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To Segregate or not to Segregate? Educational Rights
of the Roma Children in the Case Law of the European
Court of Human Rights

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Abstract

For years, Roma children have been put into special, segregated classes or schools where they have been taught a limited, low-level curriculum. The experience has left these students unqualified for all but the most basic jobs and has trapped generations of people of Roma ethnicity in a cycle of poverty and hopelessness.

Since 2007 the European Court of Human Rights has examined six cases which addressed the compatibility of segregated education of Roma children with the rights enshrined in the European Convention on Human Rights. This working paper illustrates the approach the Court has adopted in this recent case-law and its possible repercussions for future litigation and development both for Roma children but also for those who have experienced discrimination in education and in other areas protected by the European Convention.

Keywords

Educational rights, ECHR, Roma

'to separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone' (US Supreme Court decision *Brown v Board of Education of Topeka*)

Introduction

For years, Roma children have been funnelled into special, segregated classes or schools where they have been taught a limited, low-level curriculum. The experience has left these students unqualified for all but the most basic jobs and has trapped generations of people of Roma ethnicity in a cycle of poverty and hopelessness.

Since 2007 the European Court of Human Rights (hereafter the Court or the ECtHR) has examined six cases which addressed the compatibility of segregated education of Roma children with the rights enshrined in the European Convention on Human Rights (ECHR). This working paper illustrates the approach the Court has adopted in this recent case-law. It will argue that the novel approach and the key principles the Court has established will have far reaching repercussions and provide a basis for future litigation and development both for Roma children but also for those who have experienced discrimination in education and in other areas protected by the European Convention.

The working paper will be structured in the following way. The first two sections will provide a necessary background for understanding the context of the problems under discussion by (1) articulating the problems the Roma children are facing in education and by (2) addressing the issue of the negative impact of segregated education on the development of a child. After these brief introductory remarks the paper will examine first the facts of the cases under consideration and then the interpretation of the ECHR the Court has given in these cases. The paper will conclude with some final remarks on the importance of the emerging case law on segregation in education but at the same time will also reflect on the fact that victory in court and real change are sometimes two different things.

Education of Roma Children in Europe. What is the Problem?

With an estimated population between 8 million and 12 million, Roma are one of Europe's largest minorities. They are also among the most marginalized. Throughout Europe, Roma face institutionalized discrimination, limited opportunities for participation in many aspects of society and poor access to good-quality education.

Assessing the full extent of the deprivation faced by Roma children in education is difficult, as data are often partial and unreliable. However, the data that are available are quite telling. In most central and eastern European countries no more than 20% to 25% of Roma children attend secondary school and the vast majority of those are enrolled in vocational education. Many drop out of primary school. It is estimated that 15% to 20% of Roma children in Bulgaria and 30% in Romania do not continue beyond fourth grade.¹ The problem is not restricted to central and eastern Europe. It is estimated that

¹ See analysis of the situation of the Roma children in education, including cases of segregation in Poland: Buchowski, M., Chlewińska, K. (2011) *Tolerance of Diversity in Polish Schools: the case of Roma children and ethics classes*, ACCEPT PLURALISM Working Paper 14/2011; in Bulgaria: Kosseva, M., Hajdinjak, M.

(In)tolerance of Difference in Bulgarian Schools: Discourses and Practices, ACCEPT PLURALISM Working Paper 4/2011, especially pp.8-16; in Romania: Ana, Ch., Andreescu, G., Doroftei, I.-M. Matei, P.G. (2011) *The Embodiment of Tolerance in Discourses and Practices Addressing Cultural Diversity in Romanian Schools*, ACCEPT PLURALISM

half of Italy's Roma children are in primary school but fewer than 2% progress to upper secondary education.² According to the data of a recent survey by the European Union Agency for Fundamental Rights and the United Nations Development Programme in some countries, such as Portugal, Spain, France, fewer than one out of 10 Roma is reported to have completed upper-secondary education.³ One thing is clear. While data are scarce, education outcomes for Roma children fall well below the levels for the majority population.⁴

In many countries, education policies and practices result in creating segregation. In Bulgaria, for example, an estimated 70% of Roma children study in schools where the share of the majority population is less than 50%. Moreover, Roma children are often more likely than their peers to be diagnosed as 'special needs' students and assigned to 'special schools' (often for mentally retarded children) with little attention to their education needs.⁵ In Hungary, one report found that 'about every fifth Roma child is declared to be mildly mentally disabled'.⁶

Such practices are well documented, with Roma children being approximately 15 times more likely than other children to be placed in such special schools.⁷ They also reflect cultural attitudes and negative stereotyping. The international monitoring bodies have found that in Slovakia, for example, up to half of Roma children in special elementary schools were there as a result of erroneous assessment⁸.

Why is segregation at school bad? And what are the alternatives?

Essentially, the placement of children in different groups depending on abilities is known as educational tracking. Placement of children in segregated special schools is an example of very early tracking of students who are perceived to be of "low ability" or "low potential." Attitudes to educational tracking have been rather different in the educational field itself resulting in no less controversy on the part of the courts in cases involving educational tracking.⁹

However, since the 1990s, educational research has consistently shown that "tracking contributes significantly to the achievement gap between low-income, minority students and their more affluent

(Contd.) _____

Working Paper 8/2011, especially pp.9-17; in Hungary: Vidra, Z., Fox, J. (2011) *The embodiment of (in)tolerance in discourses and practices addressing cultural diversity in schools in Hungary – The case of Roma*, ACCEPT PLURALISM Working Paper 10/2011, pp.9-22.

² Open Society Institute. 2007. Equal Access to Quality Education for Roma. Vols. 1 and 2. Budapest, Open Society Institute.

³ The situation of Roma in 11 EU Member States Survey results at a glance, FRA, UNDP, 2012, http://fra.europa.eu/sites/default/files/fra_uploads/2099-FRA-2012-Roma-at-a-glance_EN.pdf. See also Triandafyllidou, A. (2011) *(In)tolerance of difference in Greek schools: the case of migrant and Roma children* ACCEPT PLURALISM Working Paper 6/2011.

⁴ Open Society Institute. 2007. Equal Access to Quality Education for Roma. Vols. 1 and 2. Budapest, Open Society Institute.

⁵ Open Society Institute. 2007. Equal Access to Quality Education for Roma. Vols. 1 and 2. Budapest, Open Society Institute. See also UNESCO (2010) *Education for all Global Monitoring Report 2010. Reaching the marginalized*, Paris, UNESCO, p. 155.

⁶ Roma Education Fund. 2007. Advancing Education of Roma in Hungary: Country Assessment and the Roma Education Fund's Strategic Directions. Budapest, Roma Education Fund, p. 32

⁷ Save the Children (2000), *Denied a future: The right to education of Roma/Gypsy and Traveller children*; and, D. Ringold (2001), Education of the Roma in Central and Eastern Europe: Trends and challenges in *The Roma education resource book*, ed. C. McDonald, J. Kovács, and C. Fényes (Budapest: Open Society Institute).

⁸ European Commission against Racism and Intolerance. 2009. ECRI Report on Slovakia (Fourth Monitoring Cycle).

⁹ Teaching Inequality: The Problem of Public School Tracking. Harvard Law Review, Vol. 102, No. 6, Apr., 1989, 1318-1341.

peers.”¹⁰ Early tracking has especially negative effects on the achievement levels of disadvantaged children. As stated in a recent communication from the European Commission: “Education systems with early tracking of students exacerbate differences in educational attainment due to social background, and thereby lead to even more inequitable outcomes in student performance. . . . [early tracking] tends to channel them [children] towards less prestigious forms of education and training. Postponing tracking until the upper secondary level, combined with transfer between school types, can reduce segregation and promote equity without diminishing efficiency.”¹¹

The longer-term consequences of tracking include dropping out of school early, thus limiting young people’s opportunities for future employment. If they do continue, they enrol in special vocational school or in short vocational training programs that result in low qualification and the acquisition of skills that are not in demand in the labour market.

That said, effective and practical alternatives exist to segregation in special schools. These alternatives, known in Europe, include settings with high expectations of all students, heterogeneous classrooms, high level curriculum for all students, use of Roma teaching assistants, after-school and summer classes, tutoring and mentoring, as well as teacher training in second language and multicultural pedagogy.¹²

The Roma Cases before the ECHR

The cases that will be examined in the present paper all concerned the situation in the education system of the Roma community. The practices complained of by the applicants were different: they concerned the creation of special schools, and also raised the problem of special classes created in common educational institutions. However, all these cases represented policies which, on their face, were not based on race or ethnic origin, and yet in fact disproportionately or exclusively affected Roma children leading to their isolation from other pupils in the educational sphere. The problem for the Court was thus to determine to what extent and on what basis such measures would be deemed discriminatory.

In *D.H and Others v the Czech Republic*,¹³ at stake was the impact on Roma children in Czech Republic of the practice of placing Roma schoolchildren, in “special schools” intended for pupils with learning disabilities where instruction was significantly inferior to that delivered in ordinary schools. The case was brought by 18 Roma students from the Ostrava region. In 2000 the applicants complained to the ECtHR arguing that their treatment amounted to discrimination in violation of Article 14 in conjunction with Article 2 of Protocol 1 of the ECHR¹⁴ as their right to education had been denied. Applicant submissions to the ECtHR included extensive research indicating that Roma

¹⁰ H. Mehan, and L. Hubbard (1999), Tracking untracking: Evaluating the effectiveness of an educational innovation. Center for Research on Education, Diversity and Excellence, University of California. http://repositories.cdlib.org/crede/rschbrfs/research_brief03.

¹¹ Communication from the Commission to the Council and to the European Parliament on “efficiency and equity in the European education and training systems,” Brussels, 8.9. 2006, COM (2006) 481 final.

¹² Council of Europe Project, “Education of Roma/Gypsie children in Europe,” DGIV/EDU/ROM. See also S. Rona, and L. Lee (2001), *School success for Roma children: Step by Step special schools initiative interim report*. (New York: Open SocietyInstitute).

¹³ *D.H. and others v. the Czech Republic*, Application no. 57325/00, Judgement of 13 November 2007.

¹⁴ Article 14 ECHR reads: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.

Article 2 of Protocol 1 of the ECHR reads: ‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions’.

children were systematically assigned to segregated schools based on their racial or ethnic identity rather than intellectual capacities. The Government, however, submitted that it was as a result of their low intellectual capacity, measured through psychological tests, that they had been assigned to these institutions. Yet the applicants highlighted that, as attested by various international monitoring bodies, the number of the Roma children placed in these schools was disproportionately high. In a decision in February 2006, the chamber of the Court stated that although the applicants had raised serious arguments, they did not amount to a violation of the Convention. The Chamber, in finding that there had been no violation of the children's rights, placed considerable reliance on the state's procedures for the testing and evaluation of children as a sound basis for determining their educational placement as well as on the professional judgment of educational psychologists who assessed children's needs, aptitudes, and abilities. The Chamber also discounted statistics that demonstrated that a disproportionate number of Roma children are assigned to special schools. Pursuant to an appeal filed by the applicants, the Grand Chamber accepted to examine the facts of the case in the light of the broader context. From this perspective, it admitted that as a general matter the school assignment policy in place in the Czech Republic had a disparate impact on Roma children compared to non-Roma children. This permitted to establish a presumption that the measure complained of by the applicants was discriminatory, which the government could try to rebut. Discussing the relevance of the psychological tests referred to by the government to justify the contested decisions, the court observed that various independent bodies have put into question their adequacy and reliability. There were reasons to suspect that they were biased against Roma and that the results were not analyzed in the light of the specific characteristics of this minority. Accordingly, they could not provide an objective and reasonable justification for the impugned measure. In a landmark decision the Grand Chamber ruled in favour of the applicants and found that they had suffered discrimination when denied their right to education; and demanded that the Czech government stop the segregation and redress its effects.

Just months after its judgment against the Czech Republic, the European Court of Human Rights issued a judgment against Greece finding that the authorities had violated the rights of Romani children from the Psari area of Aspropyrgos, to education without discrimination. While *DH* concerned the problem of special schools, *Sampanis and others v Greece*¹⁵ raised the issue of special classes created in common educational institutions. 11 applicants, Greek nationals of Roma origin, claimed that the authorities' failure to provide schooling for their children during the 2004-2005 school years and the subsequent placement of over 50 children in special classes located in the annex to the main building of the 12th Primary School School,¹⁶ was directly related to their ethnic, Roma, origin. Various elements suggested that the measure was in fact aimed at separating Roma children from other children because of their ethnic origin. Only Roma were assigned to these so-called preparatory classes. The decisions were not based on an objective assessment of children's abilities. And, later there was made no review to see if the children had progressed sufficiently to join the main school. Finally, these classes had been created in a context marked by "incidents of a racist character", with non Roma parents violently protesting against the admission of Roma children to the school. In view of all these circumstances the Court ruled that the assignment of children to these special, separate classes amounted to discrimination.

In 2012 the Court once again censured the Greek authorities for allowing discrimination against Roma of the 12th Primary School in Aspropyrgos.¹⁷ The Court, noting the lack of significant change since the 2008 judgment, found that Greece had not taken into account the particular needs of the Roma children of Psari as members of a disadvantaged group and that the operation between 2008 and 2010 of the 12th Primary School in Aspropyrgos, which was attended by Roma pupils only, had

¹⁵ *Sampanis and Others v. Greece*, Application No. 32526/05, Judgment of 5 June 2008.

¹⁶ The annex was located 5 km from the main building and was attended only by Roma children.

¹⁷ *Sampanis and Others v. Greece*, Application no. 59608/09.

amounted to discrimination against the applicants. Under Article 46 of the ECHR (binding force and execution of judgments), the Court recommended that those of the applicants who were still of school age be enrolled at another State school and that those who had reached the age of majority be enrolled at “second chance schools” or adult education institutes set up by the Ministry of Education under the Lifelong Learning Programme..

In *Oršuš v Croatia*¹⁸ 14 Croatians of Roma origin complained that they were segregated into Roma-only classes and consequently suffered educational, psychological and emotional damage. On 17 July 2008, the Court found unanimously that there had been no violation of Article 2 of Protocol No. 1 taken alone or in conjunction with Article 14 of the ECHR. The Court observed that any difference in treatment of the applicants had been based on their language skills and considered that in the sphere of education States could not be prohibited from setting up separate classes or different types of school for children with difficulties, or implementing special educational programmes to respond to special needs. However, on 16 March 2010, the Grand Chamber judgment overruled this judgement by nine votes to eight and delivered the judgment, finding a violation Article 14 of ECHR read in conjunction with Article 2 of Protocol No. 1. The majority found that only Roma children had been placed in the special classes in the schools concerned. The Government attributed the separation to the pupils’ lack of proficiency in Croatian; however, the tests determining their placement in such classes did not focus specifically on language skills, but rather assessed their general psycho-physical conditions. Once placed in Roma-only classes the children were not provided with any measures to address their alleged lack of knowledge of the Croatian language. Subsequently, there was no system in place to monitor progress of the children in learning Croatian. The educational programme subsequently followed did not target language problems and the children’s progress was not clearly monitored. Moreover, the curriculum was significantly reduced and had 30 per cent less content than the curriculum followed in mainstream classes. The placement of the applicants in Roma-only classes was therefore found unjustified, in breach of Article 2 of Protocol No. 1 and Article 14.

2013 was further marked by two decisions concerning the segregation of Roma children in educational institutions. In *Horváth and Kiss v. Hungary*¹⁹ decided on 29 January 2013 the judgement was unanimous in favour of the complaints of two young men of Roma origin. Mr. Horváth and Mr. Kiss, two Hungarian Roma were diagnosed to have a “mild mental disability”. They claimed that “their education in a special school had amounted to direct and/or indirect discrimination in the enjoyment of their right to education, on the basis of their Roma origin, in that their schooling assessments had been culturally biased, they had been placed in schools designed for the mentally disabled whose curriculum had been limited, and they had been stigmatized in consequence”. In this case the Court found that the applicants’ schooling arrangement indicated that the authorities had failed to take into account their special needs as members of a disadvantaged group. As a result, the applicants had been isolated and had received an education which made their integration into majority society difficult. The Court decided in favor of Mr. Horváth and Mr. Kiss and agreed with them that the procedure of diagnosing children as mentally disabled is discriminating Roma children. Moreover, *Horváth and Kiss*, by far is the first case where the Court explicitly mentions positive obligations of the state to address and furthermore ‘to undo a history of racial segregation in special schools’.²⁰

*Lavida and Others v. Greece*²¹ decided in May 2013 concerned the education of Roma children who were restricted to attending a primary school in which the only pupils were other Roma children. The case was brought by a national NGO, the Greek Helsinki Monitor on behalf of 23 Romani schoolchildren from the town of Sofades. In spite of the rule that pupils were to be educated in schools

¹⁸ *Oršuš and Others v. Croatia*, Application No. 15766/03, Judgment of the Grand Chamber, 16 March 2010.

¹⁹ *Horváth and Kiss v. Hungary*, Application no. 11146/11, Judgment of 29 January 2013.

²⁰ para. 127.

²¹ *Lavida and Others v. Greece*, Application no. 7973/10, Judgment of 30 May 2013.

situated near their homes, no non-Roma child who lived in the district attached to the school under consideration was educated in that school. And Roma children from other areas were assigned to this school as well. The Court noted that the relevant authorities had been informed about the existence of ethnic segregation in the education of Roma children in Sofades. However, the situation complained of by the applicants for the 2009-2010 academic year had lasted until the 2012-2013 academic year. Even in the absence of any discriminatory intention on the State's part, the Court held that a position of the State which consisted in continuing the education of Roma children in a state school attended exclusively by children belonging to the Roma community and deciding against effective anti-segregation measures could not be considered as objectively justified by a legitimate aim. The Court unanimously found that the continuing nature of this situation in Greece and the State's refusal to take anti-segregation measures implied discrimination and a breach of the right to education.

Lessons To Be Learnt From The Case Law Under Examination

The cases described have resulted in a series of landmark decisions in which several important principles have been either clarified or established.

First, the decisions have brought the ECHR's Article 14 jurisprudence in line with principles of antidiscrimination law that prevail at the international and European Union levels.

Second, for the first time the European Court of Human Rights has found a violation of Article 14 of the Convention in relation to a pattern of ethnic discrimination in a particular sphere of public life, in public schools. As such, the Court has underscored that the Convention addresses not only specific acts of discrimination, but also systemic practices that deny the enjoyment of rights to racial or ethnic groups.

Third, the Court acknowledged that in order to guarantee the effective protection of rights of non-discrimination, less strict evidential rules should apply in cases of alleged indirect discrimination. Where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State to show that the difference in treatment is not discriminatory.

Fourth, when it comes to assessing the impact of a measure or practice on an individual or group, the use of statistics may be relevant. In particular, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute *prima facie* evidence of indirect discrimination.

Finally, the Court acknowledged that discriminatory barriers to education for Roma children are present in many European countries and to address them positive action is required.

These and other principles will be addressed in more detail in the rest of the paper.

1. Unified Anti-Discrimination Principles for Europe. Indirect Discrimination

At the center of all of the six described cases brought before the ECtHR there has been the question of what constitutes discrimination in education under Article 14 of the ECHR. More precisely, the Court had to consider the situation where a difference in treatment in education has taken the form of disproportionately prejudicial effects of a general policy or measure which, though expressed in neutral terms, has discriminated against one ethnic group, the Roma minority. The Court was called to rule whether such a situation may amount to "indirect discrimination" and be in breach of the Convention.

It has long been the position of the ECtHR that the European Convention must provide practical and effective protection for human rights.²² The broad language of Article 14 has allowed it to evolve over time, to respond to changes in the understanding of discrimination and to provide increasing protection against it. However, while the Court had well developed a clear position with respect to direct discrimination, indirect discrimination had not received comparable attention. The cases under examination have provided an opportunity for the Court to synthesize its approach with respect to Article 14,²³ and to bring the Court's jurisprudence on indirect discrimination closer to other jurisdictions which have developed more progressive case law in this area. Although it is rather difficult to draw a precise line between the categories of direct and indirect discrimination, the European Union, UN bodies, the US Supreme Court,²⁴ and other national courts have all adopted a systematic approach to indirect discrimination. Thus, the UN Committee on the Elimination of Racial Discrimination (CERD) defined indirect racial discrimination, as extending "*beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect.*"²⁵ The UN Human Rights Committee has also endorsed this approach.²⁶ The European Court of Justice has confirmed that the principle of equal treatment prohibits not only overt discrimination but also all covert forms of discrimination.²⁷

In a landmark decision *D.H and Others v the Czech Republic* the ECtHR for the first time recognised the notion of 'indirect discrimination'. 'Indirect discrimination' occurs where an apparently neutral provision, criterion or practice places certain persons at a disadvantage compared with other persons. It is concerned with the impact that a policy or practice has on an individual or group. The Court admitted in *DH* that the school assignment policy in place in the Czech Republic had a disparate impact on Roma children compared to non-Roma children.²⁸ In *Horváth and Kiss v. Hungary* the Court also found that Roma, more than any other group, were burdened by the educational system in place and subject to wrongful placement in special schools based on the diagnostic system.

This permitted the Court to establish a presumption that the measure complained of by the applicants was discriminatory. The Court moreover, makes clear that **intent is not required** in cases of indirect discrimination.²⁹ It recognises that indirect discrimination maybe inadvertent and may be

²² *Airey v. Ireland*, Judgment of 9 October 1979, Series A, No. 32 (197901980) at § 24. This principle has been confirmed in a number of cases since *Airey*, such as in the case of *Podkolzina v. Lativa*, Appl. No. 46726/99, Judgment of 9 April 2002, para. 35.

²³ See a detailed analysis of the ECtHR approach to Article 14 in Gerards, J. (2004) 'The Application of Article 14 ECHR by the European Court of Human Rights', in Jan Niessen and Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Brill, 2004), 3-60.

²⁴ Actually, the concept of indirect discrimination was first recognised by the Supreme Court in the USA in *Griggs v. Duke Power* (401 U.S. 424 (1971)) and has subsequently been widely incorporated by courts and legislatures internationally.

²⁵ *L.R et al v. Slovakia*, Comm No. 31/2003, U.N Doc. CERD/C/66/D/31/2003 (2005) at para. 10.4.

²⁶ Human Rights Committee General Comment No. 18, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003) at § 2; CERD General Recommendation No. 19, (1995), U.N. Doc.A/50/18 at 140 at § 3 and CERD General Recommendation 14, (1994), U.N Doc. A/48/18 at 114.

²⁷ Case C-147/03, *Commission v. Austria*, Judgment of 7 July 2005 at para. 41; Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; Case C-65/03 *Commission v Belgium*, para. 28, and Case C-209/03 *Bidar* [2005] ECR I-0000, para. 51.

²⁸ para 193. This was radically different compared to what the Chamber ruled in 2006. Although the Chamber accepted that 'if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group', (para.46) it found no violation. See a critical review of the 2006 approach taken by the Chamber with respect to indirect discrimination. Goodwin 'DH and Others v The Czech Republic: A Major Setback for the Development of Non-Discrimination Norms in Europe', (2006) 7 German Law Journal 421.

²⁹ *D.H. and others v. the Czech Republic*, Application no. 57325/00, Judgement of 13 November 2007, para.194.

based on cultural or societal assumptions and may even have been adopted in good faith.³⁰ Thus, it is not necessary for the applicant to prove that the impugned measure was designed or applied with any discriminatory *intent*.³¹ In the case of indirect discrimination, it is sufficient that the practice or policy results in a disproportionate adverse *effect* on a particular group.

2. Structural or Systemic Forms of Discrimination

A new approach to indirect discrimination has raised before the ECtHR the question of the need to examine **structural or systemic forms of discrimination**. Previously, although the ECtHR has proved to be willing to rule favourably in an increasing number of cases involving the Roma, the underlying structural causes of exclusion have not been addressed and have often been left untouched. As Goodwin points out,

... these victories concerned cases that were outside the everyday experience of Roma. Although one could argue that abuse by both the police and the public, and the culpable neglect of the authorities, with which these cases dealt stemmed from the discriminatory environment in which Roma live, the actual events under examination were themselves not a part of systemic discrimination, an institutionalised and officially sanctioned part of the everyday in a way that planning laws and the education system are.³²

It is thus for the first time in the cases under examination that the ECtHR demonstrated readiness to take into consideration a general situation of inequality that the Roma community lives in. In assessing the disproportionate impact of apparently neutral measures on the Roma minority, the Court has considered the broader context in which indirectly discriminatory practices and policies are adopted and operate. It has found that the social context reveals **systemic** discrimination and examined evidence of **patterns of disadvantage**.³³ In evaluating disproportionate effect of placement of the Roma children in separate schools or classes, the ECtHR looked beyond the facts of the cases at hand and considered evidence of “a general picture” of disadvantage.

3. Proving Discrimination: the Burden of Proof

As it has been stressed above, indirect discrimination reflects systemic inequalities in society echoing accepted societal stereotypes and commonly held prejudices. Because it is structural – in that a particular neutral policy or practice has a disproportionately prejudicial effect on a particular minority group – it is particularly difficult to prove. However, this makes its discriminatory impact no less real on its victims. Pursuant to recent European Community Directives³⁴, all EU Member States have, or are in the process of adopting legislation to shift the burden of proof in discrimination cases. This principle reflects the well-established practice of the ECJ³⁵ and the United Nations treaty bodies.³⁶

³⁰ See similar position adopted by the CERD in General Recommendation No. 19 in which it notes that racial segregation might arise as an “unintended by-product” of individual action; A/50/18, para. 3. This has also been confirmed by the ECJ in Case 170/84, *Bilka-Kaufhaus*, [1986] ECR 1607.

³¹ *Perera v. Civil Service Commission and Department of Customs and Excise* [1982] ICR 350 (EAT), affirmed [1983] ICR 428 (CA), para.17.

³² Goodwin, M. (2009) Taking on Racial Segregation: the European Court of Human Rights at a *Brown v. Board of Education* moment? *Rechtsgeleerd Magazijn THEMIS* 2009-3, 93-105, at p.96

³³ Similarly, the CERD Committee has recently held that in assessing indirect discrimination, full account should be taken of the particular context of the case, as by definition indirect discrimination can only be demonstrated circumstantially. *L.R et al v. Slovakia*, Comm No. 31/2003, U.N Doc. CERD/C/66/D/31/2003 (2005), para 10.4.

³⁴ Race Directive 2000/43/2000 of 29 June 2000; Framework Directive 2000/78/2000 of 27 November 2000; Revised Directive 76/207/EEC.

³⁵ *Bilka-Kaufhaus*, *supra* n. 17, para. 31; Case C-33/89 *Kowalska* [1990] ECR I-2591, para. 16, and C-184/89 *Nimz* [1991] ECR I-297, para. 15; Case 109/88 *Danfoss* [1989] ECR 3199, para. 16.

The ECtHR has also already acknowledged the complexity of proving discrimination cases.³⁷ Due to its subtle character, these difficulties of evidence are compounded in cases of indirect discrimination. For this reason, courts and legislatures are increasingly accommodating in the evidence they allow of indirect discrimination. The judgements under discussion have confirmed a flexible approach taken by the European Court of Human Rights, for victims to be able to secure effective protection. The Court made it clear that once a well-grounded *prima facie* case of ‘indirect discrimination’ has been established (the applicant has demonstrated that significantly more people of a particular category are placed at a disadvantage by a given policy or practice), the **burden of proof** shifts to the respondent state to prove that the difference in impact has an objective and reasonable justification unrelated to ethnic origin. The Court has accepted that if the onus does not shift to the incumbent government at this stage of the indirect discrimination enquiry, it will “in practice be extremely difficult for applicants to prove indirect discrimination”.³⁸ The key here is whether the legislation pursues a ‘legitimate aim’ and whether the means used are ‘proportionate’.

In all of the six cases the Governments failed to justify their policies of segregation of Roma children. Whereas in *DH, Oršuš and Horváth and Kiss* the respondent states sought to explain the difference in treatment between Roma and non-Roma children by the need to adapt the education system to the capacity of children with special needs and different (including linguistic) abilities, the judgment of the Court was to the effect that the relevant psychological tests that determined placement in separate schools or classes were unreliable since they were based on the experiences of the majority population and made no allowance for cultural differences. The states thus failed to provide necessary guarantees to avoid the misdiagnosis and misplacement of the Roma children. Therefore, no ‘objective’ justification could be found for the difference in treatment.

In *Sampanis and Lavida*, the State failed to offer a convincing explanation to justify the special treatment of the Roma children as well. In *Sampanis* the ECtHR rejected the State’s arguments that the children had not satisfied all the formalities for joining the regular school. In view of the vulnerable position of the Roma, the ECtHR held that local officials should have waived certain formalities to ensure Roma children received education. In *Lavida* even with the absence of any discriminatory intention on the State’s part, the Court found inadmissible the fact that State being aware of the existing situation tolerated the discriminatory practices of segregating of Roma children and was unable to introduce effective anti-segregation measures due to the resistance of the non-Roma parents.

None of the practices exercised by the states have been found by the Court necessary to achieve a legitimate aim.

4. No Waiver of Right to Non-Discrimination

Importantly, the Court has also stressed that in view of the fundamental importance of the prohibition of racial discrimination, one could never waive the right not to be subject to racial discrimination. In *DH* and *Sampanis*, the governments argued that the parents’ consent to the placements had satisfied the justification test. Yet the Court doubted the genuineness of the parents’ consent. The parents belonged to a “disadvantaged” and “often poorly educated” community. There was no evidence that

(Contd.) _____

³⁶ The Human Rights Committee has stated that “substantive reliable documentation” will shift the burden of proof to the Respondent State; *Chedi Ben Ahmed Karoui v. Sweden*, Case No. 185/2001 of 25 May 2002, § 10. See also Conclusions of the Committee of Economic, Social and Cultural Rights on Luxembourg, U.N.Doc. E/C.12/1/Add.86 (2003), para.10, and Poland, U.N.Doc.E/C.12/1/Add.82 (2002) para. 7; Conclusions of CERD, United Kingdom of Great Britain and Northern Ireland, U.N.Doc. CERD/C/63/CO/11 (2003), para. 4.

³⁷ *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, Judgment of 26 February 2004, para. 161; *Hoogendijk v. the Netherlands*, no. 58641/00, Admissibility Decision of 6 January 2005, at pp. 21-22.

³⁸ The Court first considered the possibility of a shift in the burden of proof in the non-discrimination context in *Nachova v. Bulgaria* in 2004. See also *D.H. and others v. the Czech Republic*, Application no. 57325/00, Judgment of 13 November 2007, para.180.

they were presented with any detailed information about options or the effects of their choice, and further, they had been given a choice between sending their children to special schools or to mainstream schools where they “risked isolation and ostracism.” Though one dissenting judge castigated the majority for being patronizing in its attitude to the parents, these seemed to be good reasons for the Court to regard the consent as inadequate. The absence of meaningful consent was even more apparent in *Sampanis*. Here, the parents agreed to a separate (prefabricated) building for their children, but this consent was given under the pressure of demonstrations by large numbers of local parents who objected to the Roma children joining the mainstream school. Police were called in to assure order, and at one point, the building for the Roma children was attacked. The Court was sceptical of the value of consent in these circumstances. By doing so, the Court has further confirmed that whatever the reasons behind the placement of Roma children in separate educational institutions, from a human rights perspective clearly any ethnic segregation is unacceptable.

5. Proving Discrimination: The Use of Statistics

The cases under discussion have confirmed the Court’s position that when it comes to assessing the impact of a measure or practice on an individual or group, the use of statistics may be relevant.

Internationally, statistics are the key method of proving indirect discrimination. Where policies and practices are neutral on their face, statistics provide a valuable means of identifying the varying impact of measures on different groups of society. The EC Directives leave open the possibility that cases of indirect discrimination be proved “by any means including on the basis of statistical evidence.”³⁹ Statistics are accepted as proof of discrimination by the UN treaty bodies,⁴⁰ and before the ECJ.⁴¹ The ECtHR is not entirely new to statistics as a means of proving discrimination either.⁴²

The cases on segregation in education of the Roma children have offered an opportunity for the ECtHR to further develop its position on the use of statistical evidence.

In *DH*, the plaintiffs relied extensively on statistical data gathered in Ostrava during the 1998/1999 school year, showing that, during that year:

- Over half of the Romani children were in remedial special schools;
- Any randomly chosen Roma child was more than 27 times more likely to be placed in schools for the learning disabled than a similarly situated non-Roma child;
- Even where Romani children managed to avoid placement in remedial special schooling, they were most often schooled in substandard and predominantly Roma-only schools.
- Romani children in regular primary education in Ostrava (i.e., in the 70 standard primary schools) were heavily concentrated in 3 primary schools;
- 32 of 70 primary schools in Ostrava had not one single Romani pupil.

In *Sampanis and Others* all Roma children attending the school at issue were allocated to a separate establishment. In *Lavida* the school initially thought of as an ordinary school was attended only by Roma children regardless of the fact that due to place of residence they should have been assigned to another school. In *Horváth and Kiss* the plaintiffs drew the attention of the Court to the fact that 40 to

³⁹ Race Directive, Preamble § 15 (emphasis added).

⁴⁰ The Committee on the Elimination of Discrimination against Women has emphasised that statistics are “absolutely necessary” in understanding discrimination in General Recommendation 9, *Statistical Data Concerning the Situation of Women*.

⁴¹ Case 170/84, *Bilka-Kaufhaus*, [1986] ECR 1607, at para. 7. See also Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, acting on behalf of Danfoss [1989] ECR 03199.

⁴² See, for example, *Zarb Adami v. Malta* (Application no.17209/02) and *Hoogendijk v the Netherlands* (Application no. 58641/00).

50 per cent of the students in their remedial school were Roma students and that only 0.4-0.6 per cent of students from such schools had an opportunity to participate in integrated secondary education.

While the Court held that “statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory,” the Court nevertheless concluded that the presented figures ‘reveal a dominant trend’.⁴³ The Court then followed the EU and international precedents in ruling that “reliable and significant” statistics could be used to prove a discriminatory effect.⁴⁴

Whereas the Court has not been willing to accept statistical evidence unhesitatingly, where the credibility, strength and relevance of statistics to the case has been positively assessed, the Court has proven to be ready to rely on such statistics. Where the statistics appear on critical examination to be reliable and significant, their significance needs to be given legal effect. This has been done most often through the shifting of the burden of proof. The weight given to statistics depends upon the extent of disadvantage that they reveal. Where they reveal an overwhelming disparity, the statistics alone should amount to a *prima facie* case capable of shifting the burden of proof:

... the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce.⁴⁵

This does not, however, detract from the necessity of the Court having to scrutinise and weigh up the relevance of all evidence. In *Oršuš and Others v. Croatia* the Grand Chamber came to the conclusion that statistics presented did not demonstrate that was not a general policy to automatically place Roma pupils in separate classes in both schools at issue. Therefore, the statistics submitted did not suffice to establish that there was *prima facie* evidence that the effect of a measure or practice was discriminatory.⁴⁶ In this case, indirect discrimination was proved without statistical evidence. The Court took note of the fact that the measure of placing children in separate classes on the basis of the insufficient knowledge of the language of instruction was applied only in respect of Roma children in several schools, and thus, the measure in question represented a difference in treatment.

6. Positive Obligations

The novelty of the Roma education cases also lies in the Court’s reasoning about states’ positive obligations. *Horváth and Kiss*, by far is the first case where the Court explicitly mentions positive obligations of the state to address and furthermore ‘to undo a history of racial segregation in special schools’.⁴⁷

Such strong statements on positive obligations are not present in the previous case law. Though, it should be noted that, when it comes to positive obligations, there is a line of evolution present in the Court’s reasoning. Thus, in *Thlimmenos*, the Court established a failure of the state ‘to introduce appropriate exceptions’⁴⁸ in order ‘to treat differently persons whose situations are significantly different’⁴⁹. In *DH*, the Court found that ‘in certain circumstances a failure to attempt to correct

⁴³ *Horváth and Kiss v. Hungary*, Application no. 11146/11, Judgment of 29 January 2013, para.110.

⁴⁴ Interestingly, as some authors have pointed out, the Court has been more willing to use statistics in connection with discrimination in education than in other fields. See on the point Sandland, R. (2008) ‘Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights, Human Rights Law Review 8:3

⁴⁵ *D.H. and others v. the Czech Republic*, Application no. 57325/00, Judgement of 13 November 2007, para.188.

⁴⁶ Para.153.

⁴⁷ Para.127.

⁴⁸ *Thlimmenos v Greece* [2001] 31 EHRR 411) para.48

⁴⁹ *Thlimmenos v Greece* [2001] 31 EHRR 411) para.44.

inequality through different treatment may in itself give rise to a breach of the Article’.⁵⁰ In the same case the Court has also mentioned that Roma require special protection ‘which extends to the sphere of education.’⁵¹ In *Oršuš*, the Court noted that in the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures in order, inter alia, to assist the applicants with any difficulties they encountered in following the school curriculum. These obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems.⁵² The Court also spoke of the obligation to put in place “safeguards that would ensure that . . . the State had sufficient regard to [Roma children’s] special needs as members of a disadvantaged group”.⁵³

In *Horváth and Kiss* the Court departs from the *procedural* type of positive obligation in the previous cases and moves to a *substantive* positive obligation, namely to “undo a history of racial segregation in special schools”. “[I]n light of the recognised bias in past placement procedures”, the Court says that “the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests.”⁵⁴ Whether this entails a specific obligation on the State to provide specialized tests for children with a Roma background, and for children from other socially disadvantaged backgrounds, is not entirely clear. Nevertheless, the Court urges the states to demonstrate that the tests and their application are capable to determine fairly and objectively the school aptitude and mental capacity of the applicants.

Concluding Reflections: How important are the cases analyzed in addressing Roma marginalization in education?

There is no doubt that the cases analysed are important first and foremost because they set out unequivocally that racial or ethnic segregation in education is banned in Europe. Discriminatory treatment of Roma children, in particular, through a two-tier educational system in which the segregation of Roma children on the basis of assumed learning needs is quasi-automatic – is a pernicious phenomenon that cannot be tolerated. The Court’s rulings affirm the equal rights of all to receive an education on an equal basis with others.

Moreover, the Court has finally consolidated its approach to a number of principles related to equality in the context of the European Convention on Human Rights. In particular the Court recognized that indirect discrimination – whereby a general policy or measure has a disproportionate prejudicial effect on a particular group – is prohibited by the Convention in the same way as direct discrimination. The Court has also acknowledged the inherent difficulties in proving indirect discrimination and confirmed a flexible approach to its proof. In this way the Court has extended the possibilities for effective legal protection with respect to indirect discrimination.

More broadly, the Court’s rulings turn Article 14 jurisprudence from a formal to a more substantive model of equality. The Court has demonstrated that it is now more open to adopting a substantive equality perspective that stresses the need to protect vulnerable and disadvantaged minorities.

There is also no doubt that the analyzed six cases will provide a focal point for Roma and wider human rights groups wanting to challenge inequality across different grounds of discrimination.

⁵⁰ *D.H. and others v. the Czech Republic*, Application no. 57325/00, Judgement of 13 November 2007, para.175.

⁵¹ *D.H. and others v. the Czech Republic*, Application no. 57325/00, Judgement of 13 November 2007, para.182.

⁵² *Oršuš and Others v. Croatia* , para.177.

⁵³ *Oršuš and Others v. Croatia* , para. 183.

⁵⁴ para. 116.

However the analysed cases have also clearly indicated that several concerns, in particular, the delay in reaching the decisions and the implementation of such decisions on the ground, remain and make the realisation of the right to quality education for Roma children a far-away reality.

With regard to the delay, as O'Connell puts it, it is 'an endemic problem' which however has particular consequences in education cases. For example, the children in *DH* were segregated into special schools from 1996-1999, and they filed a complaint in the ECtHR in 2000. The Chamber ruled in 2006 and the Grand Chamber decision came in 2007. The lifespan of 7 years within which the ECHR came up with an adequate response was a way too broad for the applicants themselves to make use of the decision.⁵⁵

Concerning the implementation, once again it becomes clear that victory in court and real change do not always go hand in hand. Thus, despite two *Sampani* rulings, Greece has failed to change its ongoing discrimination against Roma school children and was again challenged before the Court in the *Lavida* case in 2013.

In Croatia, despite the *Oršuš and Others* judgment Roma children are still sometimes educated in separate Roma-only classes at mainstream schools. In Međimurje County, the locus of the matters at issue in *Oršuš*, the authorities have decreased the number of Roma-only classes from 50 to 37. Despite these measures, a number of serious problems persist. While the special language classes have been integrated into mainstream programmes, *de facto* segregation of Roma pupils persists in some schools.⁵⁶

In the Czech Republic, despite the 2007 *D.H. and Others v. the Czech Republic* ruling and the adoption of a new Schools law in 2004 which restructured the provision of special needs education, racial segregation persists in education, with an estimated 30% of Roma children still in schools designed for pupils with mild mental disabilities, compared to 2% of their non-Roma counterparts. Roma children continue to be placed in schools for children with intellectual disabilities (formerly called "special schools") on questionable grounds. As the Council of Europe's Commissioner for Human Rights emphasised thousands of Roma children continue to be 'effectively excluded from the mainstream education system in the Czech Republic and condemned to a future as second-class citizens every year'.⁵⁷

In sum, while the Roma in Europe have successfully challenged the legality of policies that result in institutionalized segregation and recent important judgments have shown 'how the Roma rights movement can look to the future',⁵⁸ efforts to combat the high proportion of Roma children in special schools have not yet had a major effect. Many of Roma children are still caught up in a sub-standard and discriminatory education systems. This suggests that implementation of the discussed decisions relies heavily on political will, and 'the challenge still remains to find convincing arguments in parliaments, local governments, and political environments'⁵⁹ to transform the judges' words into real life improvements for children's everyday lives.

⁵⁵ O'Connell, R. (2009) Substantive Equality in the European Court of Human Rights, 129, *Michigan Law Review First Impressions* 107 (2009/03/31).

⁵⁶ Commissioner for Human Rights, Report *Human rights of Roma and Travellers in Europe* Council of Europe, February 2012.

⁵⁷ Commissioner for Human Rights, Report *Human rights of Roma and Travellers in Europe* Council of Europe, February 2012.

⁵⁸ Gimenez, J. (2010) International Action to Prevent Discrimination: The Situation of the Roma Community in the Field of Education, European Diversity and Autonomy Papers EDAP 03/2010.

⁵⁹ Gimenez, J. (2010) International Action to Prevent Discrimination: The Situation of the Roma Community in the Field of Education, European Diversity and Autonomy Papers EDAP 03/2010.

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