Dismantling Segregating Education and the European Court of Human Rights. *D.H. and Others vs. Czech Republic*: Towards an Inclusive Education?

I. Genesis of a Strategic Case

The case of *D.H. and Others v. the Czech Republic*¹ (hereinafter referred to as the *D.H.* or *Ostrava case*) is a landmark case brought to the European Court of Human Rights (hereinafter referred to as the Strasbourg Court, court or ECtHR) by the Budapest-based European Roma Rights Centre (ERRC) on behalf of 18 Roma children from Ostrava, the Czech Republic’s third largest city, who, between 1996 and 1999, were placed in special schools for children with learning difficulties either directly or after a period in an ordinary primary school. In the Czech Republic, ‘special schools’ were a category of specialized schools intended for children with mild learning disabilities who were unable to attend ‘ordinary’ or specialized primary schools. By law, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests to measure the child’s intellectual capacity carried out in educational psychology and child guidance centres, and the decision required the consent of the parent or legal representative of the child concerned. In the *D.H.* case, the applicants’ parents consented and, in some instances, expressly requested their children’s placement in a special school.

Following the unsuccessful filing of complaints in domestic courts in 2000, the applicants turned to the Strasbourg Court, alleging that their assignment to special schools for children with learning disabilities contravened the European Convention on Human Rights (hereinafter referred to as the convention or ECHR). They argued that their placement in special schools amounted to a general practice that had resulted in their exclusion from the educational system.

---

¹ ECtHR, *D.H. and Others v. the Czech Republic*, Appl. No. 57325/00, judgment (Chamber – Second Section) of 7 February 2006, judgment (Grand Chamber – Second Section) (final) of 13 November 2007. Lord Lester of Herne Hill Q.C. served as the lead counsel of the applicants in this case, along with James A. Goldston, the then ERRC legal director, and David Strupek, advocate practicing in Prague.
in segregation and racial discrimination through the coexistence of two autonomous educational systems, namely ‘special schools’ for the Roma and ‘ordinary primary schools’ for the majority of the population. According to the ECtHR’s case law, a difference of treatment is discriminatory for the purposes of Article 14 of the convention (prohibition of discrimination) if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised.”

The then ERRC legal director, James Goldston, explains the reasons why the Czech Republic was chosen as a primary focal point for litigation:

As one of the most enlightened and wealthiest of the Central and Eastern Europe countries, it was a representative symbol for the post-Communist region. [...] The pseudo-scientific basis for student assignments to Czech schools offered a target vulnerable to legal challenge. [...] Several local Romani and other NGO actors in the Czech Republic had already been discussing issues related to Roma education for some time. [...] The city of Ostrava, the third largest, was attractive in view of its large Romani population and the number of community organisations present.

To obtain data to document and support the claim, the ERRC initiated a process of dialogue with Romani communities, lawyers and human rights nongovernmental organization (NGOs). After several months of intensive research conducted, in particular by local Romani representatives, who directly contacted school administrators and teachers in the Ostrava region, comprehensive data were compiled demonstrating an overwhelming practice of disproportionate assignment of Romani pupils to special schools. Indeed, although Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava, 56% of all pupils placed in special schools in Ostrava were Romani. Moreover, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Romani pupils in Ostrava assigned to special schools was 56%.

See, ECtHR, D.H.(Chamber), op.cit. note 1, para. 44. At the time the application was lodged, on 18 April 2000, Protocol No. 12 that has incorporated in the ECHR a general ban of discrimination not dependant on another convention’s provision, as in the case of Article 14, was not entered into force yet. Protocol No. 12 entered into force on 1 April 2005. Note that the Czech Republic has signed, not yet ratified, Protocol No. 12 on 4 November 2000.

3 James A. Goldston “Ending Racial Segregation in Schools: The Promise of D.H.”, in 1 Roma Rights Journal (2008), 1–5, at 2. A couple of months after the adoption of the Grand Chamber’s ruling, the ERRC published in their own review a special issue on the D.H. case. In this present article, the contributions collected in this journal by the ERRC staff, who were involved in the D.H. case with different roles, have a special consideration for the extent and quality of direct information on the preparation and evolution of the case and especially for the fact that the Grand Chamber has on the whole accepted the evidence and the reasoning of the applicants who were supported in Strasbourg by the ERRC.

Note that in the Czech Republic, the Roma have national-minority status. See, ECtHR, D.H. (Grand Chamber), op.cit. note 1, para.14.

Ibid., para.190.
Dismantling Segregating Education and the ECtHR. D.H. and Others vs. Czech Republic:

schools was 50.3%. Altogether, Romani children in Ostrava were more than 27 times as likely as non-Romani children to be sent to special school. To build a concrete case, the ERRC team identified the victims whose individual cases could serve as representative examples of the broader pattern. Lawyers and researchers from ERRC met with hundreds of Romani children and their families and informed them about the unlikelihood of success, the possibility of retaliation and the long time before a final result would be known.

In Strasbourg, many NGOs submitted third-party interventions to support the applicants’ claim, among others, Human Rights Watch, Interights, Minority Rights Group International, European Network against Racism and the European Roma Information Office. Moreover, the court considered reports from various bodies from international governmental organizations such as the European Commission against Racism and Intolerance, the Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM), the Council of Europe (CoE) Commissioner for Human Rights and the European Union Agency for Fundamental Rights.

The third-party intervention process may be beneficial for the court because it may assist in clarifying the context in which a particular policy or practice has been adopted by a convention state. It is also evident that it may be of considerable assistance for the applicants to have the support of a respected human rights organization with particular experience and expertise in the area concerned. Louise Arbour, the then UN High Commissioner for Human Rights, praised this system, noting: “The dramatic expansion in the Court’s practice of amicus curiae third party briefs, which put before the Court broader views and other legal approaches, and which can be beneficial in giving the Court’s interpretations of the Convention the richest possible basis.”

---

6 Ibid.
7 The Strasbourg Court operates a well-established and important system for intervention in cases by third parties. Article 36 of the convention permits “any person concerned” (which might include a state, an individual, or an organization) to intervene if it is considered to be “in the interest of the proper administration of justice”. Any time after the court has given the respondent state notice of an application, a third party may be given permission by the court to submit written comments or, in exceptional cases, to take part in hearings. See, Art. 36(2) ECHR and Rule 44(2) (third-party intervention) of the Rules of Court, Registry of the Court, December 2008.
8 For some examples of third-party interventions, see, Philip Leach, Taking a case to the European Court of Human Rights (Clarendon Press, Oxford, 2005), Appendices 25–30, 693–769.
A. The Chamber’s Decision: A Conservative Ruling

Almost seven years after the initial complaint was lodged before the Strasbourg Court, the Chamber (Second Section) of the ECtHR, in its judgment delivered on 7 February 2006, rejected by six votes to one the complaint, by finding that there had been no violation of Article 14 (non-discrimination) taken in conjunction with Article 2 of the First Protocol to the Convention (right to education).10 The chamber held that, among other things, “the Government ha[s . . .] succeeded in establishing that the system of special schools in the Czech Republic was not introduced solely to cater for Roma children” and that “the rules governing children’s placement in special schools do not refer to the pupils’ ethnic origin […]”.11

The court further observed that although the relevant statistics were alarming and the situation in the Czech Republic concerning the education of Roma children was “by no means perfect”, the court was unable to find that the placement of the applicants in special schools was discriminatory or was the result of racial prejudice.12

As seen, the chamber found it significant that the system of special schooling was not established solely for Romani children but, for the court, was established with the legitimate aim of adapting the educational system to the needs and aptitudes or disabilities of children regardless of their ethnic origin.13 As for the statistics submitted by the applicants as evidence, although for the court a general policy having dispropor-

---

10 The application was lodged with the European Court of Human Rights on 18 April 2000 and declared partly admissible on 1 March 2005 following a hearing before a chamber. Thus, almost six years elapsed before the Strasbourg Court could deliver its first ruling on the case. The ever-increasing workload of the Strasbourg Court is a persistent problem that has been acknowledged at various levels leading on 13 May 2004 to the adoption of Protocol No. 14 (CETS No. 194). Protocol No. 14, which aims at preserving the convention control mechanism from the risk of paralysis as a result of the volume of individual cases brought before the court, has not entered into force yet due to the lack of signature by the Russian Federation. See <http://conventions.coe.int>. To give a new impulse to the reform of the Strasbourg system and overcome its persisting blockage, the President of the Court Jean-Paul Costa suggested organizing a major conference in the first half of 2010. Such a conference would reaffirm legitimacy and clarify the mandate of the court by expressing support for it and “pump[ing] new life into this fifty-year-old by offering it a cure of youthfulness.” See “Solemn hearing of the ECHR on the occasion of the opening of the judicial year, Speech by Mr Jean-Paul Costa, President of the ECtHR, 30 January 2009”. “Maybe the hope is that a gathering of heads of government or state or foreign ministers would engender a new esprit de corps in order to convince Russia to come along and to induce some countries with large amounts of violations to take both the prevention and the cure seriously on the national level,” so commented Antoine Buyse, Netherlands Institute of Human Rights (SIM), Utrecht University, in his ECHR Blog at <http://echrblog.blogspot.com/2009/02/costas-views-on-court.html>. On the reform proposals for the Strasbourg enforcement machinery, see Roberta Medda-Windischer, “The Jurisprudence of the European Court of Human Rights”, 3 EYMI (2003/04), 389–422, at 418–422.

11 See, ECtHR, D.H. (Chamber), op.cit. note 1, paras. 48–49.
12 Ibid., para. 52.
13 Ibid., para. 49.
tionately prejudicial effects on a particular group can be considered discriminatory, it held that statistics are themselves not sufficient to establish this.\textsuperscript{14}

As regards the tests conducted to measure the child’s intellectual capacity, the parties did not dispute before the court that the tests were not administered by professional psychologists; consequently, the chamber decided that it was not the role of the court to require the Czech authorities to show that individual psychologists had not adopted a discriminatory approach to these particular children.\textsuperscript{15}

The chamber placed considerable weight on the failure of the applicants’ parents to lodge appeals to the decisions to place their children in special schools and about the fact that in a number of the cases the parents had specifically requested that their children be transferred to a special school.

The chamber noted that the applicants’ parents failed to take any action, despite receiving a clear written decision informing them of their children’s placement in a special school. Conversely, when, as happened with applicant number 10 from the list annexed to the judgment, the parents sought a transfer to an ordinary school, their request was complied with despite the fact that she was unsuccessful in the psychological tests.\textsuperscript{16} Similarly, applicant number 11 was transferred to an ordinary primary school as soon as her mother withdrew her consent to her placement in a special school. The court also noted that in the case of applicant number 16, her transfer to an ordinary school was actually initiated by the special school she attended, where she had obtained good results. Conversely, an offer of a similar transfer for applicant no. 17 was turned down by her mother.\textsuperscript{17} Therefore, in the court’s view, the fact that some of the applicants were transferred to ordinary schools proves that, contrary to what has been alleged by the applicants, the situation was not irreversible.\textsuperscript{18}

As to whether the consent of the applicants’ parents was ‘informed’, the court held that it was the parents’ responsibility, “as part of their natural duty”, to ensure that their children receive an education.\textsuperscript{19} Therefore, for the chamber, it was the parents’ responsibility to find out about the educational opportunities offered by the state, to make sure they knew that they gave their consent to their children’s placement in a particular school and, if necessary, to make an appropriate challenge to the decision ordering the placement if it was issued without their consent.\textsuperscript{20} As a result, the chamber concluded that although the applicants may have lacked information about the national education system or found themselves in a climate of mistrust, the concrete evidence before the court did not enable it to conclude that the applicants’ placement, or in some instances, continued placement, in special schools was the result of racial prejudice, as they have alleged.\textsuperscript{21}

\textsuperscript{14} Ibid., para. 46.
\textsuperscript{15} Ibid., para. 49.
\textsuperscript{16} Ibid., para. 50.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid., para. 51.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid., para. 52.
Although the chamber took into consideration the circumstances of each case to decide whether the parental consent was an ‘informed consent’, the assessment on the validity and quality of the consent was based on a comparative perspective based on the average majority persons, who are generally familiar with their rights, have not experienced pressure from public authorities and have access to relevant information to make informed decisions on their own.\textsuperscript{22}

Surprisingly, in this rather conservative and formalistic decision, there was only one dissenting opinion, expressed by the Portuguese Judge Cabral Barreto. He noted that the Czech government had previously conceded that “Romany children with average or above-average intellect [a]re often placed in [special] schools on the basis of results of psychological tests”, “[t]he tests [we]re conceived for the majority population and do not take Romany specifics into consideration”, and in some special schools, “Romany pupils made up between 80% and 90% of the total number.”\textsuperscript{23} For Judge Cabral Barreto, taken together, these concessions amounted to “an express acknowledgment by the Czech State of the discriminatory practices complained of by the applicants.”\textsuperscript{24}

The chamber’s decision prompted a number of criticisms by NGOs, academics and human rights activists best summarized by the Roma activist, Claude Cahn: “[the Chamber’s decision] seemed to indicate a future of constricted, formalistic Court interpretations of discrimination, an approach which would nullify possibilities for remedy in all but the most egregious cases.”\textsuperscript{25} The conservative position of the Strasbourg Chamber is particularly striking in comparison to the development of non-discrimination norms and their interpretation taking place in other European institutions, especially in the European Union.\textsuperscript{26} Indeed, not only has the EU established clear defi-
nitions of discrimination in recent years, but EU legislation and the European Court of Justice have long accepted the use of statistics to establish the impact of apparently neutral provision. The chamber’s decision was thus considered by many to be not only a hindrance in the improvement of the situation of the Roma, but more generally a crystallization of non-discrimination norms in Europe.

In this much criticized chambers’ decision, a spark of hope for the applicants emerged not only from Judge Cabral Barreto’s dissenting opinion (above), but also from the concurring opinion expressed, even if “only after some hesitation”, by Judge Costa of France (also President of the Court). He admitted that “[g]enerally speaking, the situation of the Roma in the states of Central Europe undoubtedly poses problems.” When it comes to the special school system at issue, he conceded: “[t]he danger is that, under cover of psychological or intellectual tests, virtually an entire, socially disadvantaged, section of the school population finds itself condemned to low level schools, with little opportunity to mix with children of other origins and without any hope of securing an education that will permit them to progress.”

In the end, Judge Costa noted that the court’s Grand Chamber might be “better placed than a Chamber” to revisit the case law applicable in this area. Judge Costa’s prediction materialized on 3 July 2006 when a panel of the court’s Grand Chamber accepted the request of the applicants to refer the case to the Grand Chamber.

**B. The Grand Chamber’s Ruling: A Remarkable Reversal**

On appeal, in a surprising reversal, the Grand Chamber pronounced that it had, by a vote of 13 to 4, overturned the chamber’s decision and determined that the relevant Czech legislation at the time had had a disproportionately prejudicial effect on

---


29 See, ECtHR, *D.H. (Chamber)*, *op.cit.* note 1, Concurring Opinion of Judge Costa, 18–20, at 18, para. 1.


33 Art. 43 ECHR (Referral to the Grand Chamber) reads: “(1)Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. (2) A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.”
the Roma community and that the applicants, as members of that community, had necessarily suffered the same discriminatory treatment.\textsuperscript{34} For the Grand Chamber, contrary to the chamber, there had been thus a violation of Article 14 of the ECHR (Prohibition of discrimination), read in conjunction with Article 2 of Protocol No. 1 (Right to education).\textsuperscript{35}

The Grand Chamber’s decision is significant in a number of respects but, especially, for its progressive and modern approaches to key non-discrimination issues in line with other European institutions and legal instruments—first of all the EU Race Directive. In addition to a clear condemnation of segregating practices in education, the new legal developments included, among other things, the \textit{prima facie} evidence capable of triggering a shift of the burden of proof in cases of indirect discrimination, the role of statistics to assess the impact of a measure or practice on an individual or group, the principle of no waiver of the right not to be subjected to racial discrimination, and a clear recognition of the Roma as a specific type of disadvantaged and vulnerable minority requiring special protection. Moreover, the notion of discrimination, defined as less-favourable treatment without objective and reasonable justification, takes a further step toward its emancipation from subjective elements such as intent and purpose in cases other than hate crime. The court further established 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.\textsuperscript{36} These new legal elements will be analyzed in the next paragraphs by referring not only to the \textit{D.H.} case, but also to other relevant international instruments.

**II. Segregation in Education and the \textit{D.H.} Case**

The case of \textit{D.H.} concerned primarily the scope of the right to education—the most controversial right since the League of Nations—and, in this regard, required a decision on whether the practice of the Czech authorities that had resulted in \textit{de facto} segregation could be considered to be compatible with the right to education as provided by the ECHR and its protocols.

Racial segregation of Roma is a common feature in Europe, and studies clearly show this alarming phenomenon in many areas, including education.\textsuperscript{37} In its \textit{D.H.} decision, the Grand Chamber took into consideration the reports on Roma segregation by many international organizations and bodies including the CoE Commissioner for Human Rights, who in a 2006 report, after having noted that segregation in education is a widespread phenomenon in many CoE member states, described the variations

\textsuperscript{34} See, ECtHR, \textit{D.H.} (Grand Chamber), \textit{op.cit.} note 1, para. 209.

\textsuperscript{35} The court awarded 4,000 EUR to each of the applicants in respect of non-pecuniary damage (each applicant had requested 22,000 EUR) and 10,000 EUR jointly in respect of costs and expenses. No pecuniary damage was alleged by the applicants. \textit{Ibid.}, paras. 211–220.

\textsuperscript{36} \textit{Ibid.}, para. 209.

\textsuperscript{37} See, among others, European Commission, DG Employment and Social Affairs, \textit{The Situation of Roma in an Enlarged EU} (Office for Official Publications of the EU, Luxembourg, November 2004), at 17–36.
of this discriminatory practices: “In some countries there are segregated schools in segregated settlements, in others special classes for Roma children in ordinary schools or a clear over-representation of Roma children in classes for children with special needs.”

Formal and informal segregation practices of Roma and Traveller pupils in EU member states have been also described by the EUMC in these terms:

Segregation has taken place within a classroom by sitting Roma pupils in a different part of the room. Arrangements have also been made to instruct them in separate classrooms within the same school (following the same curriculum or a ‘simple version’). Schools and educational authorities may segregate pupils on the basis of a perception of ‘their different needs’ and/or as a response to behavioural issues and learning difficulties. The latter could also lead to the frequent placement of Roma pupils in ‘special schools’ for mentally handicapped children, which is still a worrying phenomenon in Member States like Hungary, Slovakia and the Czech Republic.

What is relevant is that whatever the particular form of separate schooling—segregation in so-called ‘special schools’ for children with developmental disabilities, segregation in Romani ghetto schools, segregation in all-Romani classes, denial of Romani enrolment in mainstream schools, as well as other phenomena—the quality of education provided to Roma is invariably inferior to the mainstream educational standards in each country. Clearly, following a curriculum inferior to that of mainstream classes means the opportunities for further education and for finding employment in the future is drastically reduced.

---


39 European Union Monitoring Centre on Racism and Xenophobia (EUMC) (now European Union Agency for Fundamental Rights), Roma and Travellers in Public Education. An Overview of the situation in the EU Member States (May 2006), at 8. See also European Commission, DG Employment and Social Affairs, op.cit. note 37, 17–22.

40 In their observations to the Grand Chamber, the organizations Minority Rights Group International, European Network against Racism and European Roma Information Office noted that the simplified curriculum followed in the Czech special schools meant that children were not expected to know the alphabet or numbers up to 10 until the third or fourth school year, whereas their counterparts in regular schools acquired that knowledge in the first year. See, ECtHR, D.H. (Grand Chamber), op.cit. note 1, para. 53.

41 CoE Commissioner for Human Rights, op.cit. note 38, para 46; ECtHR, D.H. (Grand Chamber), op.cit. note 1, para. 50. The UN Special Rapporteur on the Right to Education, Vernor Minoz Villalobos, described very vividly what it segregation in education means by saying that “it is like learning how to play football in an elevator”. Vernor Minoz Villalobos, “Address at the Opening of the UN Forum on Minority Issues” (Geneva, 15–16 December 2008).
Some observers described these forms of segregation in education as “the latent modern day version of the ‘separate but equal’ doctrine” creating a parallel between the D.H. Grand Chamber’s judgment and the leading case of the US Supreme Court Brown v. Board of Education, in which it was held that racial segregation—the ‘separate but equal’ educational system—was unconstitutional under the 14th Amendment to the US Constitution.\footnote{See, Larry Olomofe, “Arrest the Precedent! Segregated Schooling in Contemporary Europe”, in1 Roma Rights Journal (2008), 67–72, at 69.}

It is important to note that discussing dismantling segregation in education is more complicated than it may seem at first glance. Segregation in education is in fact often the unintended effect of policies and practices applied by schools and educational authorities with ‘good intentions’ for the purposes of overcoming language barriers or remedying the lack of preschool attendance of Roma children.\footnote{This has been acknowledged by the CoE Commissioner for Human Rights, op.cit. note 38, para. 49. See also, ECrHR, D.H. (Grand Chamber), op.cit. note 1, para. 79.}

A problematic and ‘disguised’ form of segregation in education that is often practiced in good faith is, for instance, the so-called ‘early tracking’ of students that is done in many schools and educational authorities in Europe. This practice refers to the segregation of children into separate schools based on ability before the age of 13 years. According to the European Commission in its Communication on Efficiency and Equity in European Education, “whilst ['early tracking'] need not necessarily involve a division into academic and vocational tracks, in practice this tends to be the case.”\footnote{Final Communication from the Commission to the Council and to the European Parliament, Efficiency and Equity in European Education and Training Systems (Commission of the European Communities, Brussels, 8 September 2006), Com(2006) 481- Sec(2006) 1096, para 15, footnote 14. ‘Early tracking’ has to be differentiated from 'streaming', which involves tailoring the curriculum to different groups of children based on ability, but within the same school. \textit{Ibid}.}

The European Commission notes, 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 and school performance.\footnote{\textit{Ibid}.} After having noted that compulsory education is a means of providing the basic education and key competences required by all to prosper in a knowledge-based society and that this is especially important for some disadvantaged groups, in particular migrants and ethnic minorities, the European Commission further notes: “Early tracking has
especially negative effects on the achievement levels of disadvantaged children. This is partly because it tends to channel them towards less prestigious forms of education and training.\(^{46}\)

Another example of unintended negative or discriminatory result of certain educational and pedagogical measures can be taken from the so-called ‘supportive pre-school classes’ aimed at enabling Roma and other pupils to follow the regular curriculum. In this regard, the FCNM Advisory Committee, although expressing in general its appreciation for supportive preschool classes, at the same time indicated that there is a dangerous grey zone between segregating special classes and supportive and remedial classes.\(^{47}\)

In the \(D.H.\) judgment, the Grand Chamber accepted that the decision of the Czech authorities to retain the special-school system was motivated by the desire to find a solution for children with special educational needs.\(^{48}\) At the same time, the court “shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system causes.”\(^{49}\)

One of the main problems arising from the \(D.H.\) case is that whatever the merits of separate education for children with genuine mental disabilities, the decision to place Roma children in special schools was in the majority of cases not based on any actual mental disability but rather on language and cultural differences that were not taken into account in the testing process.\(^{50}\)

This can be also inferred from the fact that the tests used to place the Roma children in the ‘special schools’ were the same for all children who were examined, irrespective of their ethnic origin. The Czech authorities themselves acknowledged in 1999 that Romany children placed in special schools displayed an average or above-average intellect and were placed in those schools solely on the basis of the results of psychological tests that were conceived for the majority population without taking Rom specifically into consideration.\(^{51}\) In this regard, the court noted that various independent

\(^{46}\) Ibid., para. 16.


\(^{48}\) ECtHR, \textit{D.H.} (Grand Chamber), \textit{op.cit.} note 1, para. 198.

\(^{49}\) Ibid.

\(^{50}\) See, \textit{Ibid.}, Third Party Intervention by Minority Rights Group International, the European Network against Racism and the European Roma Information Office, para. 167. The recent UN Recommendations on Minorities and the Right to Education affirm: “State or local policies of educational segregation through special classes or special schools for minority pupils, including policies leading to overrepresentation of minority pupils in such, are strongly discouraged and in no case should minority pupils be assigned to special classes or schools simply on the basis of their ethnicity.” See, \textit{Recommendations on Minorities and the Right to Education} (UN Human Rights Council, UN Forum on Minority Issues, Geneva, 15–16 December 2008), A/HRC/FMI/2008/2, 11 December 2008, para. 21, at <http://www2.ohchr.org/english/bodies/hr/committee/Minority/Forum.htm>.

\(^{51}\) ECtHR, \textit{D.H.} (Grand Chamber), \textit{op.cit.} note 1, para. 200.
bodies, such as FCNM Advisory Committee, ECRI and the CoE Commissioner for Human Rights have expressed doubts over the adequacy of the tests. The court concluded that, at the very least, there was a danger that the tests were biased and that the results were not analyzed in the light of the particularities and special characteristics of the Roma children who sat them.

From the reasoning of the court in the D.H. case it may be inferred that the right to education means not only the individual’s obligation to attend school and the state duty to provide schooling, but also the duty to reasonably accommodate specific Romani needs in public education. This deductive conclusion, however, has not been fully elaborated in the D.H. judgment, and it is hoped that the Strasbourg Court will have the opportunity in the near future to take a more explicit stance in this regard and clarify whether and under what circumstances the convention requires a duty of reasonable accommodation and/or affirmative action in case of minority education (infra).

III. Racial Discrimination: The Major Legal Contributions of the D.H. Ruling

In addition to the reasoning elaborated by the Grand Chamber on the right to education and segregational practices, the most significant contributions of the D.H. judgment are probably those related to the issues of indirect discrimination.

52 In its opinion adopted on 6 April 2001 on the Czech Republic the FCNM Advisory Committee noted that although the special schools were designed for mentally handicapped children, it appeared that many Roma children who were not mentally handicapped were placed in these schools due to real or perceived language and cultural differences between Roma and the majority. Advisory Committee on the FCNM, Opinion on the Czech Republic, 6 April 2001, ACFC/INF/OP/I(2002)002, para. 61.

53 ECtHR, D.H. (Grand Chamber), op.cit. note 1, para. 200.

54 Ibid., para. 201.

55 Farkas, op.cit. note 22, 62.

56 In this regard, De Schutter distinguishes between ‘reasonable accommodation’ and ‘special measures’ for minorities. Reasonable accommodation consists of an obligation to identify solutions that, in the specific context in which the individual faces certain obstacles in his/her social or professional integration may remove these obstacles in order to facilitate that integration. Reasonable accommodation therefore is seen in principle as possessing an individualized character, whereas ‘special measures’ are conceived in a broader perspective of equality as means to achieve more structural solutions. See Olivier De Schutter and Annelies Verstichel, “The Role of the Union in Integrating the Roma: Present and Possible Future”, 2 European Diversity and Autonomy Papers (2005), 20. See also Lisa Waddington and Aart Hendriks, “The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination”, 18(3) International Journal of Comparative Labour Law and Industrial Relations (2002), 403–427, at 410.
A. Modern Approaches towards Indirect Discrimination

As admitted by David Strupek, among the applicants’ counsels, the D.H. case was from its very beginning based on the theory of indirect discrimination rather than direct discrimination: “This does not mean that open racism and a direct intention of school directors or child psychologists had not played a role in the placement of Romani children into special schools. It obviously had, but it simply could not be proven.”

As is well known, the main element of indirect discrimination is not the intention to discriminate but the actual effect of any given measure or policy. As seen earlier, special classes or special curriculum for the Roma have been often introduced with ‘good intentions’ for the purposes of overcoming language barriers or remedying the lack of preschool attendance of Roma children. The claim put forward by the applicants in fact was not that the Czech government intended to discriminate against them, but that, as the government itself admitted, the effect of the educational testing it administered was to place an overwhelming number of Romani children in schools for the mentally disabled, thereby denying them the right to an education on an equal footing with non-Romani children.

For the Czech authorities, on the contrary, race, colour or association with a national minority had not played a determining role in the applicants’ education: the process by which the criteria were applied and the system of special schools was all racially neutral, as the chamber confirmed in its judgment. Moreover, for the Czech authorities, this case could not be considered one of indirect discrimination which could be established with the aid of statistics. In this regard, they contended that the

57 David Strupek, “Before and After the Ostrava Case: Lessons for Anti-Discrimination Law and Litigation in the Czech Republic”, 1 Roma Rights Journal (2008), 41–49, at 42. Some argue that, because the tests and screening methods used to place Romani children in special schools treated them less favourably than majority children on account of their failure to accommodate their special minority needs and to adequately measure their intellectual abilities, this case should have been formulated as a case of direct rather than indirect discrimination based on race. See, Farkas, op.cit. note 22, 59.

58 The origins of the concept of indirect discrimination is attributed to Griggs v. Duke Power Co. before the US Supreme Court in 1971, in which the Supreme Court found that the Civil Rights Act of 1964 prohibited indirect discrimination despite the lack of a specific clause expressly doing so. In summarizing the majority’s reasoning, Chief Justice Burger explained, “The objective of Congress […] was to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures or tests, neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory practices.” Art. 2(2)(b) of the EU Race Equality Directive reads: “Indirect discrimination covers situations where ‘an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

59 ECtHR, D.H. (Grand Chamber), op.cit. note 1, para. 147.
Strasbourg case law, as in the *Zarb Adami v. Malta* case, in which the court had relied extensively on statistical evidence submitted by the parties, was not comparable to the instant case: firstly, the *Zarb Adami* case was far less complex, and secondly, the statistical disparities found in that case were the result of a decision by the state concerned, whereas for the Czech authorities, the statistics relied on by the applicants in the *D.H.* case reflected first and foremost the parents’ wishes for their children to attend special school, not any act or omission on the part of the state.

As said earlier, the *D.H.* case was based solely on statistical figures collected by the European Roma Rights Centre, supported by reports from various organizations and the Czech authorities’ own admissions. On this point, the chamber clearly held in its ruling that statistics are not by themselves sufficient to disclose a practice that could be classified as discriminatory.

The Grand Chamber completely reversed this view. It reacted to a new development emerging from the recent ECtHR’s case law and affirmed that where an applicant is able to show, on the basis of reliable statistics, the existence of a *prima facie* indication that a specific rule—although formulated in a neutral manner—in fact affects a clearly higher percentage of members of one group than members of a comparative group, it is for the respondent government to show that this is the result of objective factors unrelated to any discrimination.

The task of the court was thus to establish whether a neutral act had placed a particular group at a significant disadvantage. If so, a presumption of indirect discrimination would arise, which would shift the burden of proof rebutting it to the respondent government. As already stated in previous cases, in examining the impact of a measure or practice on an individual or a particular group, the use of reliable statistics would be sufficient to constitute the *prima facie* evidence that the applicant would be required to produce.

In other words, in cases of indirect discrimination, where the applicant demonstrates that significantly more people of a particular category are placed at a dis-
Dismantling Segregating Education and the ECtHR. D.H. and Others vs. Czech Republic:

advantage by a given policy or practice, a presumption of discrimination arises. The burden then shifts to the state to reject the basis for the *prima facie* case or to provide a justification for it.

One of the key arguments of the applicants in the *D.H.* case, especially before the Grand Chamber, was that the ECtHR’s concept of prohibition of discrimination should be closer to that found within EU law, including the case law of the European Court of Justice (ECJ). The Strasbourg Court decided to follow the applicants’ reasoning by referring extensively not only to its own case law, but also to the EU law explicitly quoting the definition of indirect discrimination and the stipulation of the reversal of the burden of proof from the European Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, as well as entire passages from ECJ judgments regarding indirect discrimination and the use of statistical evidence.\(^6^6\)

**B. Statistical Evidence and Burden of Proof in the Context of Indirect Discrimination**

As seen earlier, in *D.H.*, the Grand Chamber considered 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.\(^6^7\) The data that the European Roma Rights Centre, representing the applicants, had collected concerning the placement of children, both Romani and non-Romani, in Ostrava in 1999 demonstrated that, whereas only 1.8% of non-Romani children attended special schools, 50.3% of all Romani children did so, despite only constituting 5% of the school population in the town.\(^6^8\)

As regards the standards and quality of these statistical figures, although the Grand Chamber admitted that their reliability might be questioned, it noted that the Czech authorities had not succeeded in rebutting them, especially by submitting their own alternative evidence. The court considered that the figures submitted by the applicants revealed a dominant trend that was confirmed both by the Czech authorities and by independent supervisory bodies that have looked into the question.\(^6^9\) The Grand Chamber concluded that the statistical figures themselves sufficed to establish a *prima facie* case of discrimination and that, as a consequence, the burden of proof shifted to the Czech authorities.\(^7^0\)

As regards the question of what constitutes *prima facie* evidence capable of shifting the burden of proof, the applicants in the *D.H.* case asked the Grand Chamber

---

\(^6^6\) *Ibid.*, paras. 88–89 and 82–83. In addition to EU legislation and institutions, the Grand Chamber noted that the courts of many countries and the supervisory bodies of the United Nations treaties habitually accept statistics as evidence of indirect discrimination in order to facilitate the victims’ task of adducing prima facie evidence. *Ibid.*, para. 187.

\(^6^7\) *Ibid.*, para. 188.

\(^6^8\) *Ibid.*, para. 190.


\(^7^0\) *Ibid.*, para. 195.
to provide guidance concerning the kinds of proof, including but not limited to statistical evidence, which might be relevant to a claim of a violation of Article 14. They noted that the chamber had discarded the overwhelming statistical evidence they had adduced, without checking whether or not it was accurate, despite the fact that it had been corroborated by independent specialized intergovernmental bodies such as ECRI, CERD, and the FCNM Advisory Committee and by the government’s own admission.7

At the outset, the court stated that in its previous case law the court itself had noted that there are no procedural barriers to the admissibility of evidence or predetermined formulae for the assessment of prima facie evidence of differential treatment.72 For the court, its decisions can be supported by the free evaluation of all evidence, including inferences from the facts and the parties’ submissions. In particular, for the court: “proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact […], the specificity of the facts, the nature of the allegation made and the Convention right at stake.”7

As said earlier, in the D.H. case, the court applied the principle that 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, which must show that the difference in treatment is not discriminatory.74 In the D.H. case, the evidence submitted by the applicants were regarded by the Strasbourg Court as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. Accordingly, the burden of proof had to shift to the Czech authorities, who had to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin—proof that, in the D.H. case, the Czech authorities were unable to present.75 The correct application of the shift in the burden of proof is imperative to ensure victims are not deprived of an effective means of enforcing the principle of equal treatment; otherwise, it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.76

The statistical figures submitted by the applicants provided for the court a general picture of the situation, not only in the Ostrava region, but more generally in the Czech Republic, showing that, even if the exact percentage of Roma children in special schools remained difficult to establish, their number was disproportionately high. Accordingly, in the court’s view, the relevant Czech legislation, although formulated in neutral terms, had “considerably more impact in practice on Roma children than

71 Ibid., paras. 41 and 66.
73 ECtHR, D.H. (Grand Chamber), op.cit. note 1, para. 178.
74 See, mutatis mutandis, Nachova and Others, op.cit. note 72, para. 157.
75 ECtHR, D.H. (Grand Chamber), op.cit. note 1, paras. 195 and 208.
76 Ibid., para. 189.
Dismantling Segregating Education and the ECtHR. D.H. and Others vs. Czech Republic:

on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools.”

The conclusions of the Grand Chamber with regard to the use of statistics as a method of proving racial discrimination will probably give more impetus to the discussions about the necessity of collecting statistical data concerning race and ethnicity for the purposes of fighting discrimination. As it is known, currently, statistical data seldom refer to racial or ethnic origin, let alone to Romani origin. Moreover, in several European states, including Sweden and Denmark, data-protection legislation prevents the collection of data about an individual’s ethnic origin. Despite the legislative hindrances, even those who are against any kind of ethnic data collection accept that at least some forms of data collection, especially national censuses, are desirable. Indeed, especially in the field of education, there is a compelling need for qualitative and quantitative accurate data on minorities and on Roma in particular, in order to assess the necessary requirements in the development, institutionalization, implementation and monitoring of targeted educational policies. Indicators and benchmarks are considered to be necessary for accurate appraisals of educational policies, including assessments of the extent of discrimination against minorities and the success, or otherwise, of policies to eliminate discrimination.

In this regard, the recent UN Recommendations on Minorities and the Right to Education affirm: “Information-gathering exercises concerning minorities should take place in an ethnically sensitive manner, proceeding through statistical or other operations on a voluntary basis, with full respect for the privacy and anonymity of the individuals concerned, on the basis of their self-identification as members of groups concerned.” Likewise, among the six general conditions necessary for the improve-

77 Ibid., para. 193.
79 European Commission, DG Employment and Social Affairs, op.cit. note 37.
80 See Christopher McCrudden, “The New Concept of Equality”, 3 ERA-Forum (2003), 9–29, at 24. The collection of statistical data concerning race and ethnicity raises many issues. Among others, Does data gathering on disadvantaged ethnic groups hinder or help their cause? If the collection of data is accepted, who is to be entrusted with its collection, release and use? Is it possible to prevent negative exploitation of data? Can governments legitimately collect data on race and ethnicity so as to provide comprehensive statistics, yet still comply with constitutional principles of nondiscrimination? Do national censuses provide sufficient information about disadvantaged groups? What kind of information policies can governments implement to diminish the Roma’s distrust and encourage them to participate in censuses? For more details, see Roma and Statistics, Roundtable Discussion (Project on Ethnic Relations [PER], Strasbourg, 22–23 May 2000).
81 UN Recommendations on Minorities and the Right to Education, op.cit. note 50, para. 12. The method of data collection based on self-identification, as referred to in the UN Recommendation on Education, is criticized by some, including David Strupek, among the applicants’ counsels in the D.H. case, who noted: “[I]t is a notorious fact that statistics
ment of the situation of Roma in Europe, the CoE Parliamentary Assembly identifies the use of reliable statistical data to fight against racial discrimination protecting, at the same time, Roma against the abusive and involuntary collection of data.\footnote{82}

The importance of collecting data disaggregated by ethnicity and gender has also been confirmed by the European Committee of Social Rights. In its recent ruling on the Collective Complaints \textit{ERRC v. Greece} and \textit{ERRC v. Italy}, the European Committee established that, with regard to collecting data, where it is generally acknowledged that a particular group is or could be discriminated against, states have responsibility to collect data, including data disaggregated by ethnicity or other grounds, with due safeguards for privacy and against other abuses. Such data is indispensable to the formulation of rational policy for social inclusion.\footnote{83}

The question on how to collect data referring to racial or ethnic origin without violating the rules of protection of sensitive personal data as well as the choice concerning the best method of identifying Roma for statistical purposes must be discussed and solved, but a general consensus on the necessity to collect reliable data on minorities and, particularly, on Roma is certain beyond any doubt.

\begin{center}
\textit{C. Non-Waiver of the Right Not to be Discriminated against and the Principle of Informed Consent}
\end{center}

In the first \textit{D.H.} decision, the chamber put particular emphasis on the responsibility of the applicants’ parents, whom the court effectively blamed for failing to exercise based on self-identification in the case of Roma would not work adequately as the picture would be too distorted. The only remaining possibility is therefore identification by a third party observer. It can never be sufficiently exact either, but I still believe that most Czech Roma can be identified by visible criteria. The picture would be definitely much more precise if the number of Romani children in a classroom would be determined by a well-instructed teacher (as it was, after all, done in the \textit{Ostrava} case) rather than based on the self-declaration of parents.” Emphasis added. Strupek, \textit{op.cit.} note 57, 46. It is self-evident, however, the risk of potential abuses that such approach based on a \textit{third-party discretionary decision} could generate even if implemented in good faith.

\begin{thebibliography}{9}
\footnotesize
\item \textit{C. Non-Waiver of the Right Not to be Discriminated against and the Principle of Informed Consent}
\item CoE, Parliamentary Assembly, \textit{The legal situation of Roma in Europe}, Recommendation 1557 (2002) adopted on 25 April 2002 (15th Sitting), para. 15, point vii. International organizations have elaborated a number of instruments aimed at protecting personal privacy. See, among others, UN \textit{Guidelines Concerning Computerised Personal Data Files}, adopted by the General Assembly on 14 December 1990; EU Directive 95/46/EC of 24 October 1995 on the \textit{Protection of individuals with regard to the processing of personal data and on the free movement of such data}; CoE Convention for the Protection of Individuals with regard to \textit{Automatic Processing of Personal Data} (ETS. No. 108, adopted 28 January 1981). This instrument, in particular, permits the collection of information on racial or ethnic origin but prohibits automated storage, alteration, erasure, retrieval or dissemination of that data.
\end{thebibliography}
their ‘natural duty’ as parents. The chamber appeared to have given no weight to the applicants’ submissions that where consent is uninformed, it should not be considered consent at all. For Goodwin: “To view a child’s right to educational opportunity as being subject to the consent of the parent flies in the face not only of the progressive development of children’s rights and the wide consensus that underpins them, but also of more than fifty years of compulsory education legislation in Europe, regardless of the wishes of the parents.”

The Grand Chamber decided to also reverse the chamber’s approach in this regard. For the Grand Chamber: “[T]he Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children’s social and cultural differences and in which their children risked isolation and ostracism and special schools where the majority of the pupils were Roma.” In the words of the International Federation for Human Rights, which submitted an amicus curiae brief:

[T]he applicants’ parents had chosen what they saw as being the lesser of two evils, in the absence of any real possibility of receiving an integrated education which would unreservedly welcome Roma. The disproportion between the two alternatives was such that the applicants’ parents had been obliged to make the choice for which the Government now sought to hold them responsible.

The Czech authorities themselves admitted that parents’ consent in the Ostrava case had been given by means of a signature on a precompleted form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor did the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children’s futures.

For the court, in view of the fact that a difference in treatment was established in the D.H. case, it followed that any such consent would signify an acceptance of the

84 ECtHR, D.H. (Chamber), op. cit. note 1, para. 50–51.
86 ECtHR, D.H. (Grand Chamber), op. cit. note 1, para. 203. Farkas underlines the fact that there is a significant distinction between choice and consent, because the former denotes a free-standing parental decision, whereas the latter more often than not is attached to a recommendation from teachers, psychologists, etc. Farkas, op. cit. note 22, 60.
88 Ibid., para. 203.
difference in treatment, even if discriminatory, in other words, a waiver of the right not to be discriminated against. However, under the court’s case law, the waiver of a right guaranteed by the convention—in so far as such a waiver is permissible—must be established in an unequivocal manner and be given in full knowledge of the facts, that is to say, on the basis of informed consent and without constraint.90 Due to the fundamental importance of the prohibition of racial discrimination, the Grand Chamber considered that no waiver of the right not to be subjected to racial discrimination can be accepted and thus the Czech authorities’ argument on the parents’ liability, previously shared by the chamber, was rejected.90 Yet, to reach this conclusion, the Grand Chamber embarked in a line of reasoning that raised a number of criticisms linked to stereotypes and generalizations of Roma.

D. Stereotyping and Generalization in the D.H. Judgment

In the discussion concerning the waiver of the right not to be discriminated against and the informed consent of Romani parents, a problematic area arises in the Grand Chamber’s decision. At the outset, the Grand Chamber recognized the ‘Gypsy’ stigma attaching to Roma, independent of any desire or affirmation on the part of the individual person concerned: “As a result of centuries of rejection many Roma communities today live in very difficult conditions, often on the fringe of society in the countries where they have settled, and their participation in public life is extremely limited.”91 Then, the Grand Chamber reaffirmed the concept formulated in the so-called Gypsy/Travellers cases,92 namely that Roma are a specific type of disadvantaged and vulnerable minorities as a result of their turbulent history and constant uprooting, and thus confirmed the need to give ‘special consideration’ to the needs and different lifestyle of Roma/Gypsies both in the relevant regulatory framework and in reaching decisions in particular cases.93

When it comes to the parents’ consent, the Grand Chamber affirmed: “In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the conse-
quences of giving their consent." Clearly, the court appeared to have adopted a rather stereotyped and generalized idea of Roma parents and their capacity to perform their parental duty, endorsing the idea that in certain circumstances ‘paternalistic’ measures may be justified.

In his dissenting opinion, Judge Borrego Borrego, referring to the Grand Chamber’s comments on the Roma parents, underlined:

Such assertions are unduly harsh, superfluous and, above all, unwarranted. […] I find this particularly disquieting. The Grand Chamber asserts that all parents of Roma children, “even assuming” them to be capable of giving informed consent, are unable to choose their children’s school. Such a view can lead to the awful experiences with which we are only too familiar of children being “abducted” from their parents when the latter belong to a particular social group because certain “well-intentioned” people feel constrained to impose their conception of life on all. An example of the sad human tradition of fighting racism through racism.

The court might thus have fallen into the same trap that is at the basis of many segregation practices applied in ‘good faith’, with the conviction that good intentions justify ‘paternalistic’ measures (above). To avoid stereotyping and generalizations, the court should have used a more multifaceted view of the Romani identity—in which social deprivation may be an element in many cases but not the predominant distinctive element in general terms. This approach is closely linked to the ‘structural’ discrimination that the Grand Chamber has identified as featuring the D.H. case.

E. A Case of Structural and Systematic Discrimination

One of the most innovative parts of the D.H. decision can be found at the very end of the court’s ruling. In its conclusions, the Grand Chamber held that the relevant Czech legislation, as applied in practice at the time, had had a disproportionately prejudicial effect on the whole Romani community. It therefore considered that the applicants, as members of that community, had necessarily suffered the same discriminatory treatment. On the basis of this conclusion, the court considered every applicant as being ‘victim’ of a convention’s violation, although it judged that it did not need to examine the prejudice suffered by each individual applicant, because this emerged from the fact that they belong to the Romani community.

94 Ibid., para. 203.
95 Cahn, op.cit. note 25, 10.
96 ECtHR, D.H. (Grand Chamber), op.cit. note 1, Dissenting opinion of Judge Borrego Borrego, paras. 13-14
97 Ibid., para. 207. Farkas, op.cit. note 22, 57.
98 Ibid., para. 209. For the court there could be a convention violation even in the absence of prejudice (which is relevant only in the context of Art. 41 awards: just satisfaction). See, ECtHR, Balmer-Schafroth and others v. Switzerland, Appl. No. 22110/93, judgment (Grand Chamber) of 26 August 1997, (1998) 25 EHRR 598.
This is again a reversed approach taken by the Grand Chamber in comparison with the chamber that had stated on this point: “The Court points out, however, that its role is different from that of the aforementioned bodies [among others, FCNM Advisory Committee, ECRI, CoE Commissioner for Human Rights] and that, like the Czech Constitutional Court, it is not its task to assess the overall social context. Its sole task in the instant case is to examine the individual applications [...]”

Along the same lines, Judge Borrego Borrego in his dissenting opinion commented on the Grand Chamber approach: “This, then, is the Court’s new role: to become a second ECRI (European Commission against Racism and Intolerance) and dispense with an examination of the individual applications [...] None of the applicant children or the parents of those applicants who were still minors were present at the hearing. The individual circumstances of the applicants and their parents were forgotten.”

In this regard, the Grand Chamber judgment is thus innovative as it addressed not only the issue of indirect discrimination (above) but also the issue of structural or systematic discrimination that is the result of a particular racial group being systematically placed in a disadvantaged position in various areas of social life. The approach taken by the Grand Chamber to consider the applicants as individuals who have necessarily suffered a prejudice as members of the Romani community does not mean that the court has not assessed the individual circumstances of each applicant to verify their victim status. If this were the case, the D.H. case would have been considered an *actio popularis*, namely an abstract petition concerning a national law or governmental practice which concerns other individuals than the applicants, and as such, it would have been declared inadmissible. Each applicant as member of a ‘group of individuals’ has indeed independently qualified as a ‘victim’ because the rules of the court relating to the capacity and standing before it are inextricably linked to the requirement that an applicant must claim to be the *victim* of a violation of one or more convention rights.

The approach followed by the Grand Chamber in the *D.H.* case resembles very closely the approach taken by the Strasbourg Court in cases of potential victims. In fact, although *actio popularis* is not permitted under the convention system, the court has expanded the notion of a *victim* in other ways, having reviewed cases in which the applicants were characterized as potential victims. In these cases, the convention system permits an applicant to complain that the law itself violates their convention rights, even if there has been no specific measure implemented against them. Potential victims of convention violations, however, must satisfy the court that there is a real personal risk of being directly affected by the violation.

According to the above, those who fall into a particular group within society who might be affected by a particular measure or omission may be considered potential victims.

---

99 ECtHR, *D.H. (Chamber)*, *op.cit.* note 1, para. 45 (emphasis added).
100 Dissenting opinion of Judge Borrego Borrego, *op.cit.* note 96.
102 See, ECtHR, *D.H. and Others v. the Czech Republic*, Appl. No. 57325/00, decision (on the admissibility) of 1 March 2005. See Art. 34 ECHR (individual applications).
103 Art. 34 ECHR.
victims. For example, in *Malone v. The United Kingdom*, the UK government merely conceded that as a receiver of stolen goods, the applicant was a *member of a class of persons* who were liable to have their communications intercepted on the basis of a simple request by the police. The applicant could therefore claim to be a ‘victim’ of a violation of the convention by reason of the very existence of a given practice, quite apart from any concrete measure of implementation taken against him. Another example of *potential victims* is the case of *Open Door and Dublin Well Woman v. Ireland*, which concerned an injunction imposed by the Irish courts preventing the dissemination of information to pregnant women on abortion facilities outside Ireland. The Irish government raised objections about the victim status of two of the applicants who joined the application as women of child-bearing age, but who were not pregnant. The court held that the two applicants belonged to a *class of women of child-bearing age* that might be adversely affected by the restrictions imposed by the injunction and thus they ran the risk of being directly prejudiced by the measure complained of.

Despite this analogy with the notion of ‘potential victims’, the conclusion of the Grand Chamber in the *D.H.* case on this point, although being innovative and clearly positive in many respects for the victims, leaves open a number of questions, in particular whether the conclusions in the *D.H.* case should apply only in this specific case, or can be generalized for every case of structural violations. Moreover, even if the court did not examine the prejudice suffered by each individual applicant, the question arises of whether the Czech government could hypothetically have had the chance to rebut the presumption of discrimination in individual cases, for example, by offering a strong piece of evidence proving that one of the applicants was objectively mentally disabled. Or does the Grand Chamber indicate that even a mentally disabled Romani child hypothetically placed correctly in a special school would nevertheless win the case simply because he or she is a member of the community unjustifiably disadvantaged by the practice?

The problem of *structural discrimination* suffered by the Romani community in education as raised by the Grand Chamber is an example of the broader problem arising from the structural dysfunction in the operation of the legal systems of some contracting states of the convention that the court sought to address with the adoption of Protocol No. 14 to the convention, which, as said earlier, is not entered into force yet. Protocol No. 14 aims precisely to expedite the processing of individual applications.

104 ECtHR, *Malone v. The United Kingdom* (plenary), Appl. no. 8691/79, 2 August 1984. The practice discussed in the *Malone* case concerns the fact that, although the police in England and Wales do not have any power in the absence of a subpoena to compel the production of records of metering, a practice exists whereby the post office on occasion makes and provides such records at the request of the police if the information is essential to police enquiries in relation to serious crimes and cannot be obtained from other sources.

105 Ibid., para. 86.

106 ECtHR, *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246-A.

107 Ibid., para. 44.


109 See *op.cit.* note 10.
which derive from the same structural cause as an earlier application which has led to a judgment finding a breach of the convention (repetitive cases following a so-called “pilot judgment”). Protocol No. 14 foresees that for repetitive cases—in which a case is one of a series deriving from the same structural defect at the national level—a committee of three judges could both rule on admissibility and give judgment under a simplified summary procedure, whereas under the current system, judgments can only be given by seven-judge chambers. It has to be noted that, according to the Report of the Group of Wise Persons in charge of providing suggestions and recommendations on how to improve the Strasbourg mechanism system, a pivotal element to tackling the problem of structural violations is the improvement of domestic remedies, and in this regard, they propose “a Convention text placing an explicit obligation on the States Parties to introduce domestic legal mechanisms to redress the damage resulting from any violation of the Convention, and especially those resulting from structural or general shortcomings in a state’s law or practice.”

It follows that this type of structural problem, as the structural discrimination in the D.H. case, should be mainly addressed by the contracting states through domestic remedies and reforms to be adopted within the national legal system, if necessary with the assistance of the Council of Europe in terms of expert advice, judicial or police training schemes. In other words, the judgments of the court are only parts of a major effort that should be mainly put in place domestically by the states concerned, if necessary with the support of the European institutions.

IV. Impact in the Czech Republic and Beyond

In the D.H. case, apart from a financial award in respect of non-pecuniary damages—as a result of the humiliation and frustration caused by the indirect discrimination of which they were victim—no individual measures were foreseen: the applicants, at the time the judgment was delivered, were between 16 to 22 years old and had therefore exceeded the age of primary education. For the Council of Minister, in charge of

---

110 A few figures illustrate the problem of the repetitive cases in Strasbourg: in 2008, there were some 30,164 applications declared inadmissible (or struck out of the list of cases) and 1,671 applications declared admissible. Thus, the great majority of cases are terminated by inadmissibility or strike-out decisions (95% of cases disposed of in 2008). In the remaining cases, the court gave 1,543 judgments in 2008, and approximately 70% of these concerned repetitive cases. See, ECtHR, Annual Report 2008 of the European Court of Human Rights (provisional edition), op.cit. note 9.

111 Art. 28 of the Protocol No. 14 to the ECHR.


114 ECtHR, D.H. (Grand Chamber), op.cit. note 1, para. 217; CoE, Directorate of Monitoring, Department for the Execution of Judgments of the ECtHR, State of execution, Cases or group of cases against the Czech Republic, at <http://www.coe.int/t/e/human_rights/exe-
monitoring the execution of the court’s judgments, upon the delivery of the judgment, no further individual measures appeared necessary.115

According to the Grand Chamber, the legislation criticized in the D.H. case was already repealed at the time the final ruling was adopted: the new Czech School Act was introduced providing that children with special educational needs, including socially disadvantaged children, are to be educated in ordinary primary schools.116

In light of the adoption of this new law, the Committee of Ministers decided to resume consideration of the D.H. case in 2009 to evaluate further information on general measures, namely an action plan and information on the provisions of the new Czech School Act, its impact in practice, including statistical data as well as the publication and dissemination of the D.H. judgment to the relevant authorities, and other possible measures facilitating the integration of Roma children in the ordinary school system.117

Beyond the conclusions and recommendations of the Strasbourg organs, the D.H. case can be considered the starting point of a longer reformative process. The submission of the application in 2000 had already forced changes in the Czech educational law. At the time the initial lawsuit was brought, Czech legislation prohibited graduates of special schools from qualifying for normal secondary education, but in 2000, the government revoked this rule.118 In addition, in 2004, while the application was pending before the Strasbourg Court, the Czech Parliament adopted legislation that abolished special schools in name and modified the system of special education providing for children with special educational needs, including ‘socio-cultural disadvantaged’ children, to be educated in ordinary schools.119

The D.H. case has the potential to generate fundamental implications across the region for the education of Romani children, by condemning the practice of segregation and by increasing pressure upon governments to rapidly bring it to an end. Comparative experience with desegregation in other countries, however, suggests that decades may be needed to measure progress.120

115 CoE, Directorate of Monitoring, *ibid.*
117 CoE, Directorate of Monitoring, *ibid.*
118 Goldston, *op.cit.* note 3.
120 Goldston, *op.cit.* note 3. In 1954, the US Supreme Court case of *Brown v. Board of Education* outlawed racial segregation in public schools. Only in 1965, when the US government
As regards the Czech Republic, the implementation of the Strasbourg judgment has been strongly criticized. The shortcomings of the Czech School Act introduced in 2004 and subsequent norms and regulations are outlined in a report submitted by ERRC to the Committee of Ministers.²

The ERRC considers the reforms in the school structure of the Czech Republic “cosmetic changes only”²². The main criticism is that the Czech authorities have merely relabeled ‘special remedial schools’ as ‘practical primary schools’ without any substantial change, for instance in the composition of their teaching staff or in the content of their curriculum, leaving untouched the unequal educational opportunities for Roma children.²³ Indeed, abolishing the term ‘special remedial schools’ and relabeling the children attending them as ‘socially disadvantaged’ has not meaningfully improved the educational opportunities for them.²⁴

The fact that despite assurances of the Czech government, the situation of Roma students has not improved, has been also confirmed by research conducted by the ERRC during the first half of 2008. According to the ERRC, curriculum modifications introduced in 2007 have actually made it harder for Roma students to move into the educational mainstream.²⁵ In fact, although overall enrolment in regular schools is declining, enrolment in special schools has remained the same, and this, according to ERRC, indicates that Roma students are not moving into regular schools and that the Czech reforms have not meaningfully improved the educational opportunities for Roma children.²⁶

threatened to freeze federal funding for state education systems, did the school systems seriously begin to desegregate.

¹² Communication on General Measures Needed for the Implementation of D.H. and Others v. the Czech Republic, submitted jointly by the European Roma Rights Centre, the Roma Education Fund, the Open Society Justice Initiative, and the Open Society Institute’s Educational Support Program and Early Childhood Program according to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, 1Roma Rights Journal(2008), 7–23. See also, CoE, Directorate of Monitoring, op.cit. note 114.

¹²² Ibid., at 7.

¹²³ ECtHR, D.H. (Grand Chamber), op.cit. note 1, para.145. It has to be said that the new Czech Schools Act, op.cit. note 116, which entered into force in January 2005, contains a number of further reforms, such as waiving fees for the last year of preschool education, relaxing the rules on minimum class sizes, more-individualized education, appointing Roma educational assistants and teacher training aiming to achieve a compulsory minimum knowledge of Roma language, culture and mediation skills. See, EU Mickey, Roma and Travellers in Public Education. An overview of the situation in the EU Member States, May 2006, at 70.

¹²⁴ Communication on General Measures, op.cit. note 121, at 7.


¹²⁶ Ibid.
Another criticism made to the Czech school reform is that the Czech legislation employs a controversial terminology of defining special educational needs, which is explicitly associated with Roma.\textsuperscript{127} The category ‘children with social disadvantage’ is defined by the Czech Schools Act as to include children from “family environment with a low social and cultural status” without any explanation in the act itself or elsewhere on the criteria for defining such status.\textsuperscript{128} Neither the Schools Act nor implementing regulations provide any guidance as to who identifies children with social disadvantage and on the basis of what criteria.

The formulation—children with social disadvantage—and its definition clearly implies that cultural background is considered to be a disadvantage—a notion that according to ERRC has largely predetermined the erroneous placement of Romani children in special schools in the Czech Republic.\textsuperscript{129} This biased approach towards Roma can also be found in the 2005 Czech ‘Roma Integration Policy Concept’ that outlines key policy measures and actions aiming at improving the social situation of the Roma and combating racial discrimination.\textsuperscript{130} The document also makes reference to the Roma ‘cultural disadvantage’ that, according to the then EU Monitoring Centre on Racism and Xenophobia (now Fundamental Rights Agency) “raises questions regarding its understanding of the intrinsic value of Roma culture”\textsuperscript{131}

In various press conferences in 2008, the Czech Minister of Education Ondřej Liska explicitly acknowledged that elements rightly named as tending toward segregation still remain in the Czech educational system, that Romani children are wrongly placed into schools with lower standards and that the transformation of the former special remedial schools that were criticized by the European Court of Human Rights into practical primary schools has not produced desirable results until now.\textsuperscript{132}

For Minister Liska, the main causes of the legislative failure are to be found in the absence of a coordinated system supporting the school successes of children endangered by social exclusion, by problematic diagnostics, and also by the family environment when parents themselves require practical primary school for their children—although, as Hruba, notes commenting on Liska’s remark, “without any acknowledgement of the factors contributing to this.”\textsuperscript{133}

The diagnosis made by the Czech minister has been partly confirmed by the FCNM Advisory Committee, who has identified the local authorities as being the

\begin{enumerate}
\item ERRC, \textit{op.cit.} note 119, at 43.
\item \textit{Ibid.} See, Article 16(4) of the Czech Schools Act (Act No. 561/2004 Coll.) (unofficial translation).
\item ERRC, \textit{op.cit.} note 119, 43.
\item Concept (Project) on Timely Care for Children from Socio-Culturally Disadvantaged Backgrounds in the Area of Education) adopted by Czech Cabinet Decision No. 564/05 from 11 May 2005. See also Savelina Danova (ed.), \textit{Roma Activists Assess the Progress of the Decade of Roma Inclusion. 2007 Update} (Decade Watch, 2008), at 28.
\item EUMC, \textit{op.cit.} note 123, at 70.
\item \textit{Ibid.}, at 37.
\end{enumerate}
main factor responsible for the reform’s failure because they do not systematically implement the government’s school support scheme and do not always have the determination needed to act effectively in this field.\textsuperscript{134}

In light of the disappointing results of the Czech reforms in the field of education, the Czech Ministry of Education has decided to focus on collecting relevant data through sociological and detailed analysis of forms and causes of early exclusion of children from socioculturally disadvantaged environments.\textsuperscript{135} On the basis of this data, the Ministry plans to elaborate an amendment of the School Act regulating the education of pupils with special educational needs in which NGOs will also be involved through specific working groups.\textsuperscript{136} The minister further intends to intensify inclusive approaches in preschool education.\textsuperscript{137} Pre-primary education is in fact considered to have the highest returns in terms of the achievement and social adaptation of children.\textsuperscript{138} In this regard, the EU calls on member states to invest more in pre-primary education as an effective means to establish the basis for further learning, preventing school dropout, thereby increasing equity of outcomes and overall skill levels.\textsuperscript{139}

For the ERRC, the most effective way to implement the \textit{D.H.} ruling would be to introduce specific legislative measures imposing \textit{binding obligations} on public authorities to eliminate segregated education.\textsuperscript{140} As said earlier, for some observers, the \textit{D.H.} ruling also implies a duty of reasonable accommodation or even a duty of affirmative action despite the fact that the court’s judgment is not clear on this point. Cariolou notes that although the applicants’ representatives chose to treat the case as one that did not concern the state’s obligations to take affirmative action, perhaps in a strategic move to simplify matters, the court’s final pronouncement said that, in the circum-

\textsuperscript{134} FCNM Advisory Committee reported in ECtHR, \textit{D.H.} (Grand Chamber), \textit{op.cit.} note 1, para. 73. Many OSCE member states have sought to address the issues of integrating Roma into the mainstream educational system by developing various national education strategies for minorities or specifically for Roma. However, while well intentioned, problems arise in the implementation of these policies and the lack of sustainability. Moreover, single projects and programmes aimed at improving educational opportunities for Roma groups are often externally funded through large international NGOs instead of seeking systematic solutions. See, \textit{Implementation of the Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area. Status Report 2008} (OSCE, Office for Democratic Institutions and Human Rights [ODIHR], Warsaw, 2008), at 42.

\textsuperscript{135} In January 2006, the Czech government decided to introduce a new monitoring system for the collection of anonymous data on the Roma community. This monitoring system on employment, income, housing conditions, debts and education was expected to produce the first statistical results in 2008. EUMC, \textit{op.cit.} note 123, at 7.

\textsuperscript{136} See Hrubá, \textit{op.cit.} note 132, 38.

\textsuperscript{137} \textit{Ibid.}, 34.

\textsuperscript{138} Commission of the European Communities, \textit{op.cit.} note 44, at 5.

\textsuperscript{139} \textit{Ibid.} See also, OSCE, \textit{op.cit.} note 134, 43, which refers to a questionable early education \textit{obligation} only for Roma children “so that neither parents nor education authorities can neglect this task”. Another example of a paternalistic, well-intentioned measure?

\textsuperscript{140} ERRC, \textit{op.cit.} note 119, at 8.
stances of this case, **affirmative action** was indeed required under the terms of Article 14 of the Convention.\footnote{141}

In his concurring opinion to the chamber's ruling, Judge Costa noted that affirmative action in the *D.H.* case would have entailed increased resources for special schools to avoid the risk of their becoming, if not educational ‘ghettos’, then at least ‘dead ends’ where pupils remain until they reach the minimum school-leaving age. However, when it comes to deciding whether such an obligation exists, Judge Costa said: “it seems to me that up till now this Court has refused to consider it a State obligation.”\footnote{142}

It is well known that the convention is to a great extent concerned with limits on interferences with rights by public authorities (**negative obligations**). However, there are a number of areas in which it is clearly established that states are also required to take steps to ensure the observation of certain convention rights (**positive obligations**). For

\begin{footnotesize}

\footnote{142} ECtHR, *D.H.* (Chamber), *op. cit.* note 1, Concurring Opinion of Judge Costa in which Judge Costa relies, with respect to Article 8, on *Chapman v. the United Kingdom*, *op. cit.* note 92. In favour of an obligation to positive action, see the ruling on the Collective Complaint ERRC v. Bulgaria, in which the European Committee of Social Rights formulated the positive duty of the state to undertake action to address a particular situation of Roma. The committee affirmed that “for the integration of an ethnic minority as Roma into mainstream society measures of positive action are needed” and held that indirect discrimination may arise by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible to all. Government failure to undertake specific action to address the particular situation of Roma constitutes a breach of the state’s obligations under the European Social Charter. European Committee of Social Rights, Collective Complaint No. 31/2005, *European Roma Rights Center (ERRC) v. Bulgaria*, decision on the merits of 30 November 2006. See also, PACE Rec. 1557 (2002), *op. cit.* note 82, para. 15(4): In this recommendation, the Parliamentary Assembly calls upon the member states to complete six general conditions, which are necessary for the improvement of the situation of Roma in Europe, in terms of improving the legal status, the level of equality and the living conditions of Roma, including developing and implementing “positive action and preferential treatment for the socially deprived strata, including Roma as a socially disadvantaged community, in the field of education, employment and housing”. UNESCO has recently reaffirmed the need to adopt affirmative action or positive measures to ensure access to education for children: “Affirmative action and promotional measures are highly necessary in order to eliminate existing inequities and disparities in education.” (Emphasis in the original.) See, UNESCO, *Inclusive Dimensions of the Right to Education: Normative Bases—Concept Paper*, presented at the Eighth and Ninth Meetings of the Joint Expert Group (CR)/ECOSOC (CESCR) on the Monitoring of the Right to Education, 2008. Along these lines, the promotion of equal access to education for Roma children has been interpreted by the UN Committee on Economic, Social and Cultural Rights to comprise positive measures, such as “the grant of scholarships and the reimbursement of expenses for schoolbooks and of travel expenses to attend school,” (UN CESCR, Bosnia and Herzegovina, E/C.12/BIH/CO/1 (2006), para. 51) and the increase of “subsidies, scholarships and the number of teachers instructing in minority languages.” (UN CESCR, Serbia and Montenegro, E/C.12/1/Add.108 (2005), para. 64.)
\end{footnotesize}
instance, the obligation on states provided in Article 2(1) to protect everyone’s right to life has been interpreted as creating a positive duty to safeguard lives. In Osman v. the United Kingdom,\(^\text{143}\) for example, the court found a positive obligation to take preventive operational measures to protect those whose lives were at risk from criminal attack. In Nachova and others v. Bulgaria,\(^\text{144}\) the court emphasized that strict positive obligations are placed on the state when investigating racist violence.

As seen, positive actions are not automatically prohibited by the convention, but they will depend upon the justification for the difference in treatment in each case.\(^\text{145}\) Clarifications as to whether and under which circumstances affirmative actions are expected on the part of the state, especially as Roma are concerned, would certainly be required from the Strasbourg Court in future cases.\(^\text{146}\)

V. Other European Countries’ Practices

The analysis hitherto was conducted on the reasoning elaborated by the Grand Chamber in the D.H. judgment, which allows us to contextualize the ruling in the wider European context. In its conclusion, the court has in fact emphasized that as it was apparent from the documentation produced by ECRI and the report of the CoE Commissioner for Human Rights,\(^\text{147}\) the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children: other European States had had similar difficulties.\(^\text{148}\) The court even acknowledged that the Czech Republic, unlike other European countries, had sought at least to tackle the problem.\(^\text{149}\)

In this regard, some dissenting opinions annexed to the Grand Chamber’s judgment raised the issue of a double standard that the court would have adopted in assessing old and new member states. In particular, the Czech Judge Jungwiert elaborated at length on how old EU member states have been unable to resolve issues relating to the

\(^{143}\) ECtHR, Osman v. the United Kingdom, Appl. No. 23452/94, judgment (Grand Chamber) of 28 October 1998.

\(^{144}\) ECtHR, Nachova and others v. Bulgaria, op.cit. note 72.

\(^{145}\) See, among others, ECtHR, Lindsay v. The United Kingdom, Appl. No. 11089/84, decision of 11 November 1986, 49 DR 1986, p. 181.


\(^{148}\) ECtHR, D.H. (Grand Chamber), op.cit. note 1, para. 205.

\(^{149}\) Ibid.
education of Gypsies and Travellers and suggested that, as a consequence, there should be more self-restraint in criticizing the Czech Republic.\(^{50}\)

By joining the dissenting opinion expressed by Judge Jungwiert, the Slovenian Judge Zupancic argued very polemically: “No amount of politically charged argumentation can hide the obvious fact that the Court in this case has been brought into play for ulterior purposes, which have little to do with the special education of Romani children in the Czech Republic. The future will show what specific purpose this precedent will serve.”\(^{53}\) As for the fact that the court itself has admitted that the Czech Republic is the only Contracting State of the Convention that has tried to tackle the special educational troubles of Roma children, the Slovenian judge observed: “It then borders on the absurd to find the Czech Republic in violation of anti-discrimination principles. In other words, this ‘violation’ would never have happened had the respondent State approached the problem with benign neglect.”\(^{53}\)

Segregation of Roma children in education—including in de facto situations—is a widespread problem in many contracting states of the convention, including ‘old’ democracies where the ‘benign neglect’ denounced by Judge Zupancic is probably more the rule than the exception. As seen earlier, the court has no jurisdiction to review laws or practices in abstracto, only concrete cases brought before it by individuals or, in rare instances, by one or more state parties can be decided by the court. The direct access by individuals to the court is indeed one of the strengths of the Strasbourg system, but at the same time it is also a limitation not only because the open access to individual petitions has generated an enormous workload for the court, but because the cases decided by the court are exclusively those raised by individuals through specific applications, and these are obviously less numerous than the actual violations occurring within the contracting states.\(^{53}\)

The most conclusive proof of the court’s statement that “the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children”\(^{53}\) is probably the judgment in Sampanis and Others v. Greece, adopted unanimously by the

---

150 Ibid. Dissenting Concurring Opinion of Judge Jungwiert, para. 15.
151 Ibid. Dissenting Concurring Opinion of Judge Zupančič (emphasis added).
152 Ibid.
153 Judge Bonello has illustrated this problem in his vivid dissenting opinion in the case Anguelova v. Bulgaria concerning the killing of a Romani man by a Bulgarian police officer, in which the court found no violation of the non-discrimination rule (Art. 14 ECHR): “Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court’s case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination. […] Frequently and regularly the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it.” See, ECtHR, Anguelova v. Bulgaria, Appl. no. 38361/97, judgment of 13 June 2002.
154 Ibid., para. 205.
Strasbourg Court’s Chamber, seven months after the Grand Chamber’s ruling in the

*D.H.* case.\(^{155}\)

The *Sampanis* case concerned a number of Romani children who, due to enrolment difficulties, missed a full year of primary school education (2004–2005) and, subsequently, were placed in preparatory classes in a separate building attended only by Roma and located five kilometers from the primary school’s main premises.\(^{156}\) The court considered that the school should have paid particular attention to the vulnerable position of the Roma and should have facilitated the Roma’s enrolment. Moreover, the court found that there were neither clear criteria nor assessments on the basis of which children were placed in separate classes. Although the court accepted that preparatory classes to help children adjust to the ordinary school system could be justified, the selection of children should be based on non-discriminatory criteria. The Greek government’s argument that the parents had consented to such placement was countered by the court, which held that the possibility to waive one’s right not to be discriminated on the basis of race was not acceptable.\(^{157}\)

The *Sampanis* case draws attention and reinforces the position stemming from the *D.H.* case, namely that the segregation of Romani children in inferior schools and classes is illegal and that European governments must take responsibility for this. It is noteworthy that the court’s analysis of the placement in special classes indicates that such measures would only be admissible if there were clear and non-discriminatory criteria for placement, regular assessment tests to monitor development and that such placement would only be provisional as a reasonable objective to enable children to enter ordinary classes in due course.\(^{158}\)

Some observers note that the *Sampanis* judgment is very promising because, alongside the Greek judge, the Cypriot and the Croatian judges also voted against Greece.\(^{159}\) In particular, Judge Vajic from Croatia, the president of the chamber’s sec-

---


156 The applicants, of Romani ethnic origin, were represented in Strasbourg by Greek Helsinki Monitor (GHM), an Athens-based NGO.

157 ECtHR, *Sampanis and Others v. Greece*, op.cit. note 155, paras. 66–97. Each applicant was awarded 6,000 EUR for non-pecuniary damage, which exceeds awards made in the *D.H.* case. This may be explained by the fact that the *Sampanis* case revealed a more active engagement of the Greek authorities (Ministry of Education and the school’s authorities were concerned) in discrimination, which effectively denied the applicants the right to any education for a whole academic year. In the *Sampanis* case, the court gave special consideration to the reaction of local non-Romani parents who did not want their children to attend the same school with Romani children and had staged numerous protests, including preventing their children from attending school. The court held that it was necessary to take into account these “incidents of a racist character” and concluded that these events had an impact on the authorities’ decision to send the Romani children to the segregated annex housed in prefabricated containers. *Ibid.*, para. 82.


tion in this case, has voted in favour of the applicants while certainly being aware of a similar case pending before the court against Croatia (infra). 160

A month after the Sampanis judgment was delivered, on 17 July 2008, in a setback for Roma rights, the European Court of Human Rights ruled on this specific case against Croatia (Oršuš and Others v. Croatia), but decided that Croatia’s segregating schooling for Roma children did not breach European human rights standards. 161 In the Oršuš case, the applicants had attended in the past, and still attended at the time of the submission to the Strasbourg Court, segregated Roma-only classes in what are otherwise mainstream primary schools in various Croatian villages. 162

Similarly to the D.H. and Sampanis cases, the applicants turned to the Strasbourg Court claiming that their placement in the segregated Roma-only classes, in which the curriculum was significantly reduced in scope and volume as compared to the officially prescribed teaching plan, stemmed from a practice of discrimination based on their ethnicity by the schools concerned, reinforced by pervasive anti-Romani sentiment of the local non-Romani community. As a result of this practice of racial/ethnic segregation in education, they alleged to have suffered degrading treatment in violation of the right not to be subjected to degrading treatment (Art. 3 ECHR) in addition to a violation of the right to education (Art. 2 Protocol No. 1 to the ECHR), as in the D.H. and Sampanis cases.

Despite large volumes of factual evidence presented by the applicants showing that an overwhelming number of Roma children ended up in the segregated classes for the Roma only, the chamber ruled that they had failed to show sufficient evidence that the curriculum they followed was reduced compared with the one followed in regular classes and accepted the claim of the Croatian authorities that the placement of the applicants in Roma-only classes was based on their inadequate Croatian language


161 ECtHR, Oršuš and Others v. Croatia, op.cit. note 160. The Section of the Chamber in the Oršuš case was the same as in the Sampanis case. The Croatian Judge, Nina Vajić, was sitting as Judge Rapporteur (ex officio judge as a national of the state concerned, Art. 43 ECHR), in the former and president in the latter. The court is divided into four sections whose composition is aimed at being geographically and gender balanced and to reflect the different legal systems among the contracting parties. Updated information on the composition of the court and its sections can be found at <http://www.echr.coe.int>.

162 The application in the Oršuš case was filed by the European Roma Rights Centre in partnership with the Croatian Helsinki Committee and Lovorka Kušan, a Croatian attorney. In its decision, announced on 17 July 2008, the Chamber of the European Court of Human Rights accepted only the applicants’ claim that the length of the proceedings was in breach of the “reasonable time” requirement of Article 6(1) of the convention because the proceedings before the Constitutional Court had lasted more than four years before the decision was finally reached in February 2007. Ibid., paras. 45–49.
skills, which allows for a wider margin of appreciation.\textsuperscript{165} Thus, no violation of the right to education taken alone or in conjunction with the prohibition of discrimination (Art. 14 ECHR) was found.\textsuperscript{164} The court further ruled that notwithstanding statistical evidence, there was not “sufficient evidence that there existed a prevalent prejudice [...] to attain the level of suffering necessary to fall within the ambit of Article 3 of the Convention”.\textsuperscript{165}

In evaluating the difference of treatment in the Oršuš case, the chamber seemed to put special emphasis on the fact that the separation of Romani children in separate classes materialized within the ordinary schools—as is the case in many ‘old’ democracies—and that the children were not placed in special schools, as in the D.H. case, and this—according to the chamber—made the transfer from separate class to ordinary class “more flexible”.\textsuperscript{166}

Since the Oršuš case concerns “serious question[s] affecting the interpretation or application of the Convention” and “serious issue[s] of general importance”, in October 2008, the applicants requested that the case be referred to the European Court's Grand Chamber and, on 1 December 2008, this request was accepted.\textsuperscript{167} In this way, the Grand Chamber will have the first opportunity to address the issue of segregation of Romani children within mainstream schools.\textsuperscript{168}

\textbf{VI. Final Remarks}

The normative developments on discriminatory issues formulated in the D.H. Grand Chamber’s decision bring the jurisprudence of the Strasbourg Convention in line with EU standards as reflected in the EU Race Equality Directive and the most recent

\textsuperscript{163} \textit{Ibid.}, paras. 65–66. The applicants maintained that their language deficiency was never substantiated and that segregation must not be considered an appropriate response to language deficiency because it breaches the reasonable proportionality between the means employed and the aim sought to be realized by the separation of the applicants. Moreover, the claim that the separation was necessary due to the applicants’ poor command of the Croatian language was introduced by the Croatian authorities only when the case had been filed before the domestic courts; all of the applicants received good grades in Croatian language in the course of their studies. \textit{Ibid.}, para. 55. See also, Danka, \textit{op.cit.} note 160, 76.

\textsuperscript{164} \textit{Ibid.}, paras. 53–69.

\textsuperscript{165} \textit{Ibid.}, para. 39.

\textsuperscript{166} \textit{Ibid.}, para. 65.

\textsuperscript{167} See Art. 43 ECHR (Referral to the Grand Chamber); ECtHR, press release issued by the Registrar, No. 918, 15 December 2008, at <http://www.echr.coe.int/echr/>.

\textsuperscript{168} There were also a dozen cases initiated in 2006 in Hungary in which individual Romani children sought compensation from expert committees and special schools for misdiagnoses and inadequate education. There have been no final judgments yet. The first of those case, the so-called Miskolc desegregation case, was rejected on first instance and appealed using the arguments of the Grand Chamber’s judgment in D.H. and was sent back for retrial on account of procedural shortcomings. See Case BAZ Megyei Bíróság, 13.P.21.660/2005 and Debreceni Ítéltábla (Debrecen Appeals Court) No. Pf.I.20.683/2005, Judgment of 9 June 2006. For more details, see Farkas, \textit{op.cit.} note 22, 53.
international and national legislation. Furthermore, the *D.H.* ruling provides important guidance for future Protocol No. 12 jurisprudence that, as is well known, has introduced a general, autonomous prohibition of discrimination supplementing the existing Article 14 ECHR (the non-discrimination clause that depends on other convention rights).\(^{169}\)

The *D.H.* judgment is innovative in many respects. The court sets out unequivocally that racial segregation in education is banned in the CoE member states. Moreover, the court has affirmed that equal access to education for Roma is a persistent problem throughout Europe and that discriminatory barriers to education for Romani children are present in a number of European countries. Noteworthy also is the reaffirmation of the special situation of Roma as an ethnic minority group, who have become a specific type of disadvantaged and vulnerable minority requiring special protection.

The *D.H.* ruling will surely assist lawyers regarding both substantive and procedural issues in cases of discrimination. Firstly, it clearly states that *intent* is not necessary for the conclusion that discrimination occurred. Secondly, it gives a clear example of an indirect discrimination case. This is important, since the definition contained in the text of the law itself may not suffice, especially in a case in which a quite new legal concept is introduced.

By adopting a contextual approach in which the facts of the case emerge as elements of a larger picture of entrenched past systemic discrimination, the court also vindicated the equal rights of disadvantaged Romani children who had been victims of systematic exclusion from equal educational opportunity.

So far, so good? Not really. Roma pupils continue to present a challenge to educational policies and institutions in all CoE member states, because widespread prejudice and negative stereotypes prevent the integration of Roma pupils into mainstream schools.

Most international organizations call on their member states to introduce desegregation programmes ensuring free access to quality education for Roma children and the prevention of the rise of anti-Romani sentiment amongst schoolchildren and, at the same time, to move beyond mere desegregating policies opting instead for genuine, fully fledged forms of more-inclusive education for all.\(^{70}\)

The implementation of inclusive policies faces, however, numerous difficulties—from a degree of hostility on the part of the parents of non-Romani children to ‘incentives’ for non-Romani as well as Romani parents to maintain the high levels of Roma children in segregated schools.\(^{71}\) As the chamber noted in its admissibility decision

---

169 At the time of writing, no judgment had been delivered yet on Protocol No. 12.


171 ‘Incentives’ for non-Romani and Romani parents to maintain the status quo are described by the OSCE as follows: "Special schools receive higher subsidies from the state; simi-
in the *D.H.* case, the choice between a single school for everyone, highly specialized structures or unified structures with specialized sections is not an easy one. In general, states cannot be prohibited from setting up different types of school for children with difficulties or implementing special educational programmes to respond to special needs. In this regard, in the *Oršuš* ruling, the court explicitly stated that the placement of children in separate classes is a positive measure if designed to assist them in acquiring knowledge, for instance, language knowledge, necessary for following the school curriculum.

Only Judge Cabral Barreto in his dissenting opinion ventured to affirm that, if a child, for any reasons not linked to mental problems, finds it difficult to pursue a normal school education, he or she should be entitled to expect the state to take positive measures to compensate for his or her problems and to afford him or her a means of resuming the normal curriculum.

Yet, as seen earlier, an obligation to adopt positive action is still controversial because it has not been yet formulated in clear terms by the Strasbourg Court, although other organs of the Council of Europe, such as the European Committee of Social Rights and the CoE Parliamentary Assembly, have been much more progressive in this respect.

As in a vicious circle, social deprivation, segregated housing and poverty directly influence the educational perspectives and opportunities for Roma. It is therefore crucial to adopt an holistic approach to these problems and provide adequate financial and other means to enable Roma pupils to participate in mainstream schools including specific training for Roma teachers to promote teaching ‘in’ and ‘of’ the Romani language and the Roma culture, as well as to provide alternative models counteracting negative social stereotypes. The aim of any educational policy should be to create the larly, parents with disabled children receive higher welfare benefits to take care of them. Teachers and school personnel do not wish to lose those provisions that ensure their jobs; at the same time, welfare for a disabled child represents income that some poor Roma and Sinti families would not otherwise have.” OSCE, op.cit. note 134, 41. Likewise, Larry Olomoofe, from ERRC, reports: “During a fact finding research trip to Moldova in November 2007, I was told by a number of Romani parents that they sent their children to the ‘Roma School’ because they were safe there, could practice Romani culture and because the teachers liked them. They also stressed that since they were chronically impoverished, school meals that were provided there was a major help for them relieving them of some of the burden of having to feed their children during the day.” Olomoofe, op.cit. note 42, 70. A holistic approach addressing also the economic difficulties of many Romani families would contribute to eliminating some of the erroneous motivations in favour of maintaining the special schools for Romani pupils.

172 ECtHR, *D.H.* (Chamber), op.cit. note 1, para. 47.
173 ECtHR, *Oršuš and Others v. Croatia*, op.cit. note 160, para. 68.
174 ECtHR, *D.H.* (Chamber), op.cit. note 1, Dissenting Opinion of Judge Cabral Barreto, para.4.
175 The importance of teaching ‘of’ and ‘through the medium’ of the Romani language is increasingly referred to in state reports and in the opinions of the Advisory Committee as a necessary element of the efforts to ensure access to education for the Roma. In the opinion on Romania, for instance, the Advisory Committee mentioned that there was in
conditions for civic integration and social and intellectual development in accordance with the principles that all children and their parents must be entitled to expect from the states in the education sphere.76

In the cycle of marginalization and discrimination caused by a convergence of historical, social and political factors in which the practice of segregated schooling has proliferated, the judiciary can play a fundamental role in identifying problems concerning not only civil and political rights but also economic and social rights. The D.H. ruling certainly is and will be instrumental in shaping the future jurisprudence, as well as the understating of the notion of discrimination and the right to education, as one of the most relevant empowering social right. The D.H. case also raises a structural problem of discrimination that deserves a systematic solution in which, in addition to the judiciary, there is the need for strong action by the legislator and the public authorities, especially at the local level, to implement policies and programmes.

The future rulings of the Strasbourg Court on segregated education, in particular the Oršuš case pending before the Grand Chamber, will tell us whether the court will continue on the progressive path followed in the D.H. case or will reverse in a more conservative and formalistic closure. Certainly, the D.H. case, followed by the Sampanis case, with its pros and cons, i.e., a clear condemnation by the most prestigious European judicial body of segregation in education—although the controversial dissenting opinions and a number of legal questions are still open—nevertheless gives us reason for hope and optimism regarding the struggle for the emancipation of the Roma minority.

practice no instruction in the Roma language despite the considerable size of the Roma community living in this country. The Advisory Committee called for measures to ensure adequate opportunities to be taught the Roma language. See Advisory Committee on the FCNM, Opinion on Romania, 6 April 2001, ACFC/INF/OPI(2001)1, para. 59. In this regard, much guidance can be found in the OSCE Hague Recommendations Regarding the Education Rights of National Minorities of the OSCE (1996), which is a comprehensive text containing information on some crucial aspects of minority education. The Hague Recommendations follow the spirit of the Framework Convention and the aims of education as described in the Convention on the Rights of the Child in adopting the basic assumption of the need to balance the goal of the preservation and development of minority identity and language with that of the integration of minorities in the societies in which they live as well as a dialogue between different individuals and groups. See also Commentary on Education under the FCNM, op.cit. note 47; UN Recommendations on Minorities and the Right to Education, op.cit. note 50.