2010).

Sommerfeld v. Germany App no 31871/96 (ECtHR, 8 July 2003).

Stubbings and Others v. the United Kingdom App no 22083/93; 22095/93 (ECtHR, 22 October 1996).

Şahin v. Germany App no 30943/96 (ECtHR, 8 July 2003).

X and ECTHR v. the Netherlands App no 8978/80 (ECtHR, 26 March 1985).

Zeïbek v. Greece App no 46368/06 (ECtHR, 9 July 2009).

The US Supreme Court Cases

Brown v Board of Education, 347 U.S. 483 (1954) at 493.

Education for All Handicapped Children Act, 20 U.S.C. (1982 & Supp. III 1985).

Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

Jimenez v. Weinberge, 417 U.S. 628 (1974).

Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973).

Labine v. Vincent, 401 U.S. 532, 537 (1971).

Lalli v. Lalli, 439 U.S. 259 (1978).

Lau v. Nichols, 414 U.S. 563 (1974).

Levy v. Louisiana, 391 US 68 (1968).

Mathews v. Lucas, 427 U.S. 495 (1976).

Milliken v. Bradley, 418 U.S. 717 (1974).

Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

Mills v. Habluetzel, 456 US. 91 (1982).

New Jersey Welfare Rights Organizatio v. Cahill, 411 US 619 (1973).

Norton v. Matthews, 427 US 524 (1976).

Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 343 F. Supp. 279 (1972).

Pyler v. Doe, 457 US 202 (1982).

Reid v. Covert, 354 US. 1 (1956).

Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 285 (ECTHR.D. Tex. 1971).

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Trimble v. Gordon, 430 US. 762 (1977).

Weber v. Aetna Casualty Insurance Co., 406 U.S. 164 (1972).