

**The London School of Economics and Political Science**

*The life of norms: a critical assessment of the construction and diffusion  
of the race anti-discrimination norm*

**Katya Ivanova**

A thesis submitted to the European Institute of the London School  
of Economics for the degree of Doctor of Philosophy, London, March  
2016

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## Abstract

This thesis examines the genesis and evolution of the anti-discrimination norm directed at race and ethnicity. The thesis seeks to answer: how is the anti-discrimination norm linked to race and ethnicity produced and diffused transnationally and how is it internalised in domestic institutions and government practices? The inquiry mainly assesses the constructivist model of the norm life cycle proposed by Martha Finnemore and Kathryn Sikkink. The model presents the development of international norms as a process that consists of three stages: emergence, cascading and domestic internalisation driven by three different sets of actors who employ different mechanisms to bring about normative change.

The thesis investigates and ultimately challenges certain assumptions of the proposed model by examining the factors that account for the construction and domestic institutionalisation of the racial anti-discrimination norm in five contexts – the USA (First and Second Reconstruction periods, 1865-1877 and 1954-1975), the UK (1960s-1970s), the EU (1990s-2000s), the Czech Republic (1990s- present) and Hungary (1990s-present). It uses process tracing to re-consider and problematise the model's claims about the primary agents that drive the production and the institutionalisation of the anti-discrimination norm in each of the five cases, their motives and the mechanisms they employ to facilitate normative change.

The thesis disputes several of the main assumptions of Finnemore and Sikkink's model. The findings demonstrate that national political elites are a key factor that determines the progress of the racial anti-discrimination norm in each stage of the norm life cycle model. They also problematise the ideational basis for the motives of norm entrepreneurs, which, in fact, consist of a complex mixture of ideational and instrumental considerations. The thesis further develops the stages of the norm life cycle model. It challenges the overall design of the model and its assumed linear progression of norm evolution.

## List of Abbreviations

<b>ETA</b>	Equal Treatment Authority
<b>CARD</b>	Campaign Against Racial Discrimination
<b>CEES</b>	Central and East European States
<b>CERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>CIA</b>	Commonwealth Immigration Act
<b>CJEU</b>	Court of Justice of the European Union
<b>CoE</b>	Council of Europe
<b>CRE</b>	Commission for Racial Equality
<b>CSCE</b>	Commission on Security and Cooperation in Europe
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>ECSC</b>	European Coal and Steel Community
<b>EEC</b>	European Economic Community
<b>EU</b>	European Union
<b>FCNM</b>	Framework Convention for the Protection of National Minorities
<b>FIDESZ</b>	Alliance for Young Democrats
<b>FKGP</b>	Independent Smallholders, Agrarian Workers and Civic Party
<b>IGO</b>	Intergovernmental organisation

<b>IMC</b>	Inter-ministerial Commission for Romany Community Affairs
<b>IO</b>	International organisation
<b>MEP</b>	Member of the European Parliament
<b>MP</b>	Member of Parliament
<b>MPG</b>	Migration Policy Group
<b>MSG</b>	Minority Self-Government
<b>MSZP</b>	Hungarian Socialist Party
<b>MTAP</b>	Medium Action Plan for Improving the Living Standards of Gypsies
<b>NAACP</b>	National Association for the Advancement of Colored People
<b>NAPIE</b>	National Action Plan for Inclusive Education
<b>NGO</b>	Non-governmental organisation
<b>OOIH</b>	National Education Integration Network
<b>OSCE</b>	Organisation for Security and Co-operation in Europe
<b>PEA</b>	Act of Public Education
<b>PEP</b>	Political and Economic Planning
<b>RED</b>	Race Equality Directive
<b>RRA</b>	Race Relations Act
<b>SLG</b>	Starting Line Group
<b>SLL</b>	Society of Labour Lawyers
<b>SZDSZ</b>	Alliance of Free Democrats
<b>TAN</b>	Transnational advocacy network
<b>UNHCR</b>	United Nations High Commissioner for Refugees

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## **Introduction**

In this thesis I examine the evolution of international norms, the conditions under which normative change takes place and the processes through which new norms influence state behaviour. I explore the channels and mechanisms through which new norms disseminate in states and societies. Using the anti-discrimination norm directed at race and ethnicity, also known as the racial equality norm, I analyse how and why new norms emerge, are diffused transnationally and become incorporated in the social, political and institutional order and practices of democratic states. I seek to contribute to the constructivist theory about norm evolution by using and critically assessing the constructivist model of the norm life cycle proposed by Martha Finnemore and Kathryn Sikkink (1998), which is based on a comprehensive review of constructivist scholarship on norms in international relations. Constructivist theorists have further analysed the model's suggested mechanisms of normative change and re-assessed and extended its latter phases (Risse and Sikkink, 1999, Müller, 2004, Checkel, 2001 and 2005 and Cortell and Davis, 2005). However, whereas scholars have devoted significant attention to describing the behavioural logics guiding norm entrepreneurs and to understanding how norm socialisation occurs, our understanding of the primary agents that create normative shifts, their motives and the distinct mechanisms they employ remain undertheorized and beckon for a thorough re-examination of the model.

This chapter first briefly discusses the constructivist literature on norms to which this project makes a contribution before turning to address the key conceptual and theoretical issues in the analysis of norm development. It defines the central concepts, norms, logic of appropriateness and logic of consequences, and lays out the major tenets and stages of the norm life cycle model. It explains why the racial equality norm was selected to investigate the validity of Finnemore and Sikkink's theoretical framework concerning norm development and the focus on the life cycle model instead of alternative models of norm socialisation. Using the empirical findings, I highlight the main problems with the model and make suggestions how to re-formulate it and how to further develop its stages by specifying the actors, their motives and the mechanisms they use to facilitate (or challenge) normative change. The chapter concludes with some general notes on the chosen methodology and an outline of the thesis.

*Literature: locating the research within the Constructivist project*

In international relations, the role of norms has traditionally been nominal and mostly confined to arguments about material interests (Klotz, 1995: 13). Realists typically view norms as “rationalizations for self-interest” and refuse them explanatory power (ibid). Neorealists and neoliberals also have a narrow view of the role ideational factors play in social life. In line with their emphasis on coercion and material self-interests, neorealists maintain that norms are usually imposed by a hegemon and change in accordance with the great power’s interests and capabilities (Krasner, 1985). Neoliberals focus primarily on external incentives arguing that norms are generated by actor interactions and often employ bargaining analysis within the general discussion of “cooperation under anarchy” (Klotz, 1995: 22 and Keohane, 1984). According to the neorealist explanation, norms emerge when a hegemonic power exports them. From a neoliberal perspective, norms are created through negotiations especially between powerful state actors. Neo-utilitarianism<sup>1</sup> accepts states’ identities and interests as exogenous and given and treats ideas and beliefs as individualist in nature omitting discussions about the collective intentionality upon which ideas may rest under certain conditions.

Constructivism with its focus on the role ideational factors play in international relations emerged as a separate approach in the 1980s through the work of constructivist scholars like Alexander Wendt (1987), Friedrich Kratochwil (1989), John Ruggie (1989) and David Dessler (1989). Constructivists, Ruggie explains, seek to understand “the full array of systematic roles that ideas play in world politics rather than specifying a priori roles based on theoretical presuppositions and then testing” for those roles (1998a: 18). The core analytical features of the constructivist approach emphasise ideational as well as material factors as the building blocks of international reality, the normative and instrumental dimensions of these factors, their individual and collective intentionality and the notion that the meaning and significance of these factors have to be studied within the time and space in which they are manifest (Ruggie, 1998b: 879). Through these central features constructivism problematises the identities and interests of state actors by seeking to show how they are socially constructed and specifically how they are partly shaped through international interactions. Using micro-process tracing, constructivists also

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<sup>1</sup>I borrow the term ‘neo-utilitarianism’ from John Ruggie (1998b) who uses it as a joint name for neorealism and neoliberalism.



attempt to chart the full range of ideational factors that make up actors' behaviour and worldview (i.e., culture, principled beliefs and ideology) by examining the cause and effect knowledge of different policy problems. At the level of the international polity, constructivists accept international structure as "social" meaning that it is comprised of "socially knowledgeable" and "discursively competent" actors who are constrained by material and institutional rules (ibid).

Although constructivists share the belief that global norms are socially constructed and norms can both re-structure and re-constitute international institutions and state governments and their political behaviour and the laws and policies that govern them, there has been a paucity of theoretical work among constructivists which explains the conditions under which new norms are created, are diffused internationally and are incorporated in the domestic political and social order of states. Two models, the aforementioned norm life cycle and the spiral model of human rights proposed by Thomas Risse and Kathryn Sikkink (1999), attempt to provide overall theoretical frameworks by using an ideational analysis to trace the evolution of norms. Other scholars have focused on the interaction between domestic and international opportunity structures. Evans, Jacobsen and Putnam (1993) have developed the two-level game, an interactive and dynamic explanatory model, which gives prominence to the head of government as the main negotiator between international and domestic actors. Kathryn Sikkink's model of the insider-outsider coalition is also useful because it provides a typology of the interactions between domestic and international opportunity structures based on their openness and closure (2005).

This thesis locates itself within the constructivist project and seeks to contribute to the literature on the genesis of norms, norm socialisation and norm compliance by examining the validity of the norm life cycle model in terms of the specified agency, motives and mechanisms that Finnemore and Sikkink claim facilitate norm evolution. The analysis aims to widen and deepen the understanding about the impact of norms upon international, regional and domestic laws, policies and practices by re-evaluating the key assumptions of the model and filling the existing gaps in relation to domestic norm compliance. It fills in the existing gaps by specifying the conditions under which new norms are (not) likely to be internalised at the national and local levels. The thesis mainly engages with Finnemore and

Sikkink's norm life cycle model because this model lays out the stages of norm evolution in the most generalised manner, which allows for an evaluation of the entire cycle of norm development. The spiral model of human rights, on the other hand, limits its scope to human rights norms and to a single stage of their development which focuses on the conditions under which these norms are implemented domestically and how they shape the politics of human rights at the national level (Risse and Sikkink, 1999: 3). The other models on the interactions between domestic and international political systems provide important insights on the dynamics of complexity of multi-level governance. However, because of their focus on domestic-international dynamics of compliance, they contribute primarily to theories of norm internalisation only and do not engage directly with questions of norm emergence and norm cascade.

### *Concepts and theoretical issues*

#### Norms

The thesis adopts the well-established constructivist definition of norms as shared expectations or understandings about appropriate behaviour held by a collectivity of actors (Checkel, 1999: 83, Jepperson et al., 1996: 54 and Legro, 1997: 33). Indeed, without rules based on collective intentionality, constructivists hold, there could be no mutually understood conduct in the domestic and international realm. These rules can be "thick" or "thin" depending on the particular issue or on the influence and respectability of the agents promoting the rule (Ruggie, 1998b: 879). Constructivists commonly distinguish between two categories of norms: regulative and constitutive. Regulative norms order and constrain behaviour while constitutive norms create new interests, categories of action or actors (Finnemore and Sikkink, 1998: 891). Constitutive norms thus constitute actor identity and instrumental calculations are replaced by "logics of appropriateness" derived from these social norms (Checkel, 1997: 475). Constitutive rules are also said to "prestructure" the realm of action within which regulative rules operate (Ruggie, 1998b: 879). Although acknowledging the need for this analytical distinction, I hold that the same norm can have constraining and constitutive effects depending on the cognitive approach of agents to the given norm. In the thesis I also verify two related constructivist hypotheses. The findings in the Czech and Hungarian cases confirm that if actor behaviour is exclusively governed by means-ends logic, then the impact

of the norm is largely regulative and its strength depends on the cost-versus-benefits calculations and the degree of coercion applied upon the actor (see Cortell and Davis, 1996). The evidence in the UK case shows that when actor behaviour is primarily an expression of complex learning processes where the actor has been exposed to new information and values and consequently has adopted new preferences, the norm has a constitutive impact because it alters the actor's identity (see Finnemore, 1993 and Soysal, 1994).

### Logic of consequences and logic of appropriateness

This thesis is guided by the constructivist premise that two cognitive logic models guide actor behaviour and the logic that dominates determines whether the internalisation of new norms is 'thin' or 'thick'. The logic of consequences underlies human agency that manifests itself in the form of instrumental adaptation and strategic bargaining. Rationalists imagine that actors select among alternatives by "evaluating their likely consequences for personal or collective objectives, conscious that other actors do likewise" (March and Olsen, 1998: 949). In other words, a consequential frame presents political order as the outcome of negotiations among rational actors who pursue preferences and interests in a coordinated way through bargaining, negotiation, coalition building and exchange (ibid., 950). Strategies of norm enterprising agents that primarily "name and shame" norm violators or use 'carrot and stick' approaches to elicit norm compliance are said to result in the instrumental adaptation of new norms by domestic political elites and are linked to the regulative function of norms.

The logic of appropriateness, March and Olsen maintain, is manifested in human action that is premised on recognising and exhibiting appropriate behaviour rather than on calculating potential incentives from alternative options (1989: 22). Actors are seen as following rules that associate particular identities with particular situations. The pursuit of their goals is associated with their identities more than with their interests and with the selection of rules to which they adhere more than with their rational expectations (March and Olsen, 1998: 951). The concept of appropriateness, therefore, brings ethical dimensions and aspirations in political behaviour. Scholars who embrace the identity position imagine political actors as displaying proper behaviour by acting in agreement with rules and practices that are

socially constructed and publicly known, expected and accepted (Cerulo, 1997). They present an international society as a community of rule followers with “distinctive sociocultural ties...intersubjective understandings and senses of belonging.” (March and Olsen, 1998: 952). Identities and rules in the community both constitute and regulate the actors and are modelled and reinforced by social interaction and experience (Kratochwil and Ruggie, 1986, Wendt and Duvall, 1989 and Katzenstein, 1996).

In sum, a review of the literature suggests two cognitive models that guide political behaviour, a logic of consequences and a logic of appropriateness, and, related to these are two powerful mechanisms that drive this behaviour. The first is derived from rational choice according to which norm development is dependent on the interests of political elites (e.g., political survival, re-election) and the pressure they face from below (societal pressure) and from above (international pressure). The second is an elite learning mechanism also known in the literature on norms as norm socialisation which ascribes political actors the ability for deep learning that allows for the internalisation of norms and reconstitution of identities without obvious material incentives.

### *The norm ‘life cycle’*

Having sketched the key concepts of constructivism the chapter briefly outlines the structure and main premises of the norm life cycle model whose critical evaluation is the core objective of the thesis. The conceptual framework as articulated by Finnemore and Sikkink (1998) comprises of three stages that illustrate the imagined progression of the formation and development of new norms: 1) norm emergence, 2) norm cascade, and 3) internalisation. In the model change at each stage is characterised by different actors, motives, and mechanisms of influence (see Appendix A).

#### Norm emergence

The norm life cycle model locates the emergence of new global norms at the supranational level. According to the authors, two elements appear common in the successful formation of international norms: norm entrepreneurs and organisational platforms from which they promote their norms. Transnational non-state actors,

individuals and non-governmental organisations, are the assumed norm enterprising agents at this stage and are said to have strong notions of appropriate behaviour and act upon those notions by engaging in moral “proselytizing” (Finnemore and Sikkink, 1998: 897-900 and Nadelmann, 1990). They are said to be vital for norm emergence because they draw attention or even ‘create’ issues by using language that interprets and dramatizes them, a process also known as ‘framing’. Norm emergence is seen as a challenging process because new norms never originate in a normative vacuum but in a fiercely contested normative space where they must compete with other issues, opinions and ideas (Finnemore and Sikkink, 1998: 897).

Since NGOs are not generally bound by the same diplomacy rules that constrain government agents, Finnemore and Sikkink contend that they are the primary norm entrepreneurs able to create highly contested and visible agendas whose goal is to ultimately re-define appropriate behaviour for state actors in relation to the particular norm they promote (1998: 899-900). Networks of NGOs, described extensively in Keck and Sikkink’s work on transnational advocacy networks, are considered to be an important source of legitimacy due to their ability to gather reliable information quickly and based on their reputation as independent agents (1998a). The specified main motivational factors for these moral entrepreneurs are ideational commitment, altruism and empathy (Finnemore and Sikkink, 1998: 898).

Finnemore and Sikkink propose that the major mechanism that drives norm formation is persuasion (ibid. 900). Persuasion has to do with “cognition and the active assessment of the content of a particular message” (Johnston, 2001: 469). It can bring changes in minds, opinions and identities in the absence of explicit material or mental coercion (ibid). Norm entrepreneurs are expected to actively employ persuasion to bring issues to the fore of public agendas by framing them in creative and meaningful ways that resonate with other norms already established in the public’s broader understanding. Barnett defines a frame as a device employed to “fix meanings, organize experience, alert others that their interests and possibly their identities are at stake, and propose solutions to ongoing problems” (1999: 25). Since norms emerge in a highly contested normative space how well the issue is framed is expected to be of critical importance. Norms that are framed by using complex means-ends calculations, a device also known as ‘strategic framing’, and through distortive communicative processes seeking to unleash material levers are arguably less successful than those that enter public space via a process of “communicative

rationality”, which presupposes “actors reciprocally challenging one another’s validity claims in order to find shared truth” (Payne, 2001: 47). It is hypothesised that cognitive frames which resonate with broader public understandings are more likely to assert themselves as new ways of conceptualising an issue and hence are considered highly effective. The ability of norm entrepreneurs to frame issues successfully is particularly challenging because to promote a norm internationally they must appeal to belief systems and life stories in many different social contexts and cultures (Keck and Sikkink, 1998b: 224).

Finnemore and Sikkink stipulate that in order for a norm to reach a threshold, also known as a tipping point, and advance to the next stage, it usually must become accepted and institutionalised in relevant international institutions, agreements and rules (1998: 900). Institutionalisation in international law and in the rules of international organisations can strongly contribute to the possibility of a norm cascade because it clarifies what the norm is and what constitutes its violation. Institutionalisation is an important but, according to Finnemore and Sikkink, not necessary condition for norm cascade as occasionally it occurs once a norm cascade has already been triggered (1998: 900). In some cases, however, it is vital for the norm entrepreneur to persuade a critically important international institution to embrace the specific norm. This happens when channels between state and norm entrepreneurs are blocked and NGOs end up bypassing targeted states and directly search out international organizations that are influential in the international realm to bring pressure upon norm-violating states. This is described as the “boomerang pattern” (Keck and Sikkink, 1998a: 12-14). International organisations can be powerful allies because they often have fashioned an image of themselves as neutral, impartial, and objective, thus defining themselves as representatives of the international community against self-serving states (Barnett and Finnemore, 2005: 173). Once the norm entrepreneur (often through well-established international organisations) has persuaded a critical mass of states, estimated to be one third of the given community of states, to accept new norms, the norm reaches its tipping point. Finally, it is important which states adopt the norm. “Critical states” – those without whose support the substantive norm goal is undermined – are crucial in triggering the norm cascade (Finnemore and Sikkink, 1998: 901). Chief norm-violating states and states that have an established moral stature are among the most important actors that norm entrepreneurs must convince (*ibid*).

In sum, norm entrepreneurs need to secure the support of critical actors such as influential international organisations and states without whose backing norm influence would be greatly diminished (e.g. powerful states able to exercise considerable leverage regionally or internationally). Since norm entrepreneurs are mostly individual non-governmental organisations or transnational advocacy networks of NGOs that join their resources and expertise to advocate for a norm, they are hardly ever able to ‘coerce’ norm agreement – they have to persuade instead. Once they have persuaded a ‘critical mass’ of states to become norm leaders, the norm is said to have reached a threshold or tipping point and enters the second stage of norm cascade.

### Norm Cascade

In the second stage, Finnemore and Sikkink argue, a different dynamic begins as more states start to adopt new norms even without domestic demands for such change (1998: 902). This is referred to as norm cascading and its dominant mechanism is socialisation (ibid). Socialisation refers to the process of induction of “actors into the norms and rules of a given community” (Checkel, 2005: 804). For successful socialisation to occur an agent must adopt community rules by switching from a logic of consequences to a logic of appropriateness and to continue complying with these rules over time without the presence of incentives or sanctions (ibid., see also Finnemore, 1996: 29). Checkel (2005) identifies two types or levels of socialisation: Type I occurs when agents comply with a new rule through role playing. They learn how to act in accordance with community expectations and adopt the role irrespective of whether they like or agree with it. Type II socialisation occurs when agents adopt the new rule because they accept it as ‘the right thing to do’ and in the process their identity is transformed. Strategic instrumental calculations no longer affect rule compliance (2005: 804-805). Socialisation, according to Finnemore and Sikkink, works for two reasons: the recognition that state identity shapes state behaviour and that state identity itself is shaped by the cultural-institutional context in which states operate (1998: 902).

Finnemore and Sikkink suggest that states get on the norm ‘bandwagon’ out of a sense of ‘peer pressure’ (1998: 903). They hypothesise that states are motivated to join the norm-complying community for the purpose of legitimisation, conformity

or self-esteem (ibid). The normative legitimacy of a rule refers to the “generalized perception...that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (Suchman, 1995: 574, see also Franck, 1990: 24). Legitimacy, however, hardly exists in its pure form in international relations. Legitimacy is often intertwined with coercion and self-interest (Hurd, 1999: 389). Hurd suggested that sometimes legitimacy derives from coercion since social agreements on which legitimacy is based can be the result of coercive practices (ibid). Legitimacy though operates differently than the power relations from which it may have originated. It, as Hurd points out, has different costs and consequences and different means of reproduction than the structures of coercion and self-interest (ibid). International legitimation is important to state leaders because it influences perceptions of legitimacy domestically.

Conformity and esteem are also identified as significant stimulants for rule adoption. Conformity involves ‘social’ proof’ and ‘membership’. Social proof refers to the actions of others that ‘provide information about what is proper for us’ and is said to fulfil a “psychological need to be a part of a group” (Axelrod, 1866: 1105). Membership in a group (alliance, treaty, intergovernmental organization) also enforces conformity because it comes with certain obligations and responsibilities while withdrawing carries with itself the risk of disapproval and even isolation. Esteem has to do with the desire of individual state leaders to follow appropriate norms in order to be viewed positively by others and themselves. In other words, state leaders conform to new rules to avoid disapproval and to boost national esteem and their own self-esteem (Finnemore and Sikkink, 1998: 904).

### Internalisation

The final stage may take place if norms become so widely and deeply accepted by actors that they achieve a ‘taken-for-granted quality’ and are complied with almost automatically (Finnemore and Sikkink, 1998: 904). Internalised norms, as Finnemore and Sikkink note, are presented as exceptionally powerful because they are not typically questioned and are hard to detect (ibid). Professions and bureaucratic mechanisms, within individual states, are assumed to serve as the prime agents of norm internalisation. Professional training is portrayed as going beyond imparting technical knowledge and is assumed to socialise professionals resulting in



the instilment of normative biases that are eventually reflected in policies produced by decision-making agencies (Finnemore and Sikkink, 1998: 905). In other words, if a norm is sufficiently internalised, it should be reflected in the normative biases of professionals in decision-making agencies. Habit can be another important mechanism for norm internalisation. Habit-driven actors that have established stability and trust among themselves can be motivated to internalise new norms in an indirect way. For example, procedural changes can generate new political processes that in turn may lead to unintended but significant normative convergence (Finnemore and Sikkink, 1998: 905 and Rosenau, 1986: 861-870).

#### *Problematising the norm life cycle model: the main arguments*

This project evaluates the norm life cycle model by tracing the evolution of the race anti-discrimination norm. The US case study looks into the norm entrepreneurs, their motives and the mechanisms that facilitated the emergence of the new norm while the UK and EU cases shed light on the agency and processes that drive norm internationalisation and cascading. The Hungarian and Czech cases assess the development of the new norm from the moment it enters domestic political space and specify the factors that determine the (non-) internalisation of the norm.

The constructivist literature contains a number of excellent empirical studies that portray how international norms are able to produce domestic change and become embedded in the political order of a state (Finnemore, 1993, Nadelmann, 1990 and Price, 1995 and Linden, 2002). The problem with the studies lies in their focus as they have either mostly examined norms that have not had to displace strongly held pre-existing countervailing norms and/or have selected weak and developing states that have strong material incentives that drive them to adopt the preferred standards of behaviour within the international system. Martha Finnemore (1993), for example, argues that international organisations are able to act as ‘teachers of norms’ by tracing how UNESCO ‘taught’ states to produce innovative science policy and to create science bureaucracy to co-ordinate and implement the new policy. Ethan Nadelmann (1990) explains how global prohibition regimes are created by tracing the international prohibition of piracy, slavery and slave trade and the killing of whales and elephants. Richard Price (1995) describes the genealogy of the chemical weapons taboo at the international level and Ronald Linden et al.

(2002) examine the impact of international organisations on Central and East European states in a wide range of policy areas. The very nature of the chosen norms makes it relatively easy to advocate for and establish strong international support for these particular norms while the adoption of norms by weaker CEE states with limited political options casts doubt about the existence of norm socialising processes within a coercive conditionality framework. By contrast, the literature on norms has been mostly silent on cases where the construction, diffusion and acceptance of a new norm is likely to be very difficult as in states that have strong national attachment to opposite norms (Cortell and Davis, 2005: 4). By focusing on the race anti-discrimination norm which is also easily linked to citizenship and national identity and belonging and which has faced societal and political opposition in CEE states, I aim to problematize some of the core assumptions of the norm life cycle model and to specify the limits of the constructivist argument concerning the importance of norms and their influence on states.

In regards to the overall design and framework of the life cycle mode, the thesis will demonstrate that the presentation of norm development in three distinct stages is, in actuality, more complex: the stages are not as clearly delineated as portrayed in the model and each phase contains within itself elements of the other stages. Using the empirical findings, the thesis will show that each main stage contains a small-scale life cycle within itself. This enhances the model's dynamism and points to the need of a further analysis due to the additional layers in each phase of the norm life cycle model.

The thesis upholds previous criticisms of the model related to the assumed sequential and one-directional presentation of the life of norms (see Appendix B). It has been argued that the trajectories of norms are highly dynamic: under the right conditions norm construction, diffusion or internalisation can take substantial leaps forward but if these conditions cease and the norm is not sufficiently well-institutionalised into international and/or domestic laws and practices it can stagnate, move backward and even undergo erosion (Checkel, 2012 and Jackson-Preece, 2012). The empirical investigation into the life of the race anti-discrimination norm validates these criticisms: this is most clearly manifest in the US and Hungarian cases where it will be shown that the norm experiences progress, stagnation and destruction and the agents responsible for these changes will be identified.

## Assessing norm emergence

The analysis of the construction of the racial equality norm in the United States shows that the analytical distinction Finnemore and Sikkink make between domestic and international norms is unsustainable and may limit the research on norm emergency and potentially compromise their suggested theoretical framework (1998: 893). Despite their acknowledgement that many international norms that seek to set certain standards of appropriate state behaviour start out as domestic and subsequently became internationalized through the efforts of various norm entrepreneurs, Finnemore and Sikkink nevertheless present norm emergence as an act that takes place exclusively at the international level (*ibid*). Imagining the ontological beginning of a new norm in a supranational context, I argue, is problematic because it omits an essential step in norm development for norms which originate in a domestic environment. If this thesis had adhered to Finnemore and Sikkink's proposed framework, I would have been precluded from tracing the emergence of the race anti-discrimination norm because the norm was brought to life in a national context. The original design of the norm life cycle, I suggest, should be expanded to accommodate the examination of domestically emerging norms. Otherwise, the theoretical framework will remain incomplete and will continue to restrict research into the causal mechanisms and processes that account for the emergence of those global norms that start out as domestic norms.

In terms of agency the thesis on the race anti-discrimination norm demonstrates that national governing elites can act as key actors responsible for the creation of those norms that originate domestically. They accomplish this by codifying the norm into new laws, creating new and reforming existing institutions and practices that uphold the norm and even using military force to suppress entrenched opposing norms which, in the US case, are servitude and racial apartheid. Agreement for norm support among the leading elites from the executive, legislative and judiciary branches, the thesis will show, strongly contributes to quicker norm emergence and deeper norm institutionalisation and decreases the chances for norm setbacks and reversal.

The thesis also contests the assumptions of the model about the motives that drive norm entrepreneurs during norm construction. It shows that what motivates norm architects is a mixture of ideational and instrumental considerations. I argue that when ideas and interests converge, they reinforce the commitment of the norm

entrepreneurs and boost their decision-making activity. When they diverge, instrumental considerations commonly prevail, which results in norm stagnation or erosion. Generally, I claim, that norms which originate domestically especially those related to minority populations and equality appear to be justice-driven while internationally crafted norms of this nature tend to be security-driven. This, in turn, shows that domestic elites can employ the notion of justice more readily and convincingly than international norm entrepreneurs because they have an easier time constructing linkages between racial equality and national belonging by framing racial minorities as a constitutive part of the nation state. International actors, on the opposite, have a difficult time constructing similar frames and their arguments tend to be less convincing. Ultimately, the findings demonstrate that the level at which a norm is constructed matters for its subsequent progress: the US and UK cases establish that domestically emerging norms, in this case race antidiscrimination, become reasonably firmly and deeply embedded in the laws and institutional practices of states even when they clash with staunchly held pre-existing opposing norms. The Czech and Hungarian cases demonstrate that when the same norm is constructed and promoted by supranational actors, it achieves thin institutionalisation, has insufficient domestic legitimacy and is easily undermined.

#### Assessing norm cascading

When it comes to norm cascading, the thesis demonstrates that the process is more nuanced and varied than Finnemore and Sikkink suggest (1998: 899). It also invalidates their assumption that norm entrepreneurs at the international level are the only agents of norm diffusion (ibid). The historical evidence about the transference of the notion of race anti-discrimination into UK law, policy and institutional practices shows that national elites also can act as norm entrepreneurs at this stage. The UK analysis establishes that the national elites from norm violating states are capable of starting a process of norm socialisation through the intentional arrangement of knowledge exchange with their norm promoting counterparts (in this case American legislators, administrators and experts in the anti-discrimination field). The subsequent analysis of the EU case, which traces the continued regional diffusion of the norm, also suggests that domestic political elites may play a distinct role in the facilitation of norm ‘travel’ along with international and regional institutions, in this instance the Council of Europe and the European Union.

I also argue that ideational commitment and material considerations continue to motivate the norm entrepreneurs during the second stage. I confirm and develop Finnemore and Sikkink's claim that norm socialisation is the main mechanism that drives the cascade (1998: 902). The analysis of the UK case demonstrates that norm socialisation processes that are initiated by the domestic institutional norm entrepreneurs of norm violating states, are very successful in ensuring the institutionalisation of the norm in relevant legislation and policy because of their domestic position of power and the domination of a justice-driven rationale for norm conformity. On the other hand, norm socialisation that is initiated by international norm entrepreneurs upon norm violating states has significantly less chance for success due to the 'outsider' status of the norm entrepreneurs and the fact that the imposition of new norms from above upon states almost always includes norm socialising efforts and material incentives/punishments for (non-)compliance. The new norm then is more likely to be adopted formally and stay nominally on the political agenda of norm accepting states but, as the Czech and Hungarian cases show, it is unlikely to be permanently internalised.

I make two additional claims about the concepts norm violator, norm entrepreneur and norm threshold. I argue that the distinction Finnemore and Sikkink maintain between the actors they identify as norm entrepreneurs (international organisations and norm promoting states) and norm violators (non-conforming states) is analytically inaccurate (1998: 902-903). The empirical findings show that the boundaries between the two concepts are fluid: the same actors are capable of exhibiting norm enterprising and norm violating behaviour. This makes the categorisation of actors problematic because it limits the evaluation of the full range of behaviour the actors display. The thesis also shows that the norm threshold, or tipping point, is not a reliable tool for marking the moment at which a cascade turns into a quasi-automatic process which is said to bring norms uncontestedly in the domestic realm. The findings of the EU case reveal that even when all states in a given region agree and become contractually bound to conform to a new norm, in this case racial and ethnic anti-discrimination, contestation and refusal to conform to the given standard of appropriate behaviour remain a likely possibility especially when the new norm seeks to displace strongly held domestic opposing notions.

## Assessing internalisation

The internalisation stage is the most theoretically underdeveloped part of the model because the primary concern of the norm life cycle model is norm development and diffusion in the international system. The few assumptions Finnemore and Sikkink make in the last stage about the main actors, their rationale for action and the mechanisms that facilitate internalisation are problematized by the empirical evidence in this study, which provides further insight into the internalisation process by examining domestic factors that influence the norm acceptance process (1998: 904-905). The thesis draws on the wider literature on domestic politics of compliance to explain the varying degrees of norm compliance in the Czech and Hungarian cases (Simmons, 2005 and Dai, 2005). Throughout the norm life cycle model Finnemore and Sikkink follow the dominant constructivist approach which in order to demonstrate that international norms influence state behaviour locates the causal significance of norms at the level of state interactions (Cortell and Davis, 1996: 451). In other words, instead of shifting the level of analysis to states' domestic politics, they suggest that once a tipping point is reached domestic political elites and bureaucracies in their aim for international legitimacy embrace the new norm through its institutionalisation in laws and state structures (Finnemore and Sikkink, 1998: 902). Their analysis implies that domestic factors are less important in determining whether a norm becomes internalised in a state's order. However, Finnemore and Sikkink provide little compelling theoretical justification for paying so little attention to the domestic level. Their model suggests that once the new norm has been officially recognised at the supranational level and the states in the given system have consented to incorporate the norm in their domestic orders, they follow through and implement the agreement (*ibid.*, 902-905).

The emerging literature on norm compliance, however, tells a different story. External actors, as Beth Simmons notes, can facilitate in part the processes of domestic compliance with international norms, "but in principle they are all possible without the contributions and interference of outside actors" (2005: 126). The growing literature on norm internalisation, which investigates the role domestic factors play in norm compliance is an important complement to the approach Finnemore, Sikkink and other constructivist scholars adopt which emphasises transnational norm entrepreneurs as primary change agents (Simmons, 2005: 126, Cortell and Davis, 2005, Checkel, 1997 and Linden et al., 2002).

Cortell and Davis (2005) identify two factors, the domestic salience of an international norm and domestic structures, which condition the extent to which a norm may be incorporated in a state's political order. Domestic salience refers to the degree to which an international norm resonates with pre-existing domestic values, interests and practices (Schimmelfennig, 2002: 14). The degree of norm salience is said to be indicated by the consistent incorporation of the norm into public discourse, policies and state institutions. Of the three indicators, domestic discourse is considered the most important because it ideally precedes and guides policy changes. Norm salience is presented as a continuous variable with a range that extends from limited to high and can be measured by examining a state's policy agendas and institutions. Domestic salience is high when the norm's objectives and prescriptions are mostly uncontested and widely employed to justify specific policy choices and the state takes active steps to eliminate alternative practices. Norm salience is moderate if state behaviour is vague and ambivalent namely if the policy agenda and institutions formally incorporate the norm but policies and institutions that allow for competing normative claims continue to exist and procedures for monitoring and enforcing compliance are either missing or not applied. Salience is considered limited when the norm is placed on the policy agenda nominally but most institutions promote opposing norms and political elites openly question or even challenge the validity of the norm (Cortell and Davis, 2005: 9).

Domestic structure refers to the structure of government of the state and its institutions. In cases assessing norm internalisation processes domestic structure typically acts as an intervening variable. While domestic structure may not matter in cases in which the domestic salience of new norms is high, its significance is impossible to overlook when the international norm is contested.

In her research on the commitment and compliance of national governments with international human rights treaties, Beth Simmons identifies three kinds of actors – legislative veto players, subnational players, and judicial institutions – which play an important role in either constraining or enhancing domestic compliance with international law (2005: 68-77). She claims that domestic systems with multiple legislative veto plays, as in the case of supermajorities or bicameral majority approval, can add hurdles to the ratification of international human rights treaties (69). Subnational players especially powerful local governments which enjoy relative independence can also resist the ratification efforts of central governments in

cases in which new treaties encroach on their prerogatives (69). Finally, she argues that several structural features of common law systems make it more difficult than in civil law systems for national governments to avoid making the domestic changes that the international treaty envisions (75). Of particular importance for Simmons are the greater independence of the judiciary from the rest of the national policymakers, the power of the courts to review administrative actions and to hold governments accountable for violations of constitutional or treaty-based human rights and the role of precedent, which allows for the deeper institutionalisation of treaties into domestic law (ibid). The thesis applies Simmons' hypotheses to the cases of norm compliance studied here in order to explain the degree of norm acceptance.

As already mentioned the acceptance of the norm at the supranational level and norm cascading do not necessarily always translate into domestic conformity to the international norm. Generally speaking, norm adherence varies largely from state to state depending on the degree of legal institutionalization of the norm and the decision-making processes through which the norm is constructed at the national level. Taking into consideration the existing literature on norm compliance, I make several claims that aim to re-devise the internalisation stage by exploring the domestic context to glean further insight into the conditions which determine the (non-) internalisation of international norms and the degree of norm salience.

I argue that national political elites play an important role in determining whether and the extent to which states fulfil their international commitment to norm conformity. The Hungarian and Czech cases demonstrate that even when a new norm becomes incorporated into regional law that all member states are bound to recognise and incorporate in national legislation, the cascading and internalisation can be gravely disrupted when national political elites renege their commitment. On the other hand, the UK case shows that if domestic elites have sufficient ideational commitment to the new norm and consider its internalisation of considerable political interest, norm conformity and high norm salience can be achieved with little agency of international actors.

In this stage, Sikkink's dynamic multi-level governance model is useful in assessing the potential degree of norm internalisation (2005). According to Sikkink, when norm entrepreneurs face (or perceive that they face) closed opportunity structures nationally and internationally, the chances of successful norm



internalisation are greatly diminished (2005: 159). When domestic structures are perceived as closed and international structures as open, norm entrepreneurs seek international allies to increase the pressure upon their governments to institutionalise new norms (161). When both types of structures are relatively open, Sikkink hypothesises, norm entrepreneurs tend to privilege their engagement with domestic political actors but still keep international structures as complementary to ensure the deep institutionalisation of norms into domestic law, policy and practice (164-165). Finally, when domestic opportunity structures are seen as open but international ones are closed, this results in defensive transnationalism, a situation in which norm entrepreneurs work with and lobby their governments to democratise international institutions (164).

The multi-level governance model, in part, explains the prolonged and contested internalisation process of the racial antidiscrimination norm. Since the domestic opportunity structures in the Czech Republic are seen as closed and the European structures as open, the model expects norm entrepreneurs to seek the support of European allies to pressure the Czech government to institutionalise the racial anti-discrimination norm in national law and practice. The empirical evidence shows that norm entrepreneurs have indeed worked with the European Commission, the Council of Europe and especially the European Court of Human Rights to force the Czech government to initiate normative change. In the Hungarian case (2002-2008), norm progress can also be understood in terms of open opportunities structures at the national and supranational levels. Once the national opportunity structures closed (2008-present), the process of norm institutionalisation was reversed and the gains undone.

As already pointed out in the norm emergence phase the nature of the new norm and the level at which it is constructed are important determinants of the degree of domestic institutionalisation and salience of the new norm. Norms that do not have high domestic resonance are more likely to succeed in their internalisation if they are promoted by justice-driven national elites. Norms that are exclusively promoted by supranational actors are unable to achieve internalisation when the national elites' reasons for norm recognition are primarily instrumental. In such cases the elites are expected to 'talk the talk' or mimic the language of international institutions and to create new formal Potemkin institutions which are required to

gain the desired international legitimacy while continuing their old behaviour and avoiding the political cost of adaptation (Schimmelfennig, 2002: 12).

I also argue that an analytical distinction should be made between internalisation at the national and local level and further research is needed to identify the differences and linkages between the two levels in terms of agency and mechanisms. The empirical evidence shows that the government setup of states, centralised or decentralised, can interrupt or facilitate norm adherence. In the thesis, a centralised government refers to a government in which the legal authority, planning and decision-making power rests primarily with the executive branch. A decentralised government here should be understood primarily in terms of administrative decentralisation. Administrative decentralisation aims to redistribute authority, responsibility and financial resources for providing public services among the regional and local levels of government. It refers to the transfer of responsibility for the planning, financing and delivery of certain public functions from the central government and its agencies to subordinate levels of government headed by semi-autonomous regional or local public authorities. The thesis does not present government centralisation and decentralisation as 'either – or' conditions. It uses the concepts with the understanding that they do not represent two distinct and absolute systems of governance. In fact, the terms should be viewed as one continuous variable with values ranging from limited to high depending on the balance between the decision-making functions of national, regional and local political elites.

The analysis of the US and UK cases demonstrates that when key national elites act as norm promoters and the governance system is centralised, norm conformity at the national and local levels is higher due to the greater political power national elites have within the system. The Hungarian case demonstrates that when norm supporting national elites govern within a decentralised system, local norm adherence is low when local authorities choose to adhere to opposite norms due to personal and political considerations. The Hungarian and Czech cases also show that the governance framework is largely immaterial in situations when the national and local political elites are hostile to the new norm although if national elites govern within a centralised system norm erosion tends to be quicker.

The analysis also confirms Beth Simmons' argument that judicial institutions which tend to have more independence influence norm internalisation. In those states

like the United States with a common law system due to the legal notion of precedent, which establishes a doctrine or rule that extends to and governs subsequent legal decisions in similar cases, the judiciary can be a powerful actor able to deliver high impact judgments that can in equal measure interrupt or significantly augment the progress towards norm adherence. In those states, like the Czech Republic and Hungary, which are governed by a civil law system the judiciary is limited in its ability to act because civil law does not recognise the doctrine of legal precedent which makes the issuance of broadly formulated judgments with high national impact impossible to produce. In the Czech Republic and Hungary, the courts lack the power to review government actions and particularly in Hungary the judiciary has virtually no independence and is closely supervised by the executive branch (see Kornai, 2015)

Ultimately, the thesis demonstrates that the state should not be imagined as a rational unitary actor but be seen as encompassing a variety of actors with distinct sets of interests, agendas and institutional biases that may lead them to display different attitudes to the prospect of norm internalisation. The empirical findings suggest that further research is necessary to determine the relationships and power dynamics among the three branches of the government to be able to assess the degree of norm internalisation.

### *Methodology, sources and case selection*

The methodology of choice I adopt to assess the stages of norm evolution is process tracing. Process tracing examines “whether the intervening variables between a hypothesised cause and observed effect move as predicted” or, in other words, process tracing looks at the causal mechanisms that are in operation in a case (Bennett and George, 2005). Process tracing is a particularly suitable tool for large historic case studies because it enables the researcher to draw “descriptive and causal inferences from diagnostic pieces of evidence ... [which are] understood as part of a temporal sequence of events or phenomena (Collier, 2011: 824). Students of norms who examine complex social processes are frequently faced with the problem of equifinality, or the existence of multiple pathways that can lead to the same outcome (Checkel, 2012 and Jackson-Preece, 2012). Process tracing aims to alleviate the problem by establishing a clear pathway that validates the inferences that are drawn.

In terms of sources, this analysis on norm formation, diffusion and conformity uses data derived from secondary literature, and official reports produced by national governments, international organisations, monitoring bodies, non-governmental organisations and international and domestic courts. Interviews and discussions with more than thirty representatives of intergovernmental organisations, state institutions, national and international NGOs and individual experts and activists in the field of anti-discrimination were conducted in order to acquire additional information about political decision-making, norm implementation, compliance, perceptions about the norm and motivations for championing the norm or not. On the international level, the most relevant bodies contacted were the Council of Europe, the European Roma Rights Center, the Roma Education Fund, the Open Society Foundations and the Roma Decade Secretariat. At the domestic level, information and documents were collected from the Office of the Czech Ombudsman, the Czech Agency for Social Inclusion, the Czech Ministry of Education, the Czech Ministry of Human Rights, the Czech Helsinki Committee, the Hungarian Office of the Commissioner for Fundamental Rights, the Hungarian Secretariat of Social Inclusion, the Hungarian Equal Treatment Authority and Roma Versitas.

As Peter Vermeersch (2006: 9) points out it is important to note that the information obtained from state and non-state representatives and official documents should not be taken as unproblematic representations of reality. Both institutional and activist reports are likely to contain some bias and government reports often offered scant information on the implementation and compliance with norm-related policies and legislation. Predictably, non-governmental norm entrepreneurs voiced strong criticisms against government policies, their implementation and institutional practices that constrain norm adherence. Governments tended to deflect criticism either by citing good relationships with civil society actors or by ignoring the levied criticisms. The interview accounts then should not be considered as trusted descriptions of reality but as useful sources that offer insights into the views, understandings and positions of those who play part in determining norm (d)evolution.

Historical context has largely determined which cases are analysed here. The thesis starts out with the politics of race in post-Civil War America because this is the context in which the norm of racial equality was initially articulated. The analysis

of UK's race relations politics was necessary because it enabled the assessment of the actors and processes that made the transatlantic transfer of the racial anti-discrimination norm possible. Examining the institutionalisation of the norm into European law has allowed me to analyse a regional norm cascade. In regards to internalisation, the Czech Republic and Hungary were selected because they are democratic states that fit the norm life cycle's description of countries which are highly likely to display strong adherence. The Czech Republic and Hungary strove for international legitimacy and displayed determination to 'return to Europe' throughout the 1990s. Finally, they have a history of discrimination against the Romani minority residing within their borders and the application of the racial and ethnic anti-discrimination norm to the Roma by the respective governments represents a litmus test to its degree of norm internalisation.

The thesis focuses on elite learning and behaviour, norm institutionalisation and on the domestic and international institutions political elites inhabit. It privileges the examination of norm institutionalisation processes in domestic laws and policies. Consequently, grassroots norm entrepreneurship and wider societal agency play a limited role in the thesis. They help to explain the general social context within which political elites operate and construct legal, policy and institutional frameworks that either constrain or promote normative change.

#### *Overview of the research*

This thesis consists of an introduction and six chapters. Chapter One analyses the emergence of the racial anti-discrimination norm, which was first articulated within the US federal government in post-Civil War America. The chapter traces relevant political developments during the First and Second Reconstruction periods, 1865-1877 and 1954-1975 respectively, which highlight the role national political elites play in norm-building, and assesses the motives of these norm entrepreneurs vis-à-vis the assumptions of the norm life cycle model. It examines the relationship between the three government branches and the impact the structure of the state has upon norm development.

Chapter Two continues to examine the evolution of the racial anti-discrimination norm by focusing on the agents and mechanisms that drive its internationalisation, or diffusion, from the US to the UK context. It shows that when it comes to cascading national elites can drive norm diffusion on their own and they tend to be highly successful in their endeavour. The chapter confirms that norm

socialisation is the main mechanism that ensures long-term norm institutionalisation by examining the elite learning processes that occurred between UK and US elites through knowledge exchange in the 1960s and the 1970s.

Chapter Three continues tracing the regional cascading of the norm in Europe by analysing the making of the EU Race Equality Directive and jurisprudence developments at the European Court of Human Rights from the late 1990s to the present. It proposes that even at this level the codification of the norm into EU law was in part made possible by the agency of a transnational advocacy network that had domestic roots because it was composed of national government officials and experts. The empirics also problematise the concepts of norm entrepreneur, norm violator and question the usefulness of the notion of norm threshold.

Chapter Four continues to trace the journey of the racial anti-discrimination norm by using the Czech case (1990s to present) to specify the conditions that determine the degree of domestic norm internalisation. The developments surrounding the transposition of the Race Equality Directive and the implementation problems of the 2007 landmark case *D.H. and Others v. the Czech Republic* illustrate that controversial norms which are imposed by supranational actors are unable to achieve internalisation if the national elites are predominantly driven by instrumental concerns. When ideational commitment is absent, the institutionalisation of the new norm is thin. The norm is superficially codified into domestic law but is not properly implemented and ends up being exposed to contestation in the practices of state institutions and the mainstream domestic political discourse.

Chapter Five which focuses on norm internalisation in Hungary (1990s to present) continues to validate the main argument running through the thesis about the key role of domestic political elites in norm development. The analysis confirms the hypothesis that a state's governance framework acts as an intervening variable that constrains or facilitates the actions of political elites. It shows that the considerable efforts of norm-supporting political elites to ensure norm adherence failed due to the decentralised and fragmented governance system which bestowed significant powers upon norm-defiant local officials. The subsequent centralisation of the system has worsened the situation because the new governing elites are hostile to the notion of racial equality.

The final chapter summarises the theoretical contributions the thesis makes to the literature of norm evolution and the implications of the findings for future research.

## Chapter One

### The genesis of the racial anti-discrimination norm: The United States context

This chapter examines the construction of the racial anti-discrimination norm, first designed by norm entrepreneurs within the US Congress in post-Civil War America, by tracing relevant political and jurisprudential developments during the First and Second Reconstruction periods. The goal of the historical analysis is to highlight the role national political elites played in the norm creation, the relationship between ideational and instrumental concerns that motivated the elites' support for a new political and social order and the role the government system plays in the institutionalisation of new norms.

The norm life cycle model and its subsequent variations present norm emergence as a process that is driven by transnational norm entrepreneurs, usually international NGOs and influential individuals, who seek to secure the support of state actors and influential intergovernmental organisations to endorse the new norm and incorporate it into their norm socialisation agenda (Finnemore and Sikkink, 1998: 896-901). The examination of the genesis of the racial equality norm, however, suggests that national political elites also can play an important role in this phase and determine the degree of prominence and subsequent institutionalisation of the new norm into law, policy and institutional practice when the norm is initially constructed in a domestic context. Their support for the new norm through legislative, judiciary and military means was crucial for the brief flourishing of the racial equality norm during the First Reconstruction, 1865-1877, and its permanent institutionalisation during the Second Reconstruction, 1954-1975. The empirical evidence from the First Reconstruction also suggests that should national elites withdraw their norm commitment, the new norm inevitably undergoes a civic 'death' and does not re-emerge until a new set of political elites embraces the norm again. For the purposes of this analysis civic death is defined as the disappearance of a norm from political discourse and societal practices and conventions, its un-embedding from national and local laws, policies and institutional practices and its replacement with opposing norms. The Czech and Hungarian cases which are examined in chapters 4 and 5 uphold the hypothesis of the elites' importance to norm emergence and internalisation into a state's political order.



Besides presenting national political elites as causal mechanisms of norm emergence, the chapter re-examines the elites' motivations that drive their agency. To recapitulate, Finnemore and Sikkink hypothesise that in the initial phase norm entrepreneurs are motivated by altruism, a sense empathy and ideational commitment (1998: 898). Here they are correct in part. The thesis confirms that US elites who promoted the racial anti-discrimination norm were largely justice-driven but it also argues that their ideational motives were entwined with pragmatic concerns related to party-building, electoral outcomes and foreign policy objectives. In fact, the findings suggest that in the US case ideational and instrumental considerations were inextricably entwined: for example, the enfranchisement of the newly freed male population in the 1860s was perceived by Republican reformers in Washington as both a matter of justice and an essential part of African American political inclusion as well as a political necessity to keep the Republican party in power. While the African American vote was needed to ensure Republican electoral victory, the freedpersons also needed the party to ensure their citizenship rights. In other words, ideas and instrumentality should not necessarily be conceptualised in opposition but depending on context they can act as motivational forces that reinforce the normative commitment of political elites and intensify their agency.

Two further claims are made in this chapter. The setup of a state's government system acts as an intervening variable that facilitates or inhibits the creation and internalisation of new norms. The chapter reveals that the brief periods when the southern states were under the direct control of the federal government, which was mostly achieved through military means, were characterised by a rapid advancement of the social and political inclusion of African Americans despite the widespread opposition and hostility of the ex-rebel ethnic majority. On the other hand, when political elites who display norm commitment act within a decentralised governance system and the local authorities support opposing ideas and practices, norm conformity especially at the local level decreases. My research affirms Beth Simmons' claim about the significance of federal political systems with their influential subnational players in constraining norm institutionalisation (2009:69) US federalism can largely explain why the racial anti-discrimination norm is well-institutionalised and accepted at the national level but frequently challenged by

officials and private individuals at state and local levels in the southern United States.

Finally, I argue that the distinction Finnemore and Sikkink make between international and domestic norms is analytically unsustainable. Many international norms, as the authors themselves admit, begin as domestic norms and eventually become internationalised (Finnemore and Sikkink, 1998: 893). Still they treat domestic norms as separate and in their model they place the ontological beginning of new norms at a point at which the new norm is at the supranational level regardless of whether the norm was first formulated in a domestic or international context (ibid., 893 – 894 and 899). For international norms whose formation does not begin at the regional or international level, it means that the norm life cycle model skips a critical step in their creation and precludes researchers from examining their domestic origins and the driving mechanisms that facilitate norm-building and internationalisation. This research shows that starting at the national level is essential for understanding how and why new norms that originate in a domestic context are created and why they succeed in being institutionalised in the domestic order and subsequently ‘exported’ to other states or why they fail to do so.

In this thesis I seek to verify the mechanisms and processes which my assessment of constructivist theoretical approaches cues me to look. Consequently, only relevant aspects of political history are treated in this chapter despite the vast monographic literature the two reconstructions have generated. The US analysis begins by tracing the political and jurisprudence building processes during the First Reconstruction. It attributes the swift ascendance of the racial equality norm to the actions of a core group of congressional Republicans who placed the former slaveholding states under direct control of the federal government, enshrined racial equality in the constitution, bolstered the norm through further legislation, and used the military as a norm protector and enforcer. The subsequent civic death of the norm is explained by the withdrawal of norm support including the military, by these same elites. As the Republican government became entangled in a number of scandals towards the end of the First Reconstruction, political priorities shifted and the African American vote was no longer deemed as crucial for Republican electoral victory. The actions of another set of elites, the Supreme Court judges, accounts for the re-emergence of *de jure* racial discrimination and segregation and the re-

surfacing of state and local institutions and practices in the southern states that upheld the pre-Reconstruction countervailing norms of ethnic inferiority and separation of the races.

The chapter presents the re-emergence and successful institutionalisation of the racial anti-discrimination norm during the Second Reconstruction as the outcome of a complex interaction between advocacy groups, national political elites and the Supreme Court judges. While the judiciary is considered instrumental in formally delegitimising racial inequality, the re-employment of the same tools used during the First Reconstruction by the ruling elites – federal supervision of southern states and mobilisation of the military – is considered decisive in bringing forth normative change. The irreversibility of the process is again explained by the emerging consensus about the sustained support for the norm's institutionalisation between key norm entrepreneurs within the executive, legislative and judiciary branches of the federal government.

### **The First Reconstruction (1865-1877)**

#### *Political processes*

Norms, the constructivist literature has shown, emerge in a fiercely contested environment and the genesis of the racial anti-discrimination norm is no exception. In the aftermath of the Civil War Lincoln's successor, Andrew Johnson, emerged as a 'remarkably active president' whose ambition to develop a 'Restoration policy' in the post-bellum southern states that featured racially conservative reconciliation elements locked him in a political battle with the Thirty-ninth Congress (1865-1867). Thirty-ninth Congress at the time was dominated by a core of politicians known as the Radical Republicans who were to become the architects of an astounding racial restructuring of the American political order (Valelly, 2004: 26, McPherson, 1988: 699-703, Trefousse, 1989: 196-197). Stepping into office, President Johnson sought to reverse the two Republican reconstruction policies aiming at land redistribution and prevention of office holding by former Confederates. He attacked the Freedman's Bureau which was charged with land redistribution by forcing the return of the land former slaves had been given to work to their former masters (Trefousse, 1999).

Johnson also challenged the Ironclad Test Oath initiative. The latter was a piece of Congressional legislation dealing with elective and appointive office, which excluded those who “had borne arms against the United States”, aided anyone who did so, held an office in a government hostile to the United States and “yielded a voluntary support to any pretended government” from the US Congress and from federal court positions (Ironclad Test Oath, 1866 and Hyman, 1954). Johnson, however, issued two proclamations: the first was to grant amnesty to participants in the rebellion and the second established provisional governments in key rebel states staffed by ex-rebels (Richardson, 1908: 310-332). These policies triggered the restoration of white supremacy. Shortly after its restoration, the Mississippi state legislature passed a series of statutes establishing African American labour peonage, a form of re-enslavement, which were quickly copied by other southern state governments. To make matters more alarming for those in favour of African American empowerment, the labour peonage codes coincided with the formal abolition of slavery through the ratification of the Thirteenth Amendment, which had immense consequences for political parties. In the antebellum period, male slaves had counted as three fifths of a person in appointment and in the Electoral College but with the change of their political weight increased. Yet, the new peonage statutes and the lack of voting and office holding rights by the freedmen effectively strengthened the political representation of their former masters who found themselves in stronger political position than before (Vallelly, 2004: 28).

The situation presented two issues before the Republican-controlled Thirty-ninth Congress. The first was the issue of African American civil rights and the second southern political representation. Historical records reveal that these issues triggered a swift Congressional response which was led by the Radical Republican faction. In his well-known speech before Congress on 18 December 1865, the key Republican leader, Thaddeus Stevens, called for a long and harsh Reconstruction whose key feature was the federal protection of the political, economic and social rights of former slaves, which he argued could be ensured only by the continued political dominance of his party (Harold, 2008: 193-199). If the ex-rebels were allowed to participate in the national government, their increased representation would “always give them a majority in Congress and the Electoral College” and therefore possession of the White House and Congress (ibid., 197). Stevens believed

that the Republican Party and the ideals it embraced faced an existential threat, “They [Southern Democrats] will at the very first election take possession of the White House and the Halls of Congress. I need not depict the ruin that would follow...The oppression of the freedmen; the re-amendment of their State constitutions, and the re-establishment of slavery would be the inevitable result” (ibid). To prevent this, he proposed a two-pronged approach: the constitutional protection of African American suffrage and the relegation of ex-rebel states to “conquered provinces...” subject to the absolute disposal of Congress” (ibid., 194). He reasoned that these states “severed their original contacts” once they raised arms against the Union and justified Congressional takeover of state matters by invoking Article 4 of the Constitution, which places the power of the admittance of new states into the Union with Congress (ibid).

The ideational motives of the Radical Republicans also figure prominently in Thaddeus Stevens’s speech. In it Stevens argued for the responsibility of the federal government to protect the new citizens of the United States,

We have turned, or are about to turn, loose four million slaves without a hut to shelter them or a cent in their pockets. The infernal laws of slavery have prevented them from acquiring an education, understanding the common laws of contract, or of managing the ordinary business of life. This Congress is bound to provide for them until they can take care of themselves. If we do not furnish them with homesteads, and hedge them around with protective laws; if we leave them to the legislation of their late masters, we had better have left them in bondage. If we fail in this great duty now, when we have the power, we shall deserve and receive the execration of history and of all future ages (Harold, 2008: 197).

The speech suggests that the Radical Republicans perceived the legal protection of African Americans as a paramount political goal and had a strong sense of responsibility towards ensuring the former slaves’ social and political equality. His speech sums up the motives of the Republican political elites for re-structuring the social and political order of the southern states. On the one hand, they were motivated by the novel idea of racial equality. On the other, the Republicans had their pragmatic considerations which had to do with future Republican electability.

The First Reconstruction narrative has shown so far that the norm of racial equality was the product of a ‘revolution from above’ triggered by an elite group of national political actors who rejected the notion of the ‘white man’s Government’. The First Reconstruction case does show that the agents of normative change are

more varied than the norm life cycle model assumes. The historical evidence reveals that national political elites should also be credited with norm creation in addition to transnational advocacy organisations and the networks they form (Finnemore and Sikkink, 1998: 899). In regards to motives, as the model suggests these elites were clearly driven by a sense of justice and ideational commitment evident in their acknowledgement that equal rights must be innate in every human being regardless of colour (ibid., 898). However, their actions to cordon off confederate access to political power also shows that instrumental concerns figured prominently, were intrinsically connected with the Republican justice-driven agenda and heightened the normative commitment of Republican elites.

The enshrinement of the racial equality norm in the Constitution through constitutional amendments was seen as the most reliable way to ensure political success and compliance with the new norm. The Congressional Republicans quickly formed the Joint Committee on Reconstruction, which soon drafted a civil rights bill, whose purpose was to serve as a corrective to the emerging local and state Black codes. The bill was approved without amendments in both the House and the Senate on 2 February and 13 March 1866 respectively showing unprecedented Republican support for the Reconstruction project (Palmer and Ochoa, 1998 and Trefousse, 2005). The president vetoed the bill on 27 March that same year citing the exclusion of southern politicians from the government and the threat the bill presented to established 'racial custom' in the South and federalism as the reasons for its denouncement. Congress' remarkable override less than a month later and its passage of the Fourteenth Amendment on 9 July 1868 signalled an irreversible split between Johnson and Congress (Cox and Cox, 1961).

The Fourteenth Amendment, the pillar of Congressional Reconstruction, was designed to provide federal protection for the equality of the former slaves before the law (Sections 1 and 5), to disenfranchise southern white males who had participated in the Civil War (Section 2), and to exclude ex-rebels from public office holding (Section 3). The legislation, however, intensified the crisis between the president and the Radical Republicans. Johnson and the Democratic leadership openly encouraged the southern states not to ratify the amendment, to exclude the former slaves from suffrage, to liberally pardon former rebels and to validate the newly formed state governments with their Black Codes (Belz, 1969: 306). Strengthened by voters'

approvals of the civil rights measures evident in the impressive Republican gains in the 1866 elections, Congress put a stop on Johnson's subterfuge by rolling out a programme of immediate compliance with the amendment in the former Confederate states to be implemented under the direction of the US army.

Acting highly entrepreneurially, the Congressional Republicans passed several more detailed pieces of legislation over President Johnson's veto, which specified the key tenets of military reconstruction. The 1867 Military Reconstruction Act established five military districts in the southern states under the control of the US army that were to remain in existence until new governments were formed. The military was tasked with registering eligible African American voters and ensuring that no ex-rebels had access to the ballot box. The 1867 Tenure of Office Act and the 1867 Command of the Army Act ensured Congressional control over the Army while the Supplementary Reconstruction Act enacted that same year supplied the mechanisms for the new political processes in the occupied territories (Sefton, 1967). To guarantee the irreversibility of African American suffrage, on 30 March 1870 Congress also passed the Fifteenth Amendment that explicitly banned the state and federal government from denying and obstructing the right to vote on account of race, colour, or previous condition of servitude (Section 1). Of particular note is also the 1875 Civil Rights Act, a piece of visionary legislation produced by Congress and President Grant's administration, that established equal access to public facilities for African American citizens and prohibited the exclusion of freedpersons from jury service (see U.S. Statute 18, 1875: 335-37). Now African American citizens were explicitly guaranteed full participation in the social life of their communities (save integrated schooling which was discussed but excised from the final version) and afforded a say in judiciary matters.

The historical research suggests that the centralisation of the government in the ex-slave owning states was crucial in establishing an environment that would allow for the implementation of the newly passed legislation. Tasking the military with the execution of the Reconstruction Acts allowed for the unprecedented albeit brief compliance with the new norm of racial equality at the local level. The military enforced the Ironclad Test Oath and provided critical protection to southern African Americans by protecting public assemblies for the purposes of voter registration, election, state constitutional convention and the ratification of state constitutions

(Selfton, 1967: 137). Estimates show that over 700,000 African American men were registered to vote compared to 627,000 white men and 162 African American men had positions in state and federal government during the military reconstruction period suggesting that the political inclusion of the former male slaves was highly successful (Woodward, 1957: 235-6 and Kousser, 1992: 135-140). Military protection contributed to the general feeling of emancipation which allowed freedpeople to claim the rights to education and free movement besides voting. At the height of the First Reconstruction in the mid-1870s, forty percent of African American children were enrolled in school, three times more than just five years before (Miller, 1999: xxviii).

The story of the First Reconstruction is a story about the design and execution of an unprecedented experiment in racial equality. The political developments support the main argument made at the beginning of the chapter about the centrality of national political elites in norm production. The case demonstrates that Congressional Radical Republicans were the architects of a new racially inclusive political order who institutionalised the racial equality norm in the law of the land and in the governing federal and state institutions and bureaucracy. The prominent role of national political elites in norm creation and diffusion is not an isolated occurrence limited to the First Reconstruction. Their agency, the chapter shows, continued to be instrumental in the norm's re-establishment during the Second Reconstruction, and as chapters 2 and 3 will demonstrate, in the norm's transference in the UK context and the norm's codification at the EU level.

The research also confirms that the ideational motives of norm entrepreneurs are linked with and reinforced by instrumental concerns that shape the strategies norm entrepreneurs design to transform their normative commitment into policy. The extensive constitutional and policy reforms the Republican-controlled Congress undertook were both driven by genuine concerns for the social well-being, political empowerment and protection of former slaves and by considerations involving Republican electability and stay in power. Furthermore, norm enterprising political elites are more likely to succeed in accomplishing their agenda when the government structures and governance mechanisms are centralised. In this case, constitutional provisions allowed the Radical Republicans in power to temporarily bring the norm-violating southern states under the control of the federal government and to re-



structure entrenched lilywhite electorates and modes of governance based on white supremacy and black intimidation.

### **The civic death of the racial equality norm**

This section examines the causes of the decline and eventual erosion of the racial equality norm. Several explanations have been put forward by scholars: white racism and the corollary absence of any moderate tendency by southern whites (Cook, 2003: 255), class divisions between southern rural and urban African Americans (Fitzgerald, 2002) and the failure of land reform and economic independence of African American citizens (Mandle, 1978 and Billings Jr., 1979). This thesis, however, takes on an institutional perspective that investigates the role of jurisprudence building and the political and institutional support available at the time to advance the new norm. It proposes that the norm's civic death was the outcome of its incomplete institutionalisation, exemplified by the Supreme Court decisions which invalidated most of the Reconstruction legislation and the inability of the Radical Republican elite to generate sustained political support for the Reconstruction project within the wider Republican Party. Violent politics orchestrated by Southern Democrats, which breached the norm of democratic participation in electoral processes, played a substantial part in the collapse of the newly formed institutions and policies that affirmed African American political and social equality. The narrative underscores the importance of governing elites for norm enforcement and the consequences of reversing political goals and norm commitment that came at an immense personal cost for African Americans. Related to this, it shows that institutional norm entrepreneurs in one branch of the government cannot enforce institutionalisation and compliance on their own. The norm's success depends on the support of key norm promoters in legislature, executive and judiciary.

#### *Political developments*

The institutionalisation of the racial equality norm ended up flawed and incomplete. The decision to link re-admission of individual states to Congress was based on the ratification of the Fourteenth Amendment. Although reluctantly done by state-level politicians, the ratification guaranteed a swift return to civil government in much of the former Confederacy. Once federal protection was

withdrawn, however, southern Republicans were left to compete for office with their long established Democrat rivals. African American Republicans were left particularly vulnerable as white on black violence re-surged throughout the region fueled by the Ku Klux Klan and Klan-like groupings comprised of ordinary professionals like paper editors, lawyers, doctors, county sheriffs and postal workers to name a few (Hurst, 1993: 4, Taylor, 1974: 161-64). The militarisation of electoral politics, Vallyly observes, put much pressure on the Republican Party and its new African American coalition partners (2005: 92). Political violence shattered communities and sapling African American associations stunting the development of robust associationalism that could aid the institutionalisation of the new norm.

Just as detrimental to the Reconstruction project was the intense factionalism within the Republican Party (Perman, 1984). Continued military intervention in the Southern United States was at odds with moderate white Republicans and divided President Grant's Republican cabinet on the usefulness of affording continued federal protection to southern African American citizens. Moderate Republicans considered partnerships with ex-Confederates necessary for stabilizing the region and solidifying electoral success, a position that alienated African American Republicans. Other intra-party sources of division on state and local levels included competition for public positions between native southern African Americans and often highly educated African Americans from the North and between whites from the North (Carpetbeggars) and southern white Republican supporters (scalawags). Particularly damaging was the politics of racial symbolism manifested in the tendency of pro-Republican whites to relegate black office holders to junior positions in government while using the latter to deliver the electoral base (Vallely, 2005: 90-91).

The Long Depression, an economic recession that lasted from 1873 until 1879 and corruption charges against Republican government authorities at the national, state and local levels shifted the political priorities and notably lessened northern support for further political, military and financial investment in the Reconstruction project. The disenchantment with the continued Reconstruction efforts of the Grant administration and more significantly with corruption charges and the economic downturn were evident in the 1874 Congressional elections when Democrats for the first time in the post-bellum period controlled the House of

Representatives. Facing the possibility of surrendering their governing power entirely in the intensely disputed 1876 presidential election, Republican elites officially finalised their abandonment of the racial equality norm. Much of the Republicans' narrow win rested on their promise to limit the role of the federal government in promoting civil rights. This informal promise known as the Compromise of 1877 put a Republican in the White House in exchange for economic aid to the South and the withdrawal of the last federal troops from the southern states.

These political developments show that central control is crucial in maintaining new policies that uphold the racial equality norm. They also point to the difficult task institutional norm entrepreneurs have in ensuring the continuous support of their wider political base for new norms. Racial equality, as noted above, proved hard to achieve even under the best of conditions as its white enforcers subtly arranged for lesser governing power for African American office holders at the local level, suggesting inconsistencies in understanding and applying the racial equality norm between the national and local levels. The brief episode also highlights the triumph of instrumental over ideational concerns. When material and ideational priorities diverge, material considerations tend to prevail.

### *Jurisprudence building*

Republican constitutionalism, the nationalist view that the constitution was “not a set of limits on government but a source of sovereign, positive, regulatory government able to establish and enforce national [civil] rights” soon faced the scrutiny of the judiciary (Valelly, 2005: 105). The Supreme Court, including the moderate Republican judges, were not persuaded by the basic premises of the new constitutional amendments and Reconstruction Acts, which they viewed as a threat to the foundational notion of federalism. Valelly argues that the Republican-led civil rights revolution frightened the Court and the judges saw themselves as the power able to restore the balance between federal and state power (ibid., 119). In its effort to preserve existing federal governing arrangements, the Supreme Court substantially damaged the racial equality project.

The 1872 *Slaughterhouse Cases* represented the first full test of the new laws. Ruling for the state of Louisiana, the Supreme Court judges held that the

“privileges and immunities” of the citizens of the United States and their equal protection under the law do not extend to economic rights (*Slaughterhouse Cases*, 1872). Although the Court did not question the validity of the Fourteenth Amendment, it significantly weakened the regulatory power of the national government over state matters by distinguishing between two citizenships, state and national, and by suggesting that the power to protect the fundamental rights of citizens rests primarily with the state (ibid). Such a reading of the law, Reconstructionists feared, would empower white supremacists as it essentially contested the legitimacy of the federal government to protect constitutional rights and sought to decentralise its power. As the African American leader Frederick Douglass remarked, “Two citizenships...mean no citizenship...The nation affirms, the State denies, and there is no progress. The true doctrine is one nation, one country, one citizenship, and one law for all the people” (quoted in Wang, 1997: 124).

The judges’ rationale in *US vs. Cruikshank* (1875) and *US vs. Reese* (1876) cases further crumbled the institutionalisation of the new norm. In these cases, the majority of justices confirmed that the protection of individual civil rights was the duty of the state confining the scope and purpose of the Reconstructionist agenda. Only if a state official could be proven to discriminate on the ground of race, was the US government allowed to intervene and take control. The direct invalidation of the Reconstruction ideals became evident in the *Civil Rights Cases* (1883) verdict, in which the overwhelming majority of judges agreed that the Civil Rights Act of 1875, which prohibited racial discrimination in places open to the public, was unconstitutional. In this way, the Supreme Court tacitly approved segregation in the private sector and severely limited the scope of the “equal protection” clause of the Fourteenth Amendment by claiming that discrimination by private individuals was not protected under the constitutional provisions.

The final nail in the coffin of the racial equality norm came some thirteen years later in *Plessy vs. Ferguson* (1896). In *Plessy*, the justices reasoned that the ‘separate but equal’ principle, which had already diffused across statutes in the majority of southern states, did not violate the ‘equal protection’ clause of the Fourteenth Amendment. The judgment sanctioned *de jure* segregation and institutionalised the emerging system of domestic apartheid. Justice Harlan, the sole

dissenter argued that *Plessy* created a two-tier system of citizenship according to which the dominant white race assumed “to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race” (Dissenting opinion of Justice Harlan, 1896). Justice Harlan also echoed the fears of Reconstructionist supporters that *Plessy* defeated the purpose of the recently adopted Reconstruction legislation and stripped federal protection from African American citizens making them helpless before the escalating violence.

The jurisprudential developments show that Congressional Republicans were unable to persuade the justices to support the new exercise in bi-racial democracy based on the regulatory power of the national government. Although the initial Supreme Court’s decisions did not invalidate the new laws outright, they were not favourable either. The Court’s lack of support and subsequent invalidation of the core ideas in the new laws presented a serious political problem for the Reconstructionists and lifted off the pressure from the norm’s opponents to comply with the new constitutional mandate. Ultimately, the narrative shows that diminishing political will, shifting priorities and increased factionalism in the Republican Party, the norm contestation by the judiciary and the decentralisation of governing power led to a complete reversal of the norm institutionalisation processes. The findings confirm the claims at the beginning of the chapter about the key role national elites have in norm construction and institutionalisation and about the need for norm support by influential norm entrepreneurs from the three branches of the government in order for the norm to achieve long-term institutionalisation. Without such support, as the First Reconstruction experiment demonstrates, new controversial norms tend to be short-lived.

### **The Second Reconstruction (1954-1975)**

This section traces the causal mechanisms that revived the process of re-institutionalisation of the racial equality norm. Here I argue that similarly to the First Reconstruction national elites were the key drivers in the norm’s institutionalisation during the Second Reconstruction although this time they did not do so entirely by their own volition but under the pressure exercised upon them by another set of norm entrepreneurs, non-state Civil Rights activists. For their part, national elites re-asserted central control over state matters and deployed the military to secure the

compliance of southern states with the new laws which were used as tools to re-grant full citizenship to African Americans. I also argue that unlike the First Reconstruction, the Second is irreversible because influential institutional norm entrepreneurs from all branches of the federal government displayed sustained support for the norm while domestic grassroots pressure and foreign policy considerations ensured that backing out of their commitment to norm enforcement would not be politically viable.

### *Political developments and jurisprudence-building*

The political and social exclusion of African Americans throughout the redeemed South was accomplished in two ways both of which were legal. Southern legislators passed new laws in the late 1880s which were written in a colour-blind language but effectively disenfranchised African American citizens. These statutes included residence requirements, poll taxes, literacy tests and clauses pertaining to “good character” and absence of crimes related to “moral turpitude” (Pauley, 2007: 31-32). African Americans were excluded socially through a series of segregationist statutes allowed under the Supreme Court’s ‘separate but equal’ doctrine which constructed an elaborate apartheid system that regulated every aspect of one’s public life including education, public transport, accommodation and public facilities.

The battle for racial equality therefore required judiciary action that would revoke the ‘separate but equal’ legal doctrine and invalidate *de jure* segregation in the public sphere. Access to the ballot and political representation necessitated Congressional action to fashion legislation to enforce the fundamentals of the Fourteenth Amendment by nullifying the myriad of state and local voting statutes that denied African Americans access to the ballot. The successful political and social inclusion of African Americans, I claim, depended on the political will of national elites and their ability to forge a consensus that would generate the passage of strong and centrally enforced policies that would dismantle state and local institutional structures and practices which embodied countervailing norms.

## Civil Rights

The first sign of the norm's revival came from the Supreme Court, which in its 1954 *Brown vs. Board of Education* decision overturned the segregation norm albeit only in the field of education. The astounding outcome in *Brown* was a combined effort of the National Association for the Advancement of Colored People, a well-established norm enterprising entity with presence at the grassroots, state and national level, and a Supreme Court with an activist judicial agenda. *Brown* came about after considerable discussions within the NAACP. NAACP's Thurgood Marshall and like-minded lawyers understood that the Supreme Court at that moment was the most 'liberal-thinking assembly' up until that time due to President Roosevelt's efforts to appoint liberal-minded judges, an approach which continued during President Truman's administration (Finch, 1981: 171). After much deliberation during a two-day meeting, the NAACP staff and volunteers coming from local, state and national levels chose "to attempt a bold, frontal attack upon educational segregation" which aimed at overturning the constitutional validity of *Plessy* (Hughes, 1964: 138).

The NAACP through its legal arm, the Legal Defense Fund, readily launched suits against school boards in Virginia, Delaware, the District of Columbia, Kansas and South Carolina, which eventually were grouped together as *Brown* for their presentation before the Supreme Court. Besides using their most capable lawyers, the NAACP also mobilized over 200 scholars and lawyers to assist during the cases' presentation of the facts and legal arguments for educational desegregation. The association also benefitted from the support of the US Attorney General who filed a brief on behalf of the United States against segregation in education. The unexpected death of Chief Justice Vinson and his replacement with California's Governor Warren significantly influenced the final outcome as Vinson was "most certainly opposed to overturning *Plessy*" while Warren not only supported desegregation but skillfully ensured the unanimity of the verdict for the plaintiffs (Jonas, 2005: 64). The ruling essentially declared segregation in education solely based on race unconstitutional because, the Court held, it deprived the children of minority groups of equal educational opportunities even when facilities and other tangible factors were equal (*Brown*, 1954).

The above developments show that unlike the norm's creation in the First Reconstruction, which was wholly dependent on the activism of national political elites, the re-emergence of the race anti-discrimination norm this time was the outcome of non-state norm entrepreneurs and state elites sympathetic to their cause. Although the events in 1954 conform in part to the norm creation phase of the norm life cycle model, significant differences remain the main one being the nature of the agents involved in norm construction. As already mentioned, the way in which the model is constructed presents norm emergence as a process that is entirely driven by non-state transnational norm entrepreneurs (Finnemore and Sikkink, 1998: 896-900). However, I have argued that a complementary approach which examines the entrepreneurship of national elites is useful for understanding norm-building processes for norms that first originate in a domestic context.

In terms of norm institutionalisation, the verdict in *Brown* would have meant little if unenforced. In the South, reaction to *Brown* was quick and negative. Virginia's Senator, Harry Byrd (1956), for example, issued the Southern Manifesto that called for 'massive resistance' to integration and decried "the Supreme Court's encroachment on rights reserved to the states and to the people". The 'massive resistance' strategy was swiftly adopted by states' governments and school boards in the region which devised a variety of measures to prevent integration as extreme and expansive as the deliberate closures of entire schools. Although tracing the process of school desegregation in its entirety is not the goal here, two integration cases merit discussion because they highlight the co-operation between national elites and the importance of central control over state and local governments without which as proposed earlier norm compliance would have been unattainable.

The 1957 integration of Central High School in Little Rock, Arkansas is a remarkable example of the effectiveness of elite collaboration and exertion of central control to bring about norm conformity in an exceptionally volatile and violent environment. After nine African American students organised by the NAACP attempted to enrol, Governor Orval Faubus with the overwhelming support of the White Citizens Council and the local community ordered the state's National Guard to prevent the students from entering the school's premises. The Governor further refused to obey a subsequent federal court ruling that in accord with *Brown* ordered the students' admittance. By doing this he openly defied central authority and placed



the burden of enforcing the court's order on the executive. After negotiations in which Faubus refused to back down, President Eisenhower placed the Arkansas National Guard under federal orders and as the violence escalated within days sent further one thousand soldiers to carry out the judicial orders (Huckaby, 1980 and Burk, 1984).

In the other infamous Stand in the Schoolhouse Door case of 1963, the Governor of Alabama, George Wallace literally backed his "segregation now, segregation forever" vision for the state by personally blocking the door of an auditorium in the University of Alabama to prevent African American students from registering. Defying court orders he only backed down after the Guard General of the urgently federalised Alabama National Guard commanded Wallace to step aside on President Kennedy's orders (Alabama Archives, 1963).

These snapshots of some of the most well-known moments of the battle for educational desegregation emphasise the essential role national elites play in norm implementation processes. The incidents in Arkansas and Alabama also confirm the hypothesis that the setup of the government system matters. In essence, the battle between the governors and the presidents was as much about racial segregation as it was about central versus state control over state affairs which since the Redemption of the South from 1877 onwards had been left up to the authority of the states. In his School House Door speech, Governor Wallace challenged the power of the federal judiciary and the executive by calling the federalisation of the Guard "illegal usurpation of power by the Central Government" and the presence of military force to protect the African American students a "frightful example of the oppression of the rights, privileges and sovereignty of this State by officers of the Federal Government" (Alabama Archives, 1963). Faced with direct defiance, the presidents enforced compliance by using the constitutional provision that gives them control over the military in matters considered to be of national emergency.

As of motives, although the federal protection of African America students was presented as wholly justice-driven, President Eisenhower could hardly be seen as a champion of racial equality and John F. Kennedy's short presidency was pre-occupied with rising Cold War tensions. Their actions can be understood as motivated by both a logic of appropriateness and by political urgency to ascertain

central control and to ward off undesired foreign policy ramifications. Both presidents were keenly aware that discrimination against African American citizens damaged the country's image and criticisms by international bodies like the United Nations and much of the foreign press served as a "source of constant embarrassment to ...[the] Government in the day-to-day conduct of its foreign relations (quoted in Lester, 2004: 458). The presidents' pragmatic concerns substantially shaped the direction of their agency indicating again the interlinking and interdependency of ideas and material concerns.

These claims confirm the hypothesis of Critical Race scholar, Derrick Bell, who in his 1980 article on *Brown v. Board of Education* argued that the Supreme Court's verdict could not be understood simply as a decision "of those concerned about the immorality of racial inequality" but as a convergence of black and white interests (524-525). Civil rights advances for African American lawyers seemed to coincide with the changing economic and foreign policy objectives of those in power (Delgado and Stefancic, 2012: 22).

Both justice-related and instrumental concerns are necessary to motivate national elites. Justice-related motives, as I show more clearly in the section below, ensure that the measures political elites take to institutionalise and enforce new norms are strong and effective in the long-term and instrumental motives expedite the elites' agentiality. This argument will be revisited in the Czech and post-2010 Hungarian cases where I argue that the extremely limited presence of justice-related concerns and an overwhelmingly instrumentally-driven *modus operandi* of political elites has resulted in weak, sporadic and short-lived institutionalisation and enforcement of the racial equality norm.

The norm institutionalisation account would be incomplete without examining the passage and the nature of the Civil Rights Act of 1964, a major piece of legislation that signaled the domestic cascading phase and the establishment of the desegregation norm with regards to African Americans as the national legal as the political standard. The genesis of the Civil Rights Act is found in President Kennedy's response to Governor Wallace's defiant and bombastic rhetoric in the Stand in the Schoolhouse Door speech. In his response, President Kennedy for the first time addressed unequivocally the issue of equality and exhorted Congress to

work together for the drafting of an effective Civil Rights bill, the first such legislation since the First Reconstruction almost a century before. In his national address in 1963, Kennedy framed the state of race relations as a matter of justice and resolutely presented African Americans as full citizens of “this [American] Nation” (Kennedy, 1963). Rebuffing Wallace’s remarks on the constitutional rights of the states, Kennedy declared,

“This Nation was founded by men of many nations and backgrounds. It was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened... We are confronted primarily with a moral issue. It is as old as the scriptures and is as clear as the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated... This is one country. It has become one country because all of us and all the people who came here had an equal chance to develop their talents. We cannot say to 10 percent of the population that you can't have that right; that your children can't have the chance to develop whatever talents they have... I think we owe them and we owe ourselves a better country than that. Therefore, I am asking for your help in making it easier for us to move ahead and to provide the kind of equality of treatment which we would want ourselves (ibid).”

The address refers to the moral imperative to act to ensure racial equality and citizenship rights to all. When taken in its entirety, however, the address also shows the pragmatic reasons for Kennedy’s demand of “the Congress of the United States to act, to make commitment it has not fully made in this century to the proposition that race has no place in American life or law” (ibid). Black church burnings and bombings, public disturbances and police brutality, business interests in the South’s development threatened by the systemic violence, and a foreign policy to win the hearts and minds in non-aligned nations at the height of the Cold War were also put forward as arguments to spring Congress into action (ibid).

Just a week after Kennedy’s speech the Justice Department sent a draft of the proposed legislation to Congress. Despite Kennedy’s passionate speech the original bill was rather weak as it did not endow the federal institutions with sufficient power to protect African American citizens from the police and other local and state authorities. The House Judiciary Sub-committee revised the presidential draft correcting the omissions and presented a substantially stronger bill for consideration. The president’s assassination temporarily halted the process but President Lyndon Johnson’s swift mobilisation of political support and pressure on both Republicans

and Democrats brought the bill back into focus. After 70 days of public hearings, close to 300 witnesses and 5, 800 pages of public testimony the House passed the bill with an overwhelming majority and sent it to the Senate (Loevy, 1995).

Even with this positive development it was clear that the real battle would be in the Senate. Although the bill needed only a simple majority of 51 votes to pass under Senate rules, Senators could filibuster to prevent voting by literally talking the bill to death. The only way to end a filibuster was with a cloture vote, which required a two-thirds majority (67 votes), or a substantially higher number of senators sympathetic to the racial equality norm. The 22 senators from the old Confederacy states, the Southern Bloc, were staunch supporters of segregation and 12 were from border states where segregation practices were still prevalent. Securing the swing votes for cloture required a massive publicity and lobbying campaign including petitions and constituent and religious leaders' meetings. President Johnson launched his own lobbying campaign employing a combination of persuasion and arm-twisting practices. Using a variety of procedural mechanics, the bill supporters put the bill up for debate and eventual vote. Good on their word, the Southern bloc launched a filibuster threatening to "resist to the bitter end any measure or any movement which would...bring about social equality and intermingling and amalgamation of the races in our [southern] states" (quoted in McKinsty and George, 2011: 193). Fantastical propositions circled the Senate during the 72-day filibuster including the forceful relocation of African American citizens from southern states to "inflict on... [non – southern] cities the same conditions proposed to be inflicted by this bill on the people [of the South]" (quoted in Andrews, 2006: 246). As the political battle in the Senate dragged on neither side was willing to compromise. With violence raging throughout the South and public pressure for the bill mounting, the pro-civil rights senators agreed on non-crucial bill amendments to secure the swing votes of the undecided. In a historic cloture vote pro-civil rights senators stopped the longest speech of the longest filibuster in US history and on 2 July 1964 passed the bill, which was to have profound implications for the emerging new social order (Risen, 2015). Or as Senator Everett Dirksen, who had played a crucial part in the bill's passage, declared, "Stronger than all the armies is *an idea whose time has come*. The time has come for *equality of opportunity* in sharing in

government, in education, and in employment. It will not be stayed or denied. It is here!" (US Senate, 1964, my emphasis).

The story of the 1964 Civil Rights Act reveals that its passage codified a huge victory for institutional and non-institutional norm entrepreneurs. It also shows that a decade after *Brown* the codification of the racial anti-discrimination norm was far from certain despite consistent desegregation federal courts judgments and (at times ambivalent) presidential support of the Civil Rights movement cause. The developments indicate that once a new norm is formally recognised, as the *Brown* judgment did, its institutional diffusion or cascading is not a guaranteed quasi-automatic process. The evidence suggests that the institutional diffusion of new norms is contested and challenging and depends on committed and justice-driven norm entrepreneurs within and without the given institution. The dramatic passage also confirms the earlier claim that the acceptance of new norms depends on the ability of national elites within Congress, the Office of the President and the federal court system to forge a consensus on the recognition and enforcement of new norms.

The 1964 Civil Rights Act has played a vital part in fundamentally altering the lives of African Americans in the South in so far as segregation and overt discrimination are concerned. The Act extended the *Brown* decision to all key areas of public life. It invalidated local segregation laws and outlawed discrimination in public accommodations (Title II), barred segregation or discrimination in government-owned or operated facilities like hospitals, libraries and parks and allowed the federal government to file lawsuits on behalf of the victims to enforce the law (Title III), and sought to outlaw employment discrimination (Title VII). Equally importantly, the codification of the norm in these fields served as the springboard from which institutional and non-institutional norm entrepreneurs launched further policies and lawsuits to stem forms and areas of discrimination the Act does not prohibit explicitly.

For example, President Johnson exerted substantial influence to incorporate Title VIII in the 1968 version of the Act, which introduced federal enforcement mechanisms to combat housing discrimination. The NAACP legal team continued to demand court action to prevent subtler forms of discrimination. In *Griggs v. Duke Power Co.* (1971), the landmark case in which the Supreme Court recognised and

prohibited indirect discrimination on the basis of race, the NAACP argued that the new intelligence and education tests imposed by the company after the enactment of Title VII limited advancement opportunities for African American workers at significantly higher rate than for white workers and did not have ‘predictive validity’ related to how well an employee could do the job in question (Greenberg, 1970). In its decision the Court acknowledged that such practices “neutral on their face, and even if neutral in terms of intent, cannot be maintained if they operate to “freeze” the *status quo* of prior discriminatory employment practices” which the plant had employed in the past (Griggs, 1971: 401). This was the first time the judiciary had identified discriminatory practices in terms of their effect and had referred to the wider context of systemic discrimination. The developments in the aftermath of the Civil Rights Act’s passage confirm the domestic cascading of the norm is not a taken-for-granted process. The process requires the continual agency of institutional and non-institutional norm entrepreneurs whose actions expand the areas of public life to which the norm applies and concomitantly deepen the norm’s institutionalisation by ensuring that notwithstanding shifting priorities and parties in power the national policy continues to affirm the norm and to ensure the vitality of its enforcement mechanisms.

### Political Rights

To understand fully the breadth and complexity of the institutionalisation of the racial equality norm, it is also necessary to look at the processes of political inclusion of African Americans during the Second Reconstruction. In some ways, the battle for racial equality in the area of political participation was more challenging because determining voter eligibility and registration criteria, historically, had been left to the states. Moreover, since poll taxes, literacy tests and other similar statutes were written in a colour-blind language, technically they did not breach the Fourteenth Amendment. This presented norm entrepreneurs within the federal government with a conundrum of how to construct effective legislation while venturing in an uncharted legal territory fraught with political and legal risks. The story of the 1965 passage of the Voting Rights Act is very similar to that of the passage of the Civil Rights Act a year earlier. It provides further evidence in support of the argument about the nature of the causal mechanisms that effect normative

change and the importance of centralised government for successful norm institutionalisation nationally and locally.

So far as the Johnson administration was concerned, voting rights were not on the immediate agenda especially after the considerable political capital spent on the 1964 Civil Rights Act. Unable to persuade President Johnson to propose a voting rights bill, Martin Luther King Jr. with the support of the Southern Christian Leadership Conference and the Student Non-violent Coordinating Committee chapters launched the Selma voting rights campaign against the unlawful court injunction that prevented African American voters from assembling and discussing civil and voting rights issues. As the non-violent marchers were brutally attacked on 7 March 1965 by state troopers and private citizens, a tragic event which became known as ‘Bloody Sunday’, public outrage and solidarity demonstrations took place across the country with demands for federal action on voting rights. Norm entrepreneurs in Congress and the Johnson administration quickly if reluctantly agreed to the need for immediate voting rights legislation. Despite the hesitancy of interfering with state rights, the drafters agreed to incorporate the suspension of literacy tests and to provide for federal supervision in localities that systemically denied voting rights on the basis of race. The initial developments that placed voting rights at the top of the nation’s political agenda reveal a complex interaction between non-government and government norm entrepreneurs. To reiterate, at this stage of institutional norm diffusion, the norm life cycle model expects a relatively prompt and uncontroversial institutionalisation especially because at this point key national elites have already recognised the new norm and launched its codification (Finnemore and Sikkink, 1998: 902). Yet, the Voting Rights Act passage demonstrates that despite their normative commitment, a significant number of national elites had to be persuaded and pressured for further action, which in turn suggests that if a new norm is particularly controversial, the agency of non-government norm entrepreneurs can still be necessary during the norm institutionalisation process.

In a televised address to the nation delivered on 5 March 1965, President Johnson submitted the draft to a joint session of Congress. Often cited as the most important speech on voting rights, Johnson’s address built upon the ideas of justice, racial equality and national citizenship for all. “There is no Negro problem. There is

no Southern problem. There is no Northern problem. There is only an American problem. And we are met here tonight as Americans – not as Democrats or Republicans – we are met here as Americans to solve that problem...Extend the rights of citizenship to every citizen of this land” (Johnson, 1965). Adopting the activists’ signature phrase “We shall overcome”, he identified himself and the Office of the President with the victims astonishing Congress and the 70 million listeners.

The Senate’s passage of the bill on 6 August that same year followed a pattern similar to that of the earlier Civil Rights Act. The bill was filibustered by Southern Democrats who argued it represented unconstitutional intrusion on the rights of states. Nevertheless, the standstill in the Senate ended up with a successful cloture vote arranged by the same group of norm entrepreneurs who orchestrated the earlier civil rights victory. In the House, the elimination of the poll tax presented itself as a contentious issue. With the House at an impasse, President Johnson again used his political influence to forge a compromise by leaving the poll tax in the bill but adding a declaration that such a tax abridges the right to vote, a provision ordering the Attorney General to immediately file lawsuits in federal court, and instructions that the courts are to hear the cases at "the earliest practical dates" (Voting Rights Act Sec. 10, 1965). The judiciary did not disappoint and a year later in *Harper v. Virginia Board of Elections* (1966) ruled poll taxes unconstitutional.

The historical evidence suggests that the re-enfranchisement of the African American minority was the outcome of national elites’ continued reinforcement of the idea about inclusive national citizenship, a notion that implicitly undermined the concept of state citizenship, and of the masterful collaboration of national elites within the three branches of the federal government. Taking into consideration the empirical findings I also claim that the exceptional support for the 1965 Voting Rights Act by key norm entrepreneurs within the three branches of the federal government established the Act as a mechanism that ensured the permanent inclusion of African Americans in the political life of the country. I argue that the Act’s provisions have contributed greatly to the irreversibility of the racial anti-discrimination norm and its general compliance at state and local level. Besides the abolition of state and local tests and other discriminatory requirements, the exceptional strength of the Voting Rights Act lies in its pre-clearance provisions that give “the executive branch extraordinary monitoring and enforcement powers” upon



southern state legislatures demonstrating yet again the importance of central control for the legal enforcement and compliance with the norm at the sub-national level (Davidson and Grofman, 1994: 380).

### **Internalisation**

At what point, if at all, does a norm become ‘taken-for-granted’ in the political and social life of a particular state? I propose that in the case of African Americans, the racial equality norm has been reasonably well-internalised at the national level while its internalisation at state and local levels in the old Confederate states is partial at best.

By the late 1970s it seemed that the internalisation of the racial equality norm was succeeding. Jim Crow signs were removed from public view, radicalism and militancy in the South were defeated and federally sponsored affirmative action programs gave African Americans access to middle class jobs in the public and private sectors. Jimmy Carter’s election as president opened the door to middle and upper level political positions. African Americans were employed in federal, state and municipal administrations across the US and the total number of African Americans in the Congressional Black Caucus had doubled (Marable, 2007: 146-147). The provisions in the Civil Rights Act of 1964 continued to be subsequently expanded and the legislation has remained uncontested regardless of political power shifts.

At the same time, racial equality has been only partly fulfilled politically and socially at the local level. Working class and low-income African Americans remain marginalised and confined to inner-city neighbourhoods, which essentially became segregated after the ‘white flight’ and ‘black elite flight’ to the suburbs. The targeted if occasional bombing and burning of African American churches in the southern states suggests that racial tensions are anything but distant memories (Green, 2015). Although there is insufficient evidence to claim that institutional discrimination at county level across the South is systemic, it does occur and individual county cases reveal a well-coordinated set of practices between predominantly white local law enforcement and municipal courts that are explicitly premised on discriminatory intent and racial bias (US Department of Justice, 2015). The developments since the Second Reconstruction suggest that although the anti-discrimination norm with

regard to African Americans has become a standard within the federal government, the “extension of democratic principles from the political system into the structures of the economy...social order” and local politics have not been fully realised and social inequality continues to perpetuate the *de facto* segregation of the majority of African Americans due to their lack of educational and residential mobility (Marable, 2007: 215). This in turn puts into question the efficacy of national institutional norm-building processes to ensure long-term and robust normative change.

The reasons for the difficulty of embedding the racial anti-discrimination norm in state and local institutions, political processes and practices to the same degree as on the national level has largely to do with American federalism or decentralisation and the historic opposition of conservative white male-dominated southern governments to federally imposed norms that challenge historic narratives that glorify Confederate resistance and disrupt hierarchical social and political structures constructed upon racial distinctions. The federal system makes compliance with the extensive civil and political rights legislation difficult and the continuous struggle of southern state governments to diminish federal oversight over voting rules has resulted in the stripping of key provisions of the Voting Rights Act that ensure equality at the ballot vote (*Shelby County vs. Holder*, 2013). The landmark case of *Shelby County vs. Holder* (2013) in which the conservative leaning Supreme Court at the time ruled for the government of Shelby County, Alabama has resulted in the dismantling of central federal oversight provisions of the Voting Rights Act (*ibid*). In practice, the judgment permitted southern state governments to pass new laws that regulate the voting process without first receiving approval from the federal government. This again opens the door for laws that disproportionately disadvantage poorer African Americans. To sum up, the opposition of local and state government authorities to the racial equality norm and the fact that they govern within a rather decentralised system have obstructed the embedding of the racial equality norm in local and state institutions and their political processes. The Central European case studies, especially the Hungarian one, show similar developments and confirm the hypothesis that if norm-promoting national elites govern within a largely decentralised system and the local authorities have historically upheld opposite

norms, compliance with and embeddedness of new norms at the local level are diminished.

## **Conclusion**

This chapter has traced the origins of the racial equality norm by examining the domestic context within which the norm was constructed. I have argued for the need to develop a complementary approach to Finnemore and Sikkink's model about transnational actors as primary change actors. Using the historical evidence, I emphasised the merit of presenting national political elites as norm entrepreneurs who are capable of constructing new norms both single-handedly and in conjunction with non-state norm entrepreneurs in order to understand better norm emergence (1998: 896-900). The story of the First Reconstruction indicates that a small group of national political elites in key positions in Congress designed and implemented measures that led to the recognition and brief and forced compliance with the racial equality norm. The story of the Second Reconstruction reveals that the cautious but steady cooperation between non-governmental and governmental norm entrepreneurs was instrumental in reviving the racial anti-discrimination norm and elevating it to a top national priority. Consequently, the agency of national elites in norm construction needs to be acknowledged as a causal mechanism that can drive both norm emergence and subsequent norm institutionalisation. The chapter also suggests that new norms which are backed up simultaneously by politically powerful norm entrepreneurs within the three branches of the government are more likely to become institutionalised long-term, are rarely contested and are unlikely to be reversed. The institutionalisation of norms that lack such comprehensive support, as the Hungarian and Czech cases will demonstrate, tends to be weaker and prone to reversal.

The chapter has also re-examined the elites' motives that drive their agency. It confirms Finnemore and Sikkink's hypothesis that national norm entrepreneurs are driven by ideals a sense of justice but it also argues that their ideational motives are entwined with instrumental reasons (1998: 898). It builds upon the claims of critical race scholars by demonstrating that when instrumental and ideational motives converge, the design and institutionalisation of new norms are prompt and effective.

When ideal and material concerns diverge, instrumental reasoning commonly prevails leading to the decline of new norms.

The legal system of common law the United States follows plays an important role in the evolution or devolution of new norms because of the power the doctrine of legal precedent gives the Supreme Court to interpret the constitutionality of new laws and to deliver high impact judgments which themselves become the law of the land. This chapter has demonstrated that the doctrine of legal precedent in the hands of conservative-minded judges decisively contributed to the civic death of the racial equality norm and signalled the end of the First Reconstruction. The activist Supreme Court in the 1950s and 1960s had an equally important part in the dismantling of the racial apartheid doctrine during the Second Reconstruction and in further embedding the racial equality norm in its jurisprudence throughout the 1970s.

The government arrangements of a state are an important variable that contributes to or impedes the norm-institutionalising actions of national elites. Here I argued that the national elites' savvy interpretation of the constitution temporarily allowed for central control over state matters during the two Reconstructions. This ensured the implementation and monitoring of laws and policies that upheld the racial equality norm. In the subsequent chapters, I shall demonstrate that decentralised governance systems substantially constrain the norm institutionalisation attempts of sympathetic national elites and that the state of the government system is not a significant intervening factor when national elites are indifferent or hostile to the new norm.

On the whole, the investigation into the origin of the racial anti-discrimination norm points to the unsuitability of the norm life cycle model to explain the development of norms that originate in a domestic context. The model needs to be re-conceptualised to accommodate the research of such norms by allowing for two norm emergence pathways depending on the environment in which the new norm is created.

The chapter makes one further claim here, which will be developed more fully as the thesis progresses. Norms that are constructed by domestic national elites are more likely to be institutionalised successfully and long-term while norms that originate in an international or regional context have a lesser chance of becoming an

integral part of a state's order. In other words, the level at which the norm is constructed matters. The US national elites who were involved in the construction of the racial anti-discrimination norm had a deep personal commitment to the norm's realisation and tended to be more successful in persuading fellow actors to support the norm. In the Hungarian and Czech cases, I shall argue, the norm has been imposed from above through the EU Race Equality Directive and the jurisprudence of the European Court of Human Rights. Consequently, it has found little resonance with political elites in both states which institutionalised the norm for overwhelmingly instrumental reasons (EU conditionality and/or compliance with EU law). Institutional norm acceptance under such conditions is superficial and easily eroded.

## Chapter Two

### Norm diffusion: race relations in the United Kingdom

This chapter continues to examine the norm life cycle model and here it concentrates on the process of norm diffusion or the manner in which norms ‘travel’ to new states and become recognised and institutionalised in their political and social order. To begin, the empirical evidence examined in this chapter confirms the existence of norm diffusion. Norm transference can and does take place although the evidence shows that it does not necessarily take place in the manner the norm life cycle model suggests. In terms of agency, the model concentrates on transnational organisations and the networks they form as well as influential states that are said to employ norm socialisation approaches to make norm-violating states recognise and accept a new norm (Finnemore and Sikkink, 1998: 898). Using the British example, I propose that the pathways of norm transmission internationally are more varied than the norm life cycle model suggests and that the UK case supports my call for developing a complementary approach to the life cycle model in which international actors are the ones responsible for norm diffusion (Finnemore and Sikkink, 1998: 902). I use the historical evidence about the formation of the race relations policy framework in the UK to substantiate my arguments that 1) national elites can be the driving force in the interstate transmission of new norms and 2) they can successfully manage the process of norm diffusion.

In terms of motivation, legitimacy, reputation and esteem are not the only motives why states decide to adopt a new norm (Finnemore and Sikkink, 1998: 898). Similarly to US national elites, UK institutional norm entrepreneurs were motivated by a mixture of ideational, justice-driven concerns and instrumental concerns like the prevention of domestic racially motivated disturbances and the mitigation of the impact produced by increasingly restrictive immigration controls. When it comes to the mechanisms that norm entrepreneurs employ to facilitate norm diffusion, the findings confirm the model’s assumption. The evidence supports Finnemore and Sikkink’s claim that socialisation, demonstration and institutionalisation account for the international diffusion of norms (*ibid*).

The chapter begins with a brief introduction of the political and social context in which the race relations legislation, which enshrined the racial equality norm in UK law, was developed. The chapter then turns to tracing the development and passage of race relations legislation between 1965 and 1976, a period known as the “liberal hour” in British race relations (Saggar, 1991: 25ff). Concentrating on relevant historical aspects, it maps out the policy framework in relation to race that was constructed and legitimised through the efforts of the reforming Home Secretary Roy Jenkins and other “liberal hour” norm enthusiasts who were a part of or had close ties to the ruling political elite. The first goal is to demonstrate that the new legislation which codified racial anti-discrimination into UK law was heavily influenced by existing US race anti-discrimination laws at the federal and state level. The second objective is to show that the transference of the new norm into UK law was a domestic affair, almost entirely driven by “liberal hour” reformers within the Labour Party. The analysis examines the British government elites’ actions in constructing UK race anti-discrimination legislation, which reveal substantial knowledge of US race anti-discrimination law obtained through research and direct knowledge exchange with US law makers and administrators. It aims to show that British political elites engaged in norm socialisation processes with their US counterparts, which led to the direct transference and the modified appropriation of key legal principles and monitoring mechanisms from the US context. I also hold that the success of the norm’s diffusion was largely due to the emerging consensus at the time between the two main parties on the removal of the race issue from party competition and the already mentioned approach of elite learning adopted by the British liberally minded political elites (Saggar, 1991: 33-40).

### *The UK political context*

Racism, Stuart Hall observes, is always historically specific and although it may draw upon cultural and ideological notions from past historical phases, it always assumes specific forms which arise out of present...conditions and organisation of society" (1978: 23, see also Solomos, 1989: 2). The particular racism that emerged in post-war Britain has often been described as ‘racism at home’, which significantly differed in its manifestation and effect from the racism at the zenith of colonialism (Hall, 1978: 23). The need for anti-discrimination legislation in the UK can only be examined within the larger context of increasing non-white migration from

Commonwealth countries to the UK and the ensuing emergence of progressively stricter immigration controls and the gradual narrowing of the definition of British citizenship.

The context in which the race relations legislation was drafted is important because it highlights the close alignment of race and integration issues with those relating to non-white immigration. The dualism that links race with immigration, as Shamit Sagar denotes, ran strongly throughout the “liberal hour” of the 1960s and served to structure the political environment within which immigration and race relations policies were debated and drafted in the 1970s and the 1980s (1991: 26). Although in the early 1950s political discourses on race revolved largely around the issue of immigration controls, the state of race relations in British society began to emerge as an underlying concern. In the decade preceding official state intervention in the area of racial discrimination, there was wide awareness that the arrival of black migrants would lead to problems in the areas of employment, housing and social services (Patterson, 1969 and Freeman, 1979). The first main problem the government viewed in need of urgent address had to do with the negative response of the majority white population to non-white immigration and the competition it was perceived to create in employment and housing (Solomos, 1989: 71). The second problem concerned the frustration of black immigrants who felt excluded from equal participation in the British society by the development of a colour bar in these fields (ibid). It is unsurprising that progressive national elites were able to move towards integrative measures after the institutionalisation of firm controls at the point of entry. Evidently, each piece of race relations legislation was conditioned upon the passage of restrictive immigration legislation and served politically as a balancing act to mitigate the impact of immigration controls reflecting the ideational and instrumental motives of its originators.

#### *The role of the media*

In her research on the impact of the struggle for racial equality in the US on British racialised relations, Nuala Sanderson argues that the period between 1958 and 1968 was characterised by a high level of interest in Britain in American news and an increasing sense of concern in press reports “that Britain was heading for an American style racial conflict” (1999: 2). Her findings show that thanks to the media



the British public and the government were kept well-informed about the developments related to the Civil Rights movement in the United States. The elites on both sides of the political spectrum drew upon information from the media reports on US news to construct arguments whether to control entry or attempt integration (ibid., 43). Although this chapter does not examine in detail the media reports a brief overview of the media coverage throughout the 1960s is necessary because the news coverage of the struggle for racial equality in the US influenced substantially the parliamentary debates on the institutionalisation of the racial anti-discrimination norm in British law and contributed to the triggering of a transatlantic cascade.

The media reports in the early 1960s influenced the political debate in two ways. Those that demonstrated sympathy for the African American cause gave ammunition to the progressive national elites in favour of integration and anti-discrimination legislation in the UK. Those reports that focused on racial violence in the southern United States, the growing movement for Black Power and made parallels with race riots in the UK were used by politicians advancing the argument for restrictive immigration controls.

Several examples showcase the role of the media in promoting good practices of race relations from the US. In 1962 *The Times* ran a positive article about the work of the Kennedy Administration in ensuring fair housing in federally-assisted accommodations (1962: 12 quoted in Sanderson, 1999: 44). The same year *The Spectator* published the report “Racial Equality by Law- The American Example” in which it analysed the workings of anti-discrimination laws in various states (1962, 460 quoted in Sanderson, 1999: 44). It argued that “the United States has exploded the myth that legislation was ineffective and that this was “one of the most striking reforms of modern social history”” while suggesting that the UK was lagging behind despite its worsening race relations (ibid). These reports demonstrate that the British public was well-informed about the American developments in regards to race and used them to reflect upon the state of British race relations affairs.

The breadth and depth of the Civil Rights Movement coverage in the UK is evident in the 28 reports run by *The Guardian* and the 10 leaders published by *The Times* between May and August 1963 which focused on the racial violence in Birmingham, Alabama and the March on Washington (Sanderson, 1999: 44). *The*

*Guardian* explicitly linked the situation in the US with the race relations situation at home. *The Guardian* claimed that the need for British anti-discrimination legislation was evident by arguing that “If the Americans have a moral responsibility for the descendants of Negro slaves...Britain has an equal responsibility for the descendants of slaves of the British West Indies (17 February, 1964: 8, quoted in Sanderson, 1999: 44). The passage of key Civil Rights legislation like the 1964 Civil Rights Act was also prominently featured in the British press with liberal newspapers calling for its emulation at home (ibid).

On the other hand, the coverage of the race riots across the United States also fueled fears that similar events could transpire in the UK and triggered public debates as to whether entry controls were effective measures to prevent potential violence. For example, during the 1965 Los Angeles riots, the UK press was replete with reports about “arrests, looting, violence and the use of troops” and many of the articles attributed the violence to African Americans and their frustration with the denial of equal opportunities making parallels with the situation in the UK.<sup>2</sup> Similar comments ran through the media coverage of other race riots in 1968 in Baltimore, Chicago, Detroit, Washington DC and New York City in the aftermath of Dr. King’s assassination. These news reports combined with commentaries about the emergence of Black separatism increased the negative British impression about the presence of a black minority within a white society.

To re-state, the British extensive and continuous coverage of the struggle for civil rights in the US and the frequent parallels it made between the political contexts in America and at home significantly contributed to raising awareness amongst the British public and government about the existence and effects of racial discrimination. The media reports also influenced the political debates about immigration controls and the recognition of the need for race anti-discrimination legislation.

#### *Towards anti-discrimination legislation: the 1965 Race Relations Act*

This section examines the creation of the first two major pieces of anti-discrimination legislation in the UK. I argue that the norm entrepreneurs responsible

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<sup>2</sup> See *Daily Telegraph*, 7 August, 1965: 1 and 14 August 1965: 1 and *Daily Express*, 17 August. 1965: 6.

for the drafting actively sought to learn from the racial anti-discrimination law already developed by their North American counterparts, a norm socialising experience that shaped the discussions and the contents of the actual race relations acts. The analysis demonstrates that although norm socialisation took place, as the life cycle model predicts, the codification of the racial anti-discrimination into UK law was done without external pressure (Finnemore and Sikkink, 1989: 898). No international norm entrepreneurs participated in the norm diffusion process. The cascade was domestically driven almost exclusively by progressive Labour politicians in influential positions within the government who were helped by legal experts.

The recognition of the need for racial anti-discrimination laws within the Labour party can be traced back at least to 1952 when the leadership requested advice about possible anti-discrimination legislation from several experts including Dr. Kenneth Little. Little was able to demonstrate the need for such laws and to suggest machinery similar to that of the US Fair Employment Practices Commission which was based on the premise of 'conciliation' instead of criminal sanctions (Patterson, 1969: 82-83). The appointment of two committees comprised of Labour politicians and lawyers to look into the drafting of race anti-discrimination legislation suggests that the newly elected Labour Government saw the issue as a political priority and reflects the commitment to racial equality of a strong ideological wing within the party who viewed discrimination as morally wrong and needing to be outlawed by the government (Kushnick, 1971: 238). The first committee, which became known as the Soskice Committee, adopted a rather restrictive approach to race relations law. It proposed a limited coverage of the anti-discrimination bill, applicable to public accommodations only. The work of the second committee, which comprised primarily of members of the Society of Labour Lawyers (SLL) is of special interest to the case study because the historical evidence shows that the committee's recommendations were influenced by the American experience during the Second Reconstruction and the committee's recommendations, in turn, influenced the content of the first UK Race Relations Act which was passed in 1965. The legal specialists in the Martin Committee, as the second Labour committee became known after its chair Andrew Martin, designed their proposal for a new bill based on a certain amount of legal knowledge that had been accumulated

from the adoption of anti-discrimination laws in the US up to the mid-1960 (Saggar, 1992: 80). The most progressive norm entrepreneurs within the Martin Committee, influenced by the US Civil Rights Act of 1964 and fair housing legislation at state level in the US, argued for an extended scope for the bill that would cover all major areas of discrimination (Patterson, 1969: 84).

Another distinct group from outside the Labour Party, the Campaign Against Racial Discrimination (CARD), a multiracial organisation supported by various immigrant associations, also lobbied for the creation of the 1965 Race Relations Act. It is important to note that CARD's legislative proposals were drafted by Anthony Lester, a barrister who was well acquainted with the US developments on the issue and was also a member of the SLL (Kushnick, 1971: 240 and Patterson, 1969: 84). In sum, the legislative recommendations of the Martin Committee and CARD were very similar reflecting the crossover of many of their norm enterprising actors and their knowledge of American race anti-discrimination laws (Kushnick, 240-241 and Lester and Bindman, 1972: 110-112). The two proposals widened the scope of the suggested legislation by tackling the main problems of racial discrimination in employment, housing and commercial services. Based on US legislation at state and national level, the proposals called for a statutory body whose role would be to investigate complaints and to have the power to issue legally enforceable orders against norm violators. Both groups acknowledged that North American evidence suggested that anti-discrimination laws would be more effectively enforced by administrative means rather than by lawsuits in criminal courts because legal prosecution took too long, was often prohibitively expensive, and it was difficult to prove beyond reasonable doubt that discrimination occurred (ibid).

The tracing of the origins of the first race relations law shows that the process of bill drafting was the product of "liberal hour" norm entrepreneurs within the Labour government and legal non-governmental experts closely affiliated with the government. The account also reveals that these political elites and legal experts were not only thoroughly familiar with the existing and evolving scope and enforcement mechanisms within the US Civil Rights legislation but were determined to translate the principles and mechanics of US law into the British context, suggesting that the norm socialisation process was underway. The debates surrounding the race relations bill's passage also suggest that the unlike in the US

where southern opposition to the codification of the racial anti-discrimination norm into federal law remained vigorous and violent, the Conservative leadership did not oppose the bill which initiating a two-party consensus to depoliticize the race issue (Katzenelson, 1973: 126). More importantly, the House of Commons discussions surrounding the bill show that evidence from the American experience was used widely by both parties. Recounting the debate Anthony Lester and Geoffrey Bindman noted that Labour Members referred to the CARD proposals and the North American experience, especially when it came to choosing the type of monitoring and enforcement mechanism for the race relations law (1972: 115). Supporting the SLL and CARD proposals, the Conservatives' leader Peter Thorneycroft argued that:

“We have rather a good test case here, because some of the States have applied the criminal solution and others have adopted the conciliation method. Where they have adopted conciliation, it has on the whole, worked not too badly; where they have tried the criminal approach, it has not worked at all, or practically not at all.” (House of Commons, 1965: 990)

The Conservatives' push for a mediation and conciliation body, in fact, is largely responsible for the Government's acceptance of the SLL/CARD proposals, redrafting the bill and replacing the criminal provisions with a conciliation mechanism and civil law enforcement (Hampshire, 2006: 320). Taken more broadly, the debates indicate that although the political elites involved in the shaping of the first race anti-discrimination law were exposed to norm socialising through the findings the SLL and CARD presented in the bill recommendations, the first act was of limited scope and significance. The actual Race Relations Act of 1965 did not cover the crucial areas of housing and employment recommended in the CARD proposal, and had a weak enforcement mechanism. The compliance body established by the Act became known as the Race Relations Board and was modelled, as mentioned earlier, upon state conciliation agencies in the US. Unfortunately, the Board's enforcement powers were weak because the race equality body was not granted powers of subpoena, which meant that respondents could refuse to appear before the Board. Furthermore, the Board was not granted power to bring civil proceedings in a court of law, which made the Attorney-General the only one who could initiate such actions against unlawful discrimination (Kushnick, 1971: 248-249). Certainly, the SLL and CARD lobbying efforts were largely unsuccessful because many of the Labour MPs whom the architects of the bill won over were

‘backbenchers’ who lacked the influence to shape the bill. The end result was the product of the government’s minimalist expectations and its unwillingness to take full advantage of the existing legislation in the US. This can be explained by the limited awareness of many MPs about the extent and pervasiveness of racial discrimination at home the since at the time there was no major research available on the matter in the UK.

Given these limitations, it is unsurprising that the law drew harsh criticisms from the left-leaning members of the Labour Party and liberals in general who considered the legislation “toothless and a sop” (Pimlott, 1992: 510). Regardless of the liberal sentiment, to present the 1965 Race Relations Act as devoid of value would be inaccurate. Despite its considerable shortcomings, as Hampshire argues, the Act broached the principle of race anti-discrimination, which meant it would be increasingly difficult for any government in the future “to justify inaction if evidence of racism in employment or housing were forthcoming” (2006: 321). More to the point of this study, the Act’s institutional framework – the administrative agency and civil law punishments adopted from the American context – “have formed the basis for Britain’s race relations policy to present day” as the basic structure of the monitoring body has remained the same (ibid).

Cedric Thornberry’s prophetic comment from that time also shows that to view the race relations measure as “a piece of window-dressing would be too harsh of a judgment” (Thornberry, 1965:12, quoted in Patterson, 1969: 86). Perceptively, Thornberry outlined the steps the Government would adopt in the following few years, which would deepen and expand the norm socialisation process, which it had initiated. Thornberry argued:

“Its [the Act’s] value, as has been stressed, would lie in its dramatic effect [and] should be regarded as a first step only. The way prepared, the Government should initiate a programme of research to determine how far...imported legal techniques could begin to assist in the diminution of practices which are an affront to any conception of an integrated society. There is much experience in the United States and Canada to be drawn upon” (ibid).

It is clear that Thornberry’s sentiment was shared by the institutional norm entrepreneurs who advocated for comprehensive anti-discrimination legislation and strong enforcement powers for its Board. As I claim in the next section, the norm

socialisation process progressed rapidly between 1965 and 1976 because the Labour Party stayed in power and the political elites of its progressive wing who had keen interest in further transference of principles and mechanisms related to race anti-discrimination ended up occupying key government posts that allowed them to shape and influence the crafting and passage of future race relations acts.

I argue that when it comes to motives similarly to US national elites, UK norm entrepreneurs were motivated by the uneasy combination of principled and pragmatic reasoning (Hampshire, 2006: 318). The belief in the intrinsic goodness of the norm was joined with the strategic objective of the party leadership to prevent social disorder and racial tensions as had been seen the US. These fears of a 'new Harlem' had been particularly prominent in the aftermath of the Notting Hill and Nottingham riots in 1958 in which white youth attacked West Indian immigrants, an act that exposed the myth of British tolerance (Steel, 1969: 32). Linked with this was the progressive norm entrepreneurs' aim to remove race from the sphere of electoral competition through a two-party consensus that aimed to diminish the impact of the 'racialisation' of non-white immigration under the preceding Conservative Governments, which had presented non-white immigration as the source of insoluble social problems precisely because their origin was qualified as 'racial' instead of 'social' (Carter, Harris and Joshi, 1987: 16). These stereotypes constructed non-white immigrants as a threat to 'British way of life' and reinforced a racialised presentation of 'Britishness' which included or excluded people on the basis of their colour (Carter, Harris and Joshi, 1987: 16, Solomos, 1989: 47, Foot, 1965: Ch. 7). The Labour Party leadership saw the legislation as a way to detract from and undermine the extremist anti-immigration views of Conservative backbenchers who enjoyed large public support and are well summed up in the comments of Sir Cyril Osborne, the Conservative MP for Louth. Osborne argued that a failure to stem colonial immigration 'would be "sowing the seeds of another Little Rock", a comment that played on fears engendered by the American example' (Sanderson, 1991: 36). He inflamed public anti-immigrant sentiments by drawing on dramatic metaphors that equated immigration from the former colonies to a pending racial holocaust and by referring regularly to bloody African American protests in the United States which he claimed would soon become a part of the British experience (ibid., 63 and 93).

This rhetoric compelled the Labour government to act more quickly to counter its impact by strengthening the existing race relations legislation.

There is a wide consensus amongst commentators of the period that these principled objectives may have not been sufficient to bring about the codification of the race anti-discrimination norm had they not been a part of a broader policy package underpinned by instrumental concerns. Arguably, the most obvious pragmatic motive behind the legislation was the desire to ‘balance’ the Labour Party’s approach to immigration. The approach built upon the Conservative record by strengthening the 1962 Commonwealth Immigration Act by placing further restrictions upon non-white immigration (Favell, 2001: 110-22 and Hansen, 2000: 128-9). The passage of the Race Relations Act, it was expected, would serve as a compensatory measure for the additional immigration controls and would make the maintenance and extension of immigration restrictions more acceptable (Skidelsky, 1981: 516). As James Hampshire convincingly argues the limitation-integration equation can be understood a political strategy designed “to appease anti-immigration sentiment by restrictive immigration controls, and placate liberal and left-wing progressives with race relations legislation” (2006: 309). Although the motives of the SLL and CARD norm entrepreneurs engaged in the crafting of the 1965 Race Relations Act were undeniably justice-driven, the broader approach to race of the Labour Government which allowed the Act’s passage was clearly underpinned by instrumental reasoning.

#### *Tracing norm diffusion (I): The 1968 Race Relations Act*

This section continues to advance the argument about the primacy of domestic institutional norm entrepreneurs in the deepening of the norm’s institutionalisation and the widening of its scope. Here I also claim that the tracing of the second legislation-making process shows evidence of deepening norm socialisation through regular knowledge exchange between US and UK public authorities, which influenced the contents of the new act.

Eliot Rose et al. point out that after the 1966 election it was considered unlikely that the Labour Government would re-visit race relations as the anti-discrimination measures were not popular with the electorate, organised labour was wary of regulation of employment and elements of the Labour Party were



unenthusiastic to make the issue a priority (1969: 535). Yet within two years a second Race Relations Act was passed widening the fields in which discrimination on the basis of race became illegal and strengthening the monitoring and compliance mechanism. Two interrelated factors account for keeping race relations on the Labour Government's agenda. First, a group of progressives, the legal experts and political elites who advocated for the earlier act and the newly formed race relations bodies, lobbied for follow up legislation. More significantly, they found a powerful ally in the Cabinet, in the figure of the newly appointed Home Secretary, Roy Jenkins, who displayed consistent personal commitment to anti-discrimination and launched several ambitious research projects in the field. Second, as the new body of evidence commissioned by Jenkins revealed the extent of discriminatory practices in the UK and proposed viable solutions based on best practices from North America, those sceptical of and hostile to a subsequent act found it difficult to justify their opposition (Lester and Bindman, 1972:112).

The appointment of Roy Jenkins as Home Secretary was of decisive importance to the making of the subsequent Race Relations Acts in 1968 and 1976. A charismatic figure, Jenkins used much of his political capital to reach out to immigrant organisations and the general public to promote his vision for integration which he defined not in assimilationist terms but as "equal opportunity, accompanied by cultural diversity, in an atmosphere of mutual tolerance" (Patterson, 1969: 112-113). The tactics he employed from the onset of his appointment consisted of several carefully timed speeches in which he committed himself and his staff to the creation of a new race relations act. He also strategically appointed Mark Carter, another firmly committed norm entrepreneur to the chairmanship of the Race Relations Board. More importantly, Jenkins launched and subsidised a two-pronged research agenda that would first, provide evidence of the extent of discrimination in areas not covered by the 1965 law and second, would offer updated recommendations about the contents of the future law based on developments in the North American race anti-discrimination legislation (Lester and Bindman, 1972: 122-123). The actions of the Home Secretary and his associates, highlight the central role the highly agential political elites play in norm diffusion when they are justice-driven. The historical evidence, as it will be elaborated below, also shows that degree of knowledge and

expertise of political norm entrepreneurs contributes to the overall success of the norm socialisation process.

Two major reports, the Political and Economic Planning Report and the Street Report, played pivotal role in the design and passage of the 1986 race relations legislation because they supplied the evidence Jenkins and the rest of the progressive norm entrepreneurs needed to push the bill through Parliament. Jenkins was behind the initiative to commission a study on the extent of discrimination in employment, housing and the financial services, the areas were not covered by the existing law. The findings of the Political and Economic Planning Report, the PEP Report in brief, which represented the first systematic attempt to assess the extent of discrimination, established that racial discrimination in the UK was qualified as varying from the massive to the substantial. Contemporary commentators observed that,

“The findings show that the groups who were most physically distinct in colour and racial features from the English experienced the greatest discrimination, and that the group [of non-white immigrants] who were culturally most like the English, and who sought integration were most likely to experience rejection...The Report illustrated how the process of racial discrimination tended to push or keep [non-white] immigrants in poorer housing and lower status jobs, reinforcing the stereotype and preventing integration.” (Rose et al, 1969: 414)

The findings generated much public attention and garnered calls for urgent corrective action (Banton, 1985: 72). The data, combined with statistics from the Race Relations Board Report, according to which over half of the complaints received dealt with areas not covered by the law, gave Jenkins the much needed ammunition for a new piece of legislation.

The Street Report which is especially relevant for this thesis was also commissioned at Jenkins's personal instigation by the Race Relations Board and the National Committee for Commonwealth Immigration with the objective to gather and evaluate overseas experience in the field of race anti-discrimination legislation. Prior to the actual writing, each of the three legal experts observed a US state anti-discrimination commission in practice and met with a wide range of American antidiscrimination experts (Hepple, 1968: 312). This is important because it confirms the norm life cycle model's hypothesis that socialisation and demonstration serve as the dominant mechanisms for norm diffusion. The account given by one of the Street Committee members of the experience illustrates the considerable impact of the visit

upon the British norm entrepreneurs, " [We were] impressed by the method of enforcement adopted in the United States..., where special administrative agencies use education, persuasion and conciliation, and, only in the last resort, make legally enforceable orders...[and] took the view that similar techniques...were appropriate for Britain" (Lester and Bindman, 1972: 99). The comment confirms the desire of the British norm architects to engage in knowledge exchange and their decision to incorporate American legal transplants into the recommendations for the new race relations bill.

I consider the Street Report to have been the critical instrument that Jenkins and his allies employed in arguing for broadening the scope of the race relations law. Basing their arguments on the Street Committee findings, Jenkins and allied policy makers and experts argued that US (and to a lesser extent Canadian) experience demonstrated that problems in employment, housing and access to insurance and credit services "remain unsolved unless the aid of the law is sought" (Street, Howe, Bindman, 1976: 73). Citing the report's findings, they stressed the need for extending the scope of the existing act and argued that it ought to cover discrimination in critical areas like employment, especially in practices of recruitment, training, promotion, redundancies, membership in trade unions, and conditions of work, housing, particularly in selling or letting private and local authority property, and in commercial and social facilities and services (Kushnick, 1971: 255). The detailed analysis of the strengths and weaknesses of US laws and compliance mechanisms and the suggested ways in which they could be strengthened and adapted within the framework of UK law was one of the most important resources the architects of the new law used to formulate their bill proposals. Arguably, the key American invention experts and political elites committed to the race anti-discrimination norm were eager to incorporate in the new bill was a "typical American administrative body – the regulatory agency", an administrative body that can also exercise judiciary powers like holding hearings, making enforceable orders and compelling witnesses to attend the proceedings ((Lester and Bindman, 1972: 101). In their own accounts, the norm entrepreneurs who actively lobbied for giving the Race Relations Board direct legal powers show they understood that their proposals were novel and radical within the context of

English law as no existing agency in the country possessed the new powers the Street Committee claimed were necessary to secure equality of opportunity.

These findings validate the arguments laid out in the chapter. The agency of domestic institutional norm entrepreneurs, political elites and experts, was the driving factor that ensured the cascading of the race anti-discrimination norm. These elites employed norm socialisation through knowledge exchanges and demonstration visits to the US, as the dominant mechanism to fulfil their aim of a more comprehensive understanding and wider coverage of the anti-discrimination principle and an effective compliance mechanism that was to be transplanted from the US administrative machinery. The success of the norm socialisation process and the institutionalisation of US race anti-discrimination principles and machinery clearly depended on the expertise and skills of these norm entrepreneurs who were helped by the cross party perception enhanced by the media that US policy makers possessed the historical knowledge and competence in the field of racial antidiscrimination the UK needed.

The actual passage of the bill faced little opposition under the inter-party consensus on the de-politicisation of race, which had been reinforced by Jenkins's success in carrying the support of his governing party leadership, the Opposition and a large section of elite opinion with him (Saggar, 1991:33). The final 1968 RRA extended the scope of the earlier legislation making it unlawful to discriminate on the grounds of colour, race, national or ethnic origin in the areas of employment, housing, education, and credit and insurance services. The size and enforcement powers of the Race Relations Board were expanded but not as significantly as the reformists who wanted the bill to be as close to the Street report recommendations hoped. The Board was empowered to initiate investigations and to take discrimination cases to court if conciliation proceedings had failed (Kushnick, 1971: 264). The partial success of the Act can be explained by Jenkins's replacement as Home Secretary by James Callahan, who did not have the personal commitment and had played no role in persuading the government to take up the bill (Lester and Bindman, 1972: 130-1). The limited definition of what constituted discrimination which did not include the notion of indirect forms of discrimination and required the proof of discriminatory intent, meant that many discriminatory practices went undetected and made discrimination complaints increasingly hard to prove. (ibid.,

148). Still, the second Act was a marked improvement over the earlier legislation because it institutionalised the anti-discrimination norm in new areas of UK law and established a frame of reference for the 1976 Race Relations Act.

In terms of motives, the historical record is clear that the immediate “liberal hour” enthusiasts were driven by a sense of justice and the conviction that unfavourable treatment because of skin colour was morally wrong. The broader political context, however, suggests that the wider cross-party consensus on race and the passage of the act were heavily rooted in pragmatic reasoning namely the attempts to balance the 1968 Commonwealth Immigration Act which had been adopted earlier that year and to suppress Enoch Powell’s populist anti-immigration agenda. The 1968 CIA was a hurriedly passed piece of legislation, which effectively withdrew the rights of Kenyan Asians to enter the UK at the time of their intense targeting by the Kenyan Government.<sup>3</sup> Estimates show that approximately 200,000 people holding British citizenship were turned away and rendered stateless as a result of the newly imposed immigration restrictions (Hansen, 2000: Ch. 7). The Bill provoked a huge outcry from the liberal segments of society but seems to have satisfied the public opinion. Some saw it as “the most shameful piece of legislation” to be enacted and as “the ultimate appeasement of racist hysteria” while others interpreted it as a decisive and appropriate action in the face of ‘immense pressure’ (ibid., 153). The second Race Relations Act therefore should be understood as both an integrative measure and the Labour Government’s way to appease the sentiments to the left of the Labour Party.

The swift passage of the 1968 RRA can also be interpreted as the inter-party response to Enoch Powell’s inflammatory speeches the most notable of which is the so called ‘Rivers of Blood’ speech which he delivered to a meeting of the Conservative Association in Birmingham on 20 April 1968. In it he attacked the proposal for the second RRA calling the legislation replete with ‘divisive’ and ‘dangerous’ elements. Powell presented the immigrant communities as consolidating

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<sup>3</sup>The Kenyan Asians ‘scare’ of 1968 was the result of the mildly termed ‘Africanization’ policies of the Kenyan Government designed to restrict and drive out Asians of key positions in the economic and political life of the country. Once their stay in Kenya became precarious, more and more Kenyan Asians opted to flee to the UK, the only country that granted them citizenship and unrestricted access because their passports were issued under the authority of the UK Government rather than that of the colonial government (Hansen, 2000: Ch. 7).

and unifying entities plotting “to agitate and campaign against their fellow citizens” and ready to manipulate the law in order to “dominate with the legal weapons which the ignorant and ill-informed have provided” them (1991: 373-379 and Foot, 1969). He not only proposed continuous and more restrictive immigration measures but also spoke of repatriation as an ultimate solution to the ‘problem’ of the new minorities. He denied the existence of institutional and societal discrimination on racial grounds and instead held that if any such disadvantages existed they emerged not from inadequacies in the existing law and public policy but from personal circumstances. Powell spoke against integrationist measures which he viewed as a “dangerous illusion” and presented his concluding remarks in a prophetic form alluding to “River Tiber foaming with much blood” and hinting that the civil disturbances in the USA, which at the time was experiencing the height of the Civil Rights Movement protests, would soon come on British soil (ibid). The 1968 Race Relations Act, therefore, can be seen as the ultimate political opportunity for the conservative party leadership to distance itself from Powell and for the Labour Government to detract from and stall Powell’s political momentum.

The tracing of the institutionalisation of the race anti-discrimination norm in the UK reflects Philip Sooben’s claim that “United States law had made a major contribution to the British approach in 1965 and 1968...Above all, it had shown that the law could be used effectively to tackle a social as well as individual wrong” (1990: 55-6). The chapter has shown that UK reformists underwent a norm socialising experience at their own initiative, which involved knowledge exchanges with US counterparts and demonstrations of the workings of US race anti-discrimination law. In it I have demonstrated that this norm socialising resulted in the incorporation and adaptation of US race anti-discrimination approaches and monitoring mechanisms into UK race relations legislation and compliance bodies. I have attributed the success of the norm diffusion to the agency of the “liberal hour” norm entrepreneurs led and supported by Home Secretary Jenkins. I have suggested that the embedding of the norm into UK law was made more likely because 1) the political elites did not face outside pressure and instead were motivated by their own quest for justice and 2) they possessed the necessary expertise and competency to draw upon the American experience and incorporate legal notions and mechanisms that could function into a UK context. In terms of motives, we see a curious mix of

instrumental and ideational reasons for the crafting of the race relations acts: the architects of the legislation displayed a genuine commitment to the principle of anti-discrimination while the wider Labour Party leadership and the Opposition supported the initiative out of pragmatic reasons.

*Tracing norm diffusion (II): the 1976 Race Relations Act*

This section goes on to consider the role that the developing model of anti-discrimination legislation in the United States played in Britain. Above all, I demonstrate that two developments in the American approach to race anti-discrimination – the evolution of understanding discrimination as structural, systemic and indirect and the principle of positive discrimination – strongly impacted Home Secretary Jenkins and were enshrined in the 1976 legislation under his explicit order. This analysis provides the most direct evidence of norm diffusion and norm socialisation of political elites at the highest government level.

Roy Jenkins's return to the Home Secretary post in 1974 ushered in a period of 'restrained liberalism'. It also coincided with important developments across the Atlantic where an increasing awareness had emerged of the weakness of a system that relied almost exclusively on individual complaints and viewed anti-discrimination as unconnected individual wrongs (Sooben, 1990: 37). At the time, British race relations experts were starting to take an interest in the US change of approach to race as one, which was becoming more complex and sophisticated in its emphasis on institutional and structural reasons for exclusion in addition to 'prejudiced discrimination' (McCrudden, 1982: 306). By the early 1970s British legal experts in the field of anti-discrimination had developed a body of literature, which re-examined the interrelationships between race, employment, housing and poverty by taking into consideration the structures and institutions of the labour market (Hepple, 1971 and Dummett, 1973: 131). Concerns that the noticeably unequal position of first and second generation immigrants especially in the labour market could not be explained solely by 'prejudiced', direct discrimination contributed to the re-examination of the existing British race relations legislation and stimulated comparative studies with the new American approach. In Britain as in the US, institutional racism became a term associated with inequalities arising out of past and present discrimination of the type that led minority groups to not even apply

for housing or work at specific places (Select Committee on Race, 1969, quoted in McCrudden, 1982: 311).

Philip Sooben considers the US seminal case of *Griggs v. Duke Power Co* in 1971 as the event that began to shift the approach of British commentators to race antidiscrimination and impact their analyses of the existing race relations law (1990:37).<sup>4</sup> The prevailing expert view prior to the drafting of the third Race Relations Act was that legislative efforts should address systems and practices that have a disparate impact upon, or in other words, result in disadvantage to members of minorities rather than on individual acts of discrimination. Experts also acknowledged that class action lawsuits of the *Griggs* kind were incompatible with the British legal system. In order to re-orient British jurisprudence in the direction of systems of discrimination and effects upon minority groups rather than intentional individual wrongs, any future legislation would need to do that by altering the purpose and powers of the enforcement agency. The agency, these norm entrepreneurs argued, would need the powers to obtain information about relevant systems and practices and, more generally, most of its resources would be channelled away from individual complaints investigations towards a broader strategic function. Most critically the definition of discrimination would need to be extended to incorporate the notion of indirect discrimination first articulated in *Griggs* into UK law. The new definition would circumvent the problem of proving intentional discrimination as it would go beyond the notion's individualised nature and would provide the legal basis for intervening against the "effects of past and other types of institutional discrimination" (ibid). The keen interest British experts displayed in the changes across the Atlantic points to a continuing norm socialising process amongst the left leaning groups of Labour political elites and specialists in the field. This also demonstrates that the US influence on British race relations was both long-term and, as the crafting of the 1976 law will show, shaped the core of UK's present-day race anti-discrimination law both in terms of norm institutionalisation and its enforcement.

Despite the shifting view amongst law academics and practitioners in the field of race relations, the changes they suggested were not initially taken into

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<sup>4</sup> This section draws heavily on Philip Sooben's research of the origin of the 1976 Race Relations Act.



consideration by the chief architect of the legislation, Home Secretary Jenkins. Jenkins did not originally plan to expand the definition of discrimination but a visit to the US convinced him and his advisors of the need to re-draft the race relations bill in order to widen the scope of the term. Anthony Lester, Jenkins's long-term advisor, recounts the experience in the following way:

“...we were mainly inspired by the ideas from the Atlantic. Indeed, the key concept of indirect discrimination...was hastily included in the Sex [and Race] Discrimination Bill, on the eve of its publication. The omission was made good as a result of a visit with the Home Secretary to the United States. We discovered, during the visit, that we had defined the concept of what discrimination means too narrowly...The technical and crabbed language...of the legislation was Parliamentary Counsel's version of the landmark judgment of the American Supreme Court in *Griggs v. Duke Power Co.*, no doubt faithfully reflecting the Home Office instructions, if not my own hopes and expectations.”(Lester, 1994: 225).

Lester's account provides a convincing proof of the deepening of norm socialising processes of high ranking political elites. It is apparent that the first-hand knowledge obtained during the visit convinced Jenkins that a law based on the earlier narrow definition of discrimination was insufficient and the new anti-discrimination legislation would flounder if it failed to address institutional practices and patterns. These circumstances made the cascading of the indirect discrimination notion and its enshrinement in statute a quick and mostly uncontested undertaking. Jenkins understood that the disadvantages that women and ethnic minorities encountered emerged most commonly from institutional practices rather than from the purposeful actions of prejudiced persons.

Conceptually, British thinking relied heavily on America's example not only in the area of indirect discrimination but also on the issue of positive discrimination. Again, the US trip was instrumental in shifting Jenkins's position just enough to allow a modest measure of positive action (Sooben, 1990: 38). Admittedly, Jenkins did not go as far as to embrace to the same extent the concept as he did the principle of indirect discrimination. The positive action that ended up in the 1976 Race Relations Act was of limited non-compulsory nature. Nonetheless, the sheer codification of the term into UK race legislation opened the possibility for positive action schemes in those areas of employment with under-represented minorities.

To sum up, the architects of the 1976 Race Relations Act led by Roy Jenkins were heavily influenced by ongoing developments in the civil rights legislation in the USA and the provisions in the Act reflected that. The most important innovation in the law was the introduction of the concept of indirect discrimination modelled after the language of the US Supreme Court judges in *Griggs* which sought to depart from the individualised nature of previous definitions in order to permit interventions against the disparate effects of institutional discrimination. The notion of the US concept of affirmative action was modified into 'positive action' and stripped from its compulsory character. The equality body was given new objectives and powers that embodied these changes the most significant of which was the ability to conduct investigations into organisations where it had the cause to believe unlawful discrimination was taking place. The equality body was tasked with issuing codes of practice about the elimination of institutional discrimination in employment and the promotion of equality of opportunity (Solomos, 1989: 78).

As far as motives are concerned, this was the first race anti-discrimination legislation where instrumental concerns did not feature prominently and where there was little Conservative opposition to the Act (Lane, 1987: 15). The 1976 Act was also the first race relations legislation that was not preceded by immigration restrictions and thus cannot be viewed as a balancing act. The passage of the act faced little contestation largely because it was preceded by the Sex Discrimination Act pushed through Parliament by Jenkins a year earlier. It would have been difficult for Parliament, Jenkins rightly reasoned, to oppose the Race Relations Act because it would have been unable to justify denying new minorities the protections already granted to women. (Sooben, 1990: 25). The circumstances suggest that the reasons behind the act's drafting and passage were largely justice-driven although they did require much strategic thinking on behalf of the main norm entrepreneurs to ensure the Act's passage and its closest resemblance to the original draft.

## **Conclusion**

The analysis of the internationalisation, or diffusion, of the race anti-discrimination norm demonstrates that the agency which drives the process is not limited to norm entrepreneurs located at the supranational level. It shows that constructivist models that examine the agency of international organisations, norm

promoting states and the networks they form should be supplemented by an approach that focuses on understanding the agency of domestic political elites in norm diffusion. Since norm diffusion and norm institutionalisation in domestic laws, policy and practices are linked together, this further necessitates the study of national elites, who as the thesis has shown thus far, have a determinate role in the process of norm institutionalisation. The UK case study, therefore, calls for the re-conceptualisation of the role and place of domestic national elites in models of norm diffusion. Its findings suggest that the processes of norm diffusion and domestic institutionalisation tend to be less prone to reversal when they are led by domestic norm entrepreneurs.

The ideational commitment of these domestic agents to the new norm is the essential element which accounts for successful norm transference. It explains the professional investment of the political elites in the norm institutionalisation process, their purposeful search for norm socialising opportunities in pursuit of an effective framework for race anti-discrimination legislation and their unrelenting lobbying for progressively stronger and more effective race relations acts. The historical evidence shows that British norm entrepreneurs were deeply and personally vested in the transference and codification of the race anti-discrimination norm and elevated the issue as a priority for the Government. In comparison, the Czech and Hungarian cases which will be analysed in Chapters 4 and 5 demonstrate that the attitudes of the majority of national elites responsible for the institutionalisation of the norm into their respective legislative context ranged from moderately vested to openly hostile. These elites' often presented the norm as 'foreign' and 'incompatible' with domestic customs and practices and as forced upon society by supranational agents perceived as unfamiliar with the national context. The behaviour of Czech and Hungarian political elites suggests that norm diffusion initiated 'from above' is more problematic and norm institutionalisation in domestic law and institutional practices can be superficial compared to norm cascading processes driven by domestic actors. Put another way, British norm entrepreneurs followed a logic of appropriateness while their Czech and Hungarian counterparts have embraced a logic of consequences approach resulting in two differential outcomes when it comes to norm diffusion and institutionalisation.

The incorporation of the race anti-discrimination norm into UK law was an impressive achievement at the time. Most other European states and the European Community were trailing behind as they lacked protection from discrimination except in the areas of nationality and gender. The need for similar legislation at the European level, as Anthony Lester observes, was overdue as “the problems of racial discrimination and ethnic hatred are very serious and increasing problems across Europe” and “the continuing denial of the equal protection of the law to ethnic and religious minorities in Europe”, he warned, would have “extremely grave potential consequences” (1994: 6). The increasing awareness that the denial of equal protection to minorities could potentially have serious social and political implications for the enlargement and integrative ambitions of the EU served as a starting point for the gradual gathering of political support for anti-discriminatory legislation, a process which I examine in the next chapter in order to develop a comprehensive understanding of the norm cascading processes at the European level.

## Chapter Three

### Norm diffusion at the European level

The regional diffusion of the racial anti-discrimination norm has been made possible through the institutionalisation of the norm in European law. The chapter traces the institutionalisation processes by analysing the making of the European Union Race Equality Directive and jurisprudence developments at the European Court of Human Rights related to the prohibition of discrimination found in Article 14 of the European Convention on Human Rights. In terms of agential factors, the norm cascading process, if studied narrowly, partly conforms to the hypothesis of the norm life cycle model which suggests that international organisations and the networks they form drive norm cascading (Finnemore and Sikkink, 1998: 898). After all the immediate passage of the Race Equality Directive and norm institutionalisation in the ECtHR case law were the outcome of decisions made by political and judiciary elites within their respective intergovernmental organisations.

However, a closer examination of the norm cascading processes reveals a causal link between European level norm diffusion and domestic actors. In the chapter I argue that the broader formation and formulation of the EU race anti-discrimination legislation were largely driven by a transnational advocacy network, which had its roots in domestic elites as it comprised mainly (ex-) government officials and experts from quasi-governmental bodies from the UK and other west European states with well-developed anti-discrimination legislation. The aim of the advocacy network was to codify into law protection measures for racial minorities across all EU member states. The European developments also counter Finnemore and Sikkink's assumption about the distinction between norm entrepreneurs and norm violators and their categorisation of international organisations as norm enterprising actors (1998: 902). The findings challenge the assumption by demonstrating that the distinction between the two analytical categories is empirically unsustainable and that the members of international organisations do not always behave as norm entrepreneurs. The investigation of the ECtHR jurisprudence building processes shows that a significant number of judges did not behave the way the model expects them to, which placed them in direct opposition to the norm enterprising actions of other Council of Europe bodies.

In addition to agential factors, I expand on the role of the enabling conditions that contributed to the passage of the Race Equality Directive namely the existing gender anti-discrimination legislation and procedural mechanics that facilitated the codification of the norm into Union law. The gender anti-discrimination norm, which was already codified in EU law served as a blueprint for the new legislation creating a norm resonance effect. This norm resonance enabled the incorporation of protective measures into the new race directive without substantial opposition while the option of ‘fast-tracking’ allowed its passage quickly bypassing the scrutiny of national governments.

The chapter also finds that despite the successful codification of the racial anti-discrimination norm into regional law, the subsequent norm cascading and acceptance at state level have been weakened as a result of the manner in which the norm was institutionalised in European law and the enforcement mechanisms available at the European level. The ‘fast tracking’ of the passage of the Racial Equality Directive meant that most national representatives who voted for the bill were rather unfamiliar with the nature of the law while a substantial number of ECtHR judges disagreed profoundly with the findings of systemic discrimination on the basis of ethnicity in the 2007 landmark case of *D.H. v. The Czech Republic*. In other words, the regional cascading of the norm faced considerable challenges and direct opposition coming from actors within the very European institutions that according to the norm life cycle model should have acted as cohesive norm promoters. The norm contestation and its hurried codification at the supranational level, I argue in the subsequent chapters on norm internalisation in the Czech Republic and Hungary, have contributed to varying degrees of norm defying behaviour by the political elites in both states. The evidence shows that when international organisations do not behave as consistent norm entrepreneurs the cascade is not as rapid and “contagion” – like as presented in the model (Finnemore and Sikkink, 1989: 902).

More generally, the analysis suggests that norm thresholds also known as tipping points are not reliable signifiers for the quasi-automatic diffusion of new norms as the norm life cycle model predicts (see Finnemore and Sikkink, 1998: 901). The empirical evidence shows that when the norm reaches its threshold, the cascade and domestic internalisation processes do not necessarily run uncontested. The

European case demonstrates that once the tipping point of the norm was achieved with the passage of the Race Equality Directive, which contractually bound all member states to recongnise and institutionalise the racial antidiscrimination norm into domestic law, the norm diffusion continued to be fraught with challenges raised by the very domestic actors who had voted to incorporate the norm into the political and social order of their states.

The chapter begins by briefly sketching the early EU anti-discrimination developments on nationality and gender before turning to the more recently adopted race anti-discrimination measures that can be more readily applied to ethnic minorities. The analysis of the race anti-discrimination measures highlights the essential role domestic norm entrepreneurs, now united in a transnational network of experts, played in the institutionalisation of the race anti-discrimination norm into EU law. Here I draw attention to the linkages of the EU Race Directive with the British race relations measures and argue that a knowledge transfer took place. The knowledge transfer, however, was a markedly different affair than the US-UK norm cascading. It relied almost entirely on the ‘push’ factor, the agency of committed domestic antidiscrimination experts, and lacked a pull factor namely the ideational commitment and norm enterprising behaviour of EU decision-makers,<sup>5</sup> which stands in stark contrast to the enthusiastic behaviour of the ‘liberal hour’ elites in the UK case.

The second half of the chapter examines the ECtHR jurisprudence arguing that although juridically significant, the first case on ethnic anti-discrimination, *D.H. and Others v. Czech Republic* (2007), in which the Strasbourg court recognised violation of Article 14 of the ECHR (prohibition of discrimination) falls short of a *Brown v. Board of Education* moment for the Roma minority. The shortcomings lie in the formulation of the judgment and the compliance mechanism which relies on the political goodwill of national elites. This weakens the norm and reduces its chances for successful domestic internalisation.

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<sup>5</sup> The notable exception here is the European Parliament, which endorsed the idea of race anti-discrimination legislation. The European Parliament at the time, however, was an inconsequential actor with little leverage to advance the institutionalisation of the norm within EU law.

### *Early anti-discrimination legislation: nationality and gender*

The original impetus for EU anti-discrimination legislation in the areas of gender and nationality is located within the market integration paradigm and came into being specifically out of concern over discrimination in employment practices and pay (Bell, 2002: 32, 82). The race anti-discrimination initiative, on the other hand, displays characteristics of a social dimension of EU citizenship (ibid). Early on, the founders of the European Communities realised that a common market with free movement of people as a fundamental pillar would be virtually impossible without provisions prohibiting internal discrimination on grounds of nationality. Many of the early treaties ensured non-discrimination between suppliers and consumers but also included references to workers. Article 69 of the ECSC Treaty referred to the prohibition of inequality in the wages and working conditions of migrant EC workers.

At the time of the drafting of the 1957 EEC Treaty, the adoption of anti-discrimination measures directed at nationality became a high priority because three quarters of all migrants were EC nationals living in another member state (Shanks, 1977: 31). Articles 12 and 39(2) of the EEC Treaty prohibited "any discrimination on grounds of nationality" particularly within the employment context. Since none of the treaties provides a definition of 'nationality discrimination', the Court of Justice of the European Union has played an important role in the interpretation of the legislation. The CJEU has consistently held that the prohibition of discrimination on the ground of nationality covers both its direct and indirect forms.<sup>6</sup>

Besides nationality, the EEC Treaty included a provision concerning gender equality in the workplace. The solitary provision in Article 119 required equal pay for men and women and its inclusion was mostly inserted to appease France, which already had national laws guaranteeing equal pay between the sexes and feared that its laws could put the country at a disadvantage compared to the rest of the member states (Meehan, 1985: 85). However, it was not until the 1970s that Article 119 was transformed into active law after a series of political and judicial interventions (Bell, 2002: 43). The need for increased popular legitimacy for further European integration, especially after Norway's citizens rejected to accede to the EC in 1972,

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<sup>6</sup>See Case 15/69 *Sudmilch v. Ugliola* (1969) and Case C-278/94 *Commission v. Belgium* (1996).



and the liberalisation of laws regarding equality of opportunity between men and women, especially in the UK and France, made gender equality a priority. However, the scope of the successive legislation remained within the confines of employment due to the reluctance of member states to venture into sensitive areas like reproductive rights and sex-related violence even though such issues could easily be linked to work opportunities. Similarly to the 1976 Race Relations Act in the UK, the 1976 Equal Treatment Directive incorporated the concept of indirect discrimination related to gender and extended protection from discrimination to all aspects of employment. Since the Equal Treatment Directive did not contain a definition of indirect discrimination, the CJEU was instrumental in filling the gap by clarifying the criteria of what constituted an indirectly discriminatory practice. These nationality and gender measures led to the firm establishment of the anti-discrimination norm within the competence of the EU and their existence gave norm entrepreneurs concerned with race discrimination a powerful argument and an existing framework within which they could frame their demands for similar legislation with respect to race.

#### *Towards race anti-discrimination legislation*

The 1990s, the decade preceding the adoption of the 2000 Race Equality Directive, were characterised by growing concern about racist and xenophobic attitudes across Europe, the increasing visibility of extremist parties (e.g., Le Pen's National Front in France and Vlaams Blok in Belgium) and the exploitation of the lack of uniform legislation by racist groups (Bell, 2002: 54-55 and Rex, 2007: 91). On the European level, the notion of Fortress Europe was gaining prominence evidenced in tightened border security along the periphery. In this context a coalition of organisations and individuals convened in 1991 to create a strategy for uniform race anti-discrimination legislation across the EU. The alliance, the Starting Line Group, spearheaded a strategy to persuade the EU institutions of the need to address the legislative gap concerning the prohibition of racial and ethnic discrimination across member states (Amiriaux and Guiraudon, 2010, Bell, 2008a: 72-73; Case and Givens, 2010; Niessen, 2000; Niessen and Chopin, 2004; Geddes and Guiraudon, 2004 and Guiraudon, 2009). The alliance was led by Britain's Commission for Racial Equality, the quasi-governmental organisation charged with implementing the provisions of the 1976 Race Relations Act, the Dutch National Bureau against

Racism and the Migration Policy Group. These lead actors joined by lawyers, government advisers and civil servants from the EU member states conducted a series of meetings in Brussels and ultimately produced a draft directive, 'The Starting Line', which was endorsed by approximately 400 NGOs within the EU and the European Parliament.

The draft, as two of the leading drafters note in their account, proposed the prohibition of discrimination on the basis of race, colour, descent, nationality, or national or ethnic origin in a diverse range of fields from housing and education to health and social security (Niessen and Chopin, 2004: 100). The goal of these norm architects was to use the 'Starting Line' proposal as an initial point for discussing and lobbying the European Commission and Council for a comprehensive anti-discrimination directive (Case and Givens, 2010: 229-230). Since the UK CRE played a major role in the drafting of the initial and subsequent legislation proposals, the British anti-discrimination model influenced significantly the construction of the EU Race Equality Directive, the specifics of which will be expanded upon later in the chapter.

The first version of the 'Starting Line' proposal was officially launched in 1992 and received the explicit backing of the European Parliament. Through a series of anti-racism resolutions, the European Parliament appealed to the Commission to "use the proposal for a Directive as the basis for discussions...and to take inspiration from the Starting Line for the drafting of its own proposal" (Chopin, 1999: 3). The initial lobbying failed to initiate a large-scale discussion in the Commission and the Council. The Council chose to ignore the proposal because the member states at the time preferred, if at all, to address the issue through intergovernmental cooperation due to the sensitive nature of the issue and fears over further limits on national sovereignty on social issues. Officially, the Commission also justified its inaction by claiming that the EC Treaty did not provide it with the necessary competence to enact such legislation (Niessen, 2000: 497).

The initial efforts at regional norm diffusion suggest that the majority of driving agents were domestic experts from states with well-institutionalised race anti-discrimination provisions. The empirics suggest an alternative to the norm life cycle model's assumption according to which transnational norm entrepreneurs are

responsible for driving norm cascading early on (up to the so called tipping point) and are eventually superseded by international organisations in the post-threshold period of cascading (Finnemore and Sikkink, 1998: 898-902). In the European case, we continue to see pronounced domestic norm entrepreneurship and little support from the regional institution, which should have served as the major norm diffusing actor.

The differences in the UK and European cases of norm diffusion are striking. In the UK case, the ruling political elites were eager to transpose and institutionalise the race anti-discrimination norm in order to speed up the integration process of non-white immigrants. In the European case, the EU institutional actors were reluctant to broach the issue precisely because of concerns and fears among member states that possible European anti-discrimination policy could have substantial implications for and could impinge upon one of the most sensitive areas of national policy, immigration, should non-discrimination based on nationality be added to the race and ethnicity criteria (Ruzza, 2004: 89). In the EU case, national governments in the European Council largely lacked norm entrepreneurial figures and so did the EU political elite, which was unwilling to take up the issue and advocate for it before the national representatives. More broadly, the initial lack of regional norm cascading demonstrates that norm diffusion processes are not *faits accomplis* but can be interrupted and even moved backwards at this intermediate phase. What is even more interesting and unexpected in the particular case, as it will be illustrated next, is the ability of domestic agents to push the norm cascade forward despite the disinclination of the regional actor best positioned to advance the process to do so. This again suggests that domestic elites are vital for the successful advancement of the new norm between each of the three stages, which contrasts with the passive role of the agreeable norm implementer that the norm life cycle model assigns them.

In light of the lack of progress, the Starting Line Group stepped up its campaign by focusing its efforts on lobbying for an insertion of an anti-discrimination clause into the EC Treaty, which would give the Commission the clear competence to introduce specific anti-discrimination legislation. The 1997 Inter-Governmental Conference provided the right opportunity for the introduction of such a clause. The Starting Line Group drafted a text of a newly proposed amendment, the Starting Point, and lobbied continuously at national and European

level organising seminars to raise awareness and conducting consultations with state and EU officials to introduce them to the proposal and to persuade them of its need (Niessen, 2000: 102). The SLG modified its arguments for the extension of non-discrimination provisions to race and ethnicity by linking the notion to pre-existing frames that resonated with Council officials. The SLG highlighted the relation of race equal treatment provisions with the operation of the single market reasoning that their absence most likely impeded free movement as certain persons of minority origin might fear exercising their EU rights to move to another member state which lacked protective measures with respect to race. The SLG also related its demand for an anti-discrimination clause to the existing articles that ban sex and nationality discrimination. The alliance held that the proposal "was a logical extension of these measures and an integral element of the EU's 'social dimension' accompanying economic integration" (Guiraudon, 2009: 531).

The framing of the new norm in such a way as to resonate because of ideational affinity with an already accepted normative framework contributed to the decision of relevant EU actors to place the issue on their agenda for discussions on the EC Treaty. This corroborates earlier research on norm resonance by constructivists (e.g., Keck and Sikkink, 1998, and Lumsdaine, 1993) by empirically demonstrating that forging links between emerging ideas and already embedded norms can be an effective tool especially in circumstances where the norm entrepreneurs are not in possession of significant material levers.

As it became more evident that the European institutions were open to considering anti-discrimination legislation, the SLG began engaging more stakeholders in the process paying special attention to employers' organisations which along with trade unions are influential in Brussels and could potentially oppose such legislation for fear of affirmative action clauses (Niessen, 2000: 498). These concerns prompted a careful study of North American anti-discrimination legislation and the organisation of a Transatlantic Dialogue in an attempt to clarify US policies for the European private sector (Lindburg, 1998 quoted in Niessen, 2000: 498).

Framing the anti-discrimination norm in a manner that resonated with already familiar frames of reference proved to be effective judging by the wording of Article

13, which borrowed the language and content of the Starting Point proposal (Amiriaux and Guiraudon, 2010: 1697). The SLG efforts coincided with the coming to power of a new British centre-left government in 1997, which was eager to display more commitment to the European integration process and thus removed the last remaining obstacle to unanimous decision in the Council. The Council then agreed with the recommendations for treaty reform, to extend the anti-discrimination principle to race and ethnic origin along with religion, age, disability and sexual orientation (Reflection Group, 1995). The newly adopted Article 13 of the EC Treaty enabled the Commission to propose a directive to combat anti-discrimination on the aforementioned grounds.

The making of Article 13 of the EC Treaty demonstrates the capability of organised domestic norm entrepreneurs from European states with a high degree of internalisation of the race anti-discrimination norm to influence the making of viable legislation at the European level, which was intended to liberalise national legislative orders and legal structures (Case and Givens, 2010: 230). The research on the work of the Starting Line Group also shows that it mattered significantly that the norm entrepreneurs were a part of the domestic political and legal elite. These norm entrepreneurs were seen as possessing technical knowledge and expertise in anti-discrimination law and spoke the language of the EU institutions, which in turn helped them to establish interpersonal relations with members within the European policy-making bodies and to gain access to knowledge of emerging internal agendas they could use to create space for their own policy ideas (Geddes and Guiraudon, 2004).

The importance of political elites is particularly evident when comparing the work of the SLG with that of the EU Migrant's Forum, the other significant network of norm entrepreneurs who sought to advance EU anti-discrimination law. The EUMF in contrast failed to achieve its goals because it sought to extend the principle of non-discrimination to non-EU nationals, a matter the EU and national governments preferred to address through a separate policy framework (Guiraudon, 2009: 531). The chosen issues and their framing met with strong resistance from the member states because of their sensitivity, lack of popularity among national constituencies, and the absence of pre-existing legislation that could justify the adoption of such measures. The national immigrant organisations, which comprised

the EUMF also lacked the communication and policy drafting skills to advance the norm cascade.

To summarise, besides stating that domestic norm entrepreneurs are able to further regional norm diffusion, it is imperative to note that who the domestic norm entrepreneurs are is just as important because not all domestic norm entrepreneurs possess the ability to move the norm forward. Political and legal elites unlike other domestic actors are successful in advancing their normative goals because they have the necessary experience, training and technical expertise to communicate with and insert their agenda in the workings of relevant regional institutions.

From this analysis it also becomes clear that the demand for race legislation on the European level originated from concerns for the equal treatment of EU nationals with a special concern for the civil rights of first and second generation non-white immigrants who were already citizens. The realisation that such measures could benefit EU minorities, and the Roma in particular, came several years after the adoption of the Race Equality Directive in the context of the eastward enlargement and the familiarisation of the EU institutions with the depth and extensiveness of the social and political exclusion of the Roma.

#### *The Race Equality Directive*

This section examines the circumstances surrounding the adoption of the first race anti-discrimination measures in EU law and the contents of the legislation. I argue that the expedited manner in which the directive was passed limited the required discussions about the nature of the law, which meant that the national governments of the member states save the few which already had similar legislation, were largely unaware of the principles of the law that they were committing to incorporate into their national legislative systems. This, as will be demonstrated in the subsequent chapters, has contributed to turning the norm transposition into a controversial and contested process especially in those member and candidate states where anti-discrimination legislation did not exist previously. The section also highlights the similarities between UK and EU anti-discrimination law as further evidence of the cascading process, in particular the influence of British anti-discrimination legislation on the Race Equality Directive.

In light of the changes that came with Article 13, the SLG unveiled a second proposal in 1998, the new Starting Line Directive, the blueprint for the Race Equality Directive, which was adopted shortly after the SLG presented the draft to the European Council. The uncharacteristically quick adoption of the directive cannot be explained solely by SLG's lobbying efforts. According to Mark Bell, as in the British case legislators felt that the restrictive trend of EU immigration policies had to be legitimised and counter-balanced by the promotion of anti-racist integrationist measures (2002: 66-67). The most often cited event that served as the immediate trigger for RED's adoption was the forming of an Austrian coalition government in February 2000 in which the extreme-right Freedom Party of Jörg Haider claimed the majority of ministerial posts (Amiriaux and Guiraudon, 2010: 1697).

The other factor that hastened its adoption was the determination of the Portuguese Presidency to complete the negotiations by June 2000 combined with the relative insulation of the process from business interests, partisan politics and public scrutiny (Geddes and Guiraudon, 2004: 349-351). The process of adoption was expedited by the fast-track methods of the Portuguese Presidency, most importantly by the agreement of the member states to circumvent the three-week long process of translating and sending the proposals to relevant national institutions for examination. This method minimised the potential opposition to and stalling of the negotiations by national administrations. The expedition of the discussions caught business interest groups by surprise and by the time these groups realised that the proposed directive contained burden of proof provisions that could have serious implications for future litigation against employers, they had mostly missed the “negotiation train” (ibid). At the same time, the European Parliament despite its consultative role played a greater role since its opinion had to be conveyed to the Council before the formal passage of the bill. The Parliament promised a timely delivery of its opinion in exchange for a guarantee that some of its recommendations for amendment would be taken into account. Since the Parliament was a proponent of the SLG draft, it was able to reintroduce some of the SLG provisions left out of the Commission version (ibid., 349).

Unlike in the US and British cases where the government records related to the passage of race anti-discrimination measures reveal extensive consultations,

hearings and public debates, the adoption of the Race Directive was deliberately conducted in a manner designed to bring discussions to a minimum and to further limit these to experts thus excluding the very political elites in charge of implementing the directive domestically. The developments demonstrate that EU bureaucrats were aware of the substantial risk of rejection the proposal could face. This shows that the norm may not have reached its threshold of having a sufficient number of states and international actors advocate for its acceptance or, as I suggest, that norm thresholds are not reliable signifiers meaning that norm diffusion is hardly ever a quasi- automatic process that leads to domestic norm internalisation once a given number of states commit to norm conformity. Here I subscribe to the second hypothesis because following developments demonstrate that even after the norm was enshrined into EU law, its transposition was fraught with difficulties coming from national governments which either contested their obligation to incorporate the norm into national law or subsequently undid the very laws they had already passed to institutionalise the norm. In other words, even after all EU member states contracted to transpose the directive, which would have meant that the norm threshold was unequivocally reached, the norm did not diffuse across the region quasi-automatically as the norm life cycle model predicts, which suggests that the norm threshold is not a reliable marker that signals the ensuing of a non-reversible and non-challenged norm cascade (Finnemore and Sikkink, 1998: 901-902).

Yet, a cascade did ensue although not in the manner the life norm cycle model predicts. As already stated, domestic experts amongst whom norm entrepreneurs with the British Commission for Racial Equality were very active, not international organisations per se were responsible for the drafting of the Race Directive and the content of the document reflects their experiences and knowledge. The wording in the directive proposal, as those involved in the process observe, was much closer to the existing Community legislation against gender discrimination, in particular with regards to the principles of direct and indirect discrimination and the sharing of the burden of proof, than the original Starting Line (Niessen and Chopin, 2004: 103). By borrowing extensively from the sex discrimination legislation the SLG, as one of the key drafters noted, tried "to avoid pointless discussions about terminology" and to put pressure on the member states with the argument that they "cannot...backtrack by reneging on these principles which have already been agreed,



refusing victims of racism the protection accorded to women (Chopin, 1999: 4). For example, SLG's definition of indirect discrimination was drawn from Article 2 of the 1997 Directive on the Burden of Proof while the provision for the shift of the burden of proof was influenced by Article 4 of the same directive (ibid., 5). The approach adopted by the SLG with respect to the arguments they employed to justify and promote their proposal highlights the power of strategic framing in persuading and even pressuring the EU institutions to adopt a version similar to the SLG draft into European law.

Direct influences from the UK legislation can also be detected. The directive recognises positive action with a view to ensuring equality in practice but just like UK law makes such measures voluntary (RED, 2000, Art. 5). While heavily dependent on preceding EU law, the directive is also innovative and challenging as it goes beyond previous directives regarding its scope and enforcement mechanisms. Restricting its scope to the field of employment would have been a simple and uncontroversial task for the norm entrepreneurs since most member states at the time had developed some legislation granting such protection at national level. Yet, since the norm entrepreneurs understood discrimination as performed in everyday life situations not exclusive to the workplace, the directive's scope was very broad covering and going beyond the fields outlined in UK's race relations legislation. The idea for mandating anti-discrimination bodies to carry out the competencies outlined in the directive (Art. 13) was also borrowed from domestic anti-discrimination legislation.

The Race Equality Directive incorporates key legal principles and mechanisms that were first articulated and designed by US political elites and subsequently brought over and codified into UK law by progressive norm promoters there. These legal transplants, the analysis shows, have become a part of EU anti-discrimination law through the efforts of the SLG in which British experts played an important role in crafting. The EU case study demonstrates the existence of a regional cascade that unfolded contrary to Finnemore and Sikkink's model, because of differences in the types of driving agents and the irrelevance of the notion of norm threshold to the successful cascading of new norms.

### *Post-threshold norm cascading*

The transposition of the 2000 directives into national law across the 28 member states represents an unprecedented attempt at the 'Europeanization' of anti-discrimination law. Although space does not allow an extensive analysis of the transposition process across the different countries, several observations should be made because they validate the claim that norm cascades should not be presented as *faits accomplis* once a new norm has reached a tipping point. The European case in the post-RED adoption period shows that the subsequent norm diffusion faced serious challenges from national governments and required EU institutions to resort to coercive measures to bring about the directive's transposition.

The latest report from the Commission on the implementation of the Race Equality and Employment Directives shows some of the challenges the norm has encountered in its post-threshold phase. Over five years after RED's adoption, the Commission launched infringement proceedings against 25 member states due to delayed transposition and non-conformity of national legislation with the directive (European Commission, 2014: 3).

The principal reason for the non-compliance stemmed from the reluctance of the national governments especially of new member states to recognise the principle of racial equality. The lack of political will to embrace the norm especially within the new member states has disrupted the cascade. Interviews with representatives from national employment agencies, trade unions and employers from these states show a tendency to question the necessity of the directive because it was considered that discrimination was not actually a significant problem (EU FRA, 2011:10). The interviewees from the new member states, the EU Agency for Fundamental Rights reports, tended to view "anti-discrimination legislation as part of a 'western Europe package' of 'exotic' issues forced upon them from the outside" (2010: 10). Some expressed the opinion that the implementation of the directive was "a question of time and that the new Member States needed time to 'catch up'" (ibid). Other respondents denied the existence of ethnic discrimination in their countries, particularly in relation to their Roma minority, by suggesting that the poor labour market position of the Roma population was a consequence of individual characteristics (ibid). This position is also held by current prominent political elites

in the FIDESZ government in Hungary and by former and current representatives of the Czech government (interview with a former Hungarian commissioner responsible for school integration, 2014, interview with the Hungarian Minister of State for Social Inclusion, 2014 and interview with a senior official from the Czech Ministry of Education, 2014). This failure to acknowledge discrimination and the motives behind it stand in apparent contrast to the behaviour of political elites in the early phases of the First Reconstruction, during the Second Reconstruction and during the liberal hour of British race relations. The American and British political elites framed racial equality and the protection of their racial minorities as an issue of national priority. The political elites in new EU member states tend to downplay or simply reject the racial equality norm. The reasons for this are complex and have to do with the uneven pressure the European institutions applied on these states, the mixed attitudes towards the norm by influential actors within European institutions, the high political cost of norm conformity for the domestic elites and their resistance to norm socialising processes. These issues are analysed in considerable detail in chapters 4 and 5 of the thesis.

Other contributing although markedly less significant factors that explain the non-uniform and problematic norm diffusion have to do with the novelty of the legislation and with particulars of the directive itself, which make it difficult to respond effectively to the needs of different domestic contexts. In her comparative assessment of the implementation process in eight countries, Valérie Guiraudon concludes that although the EU directives created a thin layer of Europeanization they came "up against legal and mobilization cultures that are not always compatible with the concepts and procedures introduced" (2009: 535). The new concepts of indirect discrimination and the shift of the burden of proof in some cases were simply inserted within pre-existing legal structures revealing a hasty 'cut and paste' approach to implementation. The option for positive action was also rarely included in national legislation (Guiraudon, 2009: 539). The compliance with the requirement for the designation of independent equality bodies has also caused concern in certain instances. Ensuring public visibility and independence from the national government have remained elusive as in many cases equality bodies are both a part of their respective ministry and lack autonomy and tangible powers (Bell, 2008b). Most of these transposition issues are considered the result of unfamiliarity of the

implementing policy makers with anti-discrimination law (European Commission, 2014: 3).

Another relevant issue to consider is the design of the Race Equality Directive. RED was drafted in a context concerned with the integration of immigrants. No reference was made either in the SLG draft or the Commission proposal to historic national minorities or the Roma. In the new member states, however, ethnic discrimination is commonly associated with such national minorities and the Roma communities making it questionable how well the formal transposition of RED could actually also be an effective response to local situations. It is debatable whether the enactment of the race legislation could provide a useful framework for the development of national policy tools for the redress of the structural discrimination these minorities face. Segregation is a persistent problem for Romani communities in many areas such as education and housing in most of the new member states (Bell, 2008b: 38). Yet, segregation is not explicitly addressed in RED and neither is institutional racism. Moreover, RED's individual rights model of enforcement in which the case must be brought forward by the victim, cannot adequately address structural inequalities and could hardly be a sufficient instrument to halt the practice of systemic discrimination against the Roma.

#### *Jurisprudence building at the European level*

Here I examine the race anti-discrimination jurisprudence-building at the European level by focusing on the case of *D.H. and Others v. The Czech Republic* (2007) in which the European Court of Human Rights for the first time found violation of discrimination on the basis of ethnicity. I claim that although significant in terms of legal developments, the *D.H.* case does not constitute a *Brown v. Board of Education* moment for the largest historically and systemically discriminated minority in Europe. I argue that the weakness of the case law lies in 1) the formulation of the judgment, which unlike *Brown* was not unanimous and a significant number of judges wrote strong dissenting opinions displaying opposition to the norm and 2) the judges opted for the recognition of indirect instead of direct discrimination which suggests non-intentionality and can be perceived as a 'lesser' or more innocuous form of discrimination. I demonstrate that the questioning and debating of the race anti-discrimination norm within the panel of ECtHR judges

weakens the norm and reduces its chances for successful cascading and domestic acceptance.

The section briefly outlines the domestic developments of the *D.H.* case before engaging in an analysis of the ECtHR Second Section and Grand Chamber judgments. The analysis suggests that from a legal point, the case has been qualified as landmark and ground-breaking – Europe’s *Brown v. Board of Education* equivalent – because of the recognition of indirect discrimination evident in the *de facto* existence of two separate systems of education in the Czech Republic, one for children from the Czech ethnic majority and another inferior system for children from Romani ethnicity (Goodwin, 2009 and Grand Chamber Judgment, 2007: Para. 207-210). However, a closer examination of the verdict reveals substantial differences with the *Brown* verdict: these include a softer language and absence of strong statements affirming equality of the kind found in the American judgment. Ultimately, the aim of the analysis is to uncover the norm contestation processes that take place within norm enterprising structures that subvert norm diffusion. The analysis further showcases the arguments and attitudes of Czech national elites and helps shed light on the factors that perpetuate racial and ethnic discrimination in the country.

*The case of D.H. and Others v. Czech Republic: domestic developments (1999-2000)*

The launch of the case began in 1999 when the Soros-funded European Roma Rights Center sent researchers to the Czech city of Ostrava to collect data on the school enrolment of Romani children in the city’s schools. The timing and country selection for the anti-discrimination lawsuit were not coincidental. The Czech national elites were facing mounting international pressure over Romani asylum-seekers, the scandal over the apartheid wall in Usti nad Labem had broken out, and the Czech Republic was preparing for EU accession. More generally, the ERRC legal director James Goldston explains that the Czech Republic was chosen because it was perceived as the poster-child of the post-communist region in terms of its relative wealth and enlightened view of human rights (2008: 2). It was in that context, that the ERRC assisted by a network of advocacy organizations<sup>7</sup> set up the

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<sup>7</sup>Minority Rights Group International, the European Network Against Racism, the European Roma Information Office, the Roma Education Fund, the European Early Childhood Education Research

*D.H.* lawsuit which became a litmus test both for the actual commitment of Czech authorities to the anti-discrimination norm vis-a-vis its Romani minority and for the commitment of the European Court Human Rights towards the protection of vulnerable minorities from discrimination.

The lawsuit alleged that the Romani applicants were placed in special schools for children with intellectual deficiencies on account of their Romani ethnicity without objective justification. The plaintiffs first lodged an application with the Ostrava Educational Authority to reconsider the special school placement, which the local administrators denied claiming that the assignment of the children to special schools did not violate the law. Subsequently, the claimants filed an appeal with the Czech Constitutional Court claiming that they were *de facto* discriminated against through their placement in special schools resulting from the general state of the educational system and far exceeding their individual interests (ECtHR, 2005). The Ministry of Education denied any discrimination transferring the blame onto the children's parents who the officials framed as having the tendency "to have a rather negative attitude to school work" (ECtHR, 2006: Para. 16). Essentially, the Constitutional Court also placed the blame onto the parents citing their consent as the decisive factor for the special school placement. The Court dismissed the appeal partly on the grounds that it was unfounded and partly because it claimed a lack of competence to hear the case.

The domestic developments show that the norm faced rigid opposition from local and national elites. In both cases, the relevant authorities refused to form an independent investigation to assess the allegations preferring to revert to denial of existing discrimination and to prevailing stereotypes related to Romani lack of interest in and negative attitude to education. Even the highest national court divested itself from responsibility by refusing to examine the case. The case dismissal demonstrates that the judiciary affirmed the status quo of the double standard educational system through inaction. Although at the time the Czech

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Association, the International Step by Step Association, Interights and Human Rights Watch acted as third-party interveners in the lawsuit. Their research was supplemented by the testimony of a myriad of educational and other experts from the USA, the UK, and the Czech Republic among others (see Application presented by D.H and Others against the Czech Republic, available at <http://www.errc.org/cikk.php?cikk=3559>. See also the third-party comments submitted by the listed advocacy organisations at <http://www.errc.org/cikk.php?cikk=3559> [accessed on 12 January 2016]).

Republic did not have national law explicitly prohibiting discrimination in education, if willing, the Court could have applied the Strasbourg legal standards for proving racial discrimination under Article 14 of the European Convention on Human Rights which had been binding on the Czech Republic for seven years at the time.

*D.H. developments at the European level: the ECtHR Second Section Judgment (2006)*

This section traces the case developments at the supranational level. It draws attention to the arguments of the pro-Roma transnational norm entrepreneurs and the response of the Czech government before turning to assess the verdict of the Second Section. The analysis finds that the unfavourable verdict was due to the unwillingness of the Strasbourg judges to broach the subject of institutional discrimination preferring to examine the circumstances of the individual applicants in isolation from the wider context. More significantly, many of the judges on the panel who came from the new member states opted to give the Czech Government a large margin of appreciation in the way it ran its educational system. The judgment encapsulates the prejudicial attitudes of some members of the judiciary and reveals the marked reluctance of the panel to uphold Article 14 of the ECHR (prohibition of discrimination) despite the ample evidence offered before it by the petitioners, educational experts, and other Council of Europe bodies. Ultimately, the judgment reveals the arduous process of embedding the norm into European case law and sheds light on the negative impact the judges' initial rejection and ambivalence toward applying the legal norm to the Roma minority has had upon domestic norm acceptance processes.

By the time the case made its way to Strasbourg, the placement of Romani children in special schools in CEE states had become a common target of criticisms by NGOs and European bodies. Mounting evidence detailed the extent and the depth of the exclusion of Romani children from mainstream education.<sup>8</sup> Anthony Lester, one of the main experts behind UK's Race Relations Acts and James Goldston, an

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<sup>8</sup> See HCHR. 2006. Report on the human rights situation of the Roma, Sinti, and Travellers in Europe. 15 February 2006; CoE. 2005. Report submitted by the Czech Republic pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities. (2<sup>nd</sup> cycle); CoE. 2002. Recommendation No. 1557. The legal situation of Roma in Europe; ERRC. 2004. Stigmata: segregated schooling of Roma in Central and Easter Europe, a survey of patterns of segregated education in Bulgaria, the Czech Republic, Hungary, Romania and Slovakia.

American lawyer with expert knowledge about his country's civil rights litigation history, argued the case before the Court. The main goal of the ERRC and its transnational partners as is the norm with most strategic litigation was not to seek remedy for the individual applicants but to persuade the judges to rule against the systemic practice of educational segregation of Czech Roma children. The objective of the lawsuit was threefold: 1) using the European judiciary, the legal experts sought to pressure the Czech Republic to amend its education law and take steps towards desegregation; 2) by arguing for the existence of ethnic discrimination in the Czech educational system, the norm entrepreneurs sought to set a precedent to delegitimize the structural discrimination, which although not legalized is *de facto* normalized in governmental and social structures across CEE states with Romani populations; and 3) the lawyers expected that a positive ruling would have wider implications by paving the way for desegregation in other areas (employment, housing, etc.)

The language and arguments of the petitioners clearly show the intent of the norm entrepreneurs to seek effective remedy not for the individual Romani children but to invalidate the entire educational system of the Czech Republic. Very little in the case documents deals with the personal circumstances of the applicants. The case architects instead sketched broadly the social context of institutionalised racism in which the Romani minority lives selecting evidence that established a national pattern of discrimination on the basis of ethnicity. The core evidence that substantiated the plaintiffs' claims were Czech municipal and national statistics along with ERRC's own data which revealed that Romani children were 27 times more likely to end up in special schools than those of the main ethnic group (ERRC, 2000: 15-17). Borrowing from the techniques of the NAACP lawyers who orchestrated *Brown*, the ERRC brought in world renowned experts on the overrepresentation of minorities in special education who upon examining the statistics concluded that the representation of Roma students in special schools was unprecedented, and was itself *prima facie* evidence of racial segregation and discrimination (ERRC, 2000: 15-17 and Goldhaber, 2007: 161).

The ERRC used evidence from Czech educators and local and state officials to illustrate a situation of school segregation that results from a historically maintained societal belief in the intellectual and/or socio-cultural inferiority of the Roma minority as an ethnic group, which finds tangible expression in the actions of



local officials to assign Romani children to special schools. The ERRC argued that the disproportionate representation of Romani children in special schools for those with mental disability primarily stemmed from the dominant understanding of the meaning of Czech ethnicity. In the words of the ERRC legal team, “being ethnic Czech means being treated as “normal”...Czech society maintains an official commitment to race- and ethnic- neutrality...However, it is no secret that being Roma in Czech society means existing within a social category that carries many negative connotations...of laziness, of not wanting to work, of criminality, of stupidity, of violence, and of not being sufficiently concerned about the education of their children...Indeed, the fact that school and government officials for so long have tolerated disproportionate placement of Roma students in special schools...itself reveals a complacent acceptance of those disproportions built on the “ inherent” intellectual inferiority of Roma” (ERRC, 2000: 45). The post-communist period, witnesses also testified, had brought new economic incentives for preserving the status quo as special schools’ administrators used Roma children to fill the student quota to prevent school closures (ibid., 48). More broadly this status quo was said to be maintained by official tolerance at the national level despite the common knowledge that the majority of Romani students in those schools do not have a mental disability.

The ERRC further built the case by citing evidence from Council of Europe documents to add weight to the claims about quasi-automatic transfer of Romani children in special schools, the subjectivity, cultural insensitivity and inappropriate administration of psychological tests used to determine the placement of Romani children in these schools and the inferior tuition the children received, which in practice precluded the majority of children from returning to mainstream schools (ibid., 24-26 and 34).

The manner in which European jurisprudence-building related to the race anti-discrimination norm has taken place comes closest to conforming to the pre-threshold norm diffusion stage of the norm life cycle model. Just as the model suggests, we see a group of transnational norm entrepreneurs led by the ERRC using its power of persuasion to convince an international organisation to recognise the new norm and in turn use its own mechanisms to stimulate norm diffusion at the domestic level (Finnemore and Sikkink, 1998: 898-899). Even here, however, there

are evident links with domestic norm entrepreneurship and the historical processes analysed in the earlier chapters.

To restate, Anthony Lester who argued the case before the Grand Chamber was instrumental in the design of UK's race relations legislation and both Lester and Goldston, the chief case architect, were heavily influenced by the litigation strategy of American civil rights lawyers. Morag Goodwin (2004) whose research examines the way in which pro-Romani norm entrepreneurs use the strategies and techniques developed over the course of the American civil rights movement, claims that the influence the American civil rights approach has had on jurisprudence-building related to the discrimination of the Roma minority in CEE is profound. She substantiates her claims by pointing out that the majority of pro-Roma legal counsels had been trained by influential American human rights lawyers including the President of the NAACP (Goodwin, 2004: 1437). She highlights similarities in the focus of the work since much of ERRC's legal efforts attempt to combat segregation in education just like the *Brown* lawyers did employing the same methods of using statistical evidence and well-known experts to construct a convincing case (ibid. 1437-1440). Goodwin's comparative analysis shows how the pro-Roma legal experts sought to transplant legal strategies from the American to the European context with the goal of producing normative change through legal means. The developments continue to highlight both the importance of domestic norm entrepreneurs who embed themselves and their experience into transnational advocacy coalitions and the significance of the American experience which has impacted the course of Strasbourg case law related to racial anti-discrimination.

Returning to the case it is important to point out that the Czech government's response to the ERRC arguments was less persuasive mainly because the statements used to address the claimants' allegations were contradictory. The lawyers for the state justified the children's placement in special schools on procedural grounds. In other words, they alleged that state authorities had followed the proper procedure (psychological assessment and the obtainment of parental consent) for assessing mental deficiency, which did not involve the consideration of the student's ethnic background (ECtHR, 2006: 11). This was contradicted by statements in which the Czech legal counsel stated that the lack of school preparedness of Romani children was often due to their disadvantaged socio-cultural environment and was dealt with, in part, by their placement in special schools (ECtHR, 2005: 14). Although this did

not represent an explicit admission of ethnic discrimination, it did indicate both awareness that many Romani children did not suffer from mental disability and denigrated their cultural difference. The clearest example of the prejudicial attitude the Czech government displayed is contained in its remark to the ECtHR, "The Government emphasizes that thanks to the existing system [of special schools], the vast majority of Roma children are literate and have had a complete elementary education." (ibid.,15) This affirmation of the use of special schools as a tool for educating Romani children along with parental blame<sup>9</sup> demonstrated the normality of institutional racism amongst Czech bureaucrats and the comment even contained a hint of pride at the 'achievement' of ensuring a level of literacy for Roma children.

Despite the extensive evidence the ERRC presented to the panel, the judges almost unanimously (one judge disagreed) found no violation of Article 14 (prohibition of discrimination) in conjunction of Article 2 of Protocol 1 (right to education) of the Convention. In its reasoning, the Court maintained that the Czech Republic had managed to convince the judges that the system of special schools was not introduced solely to cater for Romani students and stressed that states should have a wide margin of appreciation to set up different schools for children with different educational needs. Importantly, the Court limited itself to the specific situation of the individual applicants and thus ignored most of the evidence presented by the ERRC including national and regional school statistics, reports and recommendations by its own advisory bodies, ECRI and the FCNM Advisory Committee, about patterns of systemic ethnic discrimination in the Czech educational system (ECtHR, 2006: 15-16).

James Goldston has commented that it was not coincidental that the judges from CEE states on the panel voted against recognition of discrimination (Goldhaber, 2007: 165). Although one must be cautious in suggesting a link between the judges' country of origin and their decision, it is striking that all of the CEE judges sided with the Czech government. The Court's position ultimately affirmed the status quo and failed to recognise the norm. The case outcome demonstrates that international organisations which the Finnemore and Sikkink model characterises as powerful norm entrepreneurs are not monolithic and cohesive

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<sup>9</sup>The Government argued that it must not be held responsible for an "indifferent" and "passive" attitude of Romani parents.

entities and can struggle with norm ambivalence and norm contestation within their own structures.

*D.H. developments at the European level: the ECtHR Grand Chamber Judgment (2007)*

In November 2007 the Grand Chamber of the ECtHR overturned on appeal the previous decision by finding that the assignment of Romani children to special schools amounted to indirect discrimination on ethnic grounds in the Czech educational system. In doing so, Goodwin remarks, “the Court appeared to have at last ceased to drag its feet in the area of non-discrimination and fully aligned itself with a progressive European normative framework” (Goodwin, 2009: 93). At first glance, it may seem that the judgment represents a landmark moment, a *Brown v. Board of Education* equivalent in European anti-discrimination jurisprudence with significant implications for the institutionalisation of the anti-discrimination norm in the Czech Republic and the rest of Europe’s norm violating states.

The new judgment was six times longer than the previous decision. Although length alone is not enough to draw meaningful conclusions about the quality of the judgment when taken along with other indicators, it shows that the Strasbourg bench saw the case as being central to defining the Court, its vision and purpose (Goodwin, 2009: 99). The decision revealed a markedly different approach the Grand Chamber adopted in its deliberations. Unlike the exceptionally narrow focus of the Second Section, the Grand Chamber acknowledged the wider national and regional context, which is evidenced by the seriousness with which the Court examined the data provided by the NGOs’ submissions, Council of Europe sources, Community law, UN anti-discrimination standards, and seminal UK and US cases of racial discrimination. Instead of basing their judgment on the individual circumstances of the Romani children, the Court established that the applicants had been treated unequally because the relevant national legislation as applied in practice had a systemic “disproportionately prejudicial effect on the Roma community” in the Czech state (ECtHR, 2007: Para. 209). The Court not only recognised indirect discrimination in Czech schools but went as far as declaring that although the decision is legally binding only on the Czech Republic, this is a problem of a European scope setting a precedent that Roma (and other minority groups) in similar predicaments from other member states could use in domestic courts.

Despite the euphoria surrounding the verdict, the *D.H.* case has fallen short of constituting a *Brown v. Board of Education* moment for Europe's Roma and the ECtHR. Some legal experts have questioned the sincerity and commitment of the judges to the decision. They have pointed that the weight afforded to the third party submissions, especially those produced by CoE advisory bodies, suggests that some pressure may have been exercised upon the Grand Chamber to raise the profile of the issue and add gravity to the ECRI and FCNM Advisory Committee demands for substantive educational equality (Farkas, 2008: 54-55).

More significantly, the judges opted to present the discrimination experienced by Romani children as indirect, instead of direct, meaning that no proof of intent was required. This contributed to the perception that the discrimination in the Czech educational system was non-intentional and consequently nobody was to blame as it simply resulted from measures created in a neutral fashion by the Czech authorities that happened to have a disparate impact upon the Roma. The applicants, however, argued the case on the basis of direct (intentional) as well as indirect discrimination because they alleged that the creation of the educational tests and the analysis of test results were not done in a neutral fashion. In other words, the claimants argued that the Czech authorities plainly acted in a discriminatory manner on the ground of ethnicity, as explained in a European Commission report (European Commission, 2007: Ch. 2.3). By refraining from finding direct discrimination, the Strasbourg bench considerably lessened the impact of the case.

Unlike *Brown*, the ECtHR judgment is silent on the harm done to children who have been placed in special schools. It did not address the irreparable psychological damage and the social stigma children in such schools experience nor did it consider their long-term impact. The only place, in which harm in terms of the school placement is discussed, is to determine the non-pecuniary damages for the children, whose meagre amount appears to be more a symbolic token than a well-considered effort at compensation. Moreover, in a case that concerns the *de facto* segregation of children in educational establishments, the word segregation is never mentioned. In Goodwin's words, the Grand Chamber "denied itself the opportunity to echo the US Supreme Court in declaring that segregation *per se* is invidiously evil" (2009:102). Absent from the judgment are the powerful statements found in *Brown* concerning the developmental retardation and sense of inferiority resulting from segregation and the all-important call for a racially integrated school system.

The clearest indication of the continued norm contestation within the Grand Chamber is the non-unanimous vote in favour of the violation of the Convention anti-discrimination clause. While in *Brown* the US Supreme Court issued a unanimous call for school desegregation, four judges voted against the Grand Chamber decision. All of them submitted caustic dissenting opinions, which revealed the depth of disagreement the norm evoked within an institution designed to uphold it (ECtHR, 2007). Judge Borrego Borrego was dissatisfied with the new approach of the Court, which he believed risked turning it into another ECRI instead of focusing on the individual case (ibid., Para.7). Judge Zupančič from Slovenia claimed that “the Court in this case has been brought into play for ulterior purposes” and implied that it would have been better for the Czech Republic not to try to tackle the education of Romani children at all but to act with “benign neglect” leaving them without the opportunity to access any school (ibid., 76). Judge Šikuta from Slovakia echoed the claim and continued insisting that the onus of school placement rested with the parents (ibid., 86-88). The Czech Judge Jungwiert expectedly was the most vocal critic of the verdict. According to his questionable reasoning, inequalities in the Czech educational system was justified because it had a positive aim namely to get Romani children to go to school to have a chance at success (ibid., 81). The opinions of these judges subvert the anti-discrimination norm and effectively argue that parallel and unequal educational systems represent an acceptable way to ensure schooling for Romani children.

Related to implementation, the judges did not give the CoE Committee of Ministers, whose role is to supervise the implementation of the verdict, a mandate to request specific changes in the national legislation and educational structure. In line with the principle of wide margin of appreciation, the Court allowed the Czech government to decide on the measures it would undertake to remedy the problem (ibid., Para. 216). Consequently, it denied the Committee of Ministers the opportunity to push harder for effective and expedient reforms (Devroye, 2009: 96-97). These omissions denote hesitancy on behalf of the judges and ambivalence about how far the Court’s norm commitment should stretch. The judges’ ambivalence ultimately turned what initially appeared to be a landmark decision into a verdict without teeth.

## Conclusion

This chapter traced the diffusion processes that institutionalised the race anti-discrimination norm at the European level. The empirical evidence suggests that although the formulation of the European race anti-discrimination legislation and case law was largely driven by transnational advocacy networks, the main norm entrepreneurs within these networks came from domestic elites who had either played a key part in domestic norm creation and institutionalisation or experts with strong links to influential domestic norm entrepreneurs and familiarity with the American and British race relations experiences.

The chapter also demonstrated that the norm threshold is not a reliable indicator, which once attained guarantees a quasi-automatic norm cascade. The transposition of the Race Equality Directive has shown that even when all states within a particular group or region (not just one third as the model stipulates) formally commit themselves to uphold a new norm, the cascade process can be delayed and contested (Finnemore and Sikkink, 1998: 901). European case law developments have also problematised the predicted behaviour of international norm entrepreneurs. The actions of the Strasbourg judges show that international organisations are not cohesive bodies that speak with one voice about new norm promotion. Contradictory opinions about the validity of new norms and direct opposition to their recognition within the international structures designed to uphold them are issues the norm life cycle model does not take into consideration and thus creates an inaccurate presentation of these bodies as monolithic and influential norm entrepreneurs that strive to ensure a rapid cascade (Finnemore and Sikkink, 1998: 902). The empirical evidence disproves this and suggests instead that norm contestation within institutions at the supranational level contributes to norm defying behaviour by domestic political elites tasked with incorporating the norm into their states' legislative frameworks. The next chapter which traces the institutionalisation of the race anti-discrimination norm in the Czech Republic and specifically examines the compliance of the Czech government with the Strasbourg verdict, will shed further light on the factors that hinder domestic conformity and the theoretical gaps in the internalisation stage of the norm life cycle model.

## Chapter Four

### Domestic norm internalisation I: Roma politics in the Czech Republic

So far the thesis has evaluated the emergence and cascading stages of Finnemore and Sikkink's norm life cycle model. I have argued that the model is not designed to analyse situations where the new norm is initially constructed at the domestic level prior to its internationalisation because it focuses on norm development in an international context and therefore does not concern itself with the study of domestic agents and structures. I have claimed that a complementary approach that examines the role of domestic factors, and national elites in particular, is necessary because the latter have a determinate role in the subsequent institutionalisation of new norms into law and institutional practice. I have also claimed that these norm entrepreneurs are driven by ideational and instrumental motives which when in convergence heighten the agentiality of norm promoters.

The evaluation of the cascading stage of the race anti-discrimination norm demonstrated that domestic elites can continue to be important driving mechanisms of norm diffusion as a part of or together with transnational norm entrepreneurs. In certain instances, as the UK case has shown, they can drive the process entirely on their own. The EU case study has further demonstrated that the norm threshold indicator is not a useful tool for determining the success of a cascade as even in situations when all states within a region, in this case the European Union, formally agree to recognise a new norm the actual process is fraught with difficulties resulting from unfulfilled and partly fulfilled commitments.

The next two chapters continue to trace the journey of the race anti-discrimination norm by analysing the factors that determine the level of domestic norm internalisation and the motives that drive the norm enterprising agents in this phase. This chapter analyses norm internalisation developments in the Czech context by tracing anti-discrimination legislation and its implementation vis-à-vis the Romani minority because although not numerous, the Roma have historically faced the highest degree of ethnic discrimination and social exclusion in the country. In this and the next chapters I trace the process of domestic norm acceptance in order to identify the factors that determine the degree of norm institutionalisation in the



Czech Republic and Hungary. I do that by building upon the wider literature on international norms and international law in domestic politics by analysing how the agency of domestic political elites and how domestic structural factors influence the degree of norm institutionalisation (Checkel, 1997, Simmons, 2009, Sikkink, 2005 and Cortell and Davis, 1996 and 2005). Here I do not engage with the norm life cycle model because its main objective is to sketch out international norm diffusion rather than to explain the process of domestic norm acceptance. As the norm life cycle model does not set out to analyse domestic politics, it jumps from norm cascading to a potential third phase, deep internalisation, without explaining the conditions under which such taken-for-granted norm embeddedness can be achieved (Finnemore and Sikkink, 1998: 904-905). My goal is to shed light on the domestic processes of norm internalisation and to clarify the conditions under which human rights norms can become institutionalised in the domestic order of states.

The Czech case suggests that the behaviour of national political elites is key in determining the success or failure of a new norm's institutionalisation. The analysis shows that in the Czech Republic influential elites from the three branches of the government contested the racial anti-discrimination norm. Their behaviour has prevented the cascading and internalisation of the norm into legislation, institutional practices and the wider domestic social and political order. The legislative and executive branches challenged the norm by constructing a citizenship law that disproportionately denaturalised Romani individuals and by opposing the transposition of the Race Equality Directive in domestic law. The judiciary has remained reluctant to uphold the social and political rights of Czech Roma citizens. Based on the empirical evidence I continue to advance the claim that even in situations when a new norm becomes codified into regional institutions and legislation and national governments agree to recognise the norm, cascading and internalisation can be seriously disrupted when national political elites renege on their formal commitment.

These findings support Kathryn Sikkink's work on the interaction of domestic and international opportunity structures (2005). Sikkink's multilevel governance model stipulates that when domestic opportunity structures are seen as closed and international opportunity structures as open, activists tend to seek international allies to bring pressure upon their government creating a boomerang

pattern of interaction (2005: 161-163). In the Czech case, a boomerang pattern is evident in the process of the incorporation of the Equality Directives into Czech national law and in the implementation of the *D.H.* judgment. In both instances, domestic and transnational norm entrepreneurs and European institutions brought pressure upon the Czech government to comply with European law. Sikkink hypothesises that this boomerang activism is expected to open up domestic space for political activism and change and ultimately domestic political blockages. In the Czech case, it is to be seen if, when and how this opening of the domestic political opportunity structures will take place.

The Czech case also shows that when taken together the nature of the new norm and the level at which it is constructed matter for its domestic institutionalisation. The US and UK cases have already demonstrated that controversial norms that raise questions of citizenship and belonging are more likely to be institutionalised and remain uncontested in the long run when advanced by justice-driven domestic elites. The Czech case, on the other hand, illustrates that controversial norms imposed from institutions at the supranational level are unlikely to achieve long-term institutionalisation if the domestic elites are wholly driven by instrumental concerns (in this case narrow political interests related to quick EU accession). I claim that unlike in the US and UK cases, the Czech elites have had no ideational commitment to the race anti-discrimination norm, which has resulted in its superficial codification into law and policy that have never been properly implemented. In other words, despite the elites elaborate albeit occasional window dressing efforts, the norm was never accepted and continues to be exposed to institutional and societal contestation and lack of enforcement. The findings relate to Beth Simmons' observation that the ability of international treaties that bring in new norms do change national legislative agendas; however, this legislative change "does not speak as such to deeper problems of implementation or enforcement on the ground" (2009: 129). This is only possible if the ratifiers are sincere and as noted earlier if the branches of the government and the sub-national actors take up the new norm (*ibid*).

The chapter begins by sketching the policies of the early post-communist governments throughout the 1990s that have had a substantial impact on the Roma. It is important to start at this point because since the establishment of the Czech state

in 1993, the very first government constructed legislation that stripped many Roma residing in the Czech Republic of the rights and protections afforded to them by their citizenship and pushed them on the margins of the political and social life in the country. The chapter pays particular attention to the formulation and adverse impact of the Czech citizenship law, which I argue purposely made large numbers of Romani individuals ineligible for Czech citizenship. The analysis shows that international pressure to remedy the situation resulted in delayed cosmetic amendments to the law which have not resolved the predicament of many of those denaturalised persons. This suggests international influence cannot bring about substantial normative change when the domestic political elites are hostile to the new norm.

The chapter then turns to the accession period. The examination indicates that the Czech elites made considerable efforts at showcasing concern for the Roma minority before the international community. This concern was manifested in the language of commitment to racial equality especially in EU-related communication and the creation of Roma policies and government bodies tasked with Roma integration and human rights protection. These efforts, I argue, have been driven by instrumental concerns for compliance. They represent an attempt at window dressing rather than a normative shift of the ruling elites' behaviour, which is evident in the elites' language inconsistencies (supporting racial equality before the international community and opposing it in their national rhetoric), the non-implementation and contestation of the very anti-discrimination and integrative policies that the elites created, the design of the main anti-discrimination bodies and their role, which is limited to providing anti-discrimination advice and recommendations. The chapter concludes by assessing the post-accession situation and confirms the initial claim that the norm has never been seriously considered and accepted by the successive Czech governments. Some of the governments have openly opposed it while others have been mostly silent due to the norm's association with a politically unpopular cause and its clash with firmly held countervailing domestic norms. The developments surrounding the transposition of the Race Equality Directive and the implementation of the 2007 *D.H.* verdict unequivocally display the depth and strength of the Czech elites' resistance to the norm.

### **Norm denial: Roma politics (1993-1997)**

Since the collapse of the communist regime the former assimilationist approach towards the Roma minority has been abandoned, nevertheless the political consensus on a pathway to an integrated society has not yet been realised. Between 1989 and 1992 the Czechoslovak policy on minorities and more specifically on Roma was characterised by two main formal features. First, the policy on minorities that the state adopted was based on the “civic principle” meaning that one group of citizens should not enjoy access to more resources or have more rights than another; it also meant that the expression of ethnic difference was relegated to the private sphere (Vermeersch, 2007: 80). This approach was in sharp contrast with Hungary’s minority policy developments at the time which like Czechoslovakia recognised the existence of its minorities but also granted them cultural autonomy through the system of minority self-governments at the local and national levels (Law LXXVII on the Rights of National and Ethnic Minorities). Secondly, the Romani minority was regarded in the same way as the rest of the minorities in Czechoslovakia. This meant that the state made no distinction between the position of the Roma vis-à-vis that of other minorities (Vermeersch, 2007: 80).

After the ‘Velvet Divorce’ in 1992 the Czech Republic quickly adopted the formal institutions and practices associated with a liberal democracy. The country joined the Council of Europe and ratified the ECHR less than a year after its split from the federation. Already in 1993, the Czech Republic was ranked “free” according to the Freedom House ratings which gave it a score of 1 for political rights and 2 for civil liberties.<sup>10</sup> As Safia Swimlear (2008) points out, the Czech Republic was behaving as a liberal democracy and a supporter of human rights and its political elites pointed to these developments as expressions of the new state’s priority to reclaim its rightful place in Europe. This perception by both Czechs and foreigners was enhanced by the election of the former dissident and Roma champion Vaclav Havel as the first Czech president. Havel was well-known in the West as a founding member and spokesperson for the dissident group Charter 77, which since its establishment in 1977 until the 1980s, amongst its other activities, exposed and

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<sup>10</sup>After the Czech Republic entered the EU in 2004, its ratings were upgraded to a score of 1 for all categories. See Freedom House Report. 2005. Available at <http://www.freedomhouse.org/report/freedom-world/2005/czech-republic#.UuWnevlLddg>, [accessed on 24/11/2014].

denounced the human rights abuses and assimilationist policies of the Czechoslovak Communist Regime against its Romani population (Charter 77, 1979 and 1979a). Havel's election created the illusion that minority groups including the Roma were afforded protection by the new state. The perception was bolstered by Western media which presented the Czech state as "a bastion of tolerance and lofty ideals" that had easily embraced democratic values (Perlez, 1995).

Between 1993 and 1997 the situation of the Romani communities was a low priority on the government's policy agenda. Eva Sobotka describes the period as one of 'stagnation and denial' in which ministerial proposals on Roma issues "were barely taken seriously, and ...the Romani issue was downplayed" and inaction was justified by authorities on the basis of the civic principle approach (2001a: 6 and 2001b). At the same time, the exclusion of Roma from public space intensified and the minority became a main target of newly formed neo-fascist groups ranging from skinhead gangs to the *Bílá Liga* (White League) and *Ku Klux Klan*-esque societies (Tritt, 1992: 2-3). According to Human Rights Watch (1996), Roma were routinely prohibited from accessing public establishments such as swimming pools, pubs and restaurants managed by both private parties and the state. The organisation estimates that between 1989 and 1995 at least 27 Roma had died as a result of racially motivated attacks (ibid). The Czech Helsinki Committee (1994) also observed increasing cases of crimes directed at Roma, which it claimed were caused by ethnic intolerance. Fawn (2001) theorises that although the Czech government and society strove to project an image of a tolerant, open and forward-thinking democratic nation, in the early 1990s the Czechs were, in fact, involved in a delayed nation-building project, which did not provide the political space for a discussion of racial equality, inclusivity and integration which are pre-requisites for the creation of a multicultural society.

This narrative suggests that racial equality was not on the agenda of the early post-Communist ruling elites. Although the national government officially adopted the principle of formal equality through its civic principle approach towards minorities, the approach cannot simply be understood as resulting from an attitude of benign neglect because it masked an increasing intolerance towards Romani individuals manifested in everyday acts of discrimination by private persons and

representatives of the state and ethnically motivated violence.<sup>11</sup> In the next section, through an analysis of the drafting, passage and implementation of the new Czech citizenship law I show that the Czech political elite went beyond the official policy of benign neglect towards the Roma minority and, in fact, openly engaged in discriminatory acts at the highest level.

### *The Czech citizenship law*

According to Human Rights Watch (1996), discussions amongst Czech political elites on containing the “Gypsy problem” started less than half a year prior to the official split of Czechoslovakia and revolved around the perception that Roma were largely responsible for an increase of criminal activities. In addition, the Czech authorities at the time were concerned with potential emigration of Roma from less developed Slovakia and their permanent settlement on Czech territory (ibid). An internal government document tellingly entitled, the ‘Catastrophic Scenario’, shows that the elites strategized to rid the new state of its now redundant Romani population and thus to further divest itself of its responsibilities concerning its Romani citizens. The document recommended that the Czech government “should use the process [of the split] for the purpose of departure of *non-needed* persons from factories, especially for the reasons of structural changes, and for the departure of people of *Roma nationality* to the Slovak Republic” (quoted in Human Rights Watch, 1996, my emphasis). The document reveals that the Czech elites actively and intentionally planned the construction of a major piece of legislation that was inherently discriminatory on the basis of ethnicity as it specifically targeted the Roma minority and aimed to deprive Roma residents from citizenship in the country they had been residing in for decades. The eventual law, as the chapter shows, had devastating consequences for the Roma population whose situation the Commission on Security and Cooperation in Europe qualified as potentially the largest denaturalization in Europe since WWII (Perlez, 1995).

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<sup>11</sup> As previously mentioned, between the fall of Communism and May 1995, Human Rights Watch estimates that 27 Roma including children died as a result of racial violence – by beating, knifing, drowning, shooting, burning, bombing and garroting. Yet the government did little to protect the Romani citizens. Opinion polls (e.g., Times Mirror) reported worryingly high levels of hostility towards the Roma. Everyday discrimination was most visible in the area of employment. Besides being the worst affected by the ongoing economic restructuring, the Roma minority suffered from relaxation of legal restrictions on employers which allowed the employers to discriminate routinely solely on the basis of the applicant’s Romani ethnicity (Will Guy. 2001: 294-295).

The law itself was carefully crafted in a way that did not target overtly a particular group. On the surface O’Nions notes the law was not particularly unusual in the citizenship requirements (2007: 117). It required permanent residence in the Czech Republic for the previous 2 years, a clean criminal record for the past 5 years, and mastery of the Czech language. However, these pre-requisites for citizenship had a devastating impact when applied to the Roma. The Tolerance Foundation (1994) estimates that over 20,000 Roma were stripped of their citizenship as a result of the new legislation citing the failure of many Romani families to satisfy the residency requirement due to sub-standard and overcrowded dwellings that were not considered permanent settlements by local authorities. The clean criminal record requirement also tellingly known as the ‘Gypsy clause’ had a particularly exclusionary effect when applied to Romani individuals (O’Nions, 2007: 117). Since the law did not make a distinction between minor and major offences, it has been estimated that as many as fifty percent of adult Roma were made stateless because of minor infractions (Gross, 1994). The language requirement also impacted negatively a high percentage of Roma in comparison with the Czech majority population and other well-integrated minorities. Other contributing factors were instances of bureaucratic resistance to the registration of Romani individuals as citizens even in cases in which they fulfilled the legal requirements and occasional violence, which forced some Roma to flee their homes and abandon the registration process (O’Nions, 2007: 118).

The citizenship law according to Papp (1997, 1-3) should be understood as an expression of the ethno-centric nature of the Czech understanding of citizenship and thus it is inherently discriminatory towards those who are perceived as non-Czechs. Holy’s thesis (1996) also advances the claim that belonging to the Czech nation is commonly conceptualised as based on ethnicity. In other words, being born on Czech territory and speaking Czech is not sufficient; one has to have “Czech parents”, a view that makes Czech citizenship exclusionary and effectively precludes Roma inclusion. The ethnocentric design of the law also points to the absence of influential norm entrepreneurs in the ranks of the national elites tasked with the building of the new political order, which stands in contrast to the other cases examined so far. It shows that from the very creation of the new state the domestic

elites advanced an agenda that perpetuated the historical norm of the social and political exclusion of the Romani communities.

Initially, there was little international criticism against the law, which could be explained partly by the poor understanding of the law's impact upon the Romani population, partly by the perception of the Czech Republic as a liberal democracy and by the fact that at the time the Roma were not deemed to be a political priority at the European level. From 1994 onwards, however, international criticism mounted as Czech NGOs (primarily the Czech Helsinki Committee and the Tolerance Foundation) provided more information and evidence about the disparate impact of the law upon the Roma. The US Congress, the UNHCR and the Council of Europe criticised the law for violating established international legal principles and were particularly concerned about potential large scale refugee migration resulting from the forced expulsions (US Department of State, 1994, 1995, 1996, UNHCR, 1996, CoE, 1996). The Czech government initially rejected the criticisms. PM Vaclav Klaus characterised the conclusions of the 1994 US State Department Report as "distorted and oversimplifying" while the Chair of the Czech Parliament's Foreign Affairs Committee denied practices of discrimination against the Roma (Lidove Noviny, 2000a). The Czech Ministry of Interior also rejected the allegations while the Czech Ambassador to the US at the time referred to the Human Rights Watch report as "lies" (Lidove Noviny, 2000b). Even the generally pro-Roma Havel refused US requests to "exert his considerable moral authority" to push for changes to the law and instead replied that it was "more worthwhile to work for the proper implementation and application of the citizenship law of the Czech Republic than to seek its amendment" (Crowe, 1996).

Still the government made several cosmetic changes to the law including the granting of power to the Ministry of Interior to waive the criminal record requirement on a case-by-case basis. These changes though have largely been seen as responses to international criticism designed to perpetuate the country's image as a democracy of a 'Western kind' rather than as a genuine attempt to help long-term Romani residents in the Czech lands to gain citizenship. The criminal record waiver, while an improvement on the original law, allowed officials to make arbitrary decisions and did not help those whose applications had been previously refused (Crowe, 1996). Estimates suggest that half a year after the amendment entered into



force only 200 individuals were granted citizenship, an insignificant number considering the tens of thousands of denaturalised Roma (ibid).

The developments show that the Czech political elite was paying lip service to the Roma predicament. Unlike African Americans during the Second Reconstruction, Czech Roma wielded little political power and had virtually no organised domestic lobbies of their own, which left them with no leverage and entirely dependent on the will of the political establishment (ibid). The absence of any genuine attempts amongst political leaders to take up the Roma cause confirms that international pressure alone cannot ensure the domestic acceptance of new norms when support within the domestic political establishment is lacking. The evident instrumental motives (soft security concerns) behind the international community's demands for change did not help either and may have in fact strengthened the Czech elites' resolve to come up with an instrumental solution in response to the pressure from above.

#### **The road to EU accession: tactical concessions (1997-2004)**

This section looks at the pre-accession period, which was characterised by mounting international pressure exerted on the Czech national elites to come up with reforms to ensure racial equality amongst ethnic groups in the country and, in particular, the social inclusion of the Roma. It examines the government's response to the demands of the international organisations. The government's recognition of the existence of discrimination against the Roma in the country and the proliferation of documents displaying the pro forma assurance of the government to tackle the issue should be viewed as a tactical concession rather than as the start of a socialisation process founded on a domestic political consensus that this is the right thing to do. The elites' window dressing attempts can be understood as a matching strategic response to the instrumental concerns that belied the demands of the international organisations and western states aiming to stem Roma migration westwards. Other contributing factors were the uneven and ad hoc manner in which the international demands were presented and the immense domestic political cost that would have accompanied a potential adoption of substantive racial equality measures.

1997 was marked by a peak of Roma emigration to Canada and to the UK where Czech Roma sought asylum upon arrival (Bancroft, 2005: 102-107). International criticism and calls for action on the part of the Czech government to ensure the protection of its Roma intensified (Romove Radio, 2000). Following on the demands of western states for concrete steps to further ameliorate the effects of the citizenship law, Council of Europe officials visited the country to assess the situation of Czech national minorities and to determine the Czech Republic's adherence to CoE obligations and commitments (ibid). The mounting international pressure forced the Czech elites to respond by commissioning the very first report on the situation of the Roma in the Czech Republic. The report which was ordered by Pavel Bratinka, the Minister without Portfolio and Chairman of the Government Council on National Minorities, is largely seen as a formal marker in the Czech policy toward its Roma minority. It shifted the language Czech elites employed before the international community from one of denial of institutional racism and indifference towards the Roma to a language that recognised Roma as a minority within Czech minorities in need of further assistance and protection. Bratinka and his deputy minister Viktor Dobal became the first Cabinet members "to admit publicly that racism and intolerance of national minorities is reflected in the work and attitudes of the police, the state bureaucracy, and even employers" (Lidove Noviny, 2000b). Bratinka claimed that the ultimate problem as to why Czech society was unresponsive to other nationalities was the absence of a unified government concept which would help suppress prejudice (ibid).

The Bratinka Report is important in so far as it became the first ministerial document that publicised data on the discrimination and social exclusion Roma faced and criticised the government suggesting that the civic principle approach to dealing with minorities in the republic had failed the Roma (Czech Government, 1997). In it the government conceded that international criticism was substantiated and Roma emigration was largely the outcome of high societal hostility and opposition to possible integrative measures (ibid). Initially, the government rejected the report because, in Dobal's opinion, "none of the ministers realised how serious the situation is" and because it was not "typical government material" as it emphasised positive developments by the government "too little" and criticised "too much" its inaction (Romove Radio, 2000). However, only two months later in the wake of the newly

released Council of Europe report on the situation regarding racism and intolerance in the Czech Republic and facing the threat of UK's re-introduction of visa requirements for Czechs, the very ministers who opposed the Bratinka report quickly accepted its findings (Lidove Noviny, 2000b and Perlez, 1997). A direct consequence of the Bratinka report was the formation of a new advisory body, the Inter-Ministerial Commission for Romany Community Affairs (IMC), whose responsibilities were to assist the government by proposing new policies aiming to enhance Romani integration into Czech society.

The actions of the Czech political elites appear to suggest the formal abandonment of the 'civic approach' in regards to the Roma and the start of a new approach in which the Roma were constructed as a minority in need of greater support than other minority groups. Such an interpretation, however, is misleading. The elites' behaviour should be understood instead as a tactical response to the international community that was driven exclusively by instrumental rationality. The Czech government did not initiate substantive reforms in the area of racial equality and social integration and the IMC was nothing more than a shell institution, which was underfunded, devoid of decision-making powers and with dubiously selected Romani representatives (Vermeersch, 2006: 84 and OSI, 2001:124). The government's public acknowledgment of racial discrimination should be seen as nothing more than an attempt at mimicking the language of international organisations and western states while the creation of the IMC an act of window dressing to satisfy their demands.

The behaviour of the ruling elites demonstrated a fundamental lack of political will, which can be explained by societal opposition and hostility to the idea of substantive equality and by the duplicitous approach European institutions and western states used in their dealings with the Czech Republic. The latter requires further elaboration. While many western states employed a human-rights discourse to pressure the Czech government to ensure racial equality, it was easy to discern that the concerns for Roma wellbeing were of a rather pragmatic nature and revolved around stemming Roma emigration. The UK government is a case in point. While recognising the discrimination and vulnerable position of Roma in the Czech Republic, it domestically encouraged the framing of the newly arrived Czech Roma as economic migrants and detained many of them questioning their asylum seeker

claims (Romove Radio, 2000). Other western states like Germany also employed this double approach of criticising the Czech Republic for violating the rights of its Roma citizens but domestically delegitimising the claims of Roma refugees to divest themselves of the responsibilities such categorisation would entail. This treatment which became a common West European response to follow up attempts by CEE Roma to flee their countries conflates the distinction between norm violators and norm entrepreneurs and contributes to explaining why norm socialisation never took off. Western governments similarly to European organisations should have behaved as consistent norm promoters according to the norm life cycle model because they were seen as having a certain “moral stature” since had already embedded the norm in their domestic laws and institutions (Finnemore and Sikkink, 1998: 901). The empirical evidence, however, shows that on the one hand they behaved like norm entrepreneurs in their bi-lateral dealings with the Czech government by demanding political and social rights for the Roma. On the other hand, their actions towards asylum-seeking Roma in their own states completely undermined their high claims of respect and commitment to the norm.

#### *The illusion of norm acceptance*

Laura Cashman (2008) argues that the formal approval of the Czech Republic for EU accession combined with the persisting international pressure on the Czech government to contain Roma emigration triggered the beginning of a more coherent and long-term pro-Romani policy. At first glance, it appears that the actions of the Czech government support the claim. The annual accession reports on the Czech Republic between 1998 and 2002 show that the European Commission increasingly demanded action to improve the situation of the Roma minority. From the beginning the Commission framed the Roma as a socially and institutionally discriminated minority joining the rest of the transnational actors in criticising the government for its inaction in cases of racially motivated violence and for perpetrating spatial and educational segregation (European Commission, 1998: 11 and 1999: 16-17). Using conditionality as its leverage, it mandated the formulation of a new comprehensive policy to fight discrimination and social exclusion (ibid).

The government responded by designing the Concept for the integration of the Romani community in 2000 (2000 Concept hereafter), which it heralded as the

beginning of a new long-term policy initiative. The overarching goal of the 2000 Concept was to achieve “conflict-free coexistence of the Romani community” with the Czech majority, which would depend on the fulfilment of a variety of other socio-economic goals amongst which was the “removal of all forms of discrimination” (Czech Government, 2000). The problem with the drafting of the 2000 Concept is that unlike in the UK and US cases, the process was devoid of discussions about the moral evil of ethnic discrimination and segregation. Instead the Concept was meant to be a political statement that mirrored the language in the Commission’s reports without genuine political will (as the drafting of the anti-discrimination law shows) for new race relations legislation. The evidence suggests that the single reason for the creation of the 2000 Concept was instrumental and concerned the ensuring of compliance with the accession criteria. This was made clear in the conclusion of the Concept, in which the government declared that the goals laid out in the Concept “will have a significant influence on the assessment of the EU Committee for the Czech Republic. In its last appraisal report this Committee was critical about the current manner of co-existence between the majority and the Roma. The report to be made in autumn 2000 will be *crucial* for the entry of the Czech Republic to the EU. In this sense, the government solution of the integration of the Roma into society will *influence* the integration of the Czech Republic into Europe” (ibid, my emphasis).

In the pre-accession period, the Government persistently continued ‘talking the talk’ of the European institutions. The content of the updated 2002 Concept continued to proclaim that the human rights of the Roma, their nationality and socio-economic and cultural integration were key priorities. The overall goal, according to the document was the need to ensure that the Roma were able to exercise their citizenship rights “fully and without discrimination” (Czech Government, 2002). Domestically, however, actual violations against the Romani minority continued to grow and to be marked by the government’s characteristic unwillingness to take action to protect the Romani communities.<sup>12</sup>

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<sup>12</sup>In 2001 the OSI reported that polls showed negative attitudes towards Roma and membership in racist organizations in the Czech Republic was on the rise (OSI. 2001. Minority protection in the Czech Republic.)

Generous promises for the protection and integration of the Roma minority continued to dominate the discourse around the fulfilment of the political criteria in the context of the approaching accession. Assurances were given for the adoption of comprehensive racial anti-discrimination legislation that would transpose the Race Equality Directive in order to ensure the general institutional safeguarding of the race anti-discrimination norm and to employ it as a specific mechanism for Roma protection from discrimination. The Czech government even proposed affirmative action to eliminate racial discrimination in all social fields basing its decision on the recommendation of such action by RED, CERD and FCNM and categorising Roma as historically disadvantaged group.

In the pre-accession period the Czech government appeared to comply procedurally with the institutionalisation of the race anti-discrimination norm. It ratified the instruments for combating discrimination in the two main international human rights systems, the United Nations and the Council of Europe. The government continued to affirm before international bodies the three-fold approach to Roma integration –human rights, minority rights and socio-economic measures - amongst which the human rights perspective emphasising protection from discrimination was framed as a prerequisite for the successful integration project (Czech Government, 2006 and Czech Minister for Human Rights, 2009). It also decided to participate in the Decade of Roma Inclusion in an attempt to showcase its commitment to the principles of equal treatment and integration.

In actuality the ratification of the international conventions and the adoption of the political documents for Roma integration did not contribute to the domestic institutionalisation of the racial anti-discrimination norm. The human rights discourse the government employed in its discourse at the supranational level was not replicated domestically. These discursive and behavioural contradictions, which are examined in more detail next, show that no norm socialisation process was taking place and suggest the government was not planning any legislative changes that would provide protection from discrimination. In particular, the circumstances surrounding the transposition of the Race Equality Directive, which is discussed in the following section, demonstrate that the ruling elites did not simply lack political commitment but were in fact hostile towards the enshrinement of the new norm into national law.

The behaviour of the Czech government is unsurprising considering the prevailing anti-Roma sentiment in the country and the European Commission's own ambivalent attempts at political conditionality. The Commission's behaviour is particularly puzzling and contradicts its role of a norm enterprising actor that the norm life cycle model assigns it. One of the main problems was the Commission's inconsistency in defining what constituted compliance with the "respect for and protection of minorities" criterion (Copenhagen Criteria, 1993). While the annual progress reports consistently brought up the issue of the institutional and social discrimination Roma in the Czech Republic endure, in each report the Commission concluded that despite these violations, which breached the minority protection requirement for accession, the Czech Republic nonetheless fulfilled the Copenhagen criteria. Furthermore, the Commission regularly highlighted that the transposition of the Equality Directives into national legislation had to be completed prior to the 2004 accession date (Georgescu, 2009: 48). The Czech government did not meet the deadline and therefore the Czech Republic did not comply with the *acquis*. Yet the accession went ahead, which suggests the protection from discrimination was a low priority for the Commission, something that was easily detected by the Czech elites and emboldened them in their norm subversive actions which became increasingly obvious in the post-accession years.

### **Problematising the domestic acceptance of the racial anti-discrimination norm**

This section analyses selected key developments that expose the norm subversive agenda of Czech elites. It examines the events surrounding the transposition of the equality directives, the setup of the new anti-discrimination bodies and those institutions that aim to protect the rights of minorities, the amplification of the norm's rejection at the local level, and Czech resistance to comply with the *D.H.* verdict. These issues have been selected because they most prominently display the domestic denial of the norm and demonstrate the failure of the norm diffusion process.

#### *Anti-discrimination legislation*

The adoption of a new and comprehensive anti-discrimination law by the Czech government was seen as a matter of political urgency for transnational NGOs and European institutions throughout the 2000s because the existing Czech

legislation provided inadequate protection as it consisted of *ad hoc* provisions limited to the area of employment.<sup>13</sup> It lacked definitions of the different forms of discrimination (direct and indirect discrimination, harassment and victimisation) and many areas including education, access to health care and social security, had no anti-discrimination provisions. The Czech system also lacked a specialised independent body to assist victims of discrimination (Boucková, 2007). In 2002, the Czech government promised to draft a new anti-discrimination bill by the end of the year but a draft did not materialise until 2004 (OSF, 2002: 146). The Anti-discrimination Bill was submitted to the Chamber of Deputies in the Czech Parliament in January 2005 where it was adopted, by the thin margin of one vote. In January 2006, however, the Senate rejected the Bill, “allegedly because it would lead to unwanted cases of positive discrimination” (Council of Europe, 2006). The bill was passed around in various forms through Parliament until 2008 when it was finally approved by the Chamber of Deputies and the Senate and sent to President Klaus who vetoed it (Czech Republic, 2008). Klaus who largely shaped the anti-EU domestic discourse throughout his 12-year tenure as president justified his refusal to sign the bill claiming that the current legislation was adequate (Czech Republic, 2009). His veto delayed the adoption of the bill for over a year when Parliament finally overrode the veto under mounting pressure from the European Commission, which threatened to initiate sanctions that would have resulted in substantial financial penalties (Milena Štráfeldová, 2009).

The fact that the Czech Republic was the last member state to transpose the equality directives demonstrates by itself the marked absence of political will and willingness of the national elites to codify the norm. The drawn out nearly decade-long journey of the bill’s enactment into law reveals the double standard the government continued to employ on the issue in the post-accession years. On the one hand, the norm was affirmed and the need for anti-discrimination law highlighted in all updated Roma integration strategies. On the other, the bill was persistently opposed and neglected in domestic parliamentary discussions. As EU pressure

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<sup>13</sup>See, for example, ECRI. 2009. Report on the Czech Republic (fourth monitoring cycle) p. 16; CoE. 2006. Follow-up report on the Czech Republic (2003 – 2005). Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights. CommDH (2006) 15. Strasbourg, Available at [https://wcd.coe.int/ViewDoc.jsp?id=984269&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P449\\_68356](https://wcd.coe.int/ViewDoc.jsp?id=984269&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P449_68356) (accessed on 2 December 2015).



intensified, the ruling elites dropped the pretence of norm commitment, openly displayed their hostility towards the norm and resisted the Commission's demands until the time when the potential political and economic losses left the government with no other route except to pass the legislation. In other words, the anti-discrimination law was adopted because 'this was the only option' rather than 'because it was the right thing to do' suggesting that it was driven by instrumental rationality only and significantly harming the norm's prospects of domestic impact.

#### *Ineffective anti-discrimination institutional framework*

In the early and mid-2000s institutions whose goal was to monitor the protection from discrimination of the Roma minority and to advance its integration were formed rather quickly. The construction of these institutions was the outcome of the Czech government's efforts to showcase the tangible steps it was taking to improve the situation of the minority. These bodies were predominantly and purposely designed to have no power of their own and no mechanisms to shape anti-discrimination policy, to conduct independent investigation and to assist victims of discrimination. They should be viewed as shell institutions that are unable to advance deeper and wider norm acceptance. For example, the Council for Roma Minority Affairs (previously the Inter-ministerial Roma Commission) established in 1997, is the only Roma-specific body that advises and recommends Roma integration policies. However, the Council is not independent from the government and has only advisory functions.<sup>14</sup> The Council's attempt to establish a separate Office for Ethnic Equality and Integration with its own budget and legislative powers was met with opposition by the cabinet and eventually abandoned (OSI, 2002:146). As the former Czech Commissioner for Human Rights, Peter Uhl comments, the government formally recognised and approved the principle of Roma integration, of which anti-discrimination is an essential component, but not the administrative and legislative support to execute it, which yet again points to the entrenched lack of political will to challenge the status quo (OSI, 2001:168-169).

All other official bodies that deal with issues of discrimination – the Council for Human Rights and the Council for National Minorities set up in 1998 and 2001

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<sup>14</sup> See the Inter-ministerial Commission for Roma Community Affairs website <http://www.vlada.cz/en/ppov/zalezitosti-romske-komunity/the-council-for-roma-community-affairs--50634/> (accessed on 1 March 2016).

respectively – are also relegated to having an advisory role.<sup>15</sup> While their reports and recommendations are treated as government policy documents instead of independent assessments, the bodies remain isolated from ministerial meetings where the political priorities and policies are set (US Department of State, 2000). The Office of the Ombudsman set up in 1999 is the only mechanism that can take initiative and carry out independent investigations on behalf of potential victims of discrimination. However, it does not possess sanctioning powers on its own, which renders the institution “toothless” in terms of providing actual remedy to victims. The government’s engineering of these token institutions with virtually no political legitimacy and inability to participate in the policy agenda-setting process provides further evidence that the national political elites were not involved in norm socialisation, which is the vehicle that ensures norm diffusion.

#### *Dynamics between the national and local level*

The dynamics between authorities at the national and local levels provide additional understanding about the depth of hostility towards the new norm. While at the national level the elites have had to restrain their language and actions to keep up appearances before the international community, local elites have largely been left free to breach the new norm. In practice when it comes to domestic practices I argue that the political actors at both levels mutually reinforce differential treatment on the basis of ethnicity. The Romani communities do not enjoy protection from the national authorities and only in the rare instances when international actors draw attention to particularly brazen cases of discrimination, are national elites compelled to get involved. The fragmented and decentralised system of governance in the country has facilitated the norm subverting dynamic between the national and local authorities providing an excuse for the former not to interfere in local affairs. The developments at the local level also demonstrate that international pressure influences domestic norm conformity minimally when the elites oppose the new norm.

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<sup>15</sup> See the Council for Human Rights website <http://www.vlada.cz/en/ppov/rhp/government-council-for-human-rights-50632/> and the Council for National Minorities website <http://www.vlada.cz/en/pracovni-a-poradni-organy-vlady/rnm/historie-a-soucasnost-rady-en-16666/> (accessed on 1 March 2016).

The widely publicised example of the apartheid wall built in Usti nad Labem in 1999 shows how little influence transnational norm entrepreneurs have over domestic elites who are impervious to change. The wall was erected overnight between a Romani apartment complex and their neighbours by the order of the city council. The city mayor framed the wall as a “fence” that stood as a symbol of “law and order” built as much for the protection of Roma as to appease their Czech neighbours (The NYTimes, 1999a and US Department of State, 1999). The priority of the local authorities was to satisfy the ethnic Czech residents’ demands, which put the national government in a predicament. The government was facing direct pressure from EU officials overseeing the intended enlargement to have the wall removed while seeking a way to appease the local authorities and the ethnic majority. A compromise was achieved when the government paid the local authorities to remove the wall in exchange for the investment of the funds into initiatives to improve the social conditions. The local council consented but announced that it would use the funds to buy up the homes of those Czechs who did not wish to live next to the Roma settlement, an initiative that contributed to the long-term ghettoisation and spatial segregation of the Romani population (The NYTimes, 1999b). The case shows that as far as international outcry goes, once the wall was dismantled, it died out; the national elites managed to satisfy international and local officials, and the local officials satisfied the ethnic Czechs who benefitted the most as they were given the opportunity to move to more desirable parts of town. The ultimate losers were the Romani families who not only continued to live in the substandard municipal housing complex but were denied co-existence with the non-Roma population, which intensified their marginalisation. In sum, the role the national elites play in present day Czech Republic is comparable to that of the US federal authorities after the demise of the First Reconstruction. They act mainly as tacit enablers whose lack of political will to implement the anti-discrimination legislation and the policy of integration is responsible for the continued violation of the human rights of Czech Roma.

More recent examples of developments at the local level suggest that the current situation is unlikely to change soon. In 2012, the US Department of State reported that in spite of the new legislation that explicitly prohibits discrimination in housing on ethnic grounds, some municipalities make social housing decisions on

criteria that put Roma families at a disadvantage (e.g., the applicant's reputation at previous residence) (US Department of State, 2012). That same year Parliament passed a law that gave municipalities the authority to expel residents for repeated misdemeanour offences. Critics interpreted the legislation, as a revival of the citizenship law and an obvious attempt to target Romani residents (ibid).

The interplay between local and national officials has amplified the rejection of the anti-discrimination norm by the political elites in the post accession years. Repeat attempts at the local level to reinforce spatial segregation in the form of erecting fences and walls are no longer only ignored or tacitly approved by national elites. Without the restraints of EU conditionality, national elites have become more vocal in justifying acts of discrimination inflicted upon Romani communities (Minority Rights Group International, 2008). For example, the “*neprisposobimi*” discourse, which was started by two local mayors in Moravia and Bohemia and exclusively labels Roma as ‘inadaptable’, has been taken up by the media and nationally elected representatives including senior officials from the government (Interview with an expert from the Czech Agency for Social Inclusion, 2014). The assignment of collective blame on the Romani minority for social ills continues to be popular in Czech society and a convenient political tool that is utilised by local and national centre-right elites.

To sum up, political actors across the national and local levels mutually reinforce the old norms of discrimination and segregation domestically. While in the pre-accession period the worst displays of discrimination were somewhat mitigated, in the absence of strong material leverage from above, this is no longer the case. The post-accession political developments in the Czech Republic are analogous to those at the end of the First Reconstruction when the federal government withdrew its protection from the freedpersons and left them exposed to the whims of overwhelmingly hostile state and local officials who were keen to promote the opposite norms of segregation and discrimination. The decentralised governance system in the Czech Republic which is similar to the US federal system, gives substantial decision-making power to the municipalities and contributes to the invalidation of the new norm.

*The case of D.H. and Others v. Czech Republic: desegregation with all deliberate delay (2007-2014)*

No other case better illustrates the domestic failure of the racial anti-discrimination norm cascade in the Czech Republic than the verdict implementation of the 2007 case of *D.H. and Others v. Czech Republic*. Although as mentioned previously, from a legal point the case was a qualified success, its wider social implications have thus far been extremely limited. These limitations confirm that the racial anti-discrimination norm continues to be domestically contested and denied. The analysis of the domestic implementation of the judgment shows that the Czech ruling elites have made successive perfunctory legislative changes that have not triggered educational desegregation of the American kind. The few attempts of a handful of more liberally-minded officials to initiate school desegregation were met with extreme social hostility. In the absence of high level political support as in the US case, these reforms were stifled from the beginning. The tracing of the lack of implementation of *D.H.* demonstrates the limited salience of the anti-discrimination norm and shows that the two main factors that preclude proper norm internalisation in the Czech Republic are the high level of societal resistance to the norm and the lack of political will within successive governments to embrace politically unpopular reforms.

Between 2007 and 2010 the Ministry of Education, the main organ charged with the implementation of the *D.H.* case, saw three ministers with mildly varying views on anti-discrimination reforms come and go. Minister Liška who headed the institution in 2007 has been characterised by government officials and civil society representatives as a relatively progressive individual who unlike his successors publicly acknowledged that the current educational system contains elements of segregation that result in the wrong enrolment of Romani children in special schools<sup>16</sup> (Interviews with a senior advisor in the Ministry of Education and representatives from the Office of the Czech Ombudsman, 2014; Hrubá, 2008: 37 and Johnston, 2009). Although under Liška, the Ministry did not engage in plans for a more radical reform like disbanding the system of practical schools or freezing admission to these schools, the Ministry did show willingness to work with the pro-

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<sup>16</sup> The special schools were eventually renamed 'practical' schools but *de facto* have retained their functions. The practical schools continue to enroll a disproportionately high number of Romani pupils under a reduced educational curriculum, which amounts to providing substandard education.

Roma advocacy network, Together to School,<sup>17</sup> to coin a new action plan and legislative amendments that would strengthen the anti-discrimination provisions in the 2004 School Act. The Ministry also opened the door for a public dialogue on the need for systemic changes in the educational system including a move towards inclusive education for children with disabilities and social disadvantages. Czech pro-Roma activists claim that Liška's team laid the foundation for potential reforms but did not have sufficient time to execute any of the intended changes (ibid).

According to a senior official in the Ministry of Education, Liška's reformist talk met with strong domestic objection against the abolition of practical schools resulting from the quick mobilisation of the special education establishment, which created its own association that has emerged as one of the most vocal and influential voices in shaping popular resistance to inclusive education measures (Interview with a senior official from the Ministry of Education, 2014). In 2010, in response to demands from the CoE Committee of Ministers the Czech government adopted the National Action Plan for Inclusive Education (NAPIE). In an extra gesture of goodwill to the CoE, the then Education Minister Kopicova sent a letter to all practical schools calling on them to refuse enrolment of all children without genuine disability. This action reportedly met with an angry protest from educators and, in turn, the Ministry quickly abandoned its reformist tendencies (Open Society Justice Initiative, Greek Helsinki Monitor and European Roma Rights Centre, 2011: 6-7). In response to public opposition, the Ministry went as far as to declare that seeking radical solutions was unnecessary and the lower intellect of a high number of Romani children is a fact that simply needs to be accepted. It also closed the Ministry's education reform group and demoted the key ministerial implementer of the D.H. judgment (ibid). Even non-desegregation measures like the proposal for elective Romanes language classes faced staunch opposition and were stalled (Czech Press Agency, 2010).

Education Minister Dobeš who took office after the parliamentary election in 2010 retreated further from norm commitments made by the previous minister. Dobeš abandoned planned public awareness raising campaigns against racial discrimination and retreated from plans to amend education decrees that allow the

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<sup>17</sup> Together to School is a coalition of OSF Czech Republic, the European Roma Rights Center and the Roma Education Fund.

placement of children without disability in classes established specifically for students with disabilities (Open Society Justice Initiative, Greek Helsinki Monitor and European Roma Rights Centre, 2011: 9-11). Several officials tasked with monitoring the school desegregation efforts appear to have contested the norm negation within and ended up publicly resigning over the issue. (Romea, 2010). Allegations included the lack of genuine desire of the Ministry to meet its international obligations under *D.H.* and its continuing tendency to come up with inadequate plans for school integration (Sucha, 2010).

Currently, educational discrimination remains the norm in the Czech Republic both in legislation and in practice. In 2011, the government-invited group of experts charged with the implementation of NAPIE collectively resigned blaming Minister Dobeš for sabotaging the inclusion of Romani students and disabled students into mainstream schools (Czech Press Agency, 2011). Facing international embarrassment and increasing demands for action from the Council of Europe, the government adopted the Strategy for the Fight Against Social Exclusion, 2011-2015, which is premised on the transition of all children into mainstream schools (Open Society Justice Initiative and European Roma Rights Centre, 2011). The 2011 Strategy, however, is not binding and contradicts NAPIE, which is markedly more conservative in its approach to school inclusion. The 2011 Strategy has been heavily opposed by Czech society. In February 2013, the government organised a public hearing in response to a petition of over 70,000 citizens for the preservation of the practical schools' system. During the hearing most Czech officials backed down from mainstreaming education and went as far as calling practical schools "irreplaceable" and their closing "catastrophic" (Romea, 2013). Even already adopted legislative amendments to constrain the admission of non-disabled children into practical schools have been delayed by several years or dropped completely (Open Society Justice Initiative, COSIV, European Roma Rights Centre and Open Society Fund – Prague, 2013). The financing of practical schools, which often receive twice the amount per student as ordinary schools by local authorities, and the lack of supplemental financing for social integration in mainstream schools continue to create powerful incentives for maintaining a high level of school segregation (Kostlán, 2013).

Not much is likely to change in the foreseeable future despite the coming to power of PM Sobotka's centre-left government and its re-establishment of the Ministry of Human Rights whose minister has announced his support for inclusive education. The new Minister of Education who is characterised as populist, uninterested in systemic changes to strengthen equal access to quality education, and antagonistic towards the Minister of Human Rights is unlikely to move forward with substantial changes (Interview with senior official, Ministry of Education, 2014 and interviews with representatives of the Roma Education Fund and COSIV, 2014). The unpopularity and opposition to the *D.H.* verdict, which has been framed in mainstream media and societal discourses as foreign, invasive and unjust, significantly contribute to the status quo (ibid).

The *D.H.* post-litigation developments confirm that the racial anti-discrimination norm never cascaded to the domestic level as the norm life cycle model predicts. Considering that the Czech government has been unwilling to comply with the *D.H.* judgement even on legislative grounds alone, indicates that the anti-discrimination norm in relation to the Roma has not achieved formal codification despite continuing normative pressure from the CoE Committee of Ministers and material pressure by the European Commission, which in 2012 halted structural funds for education citing insufficient attempts to make systemic changes in the educational system (Open Society Justice Initiative, COSIV, European Roma Rights Centre and Open Society Fund – Prague, 2012). Although the Strasbourg judgment has “uncorked” the issue of separate education in the Czech Republic, supranational efforts of norm socialisation and material pressure have failed to produce the expected outcome of norm diffusion, which in turn should have led to norm internalisation (Finnemore and Sikkink, 1998: 902-904). Instead, the supranational level at which the verdict was delivered has contributed to the domestic rejection of the norm. The ECtHR ruling has been perceived by Czech society as foreign and posing undue burden on the Czech state. It could be argued that if the Czech Constitutional Court had delivered the verdict instead, its implementation would have been more likely as in the *Brown vs. Board of Education* case because it would have come from a domestic court.

On the one hand, the *Brown* verdict implementation developments suggest that the level at which a court is located matters little in terms of judgment



compliance if the executive and legislative branches of the government take no action to enforce it. Implementing the *Brown* ruling in thousands of local school districts, as Frank Brown observes, “required local plaintiffs, money, and data” (2004: 182). It was not until a decade later after Congress enacted the Civil Rights Act in 1964 that school desegregation actually began. Crucial for desegregation was the clause in the Act which authorised the US Attorney General to bring legal action against segregated school districts on behalf of plaintiffs seeking school integration, free of charge (ibid). The legislation also authorised the Department of Education to collect data on school enrolment by race which made it possible to prove the existence of racial segregation in a court of law (ibid). In the US case, therefore, the national elites enacted a piece of legislation that gave the victims of educational segregation and the relevant federal authorities the tools to dismantle state-imposed segregation. In the Czech case, the national political elites have been reluctant and in certain instances purposefully stalled the amending of the School Act.

On the other hand, the level at which a verdict is issued still matters. When the US Supreme publicly recognised the anti-segregation norm, the ruling, along with the demands of African American activists for action, put pressure upon the political elites in the other two branches to work towards compliance with the verdict. In the Czech case, a hugely unpopular verdict delivered by a little known European legal body with weak compliance mechanisms has meant that the national elites have had very little impetus for actual compliance. Moreover, in the United States which follows the common law system, local, state and federal courts have had to uphold the racial equality precedent in *Brown* in subsequent lawsuits addressing school segregation in the decades after *Brown*. In the Czech Republic which follows civil law, there are no mechanisms that can in practice obligate the Czech judiciary to uphold the *D.H.* anti-discrimination principle should similar lawsuits be launched in the Czech courts. In sum, in the Czech Republic the unpopularity of any educational reform that phases out practical schools with domestic society, weak grassroots advocacy work to counter the path dependence and normalisation of educational apartheid and the virtual absence of Roma voices demanding political action have created an environment in which the ruling political elite benefits the most by taking no action against ethnic discrimination and hence maintaining the status quo.

## Conclusion

A variety of factors contribute to the absence of domestic impact of the racial anti-discrimination norm in the Czech Republic. The resistance to international demands and monitoring exemplified by the strong societal opposition to implementation of the *D.H.* judgment combined with an equally strong societal discourse which affirms long-standing institutional structures that perpetuate racial inequality is a major deterrent to normative change. The clash of the racial anti-discrimination norm with long-held anti-Roma attitudes, which have been exacerbated in the recent times by the financial crisis of 2007-2008, impede internalisation. The unwillingness displayed by senior government administrators toward the introduction of major legislative changes to close loopholes that allow for systemic discrimination, especially in the area of education and the setup of token anti-discrimination bodies also reveal that the norm was never accepted. The conviction that the Roma minority ought to enjoy full citizenship rights is on the whole missing amongst political elites and the very notion continues to be challenged within state institutions. The empirical evidence has shown that the formal acceptance of the racial anti-discrimination norm before the international community represents a concerted effort at elites' window dressing. In fact, the norm was never institutionally accepted and continues to be in a state of constant domestic rejection.

More generally, the evidence confirms that the behaviour and ideational commitment of national political elites determine the success of a new norm's acceptance. If these are absent and the compliance of political elites is exclusively driven by a logic of consequences, the cascading process can be seriously disrupted and domestic norm acceptance almost never takes place. The level at which a new norm is constructed can be an important enabling condition but only if the ruling political elites are justice-driven. The US and UK cases have shown that norms that are constructed domestically have a high chance of permanent internalisation provided that the elites willingly take on the role of institutional norm entrepreneurs. The Czech case in contrast suggests that disputed norms that are perceived as imposed from supranational institutions are very unlikely to gain domestic legitimacy unless the ruling elites choose to enforce the norms. When domestic

political elites are hostile to the new norm and advance countervailing norms the level at which the norm was constructed is irrelevant.

## Chapter Five

### Domestic norm internalisation II: Roma politics in Hungary

This chapter continues to shed light on the conditions that account for the degree of domestic norm conformity. The Hungarian case examined here evidences the main claim running through the thesis that the agency of national elites is an important determinant for the degree of embeddedness of a new norm into the social and political order of states. The Hungarian analysis re-confirms the findings in the US case where I suggested that an analytical distinction ought to be made between the national and the subnational level and where the case empirics supported Cortell and Davis's claim that the setup of a state's governance framework (centralised or decentralised) acts as an intervening variable that facilitates or inhibits the internalisation of the new norm at the sub-national level (2005). To recall, the analysis of the US case demonstrated that when national political elites view norm adoption as necessary and the government system is (even temporarily) centralised, the norm acceptance at the local level is greater. The process is reversed when the national government relinquishes its power. This case study shows that when political elites who display norm commitment act within a decentralised system, norm conformity at the local level is negligible. The post-2010 political developments in Hungary show that the centralisation of the government system can hasten the erosion of the new norm when national political elites refuse to embrace it.

The Hungarian case largely mirrors the US developments during the First Reconstruction. Here I argue that successive centre-left Hungarian governments throughout the 2000s, just like the earlier Radical Republicans in the 1870s, displayed strong commitment to the institutionalisation of the racial equality norm into legislation and national policy and to ensuring the political representation of the Romani minority within governing structures. Just as with the last Radical Republican administration from 1869 to 1877, which faced an economic downturn and corruption scandals, the final years in government of the Hungarian central-left ruling elites were also marred by an economic recession and a series of corruption scandals. In both cases, these events led to rising social tensions and the eventual abandonment of the racial equality agenda by the institutional norm entrepreneurs.

With the coming to power of the centre-right FIDESZ party, the norm's prominence in Hungary has been eroded. The norm has disappeared from the public sphere leaving the Roma minority in a particularly precarious and vulnerable position. This scenario echoes the situation of the African Americans in the South during the Redemption period.

Still it should be noted that despite these notable similarities, the US and Hungarian cases are far from identical. During the First Reconstruction in the United States, the ruling elite was able to impose direct federal supervision upon state and local authorities. Until 2010 the Hungarian elites, however, governed within a radically fragmented and decentralised municipal system, which did not allow for substantial changes at the local level (Fekete, Lados, Pfeil and Szoboszlai, 2002). The racial anti-discrimination norm is now well-institutionalised in the US political order. But in Hungary, the norm's internalisation remains incomplete because the gains the set of governing norm promoters made in the past decade has been undone by the succeeding ruling elites. It remains to be seen if and when, a change in Hungarian policy analogous to the Civil Rights era will occur.

Besides the US case, the Hungarian case most clearly challenges the assumed linear pattern of the norm life cycle model. The empirical evidence disputes the presumed linearity and proposes a dynamic model, in which the norm can move forward and backward and stay at a standstill for long periods. The Hungarian case together with the US study shows that norms can undergo dramatic leaps forward, serious setbacks and long-lasting stagnation. At the extreme, the norm can experience a civic death, as developments during the First Reconstruction in the US and the current FIDESZ rule in Hungary demonstrate. The US case also shows that the norm can re-emerge with the presence of new triggers such as highly activist social movements and institutional norm entrepreneurs sympathetic to the norm and willing to use their political influence to embed it in the laws and policies of the state. This empirical evidence calls for the norm life cycle model to be re-designed to reflect the complexity and dynamic nature of the life of norms.

This chapter examines domestic compliance with the racial anti-discrimination norm by tracing the development of Roma policy in Hungary from the 1990s until present. It begins by sketching Hungary's ambivalent approach to

racial equality in the 1990s. The analysis shows that during that period, racial equality was not on the government's agenda. At that time the main priority was the creation of minority rights legislation, which was drafted not out of concerns for minority groups in Hungary but to ensure the wellbeing and cultural autonomy of those ethnic Hungarians living in neighbouring states. The case study then turns to the 2000s, the time when the racial anti-discrimination norm reached a high level of prominence in Hungary. This prominence was due to extensive and consistent changes in policy and legislation made by Roma and non-Roma institutional norm entrepreneurs within the Centre-left coalition. These norm entrepreneurs placed a special emphasis on educational equality and integration. Yet despite the progressive and comprehensive legislative and policy reforms at the national level, the evidence suggests that segregationist and discriminatory practices at the local level either remained the same or increased. This occurred because municipal authorities used their substantial power within the decentralised system to circumvent or ignore the new anti-discrimination laws and policies. The findings link to and validate Beth Simmons' theorising about barriers posed by sub-national governments to new commitments to human rights laws undertaken at the national level (2009: 69). As Simmons would expect the majority of the Hungarian local governments strongly and persistently resisted what they saw as the national government's encroachment on their prerogatives and as the ultimate threat to the established social order and their political existence.

The chapter concludes by examining the gradual erosion of the norm in the late 2000s and its civic death with the establishment of PM Orbán's right-wing government in 2010. The Orbán government took the decision-making power away from the municipalities, an approach that has been described as an "obsession with centralisation" (Kornai, 2015 and Norwegian Helsinki Committee, 2013). The government also put aside the system of checks and balances including the independence of the judiciary, which had made progressive steps towards affirming racial equality in Hungarian case law in the previous decade (ibid). The sharp reversal of the pre-2010 policies and legislation by the current FIDESZ government has not only stalled the norm's progress but has made the issue of racial equality disappear from the domestic public domain. The post-2010 developments show that while a centralised government setup is hugely beneficial to norm enterprising

national elites for their norm institutionalisation agenda, centralisation can quicken the norm's demise when national elites oppose the new norm.

### **Norm ambiguity and norm contestation: Roma politics in the 1990s**

This section examines the behaviour and policy agenda of the Hungarian political elites in relation to racial equality in the early post-communist years. I suggest that similarly to the Czech elites, in this initial period the Hungarian authorities largely embraced the new norm formally. However, the implementation of the agreed anti-discrimination measures remained unfulfilled and the domestic political discourse was inconsistent with the government's commitments made before the international community. As in the Czech case, toward the end of the 1990s, EU conditionality emerged as a major factor that kept the racial anti-discrimination norm on the official agenda of successive governments on both sides of the political spectrum. Instrumental rationality accounted for the initial steps towards norm conformity. For example, the Hungarian Minorities Law was enacted largely out of concern for the ethnic Hungarians residing in neighbouring states. The Roma policies during this period showcased the government's concerns for the minority before international audiences while remaining unpublicized and unimplemented in Hungary. Yet, unlike their Czech counterparts, Hungarian elites displayed consistent effort to codify the rights of minorities. The emphasis during the early and mid-1990s was mostly on cultural autonomy. Very little attention was paid to anti-discrimination and social inclusion measures. Still, the Hungarian officials neither defied nor displayed the high level of hostility towards the norm that the Czech authorities did, a key difference that hinted at the possibility for eventual norm socialisation.

Unlike the Czech Republic which in the 1990s approached the situation of the Roma minority employing what has been referred to as the civic principle, Hungarian governments throughout the 1990s promoted Roma issues through a minority rights framework. This minority rights framework emphasised both Roma identity and cultural difference along with a degree of political autonomy evidenced in the creation of a separate political community with its own ethnic representation structures. Simultaneously, this was accompanied by official discourses on inclusion,

which were followed up by policies that formally set as their goal the reduction of societal discrimination against Roma communities.

Hungary was one of the first Council of Europe members to ratify the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages in 1995. The centre-left government at the time had already passed the Law on the Rights of National and Ethnic Minorities in 1993 presenting it as a display of Hungary's commitment to upholding its international obligations (ECRI, 1996: 5). International organisations generally regarded the Minorities Law as a progressive and ambitious piece of legislation because it established a system of elected local and national minority self-governments (MSGs) with authority over issues related to the culture, language and education of minority groups. The law also created the post of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities. But the actual role and functions of the Commissioner have been limited to monitoring and providing policy advice (Human Rights Watch/Helsinki, 1996: 2 and ECRI, 2004: 7).

On the one hand, the Minorities Law constitutes a departure from the communist assimilationist strategies while affirming that Hungarian minorities are "part of the sovereign people: integral elements of the state [and] their culture is a part of Hungarian culture" (Minorities Law, 1993, Para. 3(1)). Statements of senior political elites at the time also suggest consistency between legislation and political discourse in affirming the equality of Roma people with the rest of Hungarian citizens. Shortly after the Law's passage, PM Horn stressed that "Hungarian Gypsies are truly the children of our country, not fostered but born endowed with rights" (*AmaroDrom*, 1994: 2, quoted in Kovats, 1997: 59). On the other hand, the focus on minority autonomy and distinct minority cultures has been criticised for obfuscating the state's responsibility towards the particular needs of the Roma and detracting from the establishment of equal opportunities and socio-economic measures to counter the rapid spread of poverty among Romani communities in the 1990s (*ibid*). The promotion of a distinct and different Roma culture through the minority rights framework has continually risked reinforcing stereotypes that explain the socio-economic conditions of many Roma in terms of cultural difference rather than as the outcome of economic failure and unequal access to social goods, services and political representation.



In a more general sense, the Minorities Law has been criticised as having no intrinsic domestic value. Its intended purpose, some international observers have claimed, has been to boost Hungary's foreign policy objectives and image before Western states and European institutions (Human Rights Watch/Helsinki. 1996: 3). Meanwhile, it has been suggested that real commitment to minority rights, and the improvement of the Roma situation, never existed (ibid). This claim, which negates ideational commitment as an underlying motive for Hungary's minority protection legislation, is affirmed in the writings of the former Minorities Ombudsman, Jenő Kaltenbach. Kaltenbach provides further insights of the elites' motives behind the law's formulation. He claims that the creation of the Minorities Law was dictated by expectations and assumptions that the neighbouring countries with Hungarian nationals would embrace the reciprocity principle and make similar provisions by recognising at a minimum the cultural autonomy of Hungarian communities in Transylvania, Felvidék, Transcarpathia and Vojvodina (Kaltenbach, 2006:12). Related to this and particularly illuminating is the omission of the 'ethnic' minorities phrase from the initial draft of the law, which if sustained would not have recognised the Roma as a distinct minority. Schaft (1999) reports that the Roma were included in the Minorities Law only after vocal protests from Roma groups, which shows that the elites were reluctant to confer minority rights to the largest Hungarian minority.

The turning point in formulating a comprehensive Roma policy took place under the socialist-liberal government of PM Horn which was in power between 1994 and 1998. Unlike in the Czech case, initially the policy was predominantly motivated by the advocacy work of Roma activists who were highly critical of the previous government's failure to deal with racism and the rapid rise in unemployment amongst Roma. European political elites did not feel there was the need to exert much pressure on the government. Roma emigration from Hungary was not considered an issue and the Hungarian government had not attempted to produce anti-Roma laws as the Czech elites did. The first Roma-specific Government Resolution<sup>18</sup> established the Public Foundation for Gypsies in Hungary and the Coordination Council for Roma Affairs, which was vested with the authority to oversee Roma-related programmes (OSI, 2002). Although the resolution was only a statement of intentions and did not contain concrete proposals, it was nevertheless

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<sup>18</sup>Resolution 1120/1995 was passed in December 1995.

important. In it, the Hungarian government made the commitment to develop a specific Roma action plan. Indeed, two years later the government issued a formal Medium Term Action Plan for Improving the Living Standards of Gypsies (MTAP). This plan was drawn up, in part, through collaboration with the newly elected Roma national MSG. This collaboration suggests that the views of some Roma representatives were taken into account in the drafting process (Kovats, 2002/3). The MTAP passage put the anti-discrimination norm on the policy agenda. The document formally recognised the need to reduce prejudices and eliminate discrimination directed at the Roma by state and local authorities.

However, the drafting and adoption of the MTAP and the government's initial commitment to the policy were not matched by subsequent implementation assurances. Of particular importance are two pledges that never materialised. First, the provision for the development of public awareness activities to popularize the government's efforts to improve the situation of the Roma was never carried out. Second the government decided against creating new anti-discrimination measures and legal aid mechanisms (Órsos, 1998, quoted in OSI, 2002: 252). The non-allocation of resources to the already prepared programme for awareness raising activities, whose implementation would have coincided with the upcoming national elections, demonstrates that strategic considerations trumped commitments to politically unpopular causes. The incongruity between the MTAP's goal to tackle discrimination and the government's refusal to undertake legal reforms to strengthen and expand anti-discrimination provisions denote two things. First, the government displayed awareness and recognition of the norm. Second, the formal norm affirmation was not matched by acts towards actual internalisation in state and local structures, which in turn suggests limited norm adherence at the time.

The FIDESZ-FKGP<sup>19</sup> right-wing coalition led by PM Orbán came to power in 1998. Initially, it sought to reverse the slight gains made by the previous government by marginalising the Roma issue. Within weeks of coming to power, FIDESZ withdrew the MTAP for review (Kovats, 2002/3: 78). The reversal of political priorities regarding the Roma was also reflected in the general Government Programme. Insofar as minority measures were concerned, emphasis was once more

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<sup>19</sup>Alliance for Young Democrats (FIDESZ) and Independent Smallholders, Agrarian Workers and Civic Party (FKGP).

diverted at identity strengthening and cultural autonomy through the MSG mechanism. The Programme neither mentioned the situation of the Roma minority nor any measures to address ethnic discrimination and societal prejudices (OSI, 2002: 253). This silence demonstrates the government's backtracking on the actions of its predecessors. A substantial shift took place a year later when the government somewhat abruptly reinstated the MTAP, in a form that differed very little from the initial Action Plan of the socialist government. The shift in priorities in relation to the Roma minority at this juncture was predominantly the result of external material and normative pressure. This motivation is evidenced by documentation, in which the government recognised the high importance of Hungary's Roma policy for the EU and the Council of Europe (Hungarian Ministry of Foreign Affairs, 2000: 6-8). More specifically, the early Orbán government was compelled to bring back the MTAP upon signing the Accession Partnership. The Accession Partnership required Hungary to prioritise Roma integration with an emphasis on mainstream education and active measures to curb discrimination in society (European Council, 2001: 6). The FIDESZ government re-instated the MTAP because it required minimal effort. The MTAP was framed as a necessary policy of continuity with the previous government. But in reality the sole impetus behind the placement of the issue on its political agenda was clearly to move forward with the EU accession process.

Between 1998 and 2002 the FIDESZ-FKGP government undertook some positive developments such as the expansion of support grants for Roma pupils and the formation of the Roma Client Service Network for Anti-Discrimination<sup>20</sup>. Nevertheless, these remained limited to a minimal moderation of existing inequalities through increased reliance on EU funds in contrast to the effusive display of political will to Roma integration before international audiences. Domestic developments suggest a considerable deviation from the pledge to reduce discrimination against Roma in society. Despite the lobbying efforts by civil society groups and the Minorities Commissioner for a new anti-discrimination law in compliance with the newly passed equality directives, the government at the time decided against a comprehensive law. This decision was made despite the weak and scattered anti-discrimination provisions in different spheres, which were declaratory

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<sup>20</sup>The Network consisted of legal practices across Hungary that provided court representation in cases involving the discrimination of Roma persons on the grounds of ethnicity. The practices contracted with the government to provide these services to Roma clients for free.

and, except for the labour law, were not accompanied by specific sanctions. The considerable discrepancy between the presentation of Hungary's Roma policy in international forums and its domestic promotion also suggests limited norm salience. The 2002 OSI Report on Minority Protection in Hungary draws attention to the government's significant efforts to highlight its Roma initiative before international audiences including the production of a wide range of MTAP materials in English. Meanwhile, its domestic promotion lagged especially, among its key beneficiaries, the Romani communities (OSI, 2002: 261). More problematically, the approach the FIDESZ government employed domestically to publicize the MTAP stressed the financial costs without relating them to the goal of realising fundamental rights. This tactic essentially presented the Roma as a drain on public resources thus enhancing the countervailing societal norms of intolerance and prejudice against the minority (Interview with the Deputy President of the Office for National and Ethnic Minorities, quoted in OSI, 2002: 261).

The tracing of the Hungarian government's approach towards the race anti-discrimination norm vis-à-vis the Roma in this period shows that the formal recognition of the norm in Hungary, as in the Czech Republic, was a window dressing act. The policy measures adopted to ensure racial equality and integration were routinely ignored. This lack of follow through confirms that liberal and conservative elites assigned low political importance to the issue of racial equality and were instead driven by instrumental reasoning. The double approach of the government to the Romani minority - the formal discourse on inclusion and anti-discrimination accompanied by communication to the Hungarian public that invalidated it – was particularly pronounced during Orbán's initial leadership. This approach contributed to the already precarious status of Romani communities, which in general saw a decline in social position and faced increasing anti-sentiments from the ethnic majority during that period.<sup>21</sup> Still the Hungarian case shows that political elites did not display hostility towards the norm and neither did they target the Roma through legislative measures in the manner the Czech elites did. In fact, despite the pragmatic considerations behind the creation of Roma policy and the lack of

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<sup>21</sup> Research from the 1990s puts Roma at the top of the most unpopular minorities in Hungary surpassing Africans and Arabs. Only 18% were open to a friendship with a Romani person and 15% to have a Romani person as neighbour (Lendvay Judit and Szabó Ildikó. 1994. Zárt karokkal. Kisebbségkedvelés. *Heti Világ - Gazdaság* (29 April): 105–106).

consistent implementation of its provisions, the narrative suggests that the early governments, except the FIDESZ-FKGP coalition, displayed a relative openness to the Roma situation. This relative openness was evident in the willingness of the political elites to both adopt the first official policy on Roma and to negotiate with and make qualified room for the input of Roma representatives in the policy-making process.

### **Norm progress: Roma politics, 2002-2008**

The 2000s have been characterised as an unprecedented period of innovation in welfare reforms, a time in which ‘enlightened liberals’ in power embraced the human rights and equal opportunities paradigm to eliminate discriminatory practices against socially and ethnically marginalized groups (Interview with a legal expert, 2014 and interview with a former senior official from the Directorate General of Equal Opportunities, 2014). This section examines such claims in the context of the educational desegregation reforms. In so doing it confirms that the racial anti-discrimination norm gained noticeable momentum at the national level due to the efforts of Roma and non-Roma norm entrepreneurs within the ruling elite. The norm was codified into extensive anti-discrimination legislation and the government consistently affirmed its commitment to ethnic equality in international and domestic discourse. This development suggests a shift from a policy dominated by instrumentalism to one that incorporated a notion of appropriateness. In other words, the post-2002 policy developments reflected the understanding that norm conformity was the right thing to do. However, I argue that these considerable efforts that gave the impression of successful norm diffusion did not result in deeper internalisation at the local level. This was due to the decentralised and fragmented system of governance that concentrated considerable decision-making power in the hands of municipal authorities who commonly resisted the new government’s approach since they viewed the new desegregation measures as a political liability. The Hungarian developments between 2002 and 2008 in many aspects mirror those of the First Reconstruction. The institutional norm entrepreneurs at the national level in both cases displayed significant ideational commitment to the norm early on by enshrining the norm into law and in both cases the norm underwent incomplete institutionalisation. The incomplete institutionalisation was the outcome of the strong opposition to the norm by municipal officials and by the ethnic majority at the

local level and of the eventual decline of the elites' political will and commitment to the norm once material and ideational priorities diverged at the face of economic downturn and corruption scandals.

The liberal MSZP–SZDSZ<sup>22</sup> coalition which succeeded FIDESZ in 2002 quickly transposed the Race Equality Directives by passing comprehensive anti-discrimination legislation without noticeable pressure from the EU institutions to do so. This legislation signaled a normative shift in the politics of racial equality. The new administration, according to norm entrepreneurs involved in the drafting process, displayed a high degree of openness to the proposals of the anti-discrimination experts and worked with them to produce an effective and comprehensive law (Interview with a legal expert, 9 April 2014). The follow up appointment of a minister without portfolio responsible for equal opportunities confirms the government's commitment to the norm. The minister introduced the Equal Treatment Act and oversaw the development of the Roma social integration programme. Unlike the MTAP, which framed the anti-discrimination norm in an abstract manner, the Equal Treatment Act expressly named the decrease in discrimination and educational desegregation as a priority. The Act went further than the requirements set out in the Race Equality Directive. It explicitly allowed positive temporary measures to advance equal opportunities for disadvantaged groups. The commitment to the norm is also evident in the setup of the Equal Treatment Authority (ETA), the body which monitors and ensures compliance with the anti-discrimination law. Unlike its Czech counterpart, ETA has tangible powers. It can issue decisions that are binding upon the parties and can impose civil and administrative sanctions, mostly fines, upon violators of the anti-discrimination principle in addition to conducting *ex officio* investigations and providing policy advice (ECRI, 2004 and interview with a government official, the Equal Treatment Authority, 2014). The powers granted to ETA suggest that the government went beyond formal compliance with EU legislation and sought to create an institutional structure that would work independently to effectively enforce the principle of equal treatment.

The state of norm salience and internalisation can be approximated by the degree of incorporation of the norm into public discourse, policies and the daily

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<sup>22</sup> Hungarian Socialist Party (MSZP) and Alliance of Free Democrats (SZDSZ).

practices of state institutions. In a sharp departure from the FIDESZ Government Programme, which did not mention the Romani minority at all, the new government framed the integration of the Romani community in a way that echoed the language of the Civil Rights era and actively opposed long-standing practices of segregation at the local level. The government claimed that it

“pays special attention to the situation of Roma in schools, their acceptance and the *abolition of segregation*. We will review the system of redirections [into separate schools] and we will impede the exclusion of Roma children from school education by declaring them private students” (quoted in Nemeth, 2004:14, my emphasis).

The goal was re-stated in the 2004-2006 Government Programme after the change of the prime minister suggesting a consensus amongst the ruling Hungarian elite of the need for normative change. The document ensured that “We [the government] continue the efforts that ensure opportunity creation and freedom from discrimination for our Roma fellow countrymen in the field of education” and that the newly launched integration programmes would continue to ensure the teaching of “Roma and non-Roma children in an integrated way, not in separate classes...[and] to bring back the children that have been classified as disabled to the classes with regular curriculum” (quoted in Nemeth, 2004: 15). The statement is significant because it indicates norm continuity in the face of top leadership changes, consistency before international and domestic audiences despite widespread domestic resistance, and determination to confront local institutions over longstanding segregationist practices.

The government followed up its stated promises by directing much of its political capital towards strengthening anti-discrimination legislation and establishing programmes and new bodies to implement and supervise the education reforms which aimed to combat spatial school segregation, Roma only “catch up” classes with reduced curriculum, the relegation of Roma students to “private student” or homeschooling status, the streaming of Roma into dead-end short-term vocational schools and their channeling into special schools. The Minister of Education nominated a Commissioner for the Integration of Disadvantaged and Roma Children. Such positions, as seen in the previous study, tend to be token posts without decision-making power. But the Commissioner’s Office became a hub within the

Ministry, which was “impossible to circumvent” when it came to legislative amendments, new programmes and their execution and monitoring (ibid). Another important indicator that points to ideational motives is the inclusion of Roma professionals in the design of desegregation policies and programmes. Over 80% of the employees in the Commissioner’s Office were Roma. A high number of external Roma experts also participated in the policy formulations and Roma organisations were regularly consulted during the policy drafting process (ibid). The former Commissioner responsible for School Integration confirms this unprecedented opening of political space for Roma professionals. Although it is impossible to speculate about the extent to which the top MSZP–SZDSZ leaders personally identified with and believed in the desegregation initiative, there was a consensus amongst the ministers about providing support to the Commissioner’s Office. As a result, the Commissioner’s Office was given generous financial resources and left to draft and implement the education reforms at its own discretion (Interview with a former Commissioner responsible for School Integration, 2014).

The legislative reforms during that period show remarkable normative progress. The Commissioner for School Integration and his staff were the major drivers for the reforms. They proposed key amendments to the Act of Public Education (PEA), which were passed without much contestation in Parliament. The PEA amendments introduced important incentives for the desegregation of special schools by doubling the amount of per-capita funding for integrated pupils and by requiring municipalities to re-draw their school catchment areas if there was 25% or more disparity in the proportion of multiply disadvantaged children attending the various schools within their jurisdiction.<sup>23</sup> The amendments also narrowed the definition of disability to prevent the placement of children diagnosed with mild disability into a special school, tightened the requirements for “private pupil” (homeschooling) status, and made school participation in tendering for funding programmes and financial integration support conditioned upon the adoption of equal opportunity plans (Decade Watch, 2005-2006: 89, ECRI, 2009: 29 and Keller,

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<sup>23</sup> Reportedly, Roma represent about 50% of this category, which consists of children whose parents receive state assistance and who did not progress beyond primary school. The Roma children who are classified as multiply disadvantaged represent three-fourths of all Roma children in Hungary. (Interview with a former commissioner responsible for school integration, 2014)



2008: 19). At the request of the Commissioner, the government also incorporated positive discrimination measures in the Higher Education Act by providing free university education to multiply disadvantaged children (Roma Education Fund, 2007: 35).<sup>24</sup>

The Commissioner pushed for the incorporation of the anti-discrimination norm in key policies and programmes for multiply disadvantaged children. His Office was responsible for the creation of the National Education Integration Network (OOIH), which provided professional support for schools that chose to participate in the integration programme. Further measures included the ‘Tanoda’ programme, a network of after-class study halls and community centres mostly in Roma communities, substantial financial incentives in the form of grants to local authorities that agreed to close down segregated schools on their territory and the launch of the first re-evaluation programme whose objective was to re-integrate healthy children into regular schools (ibid).

The evidence suggests that the institutionalisation of the racial anti-discrimination norm in legislation, policy and practices was well underway at the national level. The majority of drivers for normative changes were government officials of Romani origin which was something unprecedented for the CEE region. The Commissioner and MEP Viktoria Mohacsi, both of Romani ethnicity, stand out as particularly instrumental in generating inter-ministerial support for the norm’s acceptance (Interview with a former senior official from the Directorate General of Equal Opportunities, 2014). They actively used the again unprecedented for the CEE region support for racial equality across the executive, legislative and judicial<sup>25</sup> branches to exert pressure on municipalities and individual schools tackling the complex issues of in-school segregation and spatial segregation through school re-zoning. They also encouraged cooperation between pro-Roma civil society norm entrepreneurs and governmental supervisory bodies to exercise stronger political pressure on municipalities and schools (ibid).

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<sup>24</sup>The multiply disadvantaged university candidates have to meet the basic entry standards for students who pay full tuition. However, they do not need to comply with the merit-based requirements for academic scholarships.

<sup>25</sup> The county courts were reluctant to recognise the existence educational discrimination based on race but the higher domestic courts tended to partially or fully embrace the norm. For an overview of the major domestic cases see S. Nemeth (Ed.) 2007. *Discrimination in Education*. UNESCO Country Report – Hungary, pp. 27-ff.

The anti-discrimination approach of the government sought to ensure equality of outcome by compensating for socio-economic disadvantage and by dismantling segregationist practices. Civil society representatives have repeatedly characterised the measures as strong, progressive, decidedly positive and thus far the only consistent effort to initiate systemic structural changes that challenge discriminatory local practices and structures (Interviews with representatives from the Roma Education Fund, 2014 and Chance for Children Foundation, 2014). At the same time, the changes did not trigger significant normative shift at the municipal level, within individual schools and in Hungarian society. Official figures, in fact, point to an increase in the number of homogenous non-Roma classes from 5.9% in 2000 to 10.1% in 2004 and in the number of homogenous Roma classes from 10.6% to 13.6% for the same period (National Institute for Public Education, 2006, quoted in ECRI, 2009: 31, note 47). The increase suggests that discriminatory practices intensified locally in the face of the changes the national government was instituting.

The major reason for the limited implementation of the anti-discrimination norm through the new policies was the decentralised institutional system setup that limited the authority of the central government.<sup>26</sup> This meant that despite the national level reforms the implementation of policies was never ensured as there was little central monitoring. The Ministry of Education and the Commissioner's Office within it had little leverage beyond providing financial incentives. Hence the measures were applied in a non-uniform manner depending on the mostly optional participation of individual municipalities. For example, the decision to apply for integration support and other supplementary funds was voluntary. Reports indicate municipalities were largely reluctant to apply because they feared political repercussions from the non-Roma electorate (Decade Watch, 2005-2006: 89). The resistance of municipal authorities to the new programmes is also evidenced in the few applications to the grant scheme for segregated schools' closures. The low level of applications (only seven in 2005) has been explained by the fact that electability considerations outweighed the financial burden of maintaining segregation (ibid). Observations by the Minorities Ombudsman also alleged that local governments were not just reluctant to synergise their policies with the national ones. Instead they often

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<sup>26</sup> The decentralisation of the education system during the 1990s gave municipal governments authority over schools and the free choice of schools introduced in 1985 gave parents the option to enrol children in schools beyond their catchment area.

engaged in discriminatory practices like undermining effective supervisory procedures when it came to the placement of children in special schools (Roma Education Fund, 2007: 33). The resistance of local authorities to normative change is demonstrated by their refusal to communicate with the national government about the new measures. For example, only six out of twenty-three counties sent local representatives to a national communications meeting on special schools monitoring. This low attendance underscores the gulf between the priorities of national and local political actors (Nemeth, 2007: 23). The impact through the judiciary was also limited. Even though domestic courts sided with the plaintiffs in many of the anti-segregationist lawsuits, due to the civil law system verdicts did not extend beyond the circumstances of individual cases and the implementation varied significantly depending on the local context.

The ineffectiveness of the national government in explaining and justifying the reforms to municipalities, educators, and the general public also contributed to the negligible ‘on the ground’ impact of the anti-discrimination norm. Conversations with former government consultants and current authorities suggest the government did not have a communication strategy in place. Instead, it went ahead with the reforms without public discussions on the issue (Interview with a legal expert, 2014). The government struggled to construct frames that were persuasive, resonated with the majority and publicised the measures in a positive way (Interview with officials in the Ministry of Human Resources, Secretariat of Roma Inclusion, 2014). Positive discrimination, inclusive education and desegregation were often perceived as foreign and relevant for non-Hungarian (namely western) societies or remained unfamiliar and vague notions. These perceptions suggest that although the resistance of local officials was frequently motivated by pragmatic electoral concerns and direct racism in some cases, it was also due to a lack of understanding of how to apply the new concepts in practice.

This analysis clarifies the conditions that allow for domestic norm conformity to occur. The Czech case shows that domestic norm diffusion is impossible when national political elites contest the norm regardless of the strength of norm enterprising efforts from the supranational level. The Hungarian case demonstrates that norm internalisation is not guaranteed even when the key drivers of normative change, the national political elites, initiate comprehensive reforms and

persistently challenge the existing counter norms. The actions of these norm entrepreneurs are seriously constrained within a decentralised government system, especially where the new norm is opposed by local actors despite having garnered support across all branches of the national government.

### **Norm erosion: Roma politics, 2008 – present**

This section traces the process of norm reversal which started in the last years of the centre-left government and accelerated and intensified under the Orbán government. The analysis highlights the similarities between the behaviour of the Radical Republicans towards the end of the First Reconstruction, 1874-1877, and the Hungarian liberal elites, 2008-2010. Both sets of norm entrepreneurs reneged on their norm commitment once it was no longer viable to uphold the norm without serious political risk for their parties' electability. The re-centralisation of the government system under PM Orbán's leadership (2010 – present) has been inconsequential as far as norm progress goes. Indeed, it has facilitated further norm erosion because it has made it easier for the conservative elites to undermine the norm through a myriad of new legislation and policy changes. The disintegration of the system of checks and balances and the concentration of the power within the executive branch have eliminated the possibility for institutional norm support from the legislative and judicial branches.

The section begins by assessing the broader political developments that led the Hungarian liberal elites between 2008 and 2010 to the decision to abandon their anti-discrimination agenda. It traces the shifts of patterns in the public discourse about racial anti-discrimination paying attention to the large role extreme right-wing parties have had in increasing social tensions and in particular anti-Roma sentiments. It then focuses on the behaviour of the FIDESZ political elites from their rise to power in 2010 onwards. FIDESZ's offensive against the anti-discrimination norm as regards the Roma and promotion of segregationist and exclusionary state practices have undone the previous gains and resulted in the civic death of the norm.

#### *The rise of extreme right-wing ideology*

The softening of the socialist's government's anti-discrimination stance began with the onset of the economic crisis in the late 2000s. This period was also

characterised by the parallel, rapid rise of anti-Roma rhetoric advanced by increasingly popular right-wing parties especially the Hungarian Guard and Jobbik<sup>27</sup>. Surveys assessing the application of anti-discrimination and integration measures point to a sharp decline of the norm in the Hungarian political context at this time. While a 2007 Decade Watch report placed Hungary on the top of best performing Roma Decade participants, a 2009 Decade Watch survey evaluating the impact of governmental policies on Roma concluded that Hungary, along with the Czech Republic and Slovakia, performed the worst. These markedly contrasting findings suggest that the anti-discrimination norm underwent a sharp decline in Hungary between 2007 and 2009 (Decade Watch, 2010: 8).

To understand the social transformations that led to the explicit targeting of Romani communities in the last years of the socialist-liberal government in Hungary it is necessary to take into consideration the undercurrent of discriminatory practices that persisted throughout the previous reform period and the local resistance to desegregation measures. The widespread societal uncertainty in the already stagnating pre-crisis Hungarian economy and the general disappointment with the ruling government served as the immediate triggers for social discontent. The disappointment with the ruling political elites culminated in the resignation of PM Gyurcsány in 2009 after a series of political and corruption scandals and significantly contributed to the rising social tensions (Norwegian Helsinki Committee, 2013: 7). In this climate, Jobbik's advancement of 'Roma criminality' as an explanatory category for the social ills gained momentum and the fragile prohibitive boundaries around proper political discourse on Roma, which the government had promoted, collapsed (Bernáth and Messing, 2013: 9-10). A survey shows that in 2008 over 90% of interviewees affirmed the existence of a 'Roma criminality' phenomenon while over 70% held that Roma were more predisposed to commit crime than non-Roma (ibid., 10). Hungarian experts identify the highly publicised killing of a sportsman allegedly by individuals of Romani ethnicity as the "deal" that sealed the social consensus on Roma criminality (ibid. and interview with a legal expert, 2014). In response to these shifts in societal sentiments and opinions, the socialist government's support for the norm weakened considerably as evidenced by the gradual replacement of the human rights discourse with a discourse on

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<sup>27</sup> The far right Movement for a Better Hungary.

economic measures and by the drastic reduction of the Equal Treatment Authority budget (Interview with a legal expert, 2014 and ERRC, 2013). Much like its Radical Reconstruction counterparts in the 1870s, the government abandoned its lofty ideational pledge in the face of impending threats to their re-electability prospects.

The rise of Jobbik to a parliamentary party in the post-2010 political reality also contributed to the norm erosion by bringing extreme right-wing rhetoric into mainstream politics and so constricting the existing political space for counter-arguments (FXB Center for Health and Human Rights, 2014). Anti-Roma marches in Roma neighbourhoods in economically suppressed regions and calls for Roma expulsions orchestrated by Jobbik and its sister organisations were employed as election campaign tools both at the national and the local level deconstructing and reinterpreting the existing patterns of appropriate behaviour.<sup>28</sup> Nationally, Jobbik ran both of its campaigns on the promise to draw attention to the issue of ‘Hungarian-Roma’ coexistence positioning itself as the only political force capable of solving the ‘problem of Gypsy crime’ through punitive measures (Magyar Távirati Iroda, 2013a and 2013b). Jobbik’s senior leaders framed the Roma issue using emotive and urgent language to appeal to the majority linking the ‘Gypsy’ situation to ‘civil war’, which can be resolved only through drastic interventions. In their words, for those unwilling to return to a “world of work, laws and education” two alternatives were proposed “they can either...leave the country because we will simply no longer put up with lifestyles dedicated to freeloading and criminality; or, there is always prison” (Traynor, 2010). The resonance and ‘normative fit’ of Jobbik’s message with voters’ perceptions of Roma has been very successful. In 2010, the party won 16% of the popular vote, which represents an eightfold increase from the 2006 elections. In the 2014 elections, Jobbik increased its gains to 20% of the popular vote making it one of the most successful right-wing parties in Europe (Mudde, 2014).

The shift in mainstream political discourse is commonly associated with Jobbik’s parliamentary gains. However, as Bernáth and Messing (2013: 11) have shown, Jobbik has no exclusive dominion over false generalisations, stereotyping and hate speech. In fact, right-wing provocative messages are perilous not only

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<sup>28</sup> See, for example, Magyar Távirati Iroda. 2010. Socialists outraged by Jobbik mayoral candidate’s call to banish Roma criminals. 26 August 2010. Available at <http://www.politics.hu/20100826/socialists-outraged-by-jobbik-mayoral-candidates-call-to-banish-roma-criminals/> (accessed on 19 December 2015).

because of their stigmatising, oversimplified and aggressive solutions to the Roma situation but also because they can obfuscate and normalise equally dangerous though less obvious prejudicial statements and behaviours of mainstream political elites like FIDESZ. Both types of political statements, the authors argue, have influenced and reinforced the spread of anti-Roma sentiments. Their analysis of media discourse on Roma shows the almost complete disappearance of the coverage of discrimination-related issues from the public domain. While in 2000, articles on the issue made up 22% of all Roma-related articles, in 2011 they had diminished to 3% (Bernáth and Messing, 2013: 26). In contrast, commentaries that present Roma exclusion as the outcome of the minority's unwillingness to integrate had increased considerably (*ibid.*). While the human rights discourse on Roma has all but vanished, the discourse on Roma criminality is ascendant. In their media sample, Bernáth and Messing show that crime-related articles involving Roma individuals rose from 25% in 1996-1997 to 37% in 2010-2011, with the newspaper with largest readership in Hungary presenting Roma in a criminal context in roughly half of its articles. Also problematic is their conclusion that public policy articles focus on the high levels of financial spending on Roma and rarely report on policy implementation and impact, thus furthering the public's impression of Roma as a burden on the public assistance system (*ibid.*, 20-27).

This section has examined the shifts of patterns in the public discourse about racial anti-discrimination. It focused on the role extreme right-wing parties have had in constructing a political reality in which discussions on racial equality have become a taboo. The analysis has shown that the rapid decline of the norm was the outcome of cardinal political shifts in Hungary, which saw the distancing of the socialist government from its anti-discrimination agenda and paralleled the rise of right-wing ideology. The next section will focus on the behaviour of the Orbán-led political elites. In it I argue that the FIDESZ government has consistently subverted the norm by framing anti-discrimination as an unhelpful political concept, by eschewing its incorporation into its policies and by producing new ones that have had a disproportionately negative impact upon individuals of Romani ethnicity. The re-centralisation of the system of governance and the breakdown of the system of checks and balances have also contributed to the civic death of the norm.

### *FIDESZ's approach to race and anti-discrimination*

The Orbán government, which came to power in 2010 and was re-elected in 2014, has marginalised the racial anti-discrimination norm and reversed the progressive politics of the previous government towards Roma integration. The constitutional reforms and institutional consolidation undertaken by FIDESZ have concentrated governing power in the hands of the executive. This concentration of power, the international community and domestic activists argue, has led to the deconstruction of the system of checks and balances and the overall decline of democratic governance in Hungary (Norwegian Helsinki Committee, 2013). János Kornai (2015: 4) describes the post-2010 developments as a “sharp U-turn” taken by the FIDESZ government that has started the systemic destruction of Hungary’s fundamental institutions of democracy. In practice, Kornai argues, “the executive and legislative branches are no longer separate, as they are both controlled by the energetic and heavy hand of ... [Viktor Orbán] who has positioned himself at the very pinnacle of power...” (ibid). The legislative branch has become a law factory whose sole function is to stamp the new legislation mostly with no parliamentary discussions “at unbelievable speed” (ibid., 5).

The ruling political group also seems to be taking control over the judiciary. The Chief Prosecutor whose office should in theory be independent from the rest of the government was selected by PM Orbán rather than parliament which formalistically approved the appointment. The President of the Supreme Court, who had been appointed by the previous government, was dismissed early, before his term expired. A new institution, the National Office for the Judiciary, was created and from the very beginning was vested with exceptionally wide powers: both to appoint judges and to decide which cases should be heard by which courts. Particularly troubling was the administration’s move to reduce significantly the retirement age for judges, which resulted in the expulsion of the older generation, including progressively minded judges in leading positions within the judiciary system (ibid.,6 and Dezso, Czigler and Takacs, 2012 and Gyulavári and Hős, 2013).

The authoritarian approach of the FIDESZ political elite means that the legislative and judiciary branches are no longer able to serve as a counter-balance to monitor and limit the actions of the ruling group. Neither are they able to provide an



alternative discourse to keep the racial equality norm on the political agenda. The government itself has not delayed putting an end to the norm's political existence. The changes the executive instituted within the Equal Treatment Authority and the Minorities Ombudsman's office have undermined the state's protection of the Roma minority. The government abolished the ETA advisory board of human rights experts, whose role was to monitor and provide guidelines for the proper implementation of the Hungarian anti-discrimination law (ERRC, 2013). On the basis of Hungary's new constitution and the new Nationalities Act adopted in 2011, the positions of the four Commissioners were consolidated into a single post, the Commissioner for Fundamental Rights, who is aided by deputies one of which is responsible for the protection of the rights of nationalities. This, in practice, means significant curtailment of power and capacity. The deputy, unlike the former Commissioner for National and Ethnic Minorities, no longer has independent powers, cannot launch *ex officio* investigations and operates with 3 instead of the previous 15 staff members (Interview with a legal advisor in the Office of the Commissioner for Fundamental Rights, 2014 and Decade of Roma Inclusion, 2013: 35). The new government also terminated the Roma Anti-Discrimination Client Service Network eliminating the only free legal aid provider for Roma (Decade of Roma Inclusion, 2013: 34).

These changes confirm that the Orbán government tolerates "no liberal fuss about rights and liberties" (Interview with administrators in the Secretariat of Roma Inclusion, 2014). It is especially troubling that the government uses its power to define 'proper' behavior through penal measures *de facto* implementing Jobbik's political platform. Two recent measures will have a disproportionately negative impact on young Roma. The amendment to the 2011 Petty Offences Act now allows for the imprisonment of juveniles while changes to the Criminal Code lower the age for serious crimes to 12 years (Decade of Roma Inclusion, 2013: 43). The changes reflect the FIDESZ political message of 'strengthen[ing] the order of daily life' by enacting laws that enjoy popular support and are perceived as enhancing public safety and order. At the same time, through these reforms the ruling elite oversimplifies the complex issues of poverty and social inequalities and therefore enables practices of institutional discrimination to continue.

In terms of Roma-specific policies, FIDESZ has actively promoted a so called “new paradigmatic shift”, which places the responsibility for integration on the targeted minority which ought to live according to the standards and expectations of the majority society (Interview with the Minister of State for Social Inclusion, 2014). This is problematic because it distorts the very concept of integration and obfuscates the responsibility of the government to ensure proper policy design and implementation and the responsibility of the ethnic majority to provide the environment in which Hungarian Roma can exercise full citizenship rights. The Minister for Social Inclusion who characterises the human rights approach of its predecessors as ineffective has sought to replace it with a ‘common sense’ perspective that he claims will deal efficaciously with everyday problems (ibid). However, he has not been able to articulate what the ‘common sense’ perspective is and why it is preferred to the implementation of the existing anti-discrimination legislation by the specialised equality bodies to resolve problems related to racial discrimination. He also discards the need for anti-discrimination awareness raising campaigns with the simplistic argument that everything is being provided for the Roma but they do not take advantage of the provisions (ibid). In sum, FIDESZ’s version of Roma integration presents the Roma minority as a homogenous group of undeserving and irresponsible individuals while absolving the government and the majority from social responsibility.

The actions of the FIDESZ senior leadership in the field of education are particularly striking as they point to the state’s explicit approval and promotion of educational inequality and even school segregation on the basis of ethnicity. The re-centralisation of the educational system undertaken by FIDESZ, which makes the state rather than the municipality the maintainer of public schools, has facilitated the implementation of new legislation and policies that have effectively destroyed the previous anti-segregation efforts. In terms of access to higher education, the government has reduced the number of state-sponsored university places. The reduction has drastically diminished the educational prospects of the already negligible number of qualified Romani students (Decade of Roma Inclusion, 2013: 52). The government has also lowered the compulsory school age from 18 to 16, which educational experts warn will have a disparate impact on Romani children as this will make it easier for schools to refuse enrollment to Romani students since the

schools will no longer be legally required to do so for their post-16 classes (Interview with a representative from the Roma Education Fund, 2014). The Ministry of Justice has also proposed an amendment to the Act on Equal Treatment to amend the provision of equal opportunities in relation to education to “equal opportunities and catch up<sup>29</sup> segregated classes”. The proposed amendment codifies segregation and prevents lawsuits against the state (Decade of Roma Inclusion, 2013: 61).

The marginalization of civil society organisations with experience in integrated schooling<sup>30</sup> and the outsourcing of segregated schools to churches and the Roma Minority Self-Government have become an important feature of the government’s approach to do away with the integration question. Minority self-governments, according to the Commissioner for Fundamental Rights, are ill-suited to run schools because of their lack of capacity and expertise in the field of education. Additionally, since the students are exclusively of Romani ethnicity, these schools draw a high percentage of multiply disadvantaged children, which in practice makes them segregated schools that provide inferior education (Hungarian Commissioner for Fundamental Rights). In effect, by providing incentives for minority self-governments to run their own nationality schools, the national government transfers the responsibility for school segregation onto the local Roma leadership.

Extensive church engagement in education is another prominent feature of Minster Balog’s politics.<sup>31</sup> He views the role of the church as a helper of disadvantaged communities able to provide Romani children with added “spiritual and disciplinary” guidance (Interview with the Minster of State for Social Inclusion,

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<sup>29</sup> “Catch up classes” is a well-known euphemism for segregated schooling. The expression is employed widely by the ruling elite in the domestic public discourse. ‘Integration’ is the term reserved for these same practices before international audiences.

<sup>30</sup>The government treats civil society organisations as political actors rather than policy partners. In practice, this treatment precludes expert input in important legislation. Civil society organisations, especially those associated with George Soros, are perceived as competitors who strive to influence policy-making processes and who have to be “reigned in” and “re-oriented” to support FIDESZ’s politics. (Interview with the Minster of State for Social Inclusion, 2014 and Interview with administrators in the Secretariat of Roma Inclusion, 2014).

<sup>31</sup> The Minster of Human Resources, Zoltán Balog, who in the current state of consolidation supervises the Ministry of Education and the Secretariat of Social Inclusion, has complete power to restructure all segregated school districts but he has rejected the possibility. A former theologian, Balog has given the church privileged status as State Partner on educational matters.

2014). Balog has encouraged churches which have traditionally been responsible for private elite education to take over “catch up”, or in other words, former and current segregated schools. The Nyíregyháza lawsuit is particularly revealing of the extent of the minister’s promotion of segregation and of the arguments he [and the rest of the FIDESZ elite] uses to justify school apartheid. At the trial, Minister Balog took the stand as a witness for the church, which had re-opened a segregated school in a Romani neighborhood<sup>32</sup>. Balog argued for the need for a two-stage integration process in which the less able students first “catch up” in a separate educational environment and then integrate into mainstream schools (Mohásci, 2014). The re-opened Roma school was framed as allowing the students to study in “a loving, accepting and open atmosphere, close to their families” (Hungarian Ministry of Human Resources, 2013). At the same time, it was clear that the church did not intend to integrate the students in the near or distant future because it refused to enroll Roma children who had displayed interest in its downtown elite school since it would be “harmful to other children” (Mohásci, 2014).

The government’s framing of integration as a ‘catch up’ process is politically convenient because unlike the frames used by the previous government – positive discrimination, desegregation and inclusive education – it reflects cultural and historic norms and in practice realises Jobbik’s populist agenda [and the aspirations of its voters] to situate the Roma in the proper social stratum, aka the bottom of society, while dismantling the vestiges of social solidarity. The case highlights the unsuitability of churches and minority self-governments to perform integrative functions and the absence of political space for domestic norm enterprising non-state actors to engage in a dialogue with the ruling political group. The post-2010 political shift towards re-centralisation and authoritarian rule has been very successful in eroding the racial anti-discrimination norm. The present situation in Hungary is reminiscent of the period between the two reconstructions in the southern United States, 1877- 1954, where much in the same way the federal government reneged its

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<sup>32</sup>The Roma school in Nyíregyháza was closed down during the anti-segregation campaign of the socialist government and the children were bussed to other schools in town. After the Greek Catholic Church, which already runs an elite school in the city, took over the building, it reopened it as a segregated school. Material incentives and the termination of the bus service programme under the orders of the FIDESZ town mayor left little choice for the Romani parents but to re-enroll their children in the segregated school. The Chance for Children Foundation took the case to court requesting the school’s closure and its transformation into an afterschool activity centre.

commitment to racial equality and protection for its African American citizens because of instrumental concerns related to the general societal hostility against the norm and future party electability. The retreat of the US federal government from state matters and Hungary's re-centralisation both resulted in the destruction of the race anti-discrimination norm. These parallel facts reconfirm that the behaviour of political elites in power (whether it is inaction or the active promotion of counter-norms) determines if norm cascading and internalisation would take place and the degree of their success.

## **Conclusion**

This analysis has traced the shifts in the development of the anti-discrimination norm in relation to Hungarian Roma. It has challenged the linear framework of the norm life cycle model by demonstrating that norm movements from stage to stage and within each stage are dynamic and vary depending on the behaviour of national ruling elites and secondary enabling conditions namely the setup of the state's government system, the existence of domestic counter norms and the degree of societal opposition to the new norm. In the Hungarian case, the internalisation stage was characterised by rapid norm progression throughout the 2000s at the national level due to the ambitious agenda of the ruling elites followed by a subsequent erosion of the norm from the late 2000s onwards. The research suggests that even at the height of the norm's progress, institutional norm entrepreneurs had limited success. They made important inroads in terms of the norm's institutionalisation into anti-discrimination legislation and desegregation action programmes. However, they faced strong resistance from municipalities and the general public. The decentralised and fragmented administrative structure of the Hungarian state at the time and the lack of effective framing of the norm, which was perceived as vague, foreign and a poor 'cultural match', explain the limited salience of the norm in Hungary despite the ambitious agenda of the norm entrepreneurs.

The analysis of domestic norm internalisation shows that besides long-term norm conformity (US Second Reconstruction and UK cases) and norm rejection from the onset (Czech case), there is a third possible scenario, incomplete internalisation, which is visible in Hungary and the First Reconstruction in the United States. Incomplete internalisation takes place when a set of norm-supporting

political elites makes important steps to codify the norm into national law and policy but the succeeding set of political elites un-does the previous gains. The Hungarian case (pre-2010) and the case of the First Reconstruction in the United States have shown that two factors account for incomplete internalisation. First, the norm tends to be short-lived when the ideational and instrumental motives that underpin the behaviour of the norm enterprising national elites diverge. Second, the chance for norm reversal is greater when the institutional norm entrepreneurs act within a decentralised system of governance and face significant resistance from the local authorities and the ethnic majority. Under these circumstances decentralisation hinders the internalisation of the new norm. Temporary centralisation also presents a barrier to norm internalisation because it does not provide sufficient timeframe and permanent mechanisms to ensure long-term norm compliance. The next chapter further analyses the different norm internalisation scenarios.

## Chapter Six

### Theorising normative change

This thesis has traced the journey of the racial anti-discrimination role by applying Finnemore and Sikkink's norm life cycle model and the wider literature on norm compliance to five case studies to examine the validity of their core premises. This final chapter compares the findings across the cases. It concludes that the investigation into the creation, diffusion and internalisation of the racial anti-discrimination norm problematises several of the key assumptions made by Finnemore and Sikkink, specifically as regarding the structure of the model's framework, the motives that drive norm entrepreneurs, and the dominant mechanisms they employ to produce normative change. Unlike the norm life cycle model which privileges the transnational norm entrepreneurs as the agents of normative change, the thesis studied the agency of domestic norm entrepreneurs, in particular domestic political elites, whose actions it argued impact the construction of new norms when they emerge first in a domestic context and the institutionalisation of these norms in domestic laws, policies and structures. This approach sought to complement Finnemore and Sikkink's model and to contribute to the literature on domestic compliance with international standards of appropriate behavior.

The empirical findings contradict the linear and sequential presentation of the evolution of new norms and problematise the design of the individual stages of the model in terms of the level of norm construction and the signifiers that are employed to mark the start of a successful norm cascade. The evidence points to the need for a complementary conceptualisation of the identity of the norm entrepreneurs. It recognises domestic governing elites as norm entrepreneurs who can drive norm creation<sup>33</sup>, diffusion and internalisation and who are supported in their actions by domestic and/or international advocacy networks and international organisations. It points to a complex interaction between ideational and instrumental motives that can either drive norm entrepreneurship (when ideas and instrumentalism pursue the same objective) or lead to norm regression (when pragmatic considerations diverge from ideational commitments).

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<sup>33</sup> This is valid if the norm originates in a domestic context.

The findings confirm the model's hypothesis that norm socialisation is essential for the success of norm cascading and for the permanent embeddedness of new norms in the political, institutional and social order of states. However, norm socialisation only works if national elites display the political will and commitment to recognise and promote the new norm. When it comes to norm internalization, using Cortell and Davis's work on domestic structures (2005), I have argued throughout the thesis that the state's system of government acts as an intervening variable which can either enable or constrain norm conformity. The norm enforcing agenda of national elites can be significantly constrained if the system is decentralised and there is widespread opposition to the new norm at the local level. The institutionalisation of a new norm tends to be long-term and minimally contested if the norm-promoting national elites act in a centralised system. Finally, the government setup is mostly irrelevant if national elites are indifferent to the given norm although a centralised system can contribute to the civic death of new norms if the national elites are hostile to the norms in question.

The chapter begins by outlining the main problems the thesis of the racial anti-discrimination norm presents to the norm life cycle model when it comes to its overall structure and its individual phases. It then turns to each phase addressing the contradictions between the empirical evidence and the model's theories. Besides pointing to the weaknesses, the chapter develops the model further by paying special attention to the norm internalisation phase. The findings suggest three possible internalisation scenarios depending on the actions of national political elites – no internalisation, incomplete internalisation and permanent internalisation.

The chapter concludes by addressing the weaknesses of traditional, positivist-oriented constructivism to derive a general theory of normative change. It suggests that norms like racial anti-discrimination, which are related to issues of identity and belonging, may be too complex to be explained solely by causal models of norm evolution. Such norms could be more deeply investigated by post-structuralist and critical constructivist approaches that adopt post-positivist methodologies which use social theory, historical sociology, and linguistics to explore the linkages between the discursive and historical constitution of identities (Buzan and Hansen, 2009).



### *The structure of the norm life cycle model*

The case studies in this thesis show that the three clearly defined and separate phases of the norm life cycle model are in practice more complex than postulated by Finnemore and Sikkink (1998). Each of the three phases of norm evolution frequently incorporates within itself elements of the other two stages. The US case study in chapter one, which traces the emergence of the racial anti-discrimination norm contains elements of domestic norm cascading and norm acceptance. The UK and EU cases in chapters two and three, which showcase the diffusion of the norm also display features of norm construction and norm acceptance in the respective political contexts. Even the Hungarian and Czech studies in chapters 4 and 5 that trace the norm cascade from the moment it enters the domestic political space and its path to internalisation, begin by examining the emergence of the norm into the state's political order. In other words, the model does not just consist of three distinct phases but of modified and smaller scale norm life cycles within each phase. This adds a layer of complexity and brings a degree of dynamism to the model.

Related to this is the main conclusion that the thesis confirms earlier criticisms of the model's linear and consecutive presentation of norm evolution. The US and Hungarian cases most clearly dispute the assumed linear pattern of the norm's development. In the two cases, we witness dynamic norm movements as the norm undergoes dramatic leaps forward, serious setbacks and long-lasting stagnation. At the extreme, the norm undergoes a civic death as the developments at the end of the First Reconstruction in the US and the FIDESZ rule in Hungary demonstrate. The US case also shows that it is possible for eroded norms not only to re-emerge in the presence of new triggers but to achieve permanent institutionalisation in the government system of the state.

Besides demonstrating that norm movements from stage to stage and within each stage are varied and dynamic, the thesis has identified the factors which determine the course of the new norm's progress, stagnation or destruction. The norm's movements in the case studies, I have argued, have depended considerably on the actions of national ruling elites and on secondary enabling conditions the most significant of which is the type of the state's government system followed by the existence or absence of counter norms and the degree and breadth of the societal

opposition to the new norm. I have noted that the norm enterprising behaviour of the Congressional Reconstructionists – the establishment of federal authority and military control over the Southern states – was key in realising racial equality in the aftermath of the Civil War. In the same way, the actions of the national elites namely the withdrawal of the legislative and executive branches from governing the affairs of the conquered Confederate states and the actions of the judiciary which legalised racial segregation, led to the norm's demise. Similarly, the norm re-emerged on the political agenda only after the judicial activism of the US Supreme Court and the follow up actions of political elites within Congress and the Office of the President, including the mobilisation of the military, which enforced the rights of African American citizens.

Similar conclusions about the driving forces behind the progress or decline of new norms can be drawn from the Hungarian case. The racial anti-discrimination norm was raised to prominence throughout the 2000s as a result of the ambitious agenda of the Centre-left elites, which made significant inroads in terms of the norm's institutionalisation into anti-discrimination legislation and desegregation programmes. However, their impact was severely hampered by a decentralised administrative system and strong local resistance by the authorities and the ethnic majority. The subsequent erosion of the norm under the Orbán government effectively deinstitutionalised the norm and reversed the progressive policies. The empirical evidence, therefore, calls for the model's re-design, to reflect the complexity and dynamic nature of the life of norms. The model should be re-drawn to incorporate the possibility for small-scale norm life cycles within the main framework and to allow for non-linear movement of norms while further specifying the primary agents and the enabling conditions that determine the norm's development.

### *Norm emergence*

#### International and domestic norms

I have noted that the distinction Finnemore and Sikkink make between international and domestic norms is problematic and presents analytical difficulties for research on norms. Many international norms, as Finnemore and Sikkink recognise, start out as domestic norms and subsequently become internationalised

(1998: 893). By claiming that domestic norms ought to be analysed separately, they present the ontological beginning of international norms at the moment in which the new norm emerges at the supranational level regardless of whether it originated in a domestic or international environment (ibid). Their analytical framework needs to be either re-thought or complemented by a separate approach that examines domestic agency because for those international norms whose construction takes place in a domestic context, it means that the norm life cycle both misses a critical step in their development and prevents the examination of the causal mechanisms that drive norm building and norm diffusion at the national level. This thesis has shown that beginning at the level at which the new norm is articulated initially, is critical for analysing the norm creation phase accurately and for accounting for the factors that determine the norm's successful or failed emergence and cascading.

The model could be re-designed to allow for two distinct norm emergence scenarios depending on the context in which the norm is constructed and for different causal mechanisms. If the norm is constructed domestically, the national elites could play a substantial role in the production and especially in the subsequent institutionalisation of the norm. Non-state enterprising actors – networks of loosely connected domestic advocacy networks – tend to act as an intervening factor. They seek to influence the policy choices of national elites and to enhance the prevention of norm reversal. If the norm originates at the regional or international level, international organisations and transnational advocacy networks drive the norm building process.

#### Norm entrepreneurs

Finnemore and Sikkink present norm emergence as a process that is realised by the actions of transnational norm entrepreneurs namely non-governmental organisations and individual actors embedded within them and the networks the NGOs form (1998: 897-900). These norm entrepreneurs aim to secure the support of critical states and major international organisations to endorse the new norm and make it a part of their high level agenda (Finnemore and Sikkink, 1998: 897-901). This research into the genesis of the racial anti-discrimination norm points to the possibility for an alternative and at the same time complementary approach in which national political elites influence norm building and the norm's subsequent

internalisation through its institutionalisation into law, policy and institutional practice. The construction of the anti-discrimination norm in the US case shows that national governing elites influenced both the formal recognition of the new norm and its subsequent institutionalisation and adherence. The analysis of the First Reconstruction demonstrates that the Republican governing elites at the time were the key actors who advocated for and had the power to initiate post-war reforms that formally incorporated former slaves into the community of American citizens and granted them access to political participation. They constructed the new norm through legislative, judiciary and military means leading to the brief flourishing of the racial equality norm in the aftermath of the Civil War and its permanent institutionalisation during the Second Reconstruction.

The norm commitment of the national governing elites is evidenced in their choice of discourse, which framed the Confederate states as “conquered provinces” under the control of Congress creating a political reality that allowed the Radical Republican-controlled Congress to pursue its Reconstruction agenda to “revolutionize the South’s institutions, manners and habits” (McPherson, 1992: 6). The choice of reform – the conferral of citizenship upon the former slaves and the prohibition of voting denial on account of race, color or former servitude in the constitution – provided the highest level of norm institutionalisation because constitutional amendments are nearly impossible to reverse as opposed to other forms of Congressional legislation. The validation and upholding of the newly granted citizenship and the suppression of Confederate separatism through reinventing the social and political opportunity structures in the South would not have been possible without the agency of the Radical Republican faction. These actors also constructed new institutions, the Department of Justice and the Office of the Solicitor General, to enforce the norm and protect citizens’ rights. They drafted and passed the first Civil Rights legislation prohibiting racial segregation and used their constitutionally bestowed powers to employ the military to enforce compliance with the newly constructed norm of racial equality. Once the political support for the radical Republican policies declines and the Compromise of 1877 was finalised, we almost immediately see erosion of the norm in the swift ‘redeeming of the South’ through the resurgence of Southern nationalism and social practices. These ante-bellum social practices reinvented the social hierarchy based on white supremacy

and legal codes which instituted apartheid and directly and indirectly robbed the new citizens of their rights.

The developments during the Second Reconstruction reinforce the argument about the key role governing elites have in constructing and enforcing the racial anti-discrimination norm. The unanimous judiciary reversal of the ‘separate but equal’ doctrine in *Brown*, which was eventually enforced by the president’s emergency measures through the mobilisation of the United States Army and the federalization of the National Guard in a number of southern states, further demonstrates that national political elites are necessary for the recognition and institutionalisation of new norms. These elites are necessary because they have the available resources and legal authority to enforce norm compliance at the regional and local levels even in exceedingly hostile contexts, in which the majority population and local political elites endorse counter norms.

The American example, however, also underscores the supporting role of non-state norm enterprising agents, in this case a loosely organised domestic advocacy network of African American organisations, in norm production and compliance. The First and Second Reconstruction show that the risk of norm erosion is significantly higher in the absence of domestic non-state norm entrepreneurs who raise and keep the issue on the political agenda, raise awareness and provide expert information on norm-related violations. Despite their radical reforms, governing elites during the First Reconstruction soon reneged on their commitment to social integration. Other post-war issues – electoral politics and reconciliation – quickly became perceived as urgent enough to address even at the expense of the rights bestowed upon the new citizens. These other priorities plunged the attempts at racial equality construction into a period of norm decay, which reached its height with the legal codification of racial discrimination at state and local level under the ‘separate but equal’ principle. During the Second Reconstruction, however, the sustained pressure by African American legal elites resulted in the judicial delegitimation of racial discrimination norms. The advocacy work of African American civil groups influenced the emergence of a cross-party consensus on the implementation of the racial anti-discrimination norm and a consistent political discourse that since then has affirmed the norm and continues to frame African Americans as a constitutive part of the nation state.

The argument about the elites' role in causing the evolution or devolution of new norms is not limited to the norm emergence stage. The claim that domestic political elites can serve as norm entrepreneurs, or norm violators depending on their motives and political environment, also runs through the latter stages of cascading and internalisation.

### Motives

In terms of motives the original model proposes that in the norm creation phase norm entrepreneurs are driven by altruism, empathy and ideational commitment (Finnemore and Sikkink, 1998: 898). Here Finnemore and Sikkink's hypothesis is partly correct because the empirical evidence suggests that the motivational forces consist of a mixture of ideational and instrumental considerations. Although I have noted that the US elites were largely justice-driven, these motives which followed a logic of appropriateness were entwined with pragmatic concerns related to party-building and electoral outcomes. The thesis suggests that the steps Congressional reformers took toward the political inclusion of the newly freed male population in the US were seen as a matter of justice and as a political necessity to keep the Republican Party in power. While the African American vote was needed to guarantee a Republican electoral win the freedpersons needed to keep the party in power to ensure their own protection. Put differently, when ideas and instrumentality converge, they reinforce the normative commitment of political elites and enhance their agentiality. When they diverge, as it happened at the end of the First Reconstruction and the last years of the Hungarian centre-left government, the instrumental concerns tend to take over stalling or completely eroding the norm's progress.

To reiterate, the investigation suggests that the construction of domestic norms, especially those related to minorities, are largely driven by ideational motivations visible in the justice discourse employed by domestic norm entrepreneurs who tend to justify the need for a new standard by framing the given group as disenfranchised citizens in search of their right to belong fully into the nation state. Internationally crafted norms of such nature tend to be security-driven and reinforce the primacy of instrumentalism in international relations. This distinction demonstrates that the justice concept is easier to employ in domestic

discourses on normative change. This is due to the ability of the norm enterprising agents within a nation state to establish linkages between anti-discrimination and citizenship by framing minority groups - African Americans in the US and commonwealth migrants in the UK - as a constitutive part of the nation state. Similar frames are more difficult to construct supranationally. Such frames are less persuasive when employed by international organisations, which are perceived as having little legitimacy in determining who belongs to a given nation state, especially when the underlying motivations betray soft security concerns and the approach they use to ensure norm compliance contains a mixture of 'carrot and stick' elements. The research on the emergence of the anti-discrimination norm in relation to the Roma in Europe shows that European intergovernmental organisations acted as the driving forces behind norm construction and the initial norm diffusion was in part due to their ability to exercise a degree of material leverage over norm violating states (Sobotka, 2003, Ram, 2010 and Cahn, 2004).<sup>34</sup> The formation of European Roma policy was driven by the member states' demands for action prompted by migration fears and by the advocacy efforts of NGOs for the equal treatment and social inclusion of Roma.

The thesis confirms what others have already found regarding different European institutions' somewhat different approaches to Roma. The OSCE adopted a security- human rights- minority rights paradigm, the Council of Europe embraced migration management-human rights-minority paradigm while the European Union seemed to strive for diversity management and improvement of the Roma situation in the context of the enlargement (Sobotka, 2007:105). Yet, security concerns have dominated over justice and moral entrepreneurship. European institutions took on the new norm after Roma-related concerns of their old member states increased suggesting that even though the Roma issue is discursively dressed up as a human rights problem the underlying impetus for Roma policies has been dictated mainly by national interests linked to soft security and to a lesser extent in response to the moral pressure and advocacy work of transnational NGOs. Ultimately, the problem

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<sup>34</sup> A distinction should be made between the emergence of the racial anti-discrimination norm at the EU level and the linking of the norm with the situation of the Roma minority. The first was driven by the actions of domestically based norm entrepreneurs organised in the transnational advocacy Starting Line Group that lobbied for race equality legislation binding for all EU member states. The second issue was elevated to regional prominence by the major European institutions.

here lies in the lack of coalescence between instrumental (security) motives and ideational motives. To reiterate, the reinvention of the Roma as a ‘true European’ minority in search of reclaiming its citizenship rights and the incorporation of the Roma into the organisations’ human rights frameworks were not sufficiently persuasive to domestic political elites. Instead norm violating domestic elites perceived them as ambiguous and even hypocritical attempts driven by the priorities of influential western member states. The perception has contributed to weak norm conformity that has been regularly challenged across member states.

#### The level of norm construction

The level at which a new norm is constructed should also be taken into consideration, albeit only in conjunction with the behaviour of the norm entrepreneurs because it influences the norm’s prospective internalisation in the domestic political and social order. The US and UK studies show that norms which emerge domestically are more likely to achieve greater embeddedness in domestic laws and institutional practices even if they face staunch opposition by societies holding onto countervailing pre-existing customs, habits and practices. Again, this can be explained by the role that national elites play in the genesis of new norms, which in turn translates into greater commitment to policies of norm enforcement. The Czech case shows that norms created at the supranational level, which do not resonate with existing domestic understandings of proper behaviour, tend to be perceived as imposed from above by foreign actors with insufficient domestic legitimacy who possess little knowledge of the domestic context. In such cases, national elites feel coerced to institutionalise the new norm and comply with the new standard in a superficial manner before the international community (formal acceptance without implementation) and contest the norm outright before their domestic audience.

#### *Norm cascade*

##### Norm entrepreneurs, motives and diffusion mechanisms

The analysis of the process of norm cascade or the manner in which norms ‘travel’ to other states and become embedded in their political and social order confirms the existence of cascading. Norm transference can and does take place



although it does not necessarily always take place in the way laid out by Finnemore and Sikkink. In terms of agency, the norm life cycle model presents international organisations and the networks they form along with critical states as the drivers of norm diffusion (1998: 898). The main mechanism they are said to employ to make norm violating states internalise new norms is norm socialisation (ibid). The empirics of this thesis, however, point to more varied pathways to norm diffusion and challenges the hypothesis that international actors are the sole drivers of norm transmission.

The historical evidence about the formation of the UK race relations policy shows that the British “liberal hour” political elites were chiefly responsible for the transference of the norm and they have been more successful than international actors tasked with a similar responsibility. Curiously, the main mechanism for the norm diffusion was norm socialisation but in reverse. The norm life cycle model expects norm exporting states and international organisations to act as teachers of norms by applying a mixture of persuasion and knowledge exchange to positively influence the behaviour of national elites from the norm violating state. However, the UK case study shows that this is not always the case. The UK case reveals that the political elites in their own context searched for a way to re-define British citizenship, re-categorise who belongs in the British state and how to balance the complexities of migration politics with justice-driven ideals. In this case there were no norm socialising efforts initiated by the US political elite or international institutions. Instead we see that British institutional norm entrepreneurs led by the reformer Roy Jenkins constructed the UK’s race anti-discrimination legislative framework by initiating direct knowledge exchange with US law makers and administrators at the federal and state levels and conducting first hand research on the American civil rights experience. This highly entrepreneurial behaviour led to both direct transference and modified appropriation of legal notions, practices and monitoring mechanisms from the US context.

The investigation into the institutionalisation of the racial anti-discrimination norm at the EU level also credits domestic experts along with European institutions with norm diffusion. In its first half the process of EU norm synchronization was led by domestic elites who were mostly past and present government officials and experts from quasi-governmental equality bodies from the UK and a few other west

European states with well-developed anti-discrimination legislation whose aim was to institutionalise protection measures for racial minorities within the European Union. In its latter part the cascade phase comes closer to the model's assumptions about primary agents since a number of regional institutions, particularly the Council of Europe and the European Union, were responsible for the further diffusion of the norm across their member states.

In terms of motives, international legitimacy, reputation and esteem are not the only reasons why norm importing states decide to adopt new norms (Finnemore and Sikkink, 1998: 898). Like their US counterparts, UK's norm entrepreneurs were driven by a combination of justice-oriented and instrumental concerns linked with the prevention of racially motivated violence and with the search of a balancing act to mitigate the impact of increasingly restrictive immigration controls. In the EU case, however, the justice-driven arguments were subsumed by economic concerns linked to the lack of an anti-discrimination standard across member states and rising nationalism in Europe. The discourse employed by the principal agents here did not frame the proposal for EU anti-discrimination legislation as socially transformative but as a logical next step that builds upon European gender anti-discrimination laws.

When it comes to the mechanisms that the norm entrepreneurs employ to facilitate the cascade in the EU case, the findings support the model's claim that socialisation, demonstration and institutionalisation account for the international diffusion of norms (Finnemore and Sikkink, 1989: 898). In the early part of the cascade, it appears that a knowledge transfer took place as the Race Equality Directive incorporated the main legal notions found in UK race anti-discrimination law. The knowledge transfer, however, was a very different affair compared to the transatlantic norm diffusion. It relied exclusively on 'push' factors, the committed anti-discrimination experts from the Starting Line Group, and lacked a pull factor namely the commitment of the EU political elites with the notable exception of the European Parliament, which stands in stark contrast to the enthusiastic behaviour of UK's elites.

In the second half of the cascade when European institutional elites attempted to bring their member states to conformity with the new norm, they employed socialisation and material leverage to achieve their goal. European institutions did

employ socialisation, especially the Council of Europe, whose competency covers racial discrimination but whose compliance mechanisms are mostly at the level of soft law and are largely underpinned by communicative logic rather than material leverage. Such socialisation efforts have had limited impact and it is often difficult to detect clear causal links between socialisation and the proliferation of Roma-specific policies in targeted states. To this it is important to add the mechanism of conditionality, which represents an instrumentalist ‘stick and carrot’ approach to compliance with EU norms, and largely accounts for the formal codification of the anti-discrimination norm in new EU member states and its formal incorporation into formal domestic policies. Besides applying material leverage externally, the EU has also used its instrumental leverage to advance the norm internally through the threat of sanctions and infringement procedures although it has done so only against the Czech Republic. The eventual albeit rather formal compliance of the Czech Republic has shown that the logic of consequences has had inconsequential impact on domestic internalisation processes.

#### Domestic-led versus international-led norm diffusion

The UK case of norm diffusion provides additional weight to the argument that new norms are more likely to displace pre-established national norms if they are driven by the domestic political elite of the norm non-compliant state. The analysis of the US-UK knowledge transfer highlights the role of government officials in norm diffusion and their capacity for social learning, which in this case was further facilitated by the fact that the two states are established democracies with a shared history. The racial tensions they experienced concurrently were also influential in furthering the race legislation agenda of UK’s norm backers and explain their imitative behavior in appropriating the norm from the American context.

The analysis of the Czech case suggests that controversial norms are unlikely to reach high domestic salience if they are exclusively promoted by transnational norm entrepreneurs. The thesis demonstrates that such norms are most likely to stay nominally on a state’s policy agenda while being undermined internally by political elites, government institutions and society. The race anti-discrimination norm in relation to Roma in the Czech Republic has largely been driven by EU conditionality and legally binding ECtHR case law. EU pressure on the Czech political elites to

internalise the norm has been unsuccessful as evidenced by the hostility of these elites towards the transposition of the Equality Directives into national law, the weak institutional structure that monitors norm compliance and the unwillingness of the succession of governments to initiate an educational reform in compliance with the *D.H.* verdict.

Analytical problems: the concepts of norm violator, norm entrepreneur and norm threshold

The construction and diffusion of the race anti-discrimination norm vis-à-vis the Romani minority problematizes the distinction the norm life cycle model makes between norm entrepreneurs and norm violators. Finnemore and Sikkink conceptualize western states and intergovernmental organizations as teachers of norms while states that do not adhere to internationally agreed standards of appropriate behavior are labeled as target or norm-violating states (Finnemore, 1993 and Finnemore and Sikkink, 1998: 900-904). The empirics in this thesis, however, show that their distinction is analytically unsustainable. The example of the UK's profiling of Roma asylum seekers and the poor treatment of its indigenous Gypsy minority erodes the distinction between norm enterprising and norm violating states (O'Nions, 2007: 124-126). This also extends to the majority of west European states with France and Italy often cited as the major offenders after having gained notoriety for their ethnic profiling, governmentally sanctioned segregation and targeted expulsions of Roma migrants (EU Observer, 2008, ERRC, 2011 and Gehring, 2013).

International organisations do not always take on consistently a norm teaching role either. The EU institutions during the 1990s, with the notable exception of the European Parliament at the time, were hesitant and unenthusiastic about the creation of race directives. Other research that analyses the actions the European Commission has undertaken to ensure the compliance of member states with the Directive on Free Movement as applied to CEE Roma confirms that categorizing international organisations as norm entrepreneurs is problematic (Gehring, 2013). In her analysis, Jaqueline Gehring concludes that when it comes to the free movement of Roma EU citizens, the European Commission tends to level little criticism at member states that violate the directive vis-à-vis the Roma. Even when the Commission issues criticisms, it retracts them quickly as the ongoing evictions of Roma in France show (ibid, 19). This, Gehring argues, not only undermines the

Commission's "own legitimacy as a protector of European citizenship rights, but also denies the reality of discrimination faced by Roma migrants throughout Europe" (2013: 19-20). The ECtHR jurisprudence building processes examined in this thesis have revealed that a significant number of the Strasbourg judiciary profoundly opposed the evidence of systemic ethnic discrimination presented in the *D.H.* case. This placed them in direct opposition to the norm enterprising actions of other Council of Europe bodies. To put it differently, the regional diffusion of the racial equality norm has faced substantial challenges and resistance, which have come from the very institutions and actors within them that according to the norm life cycle model should behave as cohesive norm promoters.

The thesis also suggests that norm thresholds also known as tipping points are not a reliable tool for pinpointing the moment at which the norm cascade becomes a quasi-automatic process that leads to successful domestic internalisation. The Czech and Hungarian cases show that when a new norm reaches the so called threshold, the cascade does not take a taken-for-granted quality even though the tipping point of the norm was achieved with the passage of the Race Equality Directive. The adoption of the directive which contractually bound all member states to institutionalise the racial anti-discrimination norm into domestic law, according to the norm life cycle model, should have guaranteed an uncontested and swift incorporation of the norm into the political order of all EU member states. Instead the Czech elites have never accepted the norm while the current Hungarian government has subverted the norm by reversing race anti-discrimination laws and policies and publicly taking a pro-segregationist stand related to Roma education.

### *Norm internalisation*

#### Problematising agency

The internalisation phase is the most underdeveloped parts of the norm life cycle model because the authors' privilege the analysis of transnational agency and its role in the diffusion of new norms internationally. The agency of domestic elites and the context in which they govern is of little interest to the authors who leave an analytical gap between the cascading of the new norm and the point at which the norm becomes institutionalised into domestic legislation and the existing institutional apparatus (1998: 902-905).

The problem with Finnemore and Sikkink's presentation of the final internalisation stage and the wider constructivist literature on transnational normative change stems from the featuring of a number of empirical studies that trace international norms whose domestic institutionalisation has proceeded in an uncontested or modestly challenged manner (Nadelmann, 1990, Finnemore, 1993 and Price, 1995). The focus of these studies is on the relatively uncontested construction of new norms at the supranational level, the primacy of transnational agency in norm construction and diffusion, and the relatively straightforward adoption of the norms by a large number of states through the signing of international conventions. The studies actually say very little about the extent to which norms are institutionalised and complied with domestically. Therefore, the findings should not be taken as a proof that norm diffusion and internalisation are one-way, top-down processes in which domestic political actors exercise little or no agency. The other main problem with these studies, which also affects the design of the norm life cycle model, is the 'cherry picking' of the norms (anti-pirating, anti-trafficking, prohibition of chemical weapons among others) whose very nature makes it easier to advocate for and garner wide international support. Constructivist studies have, in general, shied away from examining complex norms like the one studied here which relate to national identity and belonging and which typically do not have such clearly defined wide appeal. By basing their model on empirics that are limited in their scope and lacking in a rigorous analysis of domestic norm compliance, Finnemore and Sikkink provide a framework for the study of norms, which cannot accommodate instances of norm clashing which occur when new standards of behavior contradict historic national attachments to opposing norms.

The findings from the five cases studied here suggest that the behaviour of national political elites is key in determining the success or failure of domestic conformity with new norms. The thesis advances the claim that even in situations when a new norm becomes codified into regional institutions and legislation and national governments agree to recognise the norm, cascading and internalisation can be seriously disrupted when national political elites renege on their formal commitment. On the other hand, if the domestic elites consider the internalisation of the new norm a political necessity and have sufficient ideational commitment,

domestic norm embeddedness can take place without the presence of transnational norm enterprising actors.

The historical record also reveals the need for further analysis of the interactions between domestic political elites. My research which has taken into account and built upon Beth Simmons' analysis (2009) of the role of the executive and the judiciary in treaty compliance, or in this case norm compliance, shows that the collaboration of key norm entrepreneurs within the three branches of the government matters for norm conformity. The US judiciary played a critical part in dismantling the racial equality norm in the First Reconstruction and pioneered its re-institutionalisation into case law in the Second Reconstruction. In Hungary, the legislative branch and to a lesser extent, the judiciary, worked with norm entrepreneurs within the socialist-liberal government to spearhead new anti-discrimination policy and legislative reforms while the post-2010 undoing of the checks and balances system has eliminated the existing institutional support for the norm. The findings link to and support Beth Simmons' argument that treaties and the norms embedded in them have stronger effect in states with more independent judicial systems and thus possess the greatest potential to influence domestic policy in these types of domestic systems of government (2009:150). The analysis also suggests the need to disaggregate governing structures and the agents in them to account with more precision for the specific ways in which actors within the different branches interact with one another to appropriate or challenge new rules and notions. The account offered here points to the need for further research focusing on the relationships between the branches of the government and within the individual branches (e.g., bureaucratic agencies, ministries or other parts of the governing apparatus) to shed additional light on the behaviours, practices and predispositions that lead domestic actors to favor or challenge new norms.

This thesis distinguishes three possible norm internalisation scenarios depending on the behaviour of the ruling elites. First, the new norm is said to be permanently internalised in the domestic political order when the norm remains institutionalised and upheld despite changes in the state's government. The US and UK cases showcase this permanent internalisation, which should be understood not in Finnemore and Sikkink's sense as a deep and taken-for-granted embeddedness but in a more pragmatic sense, which defines internalisation not as absence of

contestation but as norm institutionalisation enforcement that endures despite the occasional contestation. Incomplete internalisation, evident in the First Reconstruction and the Hungarian case, is said to take place when a set of norm supportive political elites makes important steps in the norm's codification and promotion but the succeeding set of political elites un-does the previous gains. The third scenario, no internalisation, is exemplified by the behaviour of the political elites in the Czech case. No internalisation occurs when the domestic elites reject the norm from the onset.

#### Transnational versus domestic norm entrepreneurship

As already pointed out in the norm emergence phase when taken together the nature of the new norm and the level at which it is created are important in determining its domestic institutionalisation. The US and UK cases demonstrate that complex norms that raise questions of belonging and citizenship are more likely to be permanently institutionalised when advanced by justice-driven domestic elites. The Czech case, on the other hand, illustrates that norms imposed from actors at the supranational level are unlikely to achieve long-term internalisation when the domestic elites' rationale for compliance is wholly based on instrumental concerns, in this case short-term political goals related to EU accession. The other barrier to engaging in norm socialisation that stands out in the Czech and post-2010 Hungarian cases comes from the elites' preferences to resolve the 'Roma issue' through approaches, which are shaped by historical and discursive processes that have molded national identity in a way that presents Roma as an internal 'other' and validate racial inequality.

The thesis also suggests that non-state domestic norm entrepreneurs can influence substantially the behaviour of domestic political elites. The grassroots civil rights initiatives organised by activists at immense personal cost in the US and the advocacy efforts of the fledgling Roma movement in Hungary in the 1990s sped up the legislative and policy reforms in the area of race equality. In post-2010 Hungary, on the other hand, the Roma movement for civil rights is fraught with divisions while in the Czech Republic it is virtually non-existent. My interviews with pro-Roma and Roma activists suggest widespread passivity and reluctance among Romani communities at the grassroots level to oppose discriminatory laws and



practices and to demand compliance with existing anti-discrimination laws. In the absence of grassroots norm entrepreneurship, international pressure alone has been powerless to prevent norm erosion.

### Government setup

A state's government structure acts as an intervening variable that deserves attention because it can constrain or enhance norm internalisation. The analysis shows that an analytical distinction ought to be made between internalisation at the national and local level and that the design of the state's government framework (relatively centralised or decentralised) is a factor that facilitates or hinders the internalisation of new norms.

The thesis demonstrated that when national political elites consider norm adoption a priority and the government system is (even temporarily) centralised, the norm acceptance at the local level is greater. In the US case normative change was made possible because the interpretation of the constitutional provisions granted pre-eminence to federally made decisions. Despite the ordinarily decentralised system that gives states significant decision-making power, the thesis has shown that during both Reconstructions the national elites used their constitutionally derived powers to highly centralise the system in order to enforce the racial equality norm. Because the US Constitution mandates that Congress has the power to call upon the military to enforce the Laws of the Union, congressional elites during the First Reconstruction period were able to legitimise the establishment of military governments in the Southern states, which were accountable to them and which dismantled and rebuilt state and local institutions that incorporated the new norm in policy and practice. When it comes to the Second Reconstruction, the president acted as the key norm entrepreneur. The Constitution gives the presidential office the responsibility to "take care that the laws be faithfully executed", which is commonly interpreted as ensuring the execution of the law in practice and allows the president wide discretion over how to enforce specific laws. In other words, the president had a greater choice of opportunities for agency and was able to target the status quo in multiple ways: through military enforcement, institution building and restructuring, and laws for more robust anti-discrimination regulatory frameworks.

In the UK case, despite the system of devolution, legislating on equality matters has been reserved for the UK Parliament while the devolved administrations, with the notable exception of Northern Ireland, have been excluded from the law-making process. The centralisation of the process allowed national elites to engage in norm transference and the erection of a new institutional framework of monitoring and enforcement equality bodies across the administrations at the same time. In the EU case, the primacy of EU law over national law has enabled EU bureaucrats to monitor the formal compliance of member states with the timely and adequate transposition of the Race Equality Directive into national law. Moreover, the organisational set up and governing mechanisms of the EU institutions provide EU elites with the power to oblige member states to comply with EU laws through the mechanisms of infringement proceedings, litigation and financial sanctions. At the same time, it should be emphasised that the supremacy of intergovernmental organisations over national elites is of a rather formalistic nature and can mean very little in cases in which the domestic elites oppose the new norm. This happens because the political and legal power supranational institutions have over national elites is not comparable to the powers national elites have over regional and local authorities in a domestic centralised system due to their more limited enforcement and supervisory powers and the wide discretion national elites are granted in fulfilling the mandates of European institutions.

The pre-2010 Hungarian case also showed that when political elites who display norm commitment act within a decentralised government system, local norm conformity is negligible. The post-2010 Hungarian and Czech cases demonstrated that the government setup is irrelevant when national political elites do not embrace the new norm while a centralised system run by hostile national elites can expedite the civic death of new norms. The Hungarian decentralised municipal system until 2010 had a constraining role on the norm enterprising national elites. The thesis showed that the successive centre-left Hungarian governments throughout the 2000s, similarly to the Radical Republicans, displayed strong commitment to the institutionalisation of the racial equality norm into legislation and national policy and to ensuring the political representation of the Romani minority within governing structures. However, the extensive legislative and policy reforms at the national level especially in the area of educational desegregation were routinely contested by

municipal actors, who had authority over schools and whose unwillingness to implement desegregation policies was largely motivated by the limited domestic salience, or legitimacy, of the norm in society, making school desegregation a particularly damaging issue in the context of local electoral politics. In fact, the findings pointed out that in certain areas segregationist and discriminatory practices at the local level increased and intensified as the municipal authorities came up with especially detrimental ideas to circumvent the new laws and policies. These developments suggest that although key the norm entrepreneurship of domestic elites is not a sufficient condition for norm internalisation. The coming to power of PM Orbán's right-wing government started a dramatic restructuring of the governance system, which has been described as Orbán's "obsession with centralisation" and has sped up the demise of the racial equality norm by displacing it from the domestic public domain (Kornai, 2015).

In the Czech Republic the government system does not act as an intervening variable because of the anti-norm stand of the successive national governments that openly embraced opposing norms. The existence of a host of domestic institutions, which have been historically developed to support segregationist practices the most notable example being the extensive and well-funded system of special education which enjoys significant popular support, is an additional factor that prohibits normative progress. The current government structure that contains powerful institutions upholding contravening old norms along with the newly created weak anti-discrimination bodies has resulted in an institutional environment that is impervious to reforms and would be difficult to dismantle even if a new norm enterprising elite comes to power.

The setup of the domestic judicial system also influences norm institutionalisation. The thesis upholds several of Beth Simmons' claims (2009) in regards to the role of the judiciary in norm compliance. Several features of common law systems increase the possibility for deeper norm institutionalisation if the judiciary is sympathetic to the new human rights norm: the greater structural independence of the judiciary where judges can act as independent policy-makers, the competence of courts to hold governments accountable for violations of constitutional or other treaty-based provisions, and the role of precedent which facilitates the deeper embeddedness of norms in local jurisprudences (Simmons,

2009: 75). In civil law systems the judiciary tends to have little or no power to review government action and the constitutionality of government policies (ibid). In the absence of precedent, judges in civil law systems have no independent authority to create new rules and alter existing ones. Unlike the US judiciary, the Supreme Courts of the Czech Republic and Hungary are unable to produce high impact judgments even though strategic litigation on behalf of Roma children in the area of education has proliferated in the past decade especially in Hungary. The domestic judiciary in the two states is limited by the civil law system under which it operates and which precludes it from issuing broadly formulated verdicts with national significance. This is particularly noticeable in the Hungarian case, where despite multiple lawsuits in which the domestic courts found violation of the anti-discrimination principle in the educational system, the judgments have had limited impact. The impact is insubstantial because the court decisions are applicable only to the individual case and their enforcement has varied as it is dependent on the political will of the local authorities. This again underscores the importance of the setup of domestic structures, their scope of powers and degree of structural independence when it comes to norm internalisation.

*Going beyond conventional constructivism: implications for further research*

This thesis set out to provide a critical assessment of Finnemore and Sikkink's model of normative change by tracing the evolution of the racial anti-discrimination norm. Employing an institutional and policy-oriented analysis I re-examined and challenged the design of the norm life cycle model, the key actors, their motivations and the main mechanisms that elicit normative change. Staying within the confines of conventional constructivism I sought to develop further the relationship between agency and structure at the domestic level. In this section I address the limitations conventional constructivism faces when applied to complex norms that are central to identity and national belonging. These norms do not lend themselves easily to studies premised upon models of causality and quantification. Accordingly, they act as 'control tests' for the norm life cycle model and its limitations.

To recapitulate, Finnemore and Sikkink (1998) draw on soft-positivist methods to create a model in which ideational variables are presented as causing the

genesis and evolution of international norms. The choice of research design indicates a confluence between conventional constructivism and realist approaches, where constructivists take the inability of realists to explain certain phenomena as the starting point for showing the causal or semi-causal significance of ideational factors such as norms, values and beliefs on state behavior (Buzan and Hansen, 2009: 194). The conventional constructivist approach chosen by Finnemore and Sikkink contains inherent limitations that prevent its ability to engage critically with conceptions of norms that are linked to identity and citizenship. The reason for this has to do with the type of epistemology that conventional constructivist scholars adopt. Unlike post-positivist approaches, traditional constructivist epistemology embraces subjective conceptions of norms and sees normative change in terms of behaviors and actions that need to be explained rather than as a concept which is inherently contested and political. Because of the chosen analytical framework, epistemology and commonly used methodology of process tracing, conventional constructivism, unlike most other deepening approaches, does not allow the exploration of the relationship between norm presentations and deep-seated identities.

Critical constructivist and post-structuralist approaches that take a more discursive approach to norms and identity could usefully deepen the present research. Critical constructivism which uses linguistic analysis would be able to shed light on how the racial anti-discrimination norm becomes legitimated or invalidated through specific discursively constituted constructions that follow a specific set of rule-bound games that re-orient the constitution of identities and political interests and thus determine the policies that should be adopted (Fierke, 1999 and 2000). Post-structuralist linguistic approaches which emphasise the social power of language (Hook, 1984 and 1985) open up the possibility to conceptualise the anti-discrimination norm as a product of political practices, which is discursively constituted and has no materiality of its own outside its discursive representation (Shapiro, 1981 and Dillon, 1990). The discursive method enables the examination of the nation state and national identity as being produced and re-produced through the construction of internal 'Others' who are located in a variety of sites including ethnicity and race (Campbell, 1990: 270). Analysing political discourse in light of the need for societal cohesion could explain better the contested nature and the framing and re-framing of the anti-discrimination norm in relation to the different

minority groups in this thesis. Political discourse could conceivably challenge the norm's conceptual stability presenting it as something which changes according to transformations in understandings of national identity and the function minority groups perform within these understandings. Since critical constructivism analyses the linkages between the historic and discursive constitution of identities, it would help to explain shifts in understandings of national belonging as both a discursive practice and the outcome of major historic transformations. An examination of the very nature of the racial anti-discrimination norm through a study of the performative function the norm serves in shaping national identity in the five case studies could deepen the constructivist understanding of norm development. Alternatively, such research could contest the very idea of norm evolution if it could sufficiently problematise the conceptual stability of the racial anti-discrimination norm by arguing that the norm has no existence outside of the political discourse and practices that produce and re-produce its meaning according to temporary political aims.

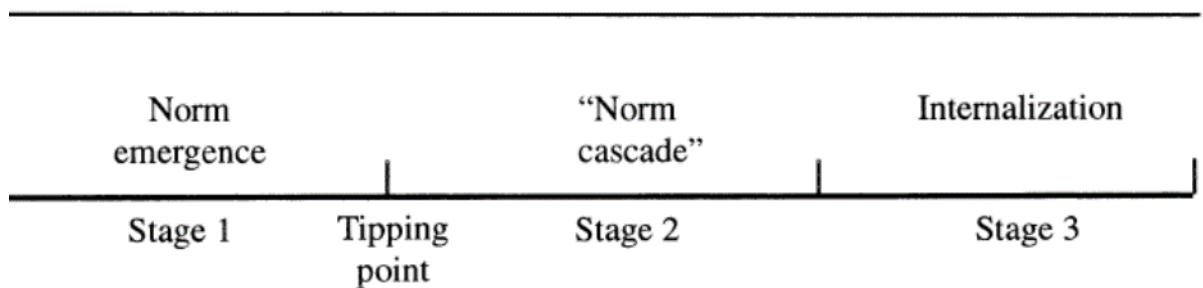
## Appendix A

**TABLE 1.** *Stages of norms*

	<i>Stage 1</i> <i>Norm emergence</i>	<i>Stage 2</i> <i>Norm cascade</i>	<i>Stage 3</i> <i>Internalization</i>
<i>Actors</i>	Norm entrepreneurs with organizational platforms	States, international organizations, networks	Law, professions, bureaucracy
<i>Motives</i>	Altruism, empathy, ideational, commitment	Legitimacy, reputation, esteem	Conformity
<i>Dominant mechanisms</i>	Persuasion	Socialization, institutionalization, demonstration	Habit, institutionalization

Source: Martha Finnemore and Kathryn Sikkink (1998: 898)

## Appendix B



**FIGURE 1.** *Norm life cycle*

Source: Martha Finnemore and Kathryn Sikkink (1998: 896)

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## **Interviews**

### *Czech Republic*

Interview with an expert from the Czech Agency for Social Inclusion, 7 May 2014, Prague.

Interview with a representative from COSIV, 7 May 2014, Prague.

Interviews with administrators from the Ministry of Education, 13 May 2014, Prague.

Interview with a senior official from the Ministry of Education, 16 May 2014, Prague.

Interview with representatives from the Office of the Czech Ombudsman, 5 May 2014, Brno.

Interview with a representative from the Roma Education Fund, 15 May 2014, Prague.

### *Hungary*

Interview with a legal expert. 9 April 2014. Budapest, Hungary.

Interview with a representative from Chance for Children Foundation. 9 April 2014. Budapest.

Interview with officials from the Ministry of Human Resources, the Secretariat of Roma Inclusion. 22 April 2014. Budapest.

Interview with a legal advisor from the Office of the Commissioner for Fundamental Rights. 24 April 2014. Budapest.

Interview with a former commissioner responsible for school integration. 24 April 2014. Budapest.

Interview with a government official from the Equal Treatment Authority. 25 April 2014. Budapest.

Interview with a former senior official from the Directorate General of Equal Opportunities. 25 April, 2014. Budapest.

Interview with a representative from the Roma Education Fund. 29 April 2014. Budapest.

Interview with the Minister of State for Social Inclusion. 29 April 2014. Budapest.

