

# Roma Segregation in Education: Direct or Indirect Discrimination?

## An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters

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The author expresses her warmest gratitude to Professor *Frowein* for his valuable comments, remarks and suggestions on an earlier draft of the Article. The views expressed in this paper are solely those of the author.

ZaöRV 71 (2011), 719-753

## Abstract

Several scholars have pointed at mutual borrowing practices between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) regarding their non-discrimination regimes. One example hereof is the recent “importation” from the EU of the principle of indirect discrimination by the ECtHR. ECtHR jurisprudence in these matters is inspired by the EU’s fundamental rights regime in general, and by the Racial Equality Directive (Council Directive 2000/43/EC) in particular. In the case *D. H. and Others v. Czech Republic*, a groundbreaking case on segregation of Roma children in education, the Grand Chamber of the ECtHR for the first time explicitly acknowledged that the principle of indirect discrimination applies to Art. 14 of the European Convention on Human Rights (ECHR). Subsequent similar cases (*Sampanis and Others v. Greece* and *Oršuš and Others v. Croatia*) were also held to be cases of indirect discrimination.

Yet several arguments can be raised in favor of a qualification of latter cases as cases of direct discrimination.

At first sight, the qualification by the ECtHR of the facts of a case as either direct or indirect discrimination might not seem of great importance, since it has no direct doctrinal implications for the system of objective justification under Art. 14 ECHR. However, there are implications for the outcome of a case brought before the CJEU or before national courts. According to Art. 2 Racial Equality Directive, cases of indirect discrimination can be objectively justified, whereas cases of direct discrimination cannot be objectively justified. From a victim’s point of view, it is thus important to qualify the facts of a case of direct discrimination correctly under the EU’s fundamental rights regime, as this leads to higher victim protection, due to an exclusion of the possibility of objective justification for the perpetrator.

In the light of the mutual borrowing practices regarding their non-discrimination regimes between the ECtHR and the CJEU, and in the light of the accession of the EU to the ECHR, it is thus not only important for the CJEU, but also for the ECtHR, to qualify the facts of a case of direct discrimination correctly, and to reason flawlessly and meticulously. Should the ECtHR continue its incorrect qualification of cases of direct discrimination, this can either lead to inconsistencies between the jurisprudence of the two Courts or – should the CJEU be inspired by the incorrect qualifications of the ECtHR in cases of segregation of Roma children in education – to a lower degree of victim protection for the Roma children.

## I. Introduction

A significant part of the 10-12 million Roma<sup>1</sup> in Europe live in extreme marginalization and very poor socio-economic conditions. The living conditions of the Roma are aggravated by the fact that the discrimination, social exclusion and segregation they face are mutually reinforcing.<sup>2</sup> The highest concentrations of Roma can be found in post-communist Central and Eastern European (CEE) countries. During the communist era, education and employment levels in CEE countries were generally raised through mandatory education and employment policies.<sup>3</sup> Following the collapse of the communist systems, the economic situation of the Roma deteriorated and anti-Roma feelings resurfaced.<sup>4</sup> Even though for many CEE States the improvement of access to quality education for Roma has been prioritized in the last years and overall strategies for the educational integration of Roma children are being adopted,<sup>5</sup> only little progress has been achieved so far. Central problems across all CEE States in the field of education are: the absence of Roma in early childhood education; the low educational attainment; high drop-out rates at young age; as well as irregular participation in education, with the consequence of illiteracy and lacking skills and qualifications for the labor market. Moreover, the schools most Roma children attend are separate, segregated and inferior. Little or no meaningful progress against segregation has been registered in the three years since the ECtHR delivered its landmark judgment in November 2007 in the case of *D. H. and*

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<sup>1</sup> The Romani people are also known by a variety of other names. In English they are mostly referred to as “Roma” or “Gypsies”, the latter often having a negative connotation. For the purpose of this paper, the term “Roma” is used as an “umbrella term” covering Roma, Sinti, Travellers and all possible sub-groups. See also *J.-P. Liegeois*, Roma in Europe, 2007, 11 et seq.

<sup>2</sup> European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The Social and Economic Integration of Roma in Europe, COM(2010)133 final, 7.4.2010, 2.

<sup>3</sup> *P. Vermeersch/M. H. Ram*, The Roma, in: B. Rechel (ed.), *Minority Rights in Central and Eastern Europe*, 2009, 63.

<sup>4</sup> *R. Stauber*, Violence against the Roma Minority in Hungary and the Czech Republic and Its Repercussions, Topical Brief No. 4, 2009, available at <http://www.tau.ac.il/Anti-Semitism/Art.s/roma.pdf>. See also *W. Guy*, Romani Identity and Post-communist Policy, in: *W. Guy* (ed.), *Between Past and Future: The Roma of Central and Eastern Europe*, 2001.

<sup>5</sup> European Commission, Commission Staff Working Document: Roma in Europe: The Implementation of European Union Instruments and Policies for Roma Inclusion — Progress Report 2008-2010, SEC(2010)400 final, 7.4.2010, 9.

*Others v. Czech Republic*,<sup>6</sup> a case of 18 Roma children who had been relegated to schools for the developmentally disabled. Today, many Roma children across Central and Eastern Europe are still relegated to such schools, because they have had no access to preschool education or do not speak their country's majority language.<sup>7</sup>

Other recent ECtHR cases on Roma educational matters, which continue the ECtHR's line of reasoning developed in *D. H. and Others v. Czech Republic*, are *Sampanis and Others v. Greece*<sup>8</sup> and *Oršuš and Others v. Croatia*.<sup>9</sup> Whereas in *D. H. and Others v. Czech Republic* the Grand Chamber of the ECtHR held that the placing of Roma children in special schools for children with learning disabilities in the Czech Republic amounts to indirect discrimination, the ECtHR did not determine whether in the *Sampanis* case the practice of segregated preparatory classes for Roma children amounted to direct or indirect discrimination. In the *Oršuš* case, the Grand Chamber identified the placing of Roma children into separate classes with an inferior curriculum as amounting to indirect discrimination.

The relevance of this concept of indirect discrimination has been recognized only quite recently by the ECtHR, and its jurisprudence in these matters is clearly inspired by the wording of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.<sup>10</sup>

The definitions of the concepts of direct and indirect discrimination under the Racial Equality Directive and in the jurisprudence of the ECtHR are the same: direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on the grounds of racial or ethnic origin (for the Racial Equality Directive) or on one of the grounds listed up in Art. 14 ECHR;<sup>11</sup> indirect discrimination shall be taken to occur where an appar-

<sup>6</sup> *D. H. and Others v. Czech Republic*, 7.2.2006, ECtHR, <http://cmiskp.echr.coe.int/tkp197/default.htm> and *D. H. and Others v. Czech Republic*, 13.11.2007, ECtHR, <http://cmiskp.echr.coe.int/tkp197/default.htm>, selected for publication in Reports of Judgments and Decisions, hereinafter also referred to as the *Ostrava* case.

<sup>7</sup> *G. Soros/J. Wolfensohn*, Ramping Up Hope for Roma with Education, *The Japan Times*, 23.11.2009, available at <http://search.japantimes.co.jp/cgi-bin/eo20091123a1.html>.

<sup>8</sup> *Sampanis and Others v. Greece*, 5.6.2008, ECtHR, <http://cmiskp.echr.coe.int/tkp197/default.htm>.

<sup>9</sup> *Oršuš and Others v. Croatia*, 17.7.2008, ECtHR, <http://cmiskp.echr.coe.int/tkp197/default.htm> and *Oršuš and Others v. Croatia*, 13.3.2010, ECtHR, <http://cmiskp.echr.coe.int/tkp197/default.htm>, selected for publication in Reports of Judgments and Decisions.

<sup>10</sup> Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L180/22.

<sup>11</sup> See also below (note 30).

ently neutral provision, criterion or practice would put a person of a racial or ethnic origin or belonging to one of the categories listed up in Art. 14 ECHR at a particular disadvantage compared with other persons.<sup>12</sup>

For instance, in cases where Roma children are put in separate classes on the alleged ground of not speaking the majority language fluently, this might seem to be a case of indirect discrimination at first sight. A provision or practice, which foresees that all children with language difficulties should attend a separate class, seems indeed to be a neutral provision or practice. When only Roma children are affected by it, and they are treated less favorably compared to other children who do not have to attend the separate classes, we can speak about indirect discrimination. However, if the language criterion is a justification brought in *a posteriori* by the government, and the real reason for putting the Roma children in a separate class was the fact of them being Roma, thus their belonging to a specific ethnic group (e.g. because of the parents of the non-Roma children not wanting their children to sit in the same class as the Roma children), then this case would be a case of direct discrimination on the ground of ethnic origin.

Even though the definition of the concept of indirect discrimination is the same in the jurisprudence of the ECtHR and under the Racial Equality Directive, there is a major difference when it comes to their respective systems of objective justification: cases of direct discrimination cannot be objectively justified under the Racial Equality Directive, whereas under the ECtHR jurisprudence under Art. 14 ECHR, both cases of direct and indirect discrimination can be objectively justified. Therefore, the qualification of the facts of a case as amounting to direct or indirect discrimination does neither have a direct influence on the objective justification mechanism under Art. 14 ECHR-jurisprudence, nor on the outcome of the case before the ECtHR. However, the difference between direct and indirect discrimination is extremely relevant for the jurisprudence of the CJEU, since the qualification of the facts of a case as direct discrimination offers a better protection for the victim of discrimination (compared to a qualification of the facts of a case as indirect discrimination) due to the fact that the perpetrator cannot objectively justify the difference in treatment.

The main argument put forward in the paper is that, in the light of the mutual borrowing habits between the CJEU and the ECtHR regarding their non-discrimination regimes, it is crucial for the ECtHR to distinguish clearly between the concepts of direct and indirect discrimination, even though this does not have a direct impact on the possibilities for objective

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<sup>12</sup> For more on the differences between direct and indirect discrimination as stipulated in Art. 2 Racial Equality Directive, see below under II.

justification under Art. 14 ECHR. Especially now that the EU will become a party to the ECHR soon, it is to be expected that mutual borrowings between the CJEU and the ECtHR will be even more prominent and frequent. In order to facilitate these mutual borrowings, it is the more important for the two courts, not only to adopt the same definition of the concepts of direct and indirect discrimination, but also to correctly identify cases amounting to direct and indirect discrimination as such.

The adoption of a clear distinction between the notions of direct and indirect discrimination by the ECtHR and the CJEU in their jurisprudence is especially relevant in Roma educational matters, since segregation of Roma in education is often disguised. A better qualification of the facts of cases of segregation of Roma in education would certainly lead to a higher protection of segregated Roma children, since cases of direct discrimination would be clearly identified as such by the CJEU, which would leave no possibility for the perpetrators to justify the difference in treatment. So far, no cases on segregation of Roma in education have come before the CJEU, but it is only a matter of time until national courts will ask the CJEU for a preliminary ruling on how to apply the Racial Equality Directive in this kind of cases.

## II. On the Distinction between Direct and Indirect Discrimination under Council Directive 2000/43/EC and the Consequences for the Objective Justification Test

The concepts of direct and indirect discrimination are defined in Art. 2 of the Racial Equality Directive, which reads as follows:

Art. 2: Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur 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, cri-

terion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

*Kristin Henrard*<sup>13</sup> distinguishes four common elements of discrimination when comparing these two definitions of direct and indirect discrimination: (1) a harm or disadvantage, (2) a causal relationship between the less favourable treatment and the disadvantage, (3) a protected ground (in the Racial Equality Directive obviously racial or ethnic origin), and (4) a comparison with comparable cases.

Then *Henrard* goes on to identify the main differences between direct and indirect discrimination. One main difference lies in the causal relationship between the harm and the protected ground.<sup>14</sup> For direct discrimination, the harm or disadvantage consists in less favorable treatment and there is a direct causal link with the protected ground. Direct discrimination is defined by reference to the comparator concept. It shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation. Unfortunately, this definition leaves the question how a comparison shall be established unresolved.<sup>15</sup>

For indirect discrimination, “the harm is rather identified at group level, namely anything that ‘would put persons of a racial or ethnic group at a particular disadvantage’, whereas the causal link between the harm and the protected ground is more indirect. This causal link is established by the actual or potential negative (disadvantageous) and disproportionate impact of a (seemingly) neutral measure on a group of ‘persons of a racial or ethnic origin’. Typical for indirect discrimination is thus that it focuses on the effects of a neutral measure on a particular group of persons.”<sup>16</sup>

Another main difference between direct and indirect discrimination lies in the possibility for the person or institution responsible for the disparate impact to objectively justify the difference in treatment. In cases of direct

<sup>13</sup> *K. Henrard*, The First Substantive CJEU Judgment on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle, Jean Monnet Working Paper 09/09, 11.

<sup>14</sup> In this context *Henrard* notes the following: “To be precise, there are actually two kinds of causal relationships that need to be present, not only one between the protected ground and the challenged treatment (the one which is the most well known), but there should also be one between the harm suffered and the challenged treatment (provision, criterion or practice). In this respect an interesting elaboration can be made in relation to direct versus indirect discrimination: while the first causal link is essential in relation to direct discrimination, it is often the second one which plays in cases of indirect discrimination.” *K. Henrard* (note 13), 11.

<sup>15</sup> *D. Schiek*, A New Framework on Equal Treatment of Persons in EC Law?, ELJ 8 (2002) 2, 295 et seq.

<sup>16</sup> *K. Henrard* (note 13), 11 et seq.

discrimination under the Racial Equality Directive, there is no room for the objective justification test. Only indirect discrimination can be objectively justified.<sup>17</sup> The modalities of the objective justification test are defined in Art. 2 (2) (b) *in fine*: a less favourable treatment can be objectively justified by a legitimate aim and the means of achieving that aim should be appropriate and necessary.

The jurisprudence of the CJEU in cases of gender discrimination shows that the distinction between direct and indirect discrimination is not always a clear one. *Henrard* notes that this is “probably related to the fact that the conceptualization of direct and indirect discrimination by the CJEU has happened on a case by case basis, and did not depart from a clear theoretical paradigm”.<sup>18</sup> This lack of a clear theoretical paradigm might explain the uncertainty of national courts<sup>19</sup> in applying national law into which the Directive was transposed.

### III. Mutual Borrowing Habits between the CJEU and the ECtHR Regarding Their Non-Discrimination Regimes

The distinction between direct and indirect discrimination in EU law did not appear in the wording of the EC treaty – and does not appear in the wording of the Lisbon Treaty – but it has rather been developed by the

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<sup>17</sup> There is one exception though, namely the case of “genuine and determining occupational requirements”, which is defined in Art. 4 Racial Equality Directive. This Article reads as follows: “Notwithstanding Article 2 (1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.” This means that there is indeed room for the objective justification test in cases of direct discrimination in cases where the characteristic on which the differential treatment is based consists in a genuine and determining occupational requirement. I will not elaborate on this exception to Art. 2 Racial Equality Directive since it is not relevant for the protection of Roma educational rights.

<sup>18</sup> *K. Henrard* (note 13), 12.

<sup>19</sup> See for instance the different preliminary questions asked to the CJEU by the Brussels Labour court of Appeal in the Case C-54-07 *Centrum voor Gelijkeheid van Kansen en Racisme-bestrijding v. Firma Feryn NV* [2008] ECR I-5187, such as question (4) on what is to be understood by the wording of Art. 8 (1) of the Racial Equality Directive, which reveals uncertainty in the head of the national judge about what is needed to establish a presumption of discrimination or a prima facie case, and how this presumption can be rebutted. See also *K. Henrard* (note 13), 8 et seq.

CJEU through its case law since the 1960s.<sup>20</sup> Whereas the concept of indirect discrimination is not new under CJEU jurisprudence,<sup>21</sup> the relevance of this concept has been recognized only quite recently by the ECtHR in relation to the ECHR. For a long time, the ECtHR based its equality jurisprudence on a formal notion of discrimination, which focused on direct discrimination, and it had difficulty with cases involving covert discrimination or indirect discrimination.<sup>22</sup> During the last decade, however, the ECtHR started to develop a substantive conception of equality.<sup>23</sup> Some of the most important developments of substantive equality jurisprudence have come in cases dealing with discrimination against Roma in education. So far, no Roma cases have been brought to the CJEU under the Racial Equality Directive, even though NGOs are increasing pressure on national courts to bring controversial cases related to Roma segregation in education before the CJEU by means of request for a preliminary ruling. In the meantime, the CJEU has developed a considerable amount of case law under the Equality Directives, by which it has enhanced the protection against discrimination in Europe.<sup>24</sup> The CJEU reasons pragmatically and teleologically in its case law and several scholars<sup>25</sup> believe that it is likely to broaden the scope of European non-discrimination law in the future. This case law has been and still is inspiration for the jurisprudence of the ECtHR.

Vice versa, there are several examples of cases where the CJEU refers to the case law of the ECtHR in the interpretation of the Equality Directives, such as the Case of *K. B. v. National Health Service Pensions Agency, Secretary of State for Health* of 7.1.2004<sup>26</sup> and the *Richards* Case of 27.4.2004.<sup>27</sup>

<sup>20</sup> See the case *Ugliola*, dating from the late 1960s and the cases of *Sotgiu* and *Sabbatini*, dating from the early 1970s. Other relevant cases are *Jenkins* and *Bilka* from the 1980s: Case C-15/69 *Württembergische Milchverwertung-Südmilch AG v. Salvatore Ugliola* [1969] ECR 363; Case C-20/71 *Luisa Sabbatini, nee Bertoni v. European Parliament* [1972] ECR 345; Case C-152/73 *Giovanni Maria Sotgiu v. Deutsche Bundespost* [1974] ECR 153; Case C-96/80 *J. P. Jenkins v. Kingsgate (Clothing Productions) Ltd* [1981] ECR 911; Case C-170/84 *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR 1607.

<sup>21</sup> C. Tobler, Limits and Potential of the Concept of Indirect Discrimination, Thematic report of the European network of legal experts in the non-discrimination field, European Commission, DG for Employment, Social Affairs and Equal Opportunities, September 2008, 5 and 23.

<sup>22</sup> R. O'Connell, Commentary: Substantive Equality in the European Court of Human Rights?, Mich. L. Rev. 107 (2009), 129, available at <http://www.michiganlawreview.org/firstimpressions/vol107/oconnell.htm>.

<sup>23</sup> R. O'Connell (note 22).

<sup>24</sup> For an overview of the most important CJEU case law under the Equality Directives, see A. Eriksson, European Court of Justice: Broadening the Scope of European Non-discrimination Law, Int'l J. Const. L. 7 (2009), 731 et seq.

<sup>25</sup> A. Eriksson (note 24), 753 and footnote 134.

<sup>26</sup> C-117/01 on the interpretation of Art. 141 of Directive 75/117.

A study on “Gender Discrimination under EU and ECHR Law” by *Samantha Besson*<sup>28</sup> shows that recently, the ECtHR and the CJEU have started a dialog and mutual borrowing habits when it comes to their non-discrimination regimes. According to *Besson*, these concrete borrowings have had no impact on the regimes themselves and have triggered no fundamental reorganization of the respective regimes of non-discrimination.<sup>29</sup>

#### IV. On the Distinction between Direct and Indirect Discrimination in the Jurisprudence of the ECtHR: Objective Justification in Cases of Direct and Indirect Discrimination

It has been mentioned above that under the Racial Equality Directive, different rules apply to the justification of direct and indirect discrimination: only indirect discrimination can be objectively justified. This is not the case in the jurisprudence of the ECtHR under Art. 14 ECHR,<sup>30</sup> since the ECtHR accepts an objective justification both in cases of direct and indirect discrimination.

When comparing the jurisprudence of the CJEU under the Racial Equality Directive and the jurisprudence of the ECtHR under Art. 14 ECHR,<sup>31</sup> it should be noted that it is difficult to compare Art. 2 Racial Equality Directive with Art. 14 ECHR since they differ considerably in aim and structure.<sup>32</sup> The Racial Equality Directive is a Directive which was designed to

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<sup>27</sup> C-423/04 on the interpretation of Art. 4 (1) of Directive 79/7.

<sup>28</sup> *S. Besson*, Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?, HRLR 4 (2008), 647 et seq.

<sup>29</sup> *S. Besson* (note 28), 677.

<sup>30</sup> Art. 14 ECHR reads as follows: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” For a comment on Art. 14 ECHR see *W. Penkeurt*, Artikel 14 (Diskriminierungsverbot), in: J. A. Frowein/W. Peukert (eds.), Europäische MenschenrechtsKonvention: EMRK-Kommentar, 2009, 401 et seq.

<sup>31</sup> Art. 14 ECHR has been complemented by Protocol 12, which entered into force in 2005. This optional protocol establishes, for those 18 Contracting Parties which have ratified it to date, a principle of equality before and in the law. For more on Protocol 12 see *R. Wintemute*, Filling the Article 14 ‘gap’: Government Ratification and Judicial Control of Protocol No. 12 ECHR, EHRLR 5 (2004), 484 et seq.

<sup>32</sup> For a comparison of the role and scope, as well as the various material and procedural constitutive elements of the EU and ECHR regimes of non-discrimination, and especially the

be transposed into the national legal orders of the EU Member States, and the Convention Articles contain human rights provisions the respect of which is to be ensured by the ECtHR. It should also be noted that, whereas Art. 2 Racial Equality Directive stands alone, a violation of Art. 14 ECHR can only occur when read together with another Convention Article.<sup>33</sup> When the enjoyment of the rights and freedoms as stipulated in the ECHR is not secured without discrimination on the grounds mentioned in Art. 14 ECHR, this article is violated.

The ECtHR has defined discrimination as: treating differently, without an objective and reasonable justification,<sup>34</sup> persons in relevantly similar situations.<sup>35</sup> It follows from this definition, that all forms of differential treatment, as well those forms possibly amounting to direct, as those forms possibly amounting to indirect discrimination, can be objectively justified. It should be noted, however, that the ECtHR does distinguish between direct and indirect discrimination, even though this does not have any consequences for the objective justification test under the ECHR. For a long time, the distinction between direct and indirect discrimination was absent from the ECtHR's case law.<sup>36</sup> It has become clear from the ECtHR's recent

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different approaches of the ECHR and EU law when it comes to gender discrimination, see S. Besson (note 28), 647 et seq.

<sup>33</sup> Besson notes that the explanation for the divergence between ECHR and EC law with respect to the principle of equality and non-discrimination may be found "in the fundamental difference in nature between both legal orders. The EU legal order is autonomous and has already been constitutionalized in many aspects, thus calling for the entrenchment of a strong equality protection clause (Art. 20 EU Charter) besides its many non-discrimination principles. In contrast, the ECHR remains a minimal catalog of fundamental rights whose exercise should be guaranteed in a non-discriminatory way; in those circumstances, Art. 14 is thought as minimal and subsidiary to national constitutional equal protection clauses (see Art. 53 ECHR)." S. Besson (note 28), 654.

<sup>34</sup> The objective and reasonable justification test consists in a test whether there is a legitimate aim for the differential treatment and a proportionality test. See *Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, also known as the *Belgian Linguistics Case*, 23.7.1968, ECtHR, Series A No. 6, where the Court states in Section 1 B para. 10 of the judgment that it "holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Art. 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized."

<sup>35</sup> *Willis v. the United Kingdom*, 11.6.2002, ECtHR, Reports of Judgments and Decisions 2002-IV, para. 48.

<sup>36</sup> D. Martin, *Egalité et non-discrimination dans la jurisprudence communautaire: Etude critique à la lumière d'une approche comparatiste*, 2006, 113.

case law, however, that both direct and indirect discrimination are prohibited.

According to the ECtHR in the case of *Hoogendijk v. the Netherlands*, “where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group”.<sup>37</sup> It was in the case of *D. H. and Others* that the ECtHR for the first time explicitly accepted that “a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC [...], such a situation may amount to ‘indirect discrimination’ [...]”.<sup>38</sup> Since the notion of indirect discrimination is relatively new in the Court’s jurisprudence, it needs to be further developed. The ECtHR itself is aware of this issue. The dissenting judges in the Grand Chamber Case of *Oršuš and Others v. Croatia* criticized the majority for having offered too little “practical guidance on how to develop and apply the notion of indirect discrimination”<sup>39</sup> and also for having “viewed the case in the first place as a means of further developing the notion of indirect discrimination in the Court’s jurisprudence”<sup>40</sup>.

The example of segregation of Roma children in education allows illustrating how the distinction between direct and indirect discrimination is not always a clear one. As mentioned above in the introduction, it is often unclear what constitutes the real rationale behind the putting of Roma into segregated classes. Mostly, unfortunately, the reasons why these children are segregated are related to their ethnic origin. However, governments and school boards come up with arguments of intellectual deficiencies or lack of language knowledge as reason to relegate these children to special schools of inferior quality. In this sense, the discriminatory treatment is “disguised” and difficult to discern.

So far, three cases on segregation of Roma in the field of education have been brought before the ECtHR, of which two were referred to the Grand Chamber (the cases of *D. H. and Others.* and *Oršuš and Others*), which in both cases overruled the chamber judgments and reached a positive outcome for the Roma pupils (violation of Art. 14 ECHR in conjunction with

<sup>37</sup> *Hoogendijk v. the Netherlands*, 6.1.2005, ECtHR, First Section Admissibility Decision, <http://cmiskp.echr.coe.int/tkp197/default.htm>, at para. 2 under “the law”.

<sup>38</sup> *D. H. and Others v. Czech Republic* (note 6) 13.11.2007, para. 184.

<sup>39</sup> *Oršuš and Others v. Croatia*, Grand Chamber Judgment, Joint Partly Dissenting Opinion, para. 19.

<sup>40</sup> *Oršuš and Others v. Croatia* (note 39), para. 15.

Art. 2 of Protocol No. 1).<sup>41</sup> These cases will be shortly examined in the next section, with a special focus on the qualification of differential treatment of the Roma in these cases as amounting to direct or indirect discrimination.

## V. Direct or Indirect Discrimination in the Cases of *D. H. and Others v. Czech Republic*, *Sampanis and Others v. Greece* and *Oršuš and Others v. Croatia*?

Even though the difference of the categorization of differential treatment of Roma in education as possibly amounting to either direct or indirect discrimination has no relevance for the objective justification test under Art. 14 ECHR, a correct categorization might encourage the CJEU to refer to the case law of the ECtHR and conversely, an unclear or imprecise argumentation by the ECtHR might discourage the CJEU from referring to the ECtHR jurisprudence. Moreover, in the light of the accession of the EU to the ECHR, incoherence in the jurisprudence of both courts should be avoided. Therefore a correct categorization of (the facts of) a case is important.

Where the ECtHR clearly states that the differential treatment of the Roma children, applicants in the case of *D. H. and Others v. Czech Republic*, amounts to indirect discrimination, the Court does not clearly differentiate whether the differential treatment of the Roma children, applicants in the case of *Sampanis v. Greece* amounts to direct or indirect discrimination. In the case of *Oršuš v. Croatia*, a third case on discrimination against Roma in education, the chamber of the ECtHR first dealing with the case failed to identify the exact ground of differential treatment of the Roma children, categorizing the differential treatment as having taken place on account of language difficulties and inadequacy of language skills instead of on account of racial or ethnic origin. In the Grand Chamber judgment, the ECtHR examined the facts of the case more in detail and underscored that the differential treatment of the Roma children had no objective and reasonable justification since some substantial safeguards were lacking. The case was examined as a case of indirect discrimination on the grounds of race and ethnic origin, and not on account of language difficulties, since no non-Roma children were in the separate classes. The case was seen as a case of indirect dis-

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<sup>41</sup> For a more general overview of recent ECtHR jurisprudence on the prohibition of discrimination, see *W. Burek, Zakaz dyskryminacji w orzecznictwie ETPCz z 2008 r.*, EPS 51 (2009) 12, 32 et seq.

crimination, even though several arguments can be found in favor of the categorization of this case as a case of direct discrimination.

The three cases of *D. H. and Others v. Czech Republic*, *Sampanis v. Greece* and *Oršuš v. Croatia* will be examined more in detail from the point of view of their qualification as a case of direct or indirect discrimination.

## 1. *D. H. and Others v. Czech Republic*, Grand Chamber Judgment of 13 November 2007

### a) The Racial Equality Directive as a Catalyst for Art. 14 ECHR

The case of *D. H. and Others v. Czech Republic*, also known as the *Ostrava* case, was launched in 1999 by 18 Roma children who sought legal redress for the practice of putting Roma students, regardless of their intellectual abilities, into special schools for children with learning disabilities. The placement in special schools occurred after psychological testing. The applicants claimed that the results of these tests were distorted because the tests were adapted to the Czech language and cultural environment. They claimed that by this practice of segregation in education, the Czech Republic had violated Art. 14 ECHR taken together with Art. 2 of Protocol No. 1 on the right to education. Research by the European Roma Rights Centre,<sup>42</sup> an NGO supporting the children in bringing the case to the ECtHR, showed that Roma students in the Ostrava region were 27 times more likely than similarly situated non-Roma to be placed in special schools.<sup>43</sup>

At first, a Chamber of the Second Section of the ECtHR held in February 2006, that there had been no violation of Art. 14 read together with Art. 2 of Protocol No. 1. It refused to consider the broader social situation of the Roma, concentrating on the position of the 18 actual applicants before it.<sup>44</sup>

<sup>42</sup> More information on this NGO is available at [www.errc.org](http://www.errc.org).

<sup>43</sup> The ERRC case files are available at <http://www.errc.org/cikk.php?cikk=2945>.

<sup>44</sup> For an analysis of the case of *D. H. and Others* see: *A. Dobrushin*, A Fresh Wind Across the Prairie: The European Court of Human Rights Acknowledges Systemic Discrimination in the Case of Education of Romani Children from Czech Republic, *Roma Rights Quarterly* 4 (2007), 73; *S. Fredman*, Human Rights Transformed, 2008, 221 et seq.; *J. A. Goldston*, Ending Racial Segregation in Schools: The Promise of *D. H.*, *Roma Rights Quarterly* 1 (2008), 1; *M. E. A. Goodwin*, *D. H. and Others v. Czech Republic*: A Major Set-Back for the Development of Non-Discrimination Norms in Europe, *GLJ* 7 (2006), 4, available at <http://www.germanlawjournal.com>; *G. Hobcraft*, Roma Children and Education in the Czech Republic: *D. H. v Czech Republic*: Opening the Door to Indirect Discrimination Findings in Strasbourg?, *EHRLR* 2 (2008), 245; *M. Niedobitek*, Der Ostrava-Fall des Europäischen Gerichtshofs für Menschenrechte: Konventions- und gemeinschaftsrechtliche Überlegungen zur Diskriminierung von Roma-Kindern im Bildungswesen, *Eur. Ethnica* 1/2 (2009), 31; *D. Stru-*

It rejected the claim largely on the basis that parental consent had been given both to the testing and to the transfer to special schools.<sup>45</sup>

The case was referred to the Grand Chamber, which ruled in November 2007 that segregating Roma students into special schools for children with learning disabilities is a form of unlawful indirect discrimination.

The judgment was path breaking in a number of respects, not in the least because it brought the ECtHR jurisprudence more in line with the EU principles of anti-discrimination law. Indeed, the Racial Equality Directive has paved the way for an enlightened approach to the question of indirect discrimination by the ECtHR. The adoption of the Racial Equality Directive might have provided “the catalyst that Article 14 has needed in order to make it effective”.<sup>46</sup> In particular, the influence of the Racial Equality Directive in the case of *D. H and Others* was threefold: it enabled a broader enquiry into the societal context behind the facts; inspired the ECtHR in adopting its definition of indirect discrimination; and allowed for a shift in the burden of proof to the respondent once a *prime facie* case was established.

First of all, the ECtHR, for the first time since it came into being, has found a violation of a Convention right in relation to a case of “structural and systemic discrimination”<sup>47</sup> in the sphere of education. As such, the Court has underscored that the Convention addresses not only specific acts of discrimination, but also systematic practices that deny the enjoyment of Convention rights to racial or ethnic groups and it looked beyond the facts of the case. It established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community as a whole, and therefore considered that the applicants as members of that community necessarily suffered the same discriminatory treatment.<sup>48</sup> The ECtHR did not examine the individual cases of the applicants. Instead, large sections of the judgment are devoted to an assessment of the social context of the case.<sup>49</sup>

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*pek*, Before and After the Ostrava Case: Lessons for Anti-Discrimination Laws and Litigation in the Czech Republic, *Roma Rights Journal* 1 (2008), 41.

<sup>45</sup> *D. H. and Others v. Czech Republic* (note 6) 7.2.2006, paras. 10-11 and 49-51.

<sup>46</sup> *H. O’Nions*, Divide and Teach: Educational Inequality and the Roma, *IJHR* 14 (2010), 477.

<sup>47</sup> *R. Medda-Windischer*, Dismantling Segregating Education and the European Court of Human Rights. *D. H. and Others vs. Czech Republic: Towards an Inclusive Education?*, *EYMI* 2007/2008 [*EYMI* 7 (2007/2008)], 39.

<sup>48</sup> *D. H. and Others v. Czech Republic* (note 6) 13.11.2007, para. 209.

<sup>49</sup> *Goodwin* criticizes the fact that the Court explicitly denied the individual’s relevance in the proceedings and its failure to see the individual child and the consequences of the vastly inferior education on offer for the life chances of the children affected, who saw their ability

Secondly, the definition of indirect discrimination adopted by the ECtHR in the *D. H. and Others* case was clearly inspired by the wording of Art. 2 Racial Equality Directive.

Thirdly, where the Second Section Chamber did not allow for a reversal of the burden of proof, the Grand Chamber did state that in order to guarantee the effective protection of non-discrimination, less strict evidential rules should be applied in cases of indirect discrimination. Where an applicant alleging indirect discrimination establishes a *prima facie* case, the burden of proof shifts to the respondent State. This is in line with Art. 8 Racial Equality Directive. The Grand Chamber also endorsed the use of verifiable statistics in order to demonstrate *prima facie* discrimination.

Finally, the Grand Chamber explicitly stated in para. 184 of the judgment that its findings are in accordance with Council Directive 2000/43/EC.

## b) Missed Opportunities

Nevertheless, one could say that the judges of the ECtHR missed some opportunities. The applicants considered in para. 139 of the judgment that the Grand Chamber should state in clear terms that the States' margin of appreciation can not serve to justify segregation in education. Throughout the whole judgment, the ECtHR did not refer to the term "segregation", apart from a remark in para. 198 of the judgment that 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". It is regrettable that the Court did not go one step further and explicitly identified segregation *per se* as a form of systemic discrimination, as it is stipulated in Art. 3 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Another missed opportunity is the fact that the ECtHR defined discrimination on account of a person's ethnic origin as a form of "racial discrimination".<sup>50</sup> Instead of using the formulation "racial discrimination", which encompasses both racial and ethnic discrimination, the use of the concept of "discrimination based on race or ethnic origin" or "discrimina-

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to play a meaningful role in the social and economic life of society severely hampered. *M. E. A. Goodwin*, Taking on Racial Segregation: The European Court of Human Rights at a *Brown v. Board of Education* Moment?, *Rechtsgeleerd Magazijn Themis* 3 (2009), 121 et seq. available at <http://online.uitgeverijparis.nl/pdf/1332.pdf>.

<sup>50</sup> *D. H. and Others v. Czech Republic* (note 6) 13.11.2007, para. 176.

tion on grounds of racial or ethnic origin” would be more in line with the wording of the Racial Equality Directive, and thus differentiating between the two concepts of “race” and “ethnic origin”. The question arises here whether this might be problematic in the light of the wording of Art. 14 ECHR, which does not contain an explicit reference to “ethnic origin” but only to “race” among the protected grounds for discrimination. Since it is generally accepted that the list of grounds in Art. 14 ECHR is not exhaustive<sup>51</sup> – due to the presence of the words “such as” in Art. 14 ECHR –, “ethnic origin” should also be considered as a protected ground under Art. 14 ECHR, even if not mentioned explicitly.<sup>52</sup>

### c) Direct or Indirect Discrimination?

*Lilla Farkas* argues that the widespread discriminatory treatment experienced by Roma pupils amounts to direct discrimination since the apparently neutral criteria of intelligence testing, as used in the *D. H. and Others* case, are not racially neutral at all.<sup>53</sup> For her, these tests do not provide an equal starting point from which to assess pupils’ intellectual ability and therefore cannot be seen in any way as neutral.

Such a view would certainly gain support from the Czech Government’s own observations regarding the inherent unsuitability of Roma pupils to education, but this may be stretching the definition of direct discrimination too far.<sup>54</sup> *Helen O’Nions* notes that “it is clear that race was not a determinative factor in the establishment of intelligence tests, rather the consequence of the tests discriminated against members of certain groups – particularly those who did not speak the majority language. Thus the tests were apparently neutral, but once operated, resulted in discrimination that should have then been remedied by substantial revisions or abolition of the

<sup>51</sup> *COE Parliamentary Assembly*, Draft Protocol No. 12 to the European Convention on Human Rights, Report, Committee on Legal Affairs and Human Rights, Doc. 8614, 14.1.2000, available at <http://assembly.coe.int>.

<sup>52</sup> However, there might be an implicit hierarchy both in the grounds mentioned, and between those grounds and those which are not mentioned. This interpretation is confirmed by Art. 1 para. 2 of Protocol No. 12, which reads as follows: “No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

<sup>53</sup> *L. Farkas*, Segregation of Roma Children in Education: Addressing Structural Discrimination through the Race Equality Directive, European Commission, DG for Employment, Social Affairs and Equal Opportunities, July 2007, 24et seq., available at [http://www.migpolgroup.com/public/docs/5.Segregation\\_Roma\\_children\\_edu\\_en\\_07.07.pdf](http://www.migpolgroup.com/public/docs/5.Segregation_Roma_children_edu_en_07.07.pdf).

<sup>54</sup> *H. O’Nions* (note 46), 478.

said tests.”<sup>55</sup> Since the applicants in the *D. H and Others*. case were put at a particular disadvantage compared with other persons on the basis of apparently neutral intelligence tests without an objective justification, and since they were not directly discriminated against on the basis of them being Roma, the case should be qualified as a case of indirect discrimination, as did the Grand Chamber in its judgment of November 2007.

## 2. *Sampanis and Others v. Greece*, Chamber Judgment of 5 June 2008

### a) *D. H. bis* or One Step Further?

In the case of *Sampanis and Others v. Greece*, the ECtHR held unani- mously that there had been a violation of Art. 14 ECHR on the prohibition of discrimination, in conjunction with Art. 2 of Protocol No. 1 on the right to education. The case was brought by 11 Greek nationals of Roma origin in respect of the treatment of their children by the educational authorities in Aspropyrgos, Greece.

According to the facts, the applicants were refused permission to enroll their children in local primary schools in September 2004, which meant that their children missed the school year 2004-2005. Subsequently, from the first day of school for the year 2005-2006, the applicants’ children when ar- riving at school faced protests from parents of the non-Roma children who blockaded the school. During these protests, even police intervention was required. From October 2005, the local educational authorities placed the Roma children in an annexed building, located five kilometers from the primary school.<sup>56</sup>

In judging whether a violation of Art. 14 ECHR had taken place, the ECtHR first referred to the definition of discrimination from the case of *Willis v. United Kingdom*.<sup>57</sup> It then went on to define discrimination on ac- count of a person’s ethnic origin as a form of racial discrimination, as it did in the *D. H. and Others* case. It acknowledged the existence of a *prima facie* case of discrimination, which triggers a shift of the burden of proof. Finally it examined whether an objective and reasonable justification existed in the

<sup>55</sup> *H. O’Nions* (note 46).

<sup>56</sup> European Network of Legal Experts in the Non-Discrimination Field, European Anti-Discrimination Law Review, October 2008, 6/7, 67, available at [http://www.migpolgroup.com/public/docs/145.EuropeanAnti-discLawReview\\_6\\_7\\_en\\_11.08.pdf](http://www.migpolgroup.com/public/docs/145.EuropeanAnti-discLawReview_6_7_en_11.08.pdf).

<sup>57</sup> *Willis v. United Kingdom* (note 35).

present case. The Court underlined in this context that in cases of differential treatment on the basis of race, color or ethnic origin, the notion of objective justification should be interpreted as strictly as possible.<sup>58</sup> It found a violation of Art. 14 ECHR, since the government had not put forward any examples of children who were subsequently admitted into the ordinary class system after having attended the separate classes.

The question arises whether the Court only consolidated the principles set out in the *D. H and Others*. case or whether it went beyond these principles? The ECtHR in *Sampanis* underlines at para. 72<sup>59</sup> that the Roma, being a vulnerable minority, need “special protection”, which is also to be granted in the field of education. It also refers to the value of cultural diversity in the next paragraph<sup>60</sup> and repeats in para. 86 that States should pay “special attention” to the needs of the Roma.<sup>61</sup>

The Court is not very clear on the point whether this “special protection” encompasses also concrete positive measures and affirmative action in the field of education.<sup>62</sup> From this perspective, the Court in *Sampanis* does not really clarify as to whether and under which circumstances affirmative action and positive measures are to be expected on the part of the State.<sup>63</sup> It

<sup>58</sup> The Court notes in para. 84 of the judgement that “[e]n cas de différence de traitement fondée sur la race, la couleur ou l’origine ethnique, la notion de justification objective et raisonnable doit être interprétée de manière aussi stricte que possible (*D. H. et autres c. République tchèque*, précité, § 196)”.

<sup>59</sup> “[Les Roms] ont dès lors besoin d’une protection spéciale. Comme en témoignent les activités de nombreux organismes grecs et européens, dont les recommandations des organes du Conseil de l’Europe (paragraphe 34-48 ci-dessus), cette protection s’étend également au domaine de l’éducation.”

<sup>60</sup> “De surcroît, la Cour a déjà observé qu’un consensus international se faisait jour au sein des États contractants du Conseil de l’Europe pour reconnaître les besoins particuliers des minorités et l’obligation de protéger leur sécurité, leur identité et leur mode de vie, et ce non seulement dans le but de protéger les intérêts des minorités elles-mêmes mais aussi pour préserver la diversité culturelle, bénéfique à la société dans son ensemble (*Chapman c. Royaume-Uni*, précité, §§ 93-94).”

<sup>61</sup> “Étant donné la vulnérabilité des Roms, qui implique la nécessité d’accorder une attention spéciale à leurs besoins (paragraphe 42 et 72 ci-dessus) ...”

<sup>62</sup> I disagree with *Leto Cariolou* who reads the *D. H.* case in such a way that “the Court’s final pronouncement entailed that, in the circumstances of this case, affirmative action was indeed required under the terms of Art. 14 of the Convention” since as well in the *D. H.* case as in the *Sampanis* case, there are only references to the vague term of “special protection” and not to the term of “positive measures”. *L. Cariolou*, Recent Case Law of the European Court of Human Rights Concerning the Protection of Minorities (August 2006-December 2007), 6 EYMI 2006/2007 [EYMI 6 (2006/2007)], 415.

<sup>63</sup> In his concurring opinion to the Chamber’s ruling in the *D. H. case*, Judge *Costa* noted that “as for *positive* discrimination – which, in the present case, would have entailed increased resources for special schools [...] up till now, the Court has refused to consider it a State obli-

does go one step further in the recent Grand Chamber judgment in the case of *Oršuš and Others v. Croatia*, where it refers to the term “positive measures” explicitly<sup>64</sup> (see below 4. a.).

Another *status quo* is that the ECtHR again avoided making a comprehensive statement condemning segregation. *Morag Goodwin* notes in this context that the Court could and should have established as a principle that it is not only the quality of the alternative curriculum but also – and even the more – the impact of separation itself on the minds of the children – both of the children belonging to the minority and the majority – which makes segregation so condemnable.<sup>65</sup>

## b) Direct or Indirect Discrimination? An Unclear Argumentation

The question arises whether the Court identified the discriminatory treatment of the Roma children in the present case as amounting to direct or indirect discrimination. Unfortunately, the Court’s position is ambiguous.

In its reiteration of general principles, the Court recalls in para. 69 of the judgment its important statement from the case of *Timishev v. Russia*, which it also stressed in *D. H. and Others v. Czech Republic*, that “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society ...”.<sup>66</sup> Cases where difference in treatment is based exclusively on a person’s ethnic origin amount to cases of direct discrimination.

The Court then proceeds in two steps: in a first step, it examines whether elements of the case justify a presumption of discrimination and a reversal of the burden of proof; in a second step, it examines whether the presumed discrimination can be objectively and reasonably justified.

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gation” (para. 7). See also *R. Medda-Windischer* (note 47), 46 et seq., and especially footnote 142.

<sup>64</sup> For an in depth analysis on positive obligations under the ECHR, see *A. Mowbray*, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004.

<sup>65</sup> *M. E. A. Goodwin* (note 49), 124.

<sup>66</sup> The original French version of para. 69 of the judgment reads as follows: “La Cour a par ailleurs considéré que, dans la société démocratique actuelle basée sur les principes du pluralisme et du respect pour les différentes cultures, aucune différence de traitement fondée exclusivement ou dans une mesure déterminante sur l’origine ethnique d’une personne ne saurait être objectivement justifiée (*Timichev*, précité, § 58; *D. H. et autres c. République tchèque*, précité, § 176)”.

In a first step, the Court notes in paras. 78 and 79 of the judgment, that in cases where the allegation is one of indirect discrimination, less strict evidential rules apply since it would be extremely difficult for the applicant to prove the existence of indirect discrimination without a reversal of the burden of proof.<sup>67</sup> This implicates that, according to the Court, the present case is one of indirect discrimination. It concludes its first line of reasoning with the statement that the burden of proof should be on the government, which will have to prove that the difference in treatment was the result of objective factors and was not related to the ethnic origin of the pupils involved.

In a second step, the Court examines whether the government can objectively and reasonably justify the difference in treatment, i.e. whether the aim the government was pursuing was a legitimate aim and whether the means used to reach this aim were proportionate. In para. 89 of the judgment, it holds that: “les autorités scolaires n’équivoquaient que des critères se rapportant directement à l’origine ethnique des intéressés”<sup>68</sup>. A consequence of the reading of this paragraph and para. 69 together is that the question whether the government can objectively and reasonably justify the difference in treatment should be answered in the negative.

If it is so that the school board only came up with arguments directly related to the ethnic origin of the applicants, should one not consider this case rather to be a case of direct discrimination?<sup>69</sup> In this sense, the findings in paras. 78 and 79 (indirect discrimination) are at odds with the ones in paras. 69 and 89 (direct discrimination) of the judgment. The school board came up with arguments for the differential treatment which directly related to the ethnic origin of the applicants and thus discriminated directly against the applicants. It did not adopt an apparently neutral provision, criterion or practice which put the Roma children at a particular disadvantage compared with other persons.

It is of course an advantage for the applicant to see the burden of proof reversed. In cases of indirect discrimination it would otherwise be difficult for the applicant to prove that apparently neutral provisions, criteria or practices do have a discriminatory character. In the present case, however, the mere fact that the school administration treated the Roma children differently because of criteria directly related to their ethnic origin, should have been enough to establish the existence of a discriminatory differential

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<sup>67</sup> *Sampanis and Others v. Greece*, paras. 78-79. The notion of “indirect discrimination” occurs twice in the judgment.

<sup>68</sup> *Sampanis and Others v. Greece*, para. 89. Stress added by the author.

<sup>69</sup> See also *M. Davidovic/P. R. Rodrigues*, Roma maken school in Straatsburg, NJCM-Bulletin 34 (2009), 155.

treatment, without the excursus on the reversal of the burden of proof, which makes it unclear whether the Court is dealing with a case of direct or indirect discrimination.

### 3. *Oršuš and Others v. Croatia*, Chamber Judgment of 17 July 2008

#### a) No lessons from *D. H. and Others*

One month after judgment in the *Sampanis* case was rendered, the ECtHR was presented with another case of discrimination against Roma children in education. The applicants in the *Oršuš* case were Croatian nationals of Roma origin. During their elementary school, the first nine applicants had attended both Roma-only and mixed classes before leaving school at the age of 15. The remaining five applicants were still at school and had so far attended Roma-only classes. Relying upon Art. 2 of Protocol No. 1, taken alone and in conjunction with Art. 14 ECHR, the applicants claimed that they had been denied their right to education and had been discriminated against in this respect. They claimed that their placement in the Roma-only classes stemmed from a blatant practice of discrimination based on their ethnicity by the schools concerned, reinforced by pervasive anti-Romani sentiment of the local non-Romani community. The applicants further claimed that the school curriculum in the Roma-only classes was significantly reduced in scope and volume as compared to the officially prescribed teaching plan, which resulted in lower quality education. As a result of their segregation, the applicants suffered severe educational, psychological and emotional harm, damage to their future educational and employment opportunities, as well as stigmatization.

The Croatian government defended the practice of putting the Roma children in separate classes by stating that the Roma pupils needed extra tuition in Croatian and that these classes were designed for them on account of their language deficiencies in Croatian language. The Court upheld this argument and underlined that differences in treatment based on race require strictest scrutiny, whereas differences in treatment based on adequacy of language skills allow for a wider margin of appreciation.<sup>70</sup> Applying this

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<sup>70</sup> It is not the first time that the Court applies a different margin of appreciation in cases where the applicant alleges a violation of Art. 14 ECHR. The stricter or larger margin of appreciation is related to the discrimination ground as defined in Art. 14 ECHR. Other grounds, apart from race, allowing for a stricter scrutiny are e.g. discrimination on the ground

wider margin of appreciation, the Court found no violation of Art. 14 and Art. 2 of Protocol No. 1. The Court reiterated that, with regard to the States' margin of appreciation in the sphere of education, the States cannot be prohibited from setting up separate classes or different types of schools for children with learning difficulties, or implementing special educational programmes to respond to special needs.<sup>71</sup>

### b) Direct or Indirect Discrimination?

The qualification of the segregation of the Roma children as direct or indirect discrimination in the *Oršuš* case is fraught with difficulties due to discrepancies when it comes to the facts of the case. The Croatian government argues that the Roma children were put in separate classes since they needed additional assistance in acquiring a better knowledge of the Croatian language. The applicants in the case, however, claim that they were never aware of their language skills being tested. Moreover, the argument that the separation was necessary due to the applicants' poor command of the Croatian language was introduced by the Croatian Government only when the case had been filed before the domestic courts;<sup>72</sup> before that, it was never mentioned. It seems that in most cases, preliminary tests were carried out before the assignment of the pupils in question to a particular class. The question arises whether these tests could be considered as neutral measures on the basis of which Roma children were put at a particular disadvantage compared with other pupils. In that case, the differential treatment of the Roma pupils in the *Oršuš* case would also amount to indirect discrimination.

The Chamber section's line of reasoning in the *Oršuš* case can be criticized for a number of reasons.

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of sex (see the case of *Van Raalte v. The Netherlands*, 21.2.1997, ECtHR, Reports 1997-I) and discrimination on the grounds of nationality (see the case of *Gaygusuz v. Austria*, 16.9.1996, ECtHR, Reports 1996-IV). Apparently, this wider or narrower margin of appreciation has mostly been decisive for the outcome of the case. See also *M. Davidovic/P. R. Rodrigues* (note 69), 168 and *Eriksson* (note 25).

<sup>71</sup> *Oršuš and Others v. Croatia* (note 9) 17.7.2008, para. 68.

<sup>72</sup> It is regrettable to read that the Croatian Constitutional Court held that the Roma children were not discriminated since the facts of the case did not lead to the conclusion that the defendant's practice was aimed at discrimination against the Roma pupils on the basis of their racial or ethnic origin and that there was no intention to discriminate (see *Oršuš and Others v. Croatia* (note 9) 17.7.2008, para. 29). This is not in line with the jurisprudence of the ECtHR, nor with the concept of indirect discrimination under EU law, where it is accepted that a discriminatory intent is not a precondition for differential treatment to amount to discriminatory treatment.

First of all, the Court might have committed a factual error by identifying the ground for the difference in treatment as being not based on race and ethnic origin but on adequacy of language skills. Should the difference in treatment be based on adequacy of language skills, it would rather be very probable to find non-Roma children with language difficulties in the so-called “remedial classes”. The fact that no non-Roma children with language problems were attending the Roma classes rather indicates that the reason for putting the Roma children in these separate classes was not one of language deficiencies. In its description of the facts of the case in the judgment, the Court did not reflect evidence about key facts pointing to the racist motives underlying the segregation of the Romani children: the fact that the applicants had no knowledge of their Croatian language ability being tested upon enrolment as there was no formal decision or other documentation communicated to them in this regard at that time; the fact that the claim that the separation was necessary due to the applicants’ poor command of the Croatian language was introduced by the Government only when the case had been filed before the domestic courts; the fact that all of the applicants received good grades in Croatian language in the course of their studies. Moreover, investigations by the ERRC show that the classes were conceived after pressure exercised by non-Roma parents because they did not want their children to be in the same class as Roma children.<sup>73</sup> This rather shows that the classes were conceived for Roma children because of them being Roma, thus on the basis of their race and their ethnic origin and not because of their language difficulties.<sup>74</sup>

Secondly, even if such an argument is not upheld and it is still considered that the differential treatment occurred on the ground of the lack of certain language skills, it is regrettable that the Court did not see that segregation can never be an appropriate response to language deficiency.<sup>75</sup> What is even

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<sup>73</sup> ERRC, European Court of Human Rights fails to find discrimination in education against Roma in Croatia, Press Release, 18.7.2008, available at <http://www.errc.org>. See also *M. Davidovic/P. R. Rodrigues* (note 69), 168.

<sup>74</sup> Speaking on the occasion of the judgment, *Viktoria Mohacsi*, Member of the European Parliament and ERRC Board Member, stated: “I feel sorry as a member of the Romani community witnessing the political sphere in Europe. This judgment reveals that, even in the European Court of Human Rights, evidence presented by Roma regarding anti-Romani motivations is not taken seriously. Nowhere in this judgment did the court deal with clear evidence of anti-Romani protests by non-Romani parents as well as the continuous victimization of persons involved in this case. I question the level of proof required of Roma to establish discrimination cases before officials.” ERRC, European Court of Human Rights fails to find discrimination in education against Roma in Croatia, (note 73).

<sup>75</sup> The applicants also submitted a report of a psychological study of children in Roma-only classes from a county in Croatia which stated that the placement of children in segre-

more regrettable is that the placement of the applicants in separate classes was presented by the ECtHR as “a positive measure designed to assist the Roma children in acquiring knowledge necessary for them to follow the school curriculum”<sup>76</sup> whereas it is quite obvious from the facts of the case that this argument, which was brought up by the Croatian government, was just a pretext for justifying the segregation of the Roma children.

The Advisory Committee under the Framework Convention for the Protection of National Minorities (FCNM) has warned on several occasions for the “dangerous grey zone” between segregating special classes on the one hand, and supportive/remedial classes on the other hand.<sup>77</sup> In the present case, the classes not designed as neither supportive nor remedial classes, since the Roma children never received additional language classes, but were clearly designed to separate the Roma pupils from their non-Roma peers.

The case was referred to the Grand Chamber, which reached a different outcome than the First Section Chamber.

#### 4. *Oršuš and Others v. Croatia*, Grand Chamber Judgment of 16 March 2010

##### a) A Divided Grand Chamber: Nine Votes to Eight

###### aa) The Reasoning of the Grand Chamber

The Grand Chamber reversed the earlier unanimous Chamber Judgment, and found a violation of the prohibition of discrimination (Art. 14 ECHR) taken together with the right to education (Art. 2 Protocol No. 1). Even though all three judgments on Roma segregation in education thus ended with the finding of a violation, the Court still seems much divided on the issue of the application and consequences of the notion of indirect discrimi-

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gated classes, whatever the purpose for doing so, produced emotional and psychological harm in terms of lower self-esteem and self-respect and problems in the development of the children's identity. In addition, the report found that the children themselves stated that they did not wish to be separated from non-Romani children, that they did not have any non-Romani friends, even though they would like to have some, and that they felt unaccepted in the school environment. See *Oršuš and Others v. Croatia* (note 9) 17.7.2008, para. 22.

<sup>76</sup> *Oršuš and Others v. Croatia* (note 9) 17.7.2008, para. 68.

<sup>77</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on Education for the Framework Convention of the Protection of National Minorities, 2.3.2006, ACFC/25DOC(2006)002, 17, available at [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_CommentaryEducation\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_CommentaryEducation_en.pdf).

nation. The voting was extremely close, with only nine out of seventeen judges voting for a violation.<sup>78</sup>

Even though the applicants argued in this case that the practice of putting Roma children into separate classes on the basis of language criteria, which were used as a pretext for racial criteria, amounted to a violation of Art. 2 Protocol No. 1 taken alone and in conjunction with Art. 14 ECHR, the Grand Chamber saw the case as raising primarily a discrimination issue and did not investigate whether the right to education standing alone was violated.

As in many previous cases dealing with Roma issues, the Court started its ruling with a preliminary remark on the specific position of the Roma population and underscored that the Roma are a type of disadvantaged and vulnerable minority. The assessment of the Court was then twofold: firstly, it examined whether there was a difference in treatment and secondly, it examined whether the difference in treatment had an objective and reasonable justification.

In a first step, the Court examined whether there was *prima facie* evidence which allowed for a reversal of the burden of proof. It noted that the statistics submitted in this case, unlike in the *D. H. and Others* case, did not suffice to establish that the effect of the practice was discriminatory. However, it accepted that the fact that the measure of placing children in separate classes on the basis of insufficient command of the Croatian language was only applied to Roma children, who are members of an ethnic group, constituted enough *prima facie* evidence in order to put the burden of proof on the government.

The government was then to prove that there was no difference in treatment. Even though the government brought up several – rather not-well founded – arguments that the Roma children did not suffer from differential treatment, the Court did not examine this issue in detail. The government referred to a judgment of the Croatian Constitutional Court, in which the Constitutional Court found that there was no evidence that the curriculum of the Roma children was reduced in scope and volume, rejected the argument of stigmatization brought up by the applicants, dismissed this assertion as arbitrary, and concluded that the Roma children were not treated differently.<sup>79</sup> Therefore it would have been appropriate for the Grand Chamber to clearly refute the arguments brought up by the Croatian government – supported by the outcome of the judgment of the Croatian Con-

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<sup>78</sup> The eight dissenting judges were *Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre* and *Vučinić*.

<sup>79</sup> *Oršuš and Others v. Croatia* (note 9) 13.3.2010, para. 60.

stitutional Court – that there was no difference in treatment, and to underscore why the government did not succeed in convincing the Grand Chamber that there was no difference in treatment. This important step is missing in the reasoning of the Court.

In a second part of its reasoning, the Court examined whether the difference in treatment had an objective and reasonable justification. The Grand Chamber found that the strange coincidence that only Roma children were placed in separate classes gave rise to a reasonable suspicion that language was used as a pretext for race, and thus interpreted the notion of objective and reasonable justification in a strict way. When judging whether the State remained within its margin of appreciation in setting up the curriculum, the Grand Chamber examined the existence of what it called “safeguards”. It identified four safeguards which should be put in place by the government when organizing temporary placement in special schools, namely: (1) a clear legal basis for selection; (2) an adapted curriculum remedying the supposed lack of proficiency in Croatian language; (3) a transfer and monitoring procedure allowing for pupils who gained enough proficiency in Croatian language to transfer again to “normal” mixed classes; (4) an active and structural involvement on the part of the relevant social services due to large drop out rates. Since none of these safeguards were put in place, the State did not remain within its margin of appreciation and the difference in treatment had no objective and reasonable justification.

The last safeguard, notably the remark on an active and structural involvement on the part of the relevant social services, is very far-going. The Grand Chamber clearly mentioned the necessity of positive obligations for the Croatian State in the field of education. The relevant paragraph reads as follows:

While the Croatian authorities cannot be held to be the only ones responsible for the fact that so many pupils failed to complete primary education or to attain an adequate level of language proficiency, such a high drop-out rate of Roma pupils in Međimurje County called for the implementation of positive measures in order, *inter alia*, to raise awareness of the importance of education among the Roma population and to assist the applicants with any difficulties they encountered in following the school curriculum. Therefore, some additional steps were needed in order to address these problems, such as active and structured involvement on the part of the relevant social services. However, according to the Government, the social services had been informed of the pupil’s poor attendance only in the case of the fifth applicant. No precise information was provided on any follow-up.<sup>80</sup>

<sup>80</sup> *Oršuš and Others v. Croatia* (note 9) 13.3.2010, para. 177.

Unlike in the *D. H. and Others* case and the *Sampanis* case, where the Court referred to the more general and vaguer term of “special measures”, the Court here established a clear obligation for the Croatian State on the part of the social services to implement positive measures in order to assist the applicants with their difficulties in following the school curriculum.<sup>81</sup> This positive evolution in the jurisprudence of the ECtHR should be welcomed.

Before reaching its conclusion, the Court also paid attention to the involvement of the applicants’ parents. The Grand Chamber consolidated its jurisprudence from the *D. H. and Others* case in this respect and confirmed that a waiver of a convention right must be established in an unequivocal manner and on the basis of informed consent. Moreover, in view of the fundamental importance of the prohibition of racial discrimination, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest.<sup>82</sup>

#### bb) Joint Partly Dissenting Opinion

Unfortunately, the Grand Chamber reached its decision by only nine votes to eight. The eight dissenting judges issued a joint partly dissenting opinion. They agreed with the majority on the definition of indirect discrimination, but did not agree on four further important points. First of all, they underscored that, in their opinion, the Roma children were not put at a particular disadvantage. Secondly, they stressed that the case is one, not about the situation of a minority in general, but about a concrete question of education practice in two schools. They reproached the majority for viewing this case “in the first place as a means of further developing the notion of indirect discrimination in the Court’s jurisprudence”.<sup>83</sup> In a third part of their opinion, they referred to the judgment of the Croatian Constitutional Court, for which they expressed their support, and stated that the difference in treatment of the Roma pupils was not based on ethnic grounds but on pedagogical grounds. And in a last paragraph, the majority judges were criticized for not having offered more practical guidance on how to develop and apply the notion of indirect discrimination, for not having respected the margin of appreciation of the Croatian State and thus for having

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<sup>81</sup> See also above V. 2. a) *D. H. bis* or One Step Further?.

<sup>82</sup> *Oršuš and Others v. Croatia* (note 9) 13.3.2010, para. 178.

<sup>83</sup> *Oršuš and Others v. Croatia*, Grand Chamber Judgment (note 39), para. 15.

overstepped their role and for having taken up the tasks of the national courts.

### cc) Critical Analysis of the Joint Partly Dissenting Opinion

It should be noted that, apart from a little step missing in its reasoning,<sup>84</sup> the judgment of the Grand Chamber is very well-reasoned and convincing. When analyzing NGO reports on the case, one can only conclude that the Croatian government did use the language criterion as a pretext for racial discrimination.<sup>85</sup> The fact that the Roma children were not given extra language classes and that there was no evaluation of their language progress, which could have allowed them to transfer into the “normal” classes, proves that language deficiency was probably not the reason why the Roma were separated from their peer pupils.

The joint partly dissenting opinion should be criticized for its considerations on segregation. It is regrettable that eight judges of the ECtHR stated in their opinion that “separation is not always considered to be harmful”. This statement should have been more differentiated (giving guidance on when separation is harmful and when it is not) and it is regrettable that it is made in the context of a case of racial segregation. Separation on the basis of ethnicity is always considered to be harmful, and is certainly not in line with the spirit and the wording of the International Convention for the Elimination of all Forms of Racial Discrimination, which condemns all forms of racial segregation in its Art. 3.<sup>86</sup> One could come up with examples of separation on the ground of gender (in boys only or girls only schools) or religion (for the purpose of religion classes), which might not always be

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<sup>84</sup> See above on the possibility for the government to prove that there was no difference in treatment.

<sup>85</sup> Moreover, when having a closer look at the figures, which are perhaps presented in an unclear way in the judgment – and this should have been done differently by the Court since the figures are important for a better understanding of the case – one sees that in the lower grades, the first and second grades for the school year 2000/2001 do have several mixed classes with Roma and non-Roma children, but the third grade in Podturen primary school has one Roma-only class with 19 pupils and one non-Roma class with again 19 pupils. Another good example is the fourth grade for the same school year in Macinec primary school: 21 out of 44 pupils are Roma and all are assigned to Roma-only classes, the remaining 23 students visiting a non-Roma class. It is very hard to believe that not a single Roma pupil in the third grade of Podturen school spoke Croatian well enough to visit the other class and that not a single Roma pupil in the fourth grade of Macinec primary school spoke Croatian well enough to visit the non-Roma class.

<sup>86</sup> Art. 3 ICERD: “States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”

discriminatory, but one cannot think of any situation in which separation on the basis of ethnicity or racial segregation is not considered to be harmful.

It should also be underscored that sometimes the grey zone between racial segregation and segregating special classes on the one hand and supportive or remedial classes on the other hand is small, as the Advisory Committee to the FCNM clearly stressed in its thematic commentary on education.<sup>87</sup> The Advisory Committee has expressed its appreciation of supportive pre-school classes if they are aimed at enabling Roma pupils or others concerned to follow the regular curriculum, but identifies structures imposing segregated education as unacceptable. In the cases of supportive or remedial classes, the term “separation” is rather not used, since it has a clear negative connotation. The overall aim here should not be to “separate” the children but to enable them to integrate successfully in the educational system.

It is regrettable that neither the Grand Chamber nor the dissenting judges referred to the Advisory Committee Commentary on Education, which in its comments under Art. 12 FCNM contains a lot of guidance on how to identify positive supportive measures for Roma children in education and how to reveal practices of segregation.

Another major point, on which one might disagree with the dissenting judges, is their appreciation of the judgment of the Croatian Constitutional Court.<sup>88</sup> This judgment should be criticized, since for the Constitutional Court, the lack of the intent to discriminate in the head of the Croatian government was one of the main reasons why it found that the Roma pupils were not discriminated. It should be stressed here, that neither according to the wording of the Racial Equality Directive, nor according to the jurisprudence of the ECtHR, the intent to discriminate should be taken into account when judging upon cases of indirect discrimination. The ECtHR clearly stated in the *D. H. and Others* case that it was not necessary “to prove any discriminatory intent on the part of the relevant authorities”.<sup>89</sup>

In sum, it can be argued that the critiques uttered by the dissenting judges are not well-founded and that the statement on separation is even potentially dangerous as it is done in the context of a case on racial segrega-

<sup>87</sup> Advisory Committee to the Framework Convention for the Protection of National Minorities, Commentary on Education under the Framework Convention for the Protection of National Minorities (note 77), 17.

<sup>88</sup> *Oršuš and Others v. Croatia*, Grand Chamber Judgment (note 39), Joint Partly Dissenting Opinion, para. 19, where the dissenting judges criticized the Grand Chamber for “overruling a well-reasoned judgment by a Constitutional Court”.

<sup>89</sup> *D. H. and Others v. Czech Republic* (note 6) 13.11.2007, para. 194.

tion and might imply that separation on the grounds of race or ethnic origin is not always harmful. It would have been more appropriate to differentiate clearly between supportive and remedial classes, as a preparation to an entry or re-entry in mainstream education on the one hand, and separation on the grounds of race or ethnic origin on the other hand.

#### dd) Critical Analysis of the Grand Chamber Judgment

Both the reasoning and the outcome of the Grand Chamber judgment should be welcomed as they unveil the disguised practices in the said schools as discriminatory and further develop the Court's jurisprudence in the field of indirect discrimination.

Perhaps two minor points of critique could be raised, though. First of all, again no explicit statement that segregation is condemnable *per se* was made by the Grand Chamber. Especially in the light of the unfortunate statement of the dissenting judges on separation not being harmful *per se*, this would have significantly contributed to the promotion of minority rights under the ECHR. Secondly, it could have been interesting not only to examine the non-discrimination aspect of the case but also the right to education aspect, and to elaborate on the fact that segregation of Roma children in education constitutes a violation of the right to education taken alone.

#### b) Direct or Indirect Discrimination?

In order to evaluate whether the practices in the Podturen and Macinec Primary school amount to direct or indirect discrimination, it should be examined whether the Roma children were put in the separate classes on the basis of an apparently neutral provision, criterion or practice.

The Grand Chamber underscored that there was no clear legal basis for putting the Roma children in the separate classes and that there were no consistent, objective and comprehensive tests which might have served as a basis for separating the children. The selection procedure of the Roma children in the present case seems totally arbitrary. Since there was no objective basis for putting the children in the separate classes, one should accept that the only basis for putting the children in the classes was their Roma background. Therefore it can be argued that the present case is a case of direct discrimination against Roma children in education.

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In the light of the mutual borrowing habits between the CJEU and the ECtHR, the lack of a clear theory about the distinction between direct and indirect discrimination in the ECtHR jurisprudence is regrettable. Unfortunately, not only the ECtHR but also the CJEU itself does not seem to answer the question related to the distinction between direct and indirect discrimination explicitly. In the *Feryn* case, the CJEU was provided with a possibility to clarify the matter, but it failed to do so, for which it was heavily criticized by legal scholars.<sup>90</sup> *Henrard* notes in this context that

“[t]he lack of a clear theory about the distinction between direct and indirect discrimination is remarkable in view of the fact that the possibility of a general ‘reasonable, objective justification’ only exists for indirect discrimination and not for direct discrimination. The Court even fails to expressly state this difference in justification possibilities in cases in which it is a central issue. [...] In view of the high expectations about the impact of the Racial Equality Directive, it is extremely important that the legal reasoning of the highest interpreter of that Directive is flawless and meticulous”.<sup>91</sup>

It is not only important for the CJEU to develop a flawless and meticulous reasoning on the differences between direct and indirect discrimination, but also for the ECtHR, which, in developing the notion of indirect discrimination in its jurisprudence, is not only inspired by EC non-discrimination law, but is also inspiring for the future jurisprudence of the CJEU.

## VI. Conclusions

The Racial Equality Directive has been a source of inspiration for the ECtHR in developing the notion of indirect discrimination in its jurisprudence. It should be welcomed that the ECtHR imported<sup>92</sup> the concept of indirect discrimination from the Racial Equality Directive and is currently further developing it in its jurisprudence. However, there is some room for improvement in the jurisprudence of both the CJEU and the ECtHR. Five concluding observations can be made.

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<sup>90</sup> For a detailed analysis of the failure of the CJEU to distinguish the concepts of direct and indirect discrimination in the *Feryn* case, and the consequences thereof, see *K. Henrard* (note 13).

<sup>91</sup> *K. Henrard* (note 13), 32 et seq. and 35.

<sup>92</sup> *S. Fredman* (note 44), 221.

First of all, a clear distinction between the concepts of direct and indirect discrimination is necessary, both by the CJEU and by the ECtHR, since it has repercussions for the justification model at the EU level, which differs in cases of direct and indirect discrimination. The lack of a clear distinction between direct and indirect discrimination in the jurisprudence of the ECtHR (no clear distinction between direct and indirect discrimination in the *Sampanis* case and a qualification of the *Oršuš* case as a case of indirect instead of direct discrimination) might hamper the building of coherent, logical and solid models of reasoning.

Secondly, another hurdle to be taken by the ECtHR is the exact identification of the grounds of discrimination.<sup>93</sup> The Section Courts did not succeed in looking further than the apparent first-sight-facts in the cases of *D. H. and Others* and *Oršuš and Others*, but fortunately the Grand Chamber did, and overruled both judgments. It is essential that the right grounds of discrimination are identified, especially in situations of segregation of Roma in education, where discrimination on the ground of race is often “disguised”. This has shown the facts of the *Oršuš* case, in which Roma children were put into separate classes apparently on the basis of language criteria. These language criteria, when examining the case more thoroughly, seemed to be a pretext for racial discrimination. A correct analysis of such cases is especially important under the application of the (transposed provisions of the) Racial Equality Directive, since categorizing such cases as cases of direct discrimination increases the level of protection of the persons discriminated, due to the fact that an objective justification in cases of direct discrimination is not possible.

Thirdly, the fact that NGOs are increasing pressure on national courts to bring controversial cases related to Roma segregation in education before

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<sup>93</sup> See also the recent case of *Munoz Diaz v. Spain*, 8.12.2009, ECtHR, <http://cmiskp.echr.coe.int/tkp197/default.htm>, selected for publication in Reports of Judgments and Decisions, in which the ECtHR held that Spain had violated Art. 14 ECHR in conjunction with Art. 1 of Protocol No. 1 by refusing the applicant a survivor's pension due to the fact that she had not been married according to Spanish civil law. The discriminatory treatment of the applicant of Roma origin consisted in the fact that the Spanish Constitutional Court when judging upon the applicant's case did neither take into account her good faith in believing previously to have concluded a valid marriage nor the existence of exceptional circumstances, whilst doing so in a number of other cases. What is remarkable in this case is that the ECtHR does not identify the grounds of discrimination, but only refers to a “disproportionate difference in treatment”. From the reasoning of the Court, “association with a national minority” seems to be the implicit ground for discrimination in the present case, even though one could also qualify the discriminatory treatment of Mrs *Munoz Diaz* as amounting to discrimination on the basis of race. It is regrettable, that the ECtHR did not explicitly identify the ground of discrimination in this case.

the CJEU should be welcomed.<sup>94</sup> One or more CJEU rulings on Roma educational issues might contribute to a better understanding of the mechanisms under the Racial Equality Directive, provided that the CJEU provides well reasoned and elucidating answers to preliminary questions by national courts and takes the opportunity to clarify the provisions of the Racial Equality Directive while engaging in “system reasoning”.<sup>95</sup> This could facilitate the proper application of non-discrimination standards at the national level.<sup>96</sup>

Fourthly, it is hoped that the ECtHR will soon acknowledge that segregation is a form of racial discrimination and that it will be more cautious in discerning the differences between separate schools and separate classes on the one hand and supportive or remedial classes on the other hand.

Finally, it should be stressed that, although EU Member States enhanced protection against discrimination by the transposition of the Racial Equality Directive, the current anti-discrimination framework does not seem to be sufficient to challenge systemic discrimination and segregation of Roma in education.<sup>97</sup> Even a conviction before the ECtHR does not seem to prompt the governments concerned to taking concrete steps to desegregate schools.<sup>98</sup> In fact, a broader approach rooted in social inclusion – rather

<sup>94</sup> The European Roma Grassroots Organizations Network (ERGO) has stressed on several occasions the importance of the CJEU as a mechanism in the implementation of existing anti-discrimination legislation. ERGO even suggests that “training Roma NGOs in bringing cases before the CJEU” should be also one of the many targeted trainings of the European Commission. See <http://ergonetWORK.org>.

<sup>95</sup> For more on so-called “system reasoning” see *K. Henrard* (note 13), 35.

<sup>96</sup> *K. Henrard* (note 13), 36.

<sup>97</sup> ERRC, *The Impact of Legislation and Policies on School Segregation of Romani Children, A Study of Anti-Discrimination Law and Government Measures to Eliminate Segregation in Education in Bulgaria, Czech Republic, Hungary, Romania and Slovakia*, February 2007, 8. The study is available at <http://www.errc.org/cms/upload/media/02/36/m00000236.pdf>.

<sup>98</sup> A recent complaint filed with the Committee of Ministers of the Council of Europe by the Open Society Justice Initiative (OSI), the ERRC and the Greek Helsinki Monitor shows that the situation of Roma children in education in the Czech Republic, Greece and Croatia is essentially unchanged. In the Czech Republic, Romani children in the city of Ostrava are still sent to Roma-only schools, and in other regions of the country, Romani children are still 27 times more likely to be assigned to special schools than non-Romani children. All of the children in the *Sampanis* case remain in the same Roma-only segregated school, despite a commitment made in December 2009 to the Committee of Ministers that this would be remedied. Romani children in Croatia are still taught in separate classes. See ERRC, Greek Helsinki Monitor, OSI, *Submission to the Committee of Ministers: the continued segregation of Romani schoolchildren for consideration by the Committee of Ministers of the Council of Europe*, Strasbourg, 30.11.2010, 1, para. 2, available at <http://www.errc.org/cms/upload/file/fourth-communication-to-the-committee-of-ministers-on-judgment-implementation-30112010.pdf>. See also *T. Hammarberg*, Report by Thomas Hammarberg, Commissioner for Human

than just anti-discrimination – is necessary to improve the situation of the Roma generally and in the educational sphere.<sup>99</sup> In order to address segregation of Roma in education, it is not enough to bring to court a school or a school maintainer or even a Ministry of Education. A change requires proactive and long-term engagement of educational institutions at all levels to eliminate the physical separation of Roma and non-Roma, to revise educational policies and consistently monitor their impact in order to exclude the possibility of segregation in the future.<sup>100</sup>

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Rights of the Council of Europe, following his visit to the Czech Republic from 17.-19.11.2010, CommDH(2011)3, 3.3.2011, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1754217>.

<sup>99</sup> *B. de Witte/E. Horvath*, The Many Faces of Minority Protection in the EU, in: K. Henrard/R. Dunbar (eds.), *Synergies in Minority Protection*, 2008, 373.

<sup>100</sup> ERRC (note 98), 8.

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