



# Indirect discrimination and school segregation of Roma children in the Czech Republic

## The parental consent defence

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<b>TO:</b>	Open Society Justice Initiative
<b>FROM:</b>	Legal Clinic for Social Justice of the University of Valencia Law School
<b>DESCRIPTION:</b>	In <i>DH v. Czech Republic</i> (2007), the Czech government argued that Roma parents consented to the assignment of their children to ‘special’ schools. According to the government, parental consent undermined the claim that the disproportionate assignment of Roma children to inferior schools amounted to discrimination. The court rejected the argument, finding as a matter of law that parents could not choose to subject their children to discriminatory education, and as a matter of fact that the parents’ consent was not informed. Since the judgment, the Czech government continues to disproportionately assign Roma children to inferior schools, but it has revised the procedure they use to obtain parental consent for the assignment, and there are some indications that Roma parents indeed wish for their children to go to separate schooling from Czech children because they would be subjected to bullying and other intimidation in integrated schools. This memorandum examines circumstances in which the disparate impact of a government policy is said to result from choices made by the purported victims, and analyses of how courts have addressed the issue of agency and discrimination.

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## A. An overview of Czech education policies and their impact on the Roma

The current situation of the education of Roma children in the Czech Republic is a result of the Romany population's secular exclusion from society and of decades of assimilationist policies under the communist regime. More recently, Roma children started to be placed in special needs schools, creating a situation of inequality.<sup>1</sup> The period between 1970 and 1990 was marked by a huge increase in the number of Roma children in these special schools. After 1989, successive democratic governments failed to guarantee equal opportunities for the Roma children.<sup>2</sup> As a result, many have been receiving a segregated, lower-level education, which reduces their prospects of pursuing higher education and obtaining employment.

Since 1993, the Ministry of Education has been implementing various measures to promote the education of Roma children. In particular, the 2004 Education Act<sup>3</sup> laid out a number of reforms such as waiving fees for the last year of pre-school education, relaxing the rules on minimum class sizes, providing more individualized education, appointing Roma educational assistants and establishing compulsory training in Roma language, culture and mediation for teachers.<sup>4</sup>

One of the main measures of this Act is the substitution of the term "special school" by the new "practical" elementary school. "Practical" training schools are lower secondary schools (5-9 grades) that have been established for primary school graduates.<sup>5</sup> Their curriculum is based on the Framework Program for Basic Education for children with special educational needs. It provides an increased number of practical subjects and a reduced number of academic subjects.<sup>6</sup>

The main shortcomings of the Act are the following:

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<sup>1</sup> EUMC, *Report on the Situation of Minority Education in the Czech Republic*, 2004, p. 16.

<sup>2</sup> Ibid. p. 17.

<sup>3</sup> Act 561/2004 on Pre-school, Elementary, Secondary, Higher and Other Types of Education.

<sup>4</sup> EUMC, *Roma and Travellers in Public Education*, 2006, p.70.

<sup>5</sup> Systém vzdělávání v ČR, available at: <http://www.nuov.cz/index.php>.

<sup>6</sup> ERRC, *The impact of legislation and policies of school segregation of Romani children*, 2007, para 115.

- It does not address the ethnic dimension of this *de facto* segregation.
- It has not affected the process by which Roma children are segregated.
- The Act also regulates the establishment of so-called “preparatory classes”. However, a third of these classes are located in buildings that today are still called “special schools”.
- The Schools Act does not designate an authority that checks discrimination within the school system. For example, there is no specific requirement on the Czech Education Inspection Authority to monitor segregation in its periodic evaluations.<sup>7</sup>
- The legislation in vigour at the time of the facts in D.H. and others did not refer to the Roma or to any other minority; it was ethnically neutral but it resulted in the indirect discrimination of many Roma children. The 2004 School Act, on the contrary, has introduced the (ethnocentric) term "socio-cultural disadvantage" to describe one of several types of disadvantage calling for special education.<sup>8</sup> The special schools are designed for three categories of children: those with health disabilities, health disadvantages and social disadvantages. The last category is deeply vague: it is defined by the Act to include children from "family environments with a low social and cultural status."<sup>9</sup> Moreover, it is not defined in the implementing regulations and it is almost invisible in the legislation.<sup>10</sup>

To sum up, the 2004 School Act ratified the substance of the two-track educational system. According to Rostas, the most painful aspects of the discrimination against Roma children were not addressed: 1) the anti-Roma environment at mainstream elementary schools; 2) Roma parents’ inability to make informed choices regarding their children’s education; 3) the more basic content of the curriculum, and 4) Roma children’s lack of access to pre-school.<sup>11</sup> Another shortcoming of the Act was its confirmation of the biased methods of evaluation of

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<sup>7</sup> ERRC, *The impact of legislation and policies of school segregation of Romani children*, 2007, para 37.

<sup>8</sup> ALBERT, G. "Education Policies in the Czech Republic", in ROSTAS, Iulius, *Ten years after. A history of Roma School Desegregation in Central and Eastern Europe*, Budapest and New York, REF & CEU Press, 2012, p. 182.

<sup>9</sup> 2004 Education Act, art. 16.4a.

<sup>10</sup> ERRC, *The impact of legislation and policies of school segregation of Romani children*, 2007, para 117-118.

<sup>11</sup> ALBERT, G. "Education Policies in the Czech Republic" , p. 185.

Roma children's capacities.<sup>12</sup> As a result, Roma children continue to be disproportionately educated in segregated practical schools or separate classes with a reduced curriculum.

The 2004 Roma Integration Policy Concept announced policy measures and actions aiming at improving the social situation of the Roma and combating racial discrimination, but it also referred to their "cultural disadvantage". The Decree on the Education of Children, Pupils and Students with Special Educational Needs and Exceptionally Gifted Children, Pupils and Students<sup>13</sup> provides for "special basic schools to educate children from socio-culturally disadvantaging environments", despite a stated commitment to desegregation.<sup>14</sup>

In some countries like Slovakia and the Czech Republic, recent amendments to education laws have created the figure of the school mediator or teacher assistant, whose employment is left to the discretion of school principals and whose funding is provided by national authorities. According to the European Roma Rights Centre, "due to the fact that the funding is not part of the per student normative provided from the central budget, school maintainers have to apply separately for it, which creates an additional administrative burden and a disincentive."<sup>15</sup>

Substantial amounts of financial assistance for projects specifically targeting the Roma have been provided from the EU budget, including over €100 million through the PHARE-program. On the legal front, article 13 of the 2000 Racial Equality Directive (RED)<sup>16</sup> introduced measures to combat discrimination on the grounds of race and ethnic origin. The Directive prohibits direct and indirect discrimination based on racial or ethnic origin in the areas of employment, training and education, among others. The Parliamentary Assembly and the Committee of Ministers of the Council of Europe have also been adopting recommendations to

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<sup>12</sup> ROMA EDUCATION FUND, *Pitfalls and Bias: Entry Testing and the Overrepresentation of Romani Children in Special Education*, 2012, pp.21-32.

<sup>13</sup> Act No.73/2005 Coll.

<sup>14</sup> EUMC, *Roma and Travellers in Public Education*, p.70.

<sup>15</sup> ERRC, *The impact of legislation and policies of school segregation of Romani children*, para 151. The Public Education Act in the Czech Republic established the teacher assistant position through Decree 73/2005 Coll of the Ministry of Education.

<sup>16</sup> EC Treaty and Directive 2000/43/EC.

improve the situation of Roma children. An example of this is the designation of the Ombudsman as a specialized body in the field of human rights. Related to this the Czech Ombudsman can investigate individual complaints and make recommendations.<sup>17</sup>

In 2000, the UN Committee on the Elimination of Racial Discrimination (CERD) called for the inclusion in the school system of all children of Roma origin, the prevention of segregation, the increase of the quality of education, the recruitment of school personnel among members of Roma communities and the promotion of intercultural education.<sup>18</sup> In a 2007 review of the Czech government's implementation of the UN Convention on the Elimination of All Forms of Racial Discrimination, the CERD expressed deep concern about the disproportionately large number of Roma children in special schools. The Committee recommended that the government "should develop effective programs specifically aimed at putting an end to the segregation of Roma in this area" and it "should review the methodological tools used to determine the cases in which children are to be enrolled in special schools so as to avoid indirect discrimination against Roma children on the basis of their cultural identity."<sup>19</sup>

Over the past few years, the Czech government has taken some steps in this direction. The National Action Plan on Inclusive Education (NAPIE), adopted in March 2010, is an effort to implement the ECtHR judgment in *D.H. and others*.<sup>20</sup> For the first time, children with "health disabilities, health disadvantages and social disadvantages" will be brought within the mandate of the mainstream education system. However, the plan does not put forward specific measures to prevent discrimination or desegregate schools.<sup>21</sup>

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<sup>17</sup> ERRC, *The impact of legislation and policies of school segregation of Romani children* para 48.

<sup>18</sup> EUMC, *Roma and Travellers in Public Education*, pp. 96-113.

<sup>19</sup> ERRC, *The impact of legislation and policies of school segregation of Romani children*, para 123; COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, *Concluding observations of the Committee on the Elimination of Racial Discrimination. Czech Republic*, Seventieth session, 19 February - 9 March, 2007, available at: <http://www.ohchr.org/english/bodies/cerd/docs/CERD.C.CZE.CO.7.pdf>.

<sup>20</sup> ENAR, *Shadow Report*, 2011, p.16.

<sup>21</sup> BEVAN, N. "Discrimination in the Czech education system: Advocating for an inclusive agenda", *Minority Rights Now*, 2011, available at: <http://goo.gl/8oTdv>.



In its September 2011 Strategy for Combating Social Exclusion,<sup>22</sup> the government committed itself to "transform" the practical schools by 2017. The Strategy also emphasized kindergarten classes which, according to a 2012 Amnesty International report, would "prepare socially disadvantaged children more effectively for attendance in mainstream elementary schools than preparatory classes do. However, there are still considerable financial barriers that affect the accessibility of kindergartens for socially disadvantaged families. [...] The proposed measures are to abolish preparatory classes in practical schools, and to make the criteria for the creation of preparatory classes and placement of children in these classes stricter."<sup>23</sup>

The last year of kindergarten is provided for free, but parents are responsible for supplies, transportation, food, and other related expenses. These costs can be prohibitive for poor families. The 2010 National Action Plan for Inclusive Education addresses this issue by including the creation of material conditions for the development of inclusive education in the area of kindergarten education.<sup>24</sup>

On the other hand, although the consent of parents is necessary to transfer children to practical school, a new regulation<sup>25</sup> only vaguely defines categories of information that should be provided to them. For instance, there is no explicit requirement to inform parents about the implications of practical education for their child's future education or employment opportunities.<sup>26</sup>

Other measures proposed by the Ministry of Education have not yet been adopted. These include amendments to Decree 72/2005, which regulates the educational-psychological testing centres responsible for diagnosing children and recommending special measures for them, as well as to Decree 73/2005, which regulates the administration of special needs education. It

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<sup>22</sup> *Strategy for Combating Social Exclusion for the period 2011-2015*, Prague, September 2011.

<sup>23</sup> AMNESTY INTERNATIONAL, *Five more years of injustice*, 2012, p.22.

<sup>24</sup> ROMA EDUCATION FUND, *Pitfalls and Bias: Entry Testing and the Overrepresentation of Romani Children in Special Education*, 2012, p. 33.

<sup>25</sup> Amendments no. 116/2011 and 147/2011 of ministerial decrees no. 72/2005 and no. 73/2005.

<sup>26</sup> AMNESTY INTERNATIONAL, *Five more years of injustice*, p.11; PEOPLE IN NEED, *Pojd'te do školy! Rovné šance navzdělávání znevýhodněných dětí*, Prague, 2011, pp.87-88.

defines in greater detail the conditions for educating "socially disadvantaged" children; there would be indications to psychologists so that only the most severely disabled children would be educated in practical schools. It also contains an explicit ban on teaching non-disabled children the curriculum designed for disabled children and requires the informed consent of parents. Finally, it establishes a maximum of three months, "after which the counselling centre would be required to evaluate this diagnostic placement and recommend measures to meet the child's needs."<sup>27</sup> According to the director of the Human Rights Section of the Office of the Government of the Czech Republic, these last measures have not been adopted because of the amount of criticism generated within the Ministry and the special education industry itself.<sup>28</sup>

Section 401 of the 2010 Czech Penal Code criminalizes segregation.<sup>29</sup> In April 2010, the Ombudsman of the Czech Republic observed that "special, segregated education should always be a last resort". He also concluded that school principals and inspectors (not the children's guardians or parents) had erred in assigning Roma children to the wrong programs, and that both the schools and the State were responsible for the current situation. The disproportionate number of Roma children placed in "practical" schools without a prior diagnosis of disability as defined by the Schools Act was thus not only indirect discrimination but also "fundamental misconduct" on the part of the authorities.<sup>30</sup>

A 2012 Amnesty International report paints a bleak picture of the current state of affairs: "In the school year 2011/2012, the Ombudsperson investigated 67 schools throughout the country that teach a curriculum for pupils with mild mental disabilities. According to the findings, on average 35% of the pupils in the 67 surveyed practical schools and classes were Roma. The trajectory to practical education usually starts when a pupil is asked to repeat a grade. Once the pupil's difficulties at school reach this point, it is likely that a psychological diagnosis supporting transfer to a practical study plan will follow rather than considering other

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<sup>27</sup> ALBERT, G. "Education Policies in the Czech Republic", pp. 190-191.

<sup>28</sup> Ibid, p.192.

<sup>29</sup> Ibid, p. 191.

<sup>30</sup> Ibid. p. 184.

interventions or support that could keep them in mainstream education."<sup>31</sup>

In summary, available data suggests that recent legislative and policy measures aiming to improve the educational outcomes of Czech Roma have been insufficient to bring about substantive change. Roma children without any mental disability continue to be disproportionately placed in lower-level practical schools, merely because of their social and ethnic origins.

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<sup>31</sup> AMNESTY INTERNATIONAL, *Five more years of injustice*, 2012, p. 9.

## B. Legal issues

Despite the recent attempts by the Czech government to tackle this situation, very little has changed in practice for the Roma children. As they belong to an ethnic minority, they still suffer segregation at schools and exclusion in their daily lives. This has become a cycle difficult to get out of.

Having described the current situation of the Roma population in the Czech Republic, we will now present the theory of indirect discrimination as it applies to the case of this vulnerable minority. We will first analyse the basic components of indirect discrimination, insisting on possible justifications for the impugned policies, and broach the theory of systemic discrimination in order to offer a perspective that the ECtHR has not stated yet.

Subsequently, we will pay attention to the parental consent defence. After giving an overview of the classical theory of consent and analysing of the rationality of this argument, we will lay out the standards that should be met for parental consent to be considered valid. Our aim is to prove that due to the circumstances in which the consent was given, it should not be considered as a valid decision.

Lastly, we will present the right to education as a fundamental right in the main international texts and put up a case for giving it priority over the right of parents to decide on their children's education.

### 1. Indirect discrimination

In the landmark 2007 case of *D.H. and other v. Czech Republic*, the ECtHR held that the disproportionate assignment of Roma children to "special schools" without an objective and reasonable justification amounted to indirect discrimination breaching article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR) read in conjunction with

article 2 of Protocol 1 (right to education).<sup>32</sup> Since then, the ECtHR has ruled in a similar way in *Sampanis and others v Greece* (2008),<sup>33</sup> *Orsus v Croatia* (2010),<sup>34</sup> and *Horváth and Kiss v Hungary* (2013).<sup>35</sup> Until now, therefore, the ECtHR has treated the school segregation of Roma children in European countries as cases of indirect discrimination. This type of discrimination exists because Roma children are concentrated in different classes or special schools where they receive an inferior education that gives them fewer opportunities to pursue higher education or find employment in the future. Thus, a system of apparently neutral norms and practices impacts negatively upon this particular group without an adequate justification. In this section, we explain the nature of indirect discrimination and its main elements.

### 1.1. Basic components

According to recent doctrine, "indirect discrimination occurs where the use of an apparently neutral and non-discriminatory way of distinguishing between individuals has a disproportionately negative impact upon members of particular groups, and the use of this method of making distinctions cannot be shown to be necessary and justified in the circumstances."<sup>36</sup>

This form of discrimination can be defined by three elements:<sup>37</sup>

- Equal treatment, which means a provision, condition or practice that is equally applied to all.
- Unequal impact with prejudicial effects for a group. It applies the comparative dimension of equality in a collective sense and raises difficult questions about the role of statistics, as well

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<sup>32</sup> European Convention on Human Rights, 1950 and Protocol 1, Council of Europe.

<sup>33</sup> *Sampanis and others v. Greece*, 2008 (ECtHR). The judgment was confirmed on December 2012, after applicants complained that the authorities had refused to abide by the first judgment. Information available at: <http://goo.gl/rkbz8>.

<sup>34</sup> *Orsus and Others v. Croatia*, 2010 (ECtHR).

<sup>35</sup> *Horvath and Kiss v. Hungary*, 2013 (ECtHR).

<sup>36</sup> BAMFORTH, N.; MALIK, M.; O' CINNEIDE, C. *Discrimination Law: Theory and Context.*, London, Thomson, 2008, p. 290.

<sup>37</sup> FREDMAN, S. *Discrimination Law* (2nd edition), Oxford, OUP Oxford, 2011, p. 179.

as the interaction between the group and the individual.

- Lack of a valid justification. To determine if a measure is justified or disproportionate requires a proportionality analysis considering: 1) if it pursues a legitimate aim; 2) if the means of achieving that aim are appropriate or necessary;<sup>38</sup> and 3) if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>39</sup>

The European Union definition is taken from the case-law of the ECtHR: “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.”<sup>40</sup> Importantly, this form of discrimination is only prohibited if the particular group affected is defined by its possession of a suspect characteristic such as age, sexual orientation, gender, religious belief, ethnic or racial origin.<sup>41</sup>

As we have seen, education policies in the Czech Republic have been found to constitute indirect discrimination against Roma children because of their ethnic origin. The Racial equality directive defines this as “an apparently neutral provision, criterion or practice [which] would put persons of a racial or ethnic origin at particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”<sup>42</sup>

In *D.H. and others*, the ECtHR observed that “as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority” that requires “special protection.”<sup>43</sup> Recent data has confirmed this diagnostic. In a

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<sup>38</sup> Council Directive 2000/43/EC, Art 2(2)(b); Council Directive 2000/78/EC, Art 2(2)(b); European Parliament and Council Directive 2006/54/EC, Art 2(I)(b).

<sup>39</sup> *Horvath and Kiss v. Hungary*, 2013 (ECtHR) para. 112.

<sup>40</sup> *DH and others v. Czech Republic*, 2007 (ECtHR) para. 184; *Horvath and Kiss v. Hungary*, 2013 (ECtHR) para. 105; *Hugh Kordan v. the United Kingdom*, 2001 (ECtHR) para. 154; *Sampanis and others v. Greece*, 2008 (ECtHR) para. 68.

<sup>41</sup> BAMFORTH, N.; MALIK, M.; O' CINNEIDE, C., *Discrimination Law: Theory and Context*, pp. 291-292.

<sup>42</sup> Council Directive 2000/43/EC, Art 2(2)(b).

<sup>43</sup> *D.H. and others v. Czech Republic*, 2007 (ECtHR) para. 182.

2008 large-scale study on the discrimination against ethnic minorities, the European Union Agency for Fundamental Rights (FRA) found that the Roma were the most vulnerable of all surveyed groups, followed by Sub-Saharan and North Africans. Half of all respondents declared having been discriminated against an average of 11 times over the past year.<sup>44</sup> The highest levels of discrimination were found in the Czech Republic, where 42% of Roma respondents declared having suffered discrimination in private services, 32% when looking for work or at work, 23% by healthcare personnel, 20% by a housing agency or a landlord, 14% by social service personnel and 10% by school personnel. Moreover, 83% considered that discrimination against the Roma was widespread in Czech society. Czech Roma were also found to be the most exposed to in-person crime (36% had been victimized over the past 12 months), although as much as 76% of victims had not reported the incident. Out of the 34% who had been stopped by the police over the past 12 months, more than half considered they had been selected because of their ethnicity.<sup>45</sup>

In 2011, the FRA carried out another survey on the life conditions of 7465 Roma and 2183 non-Roma in the Czech Republic. Results showed wide discrepancies between both groups' rates of completed upper-secondary education (approximately 30% for Roma and 80% for non-Roma), unemployment (40% and 10%), severe health problems (35% and 15%), deficient housing (15% and 5%) and severe material deprivation (70% and 20%). These statistics suggest that Czech Roma make up a highly disadvantaged group on both the redistribution and the recognition dimensions, in the sense that their stigmatized social status interacts with and reinforces their socioeconomic subordination.<sup>46</sup>

## 1.2. Statistical evidence and burden of proof

Indirect discrimination is based on a group comparison: an equal treatment can be discriminatory because of its disproportionate exclusionary impact on a group sharing a protected characteristic. In order to demonstrate this effect, the use of statistics is clearly a potent

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<sup>44</sup> FRA, *European Union Minorities and Discrimination Survey: Main Results Report*, 2009.

<sup>45</sup> FRA, *European Union Minorities and Discrimination Survey: The Roma*, 2009.

<sup>46</sup> FREDMAN, S. *Discrimination Law*, p. 25 fol.

tool.<sup>47</sup> While a wider range of evidence may be capable of being used to establish the existence of a particular disadvantage, statistics will still often be crucial.<sup>48</sup> In *D.H. and others*, the ECtHR used statistics as *prima facie* evidence of disparate impact. Where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden shifts to the respondent State, which must show that the difference in treatment is not discriminatory.<sup>49</sup> While statistics may be used, courts might also take a common sense view based on judicial notice or on obvious facts.<sup>50</sup> In *Horváth and Kiss v. Hungary*, the ECtHR reinforces the jurisprudence established in *D.H. and others* by confirming both the use of statistical data as *prima facie* evidence and the reversal of the burden of proof<sup>51</sup>. However, it is important to note that “relevant statistical evidence may be difficult to find, and in any case may not reflect the disadvantages and structural discrimination faced by many disadvantaged groups.”<sup>52</sup>

In the European Court of Justice (ECJ) case of *O'Flynn v. Adjudication Officer*,<sup>53</sup> it was determined that it was not necessary to prove that a provision in practice affects a substantially higher proportion of a group of people, as long as it was liable to have such an effect. In other words, this approach is based on the risk or liability of disparate impact rather than on the proof that such impact has in fact occurred. Indirect discrimination is thus established where, subject to a justification defence, the provision or practice “puts, or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it.”<sup>54</sup>

In a non-discriminatory environment, there would be a fair distribution of men and women,

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<sup>47</sup> FREDMAN, S. *Discrimination Law*, p. 183.

<sup>48</sup> BAMFORTH, N.; MALIK, M.; O' CINNEIDE, C. *Discrimination Law: Theory and Context*, p. 315.

<sup>49</sup> *DH v. Czech Republic*, 2007 (ECtHR) para 189.

<sup>50</sup> EUROPEAN COMMISSION, *Limits and Potential of the Concept of Indirect Discrimination*, 2008, p. 40.

<sup>51</sup> *Horvath and Kiss v. Hungary*, 2013 (ECtHR) para. 106-108.

<sup>52</sup> BAMFORTH, N.; MALIK, M.; O' CINNEIDE, C. *Discrimination Law: Theory and Context*, p. 320.

<sup>53</sup> *O'Flynn v. Adjudication Officer*, 1996 (ECJ) para. 21.

<sup>54</sup> Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000.



ethnic and religious groups, heterosexuals and homosexuals, able-bodied and disabled people. The under-representation of one of these groups, such as the under-representation of Roma children in mainstream schools, and the over-representation in special schools, this is plausibly due to a hidden obstacle that should be removed. According to Fredman, this approach is particularly useful where the discriminatory practice is opaque and informal.<sup>55</sup>

We think that it has been shown that education policies in Czech Republic have a prejudicial effect on Roma children. It was shown in the case DH and others and the truth is that the situation has not changed.

On the other hand, according to the ECtHR, where it has been shown that legislation produces an indirect discriminatory effect, it is not necessary to prove any discriminatory intent on the part of the relevant authorities.<sup>56</sup>

### 1.3. Justification

Justification is the third relevant element to take into account when establishing whether a practice is indirectly discriminatory or not. In *Bilka*,<sup>57</sup> the ECJ stated that the respondent must show that the means chosen serve a real need, that they are appropriate to achieve that objective, and that they are necessary. In *Seymour Smith*,<sup>58</sup> it insisted that mere generalizations should not suffice. The ECtHR has stated that: “Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.”<sup>59</sup>

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<sup>55</sup> FREDMAN, S. *Discrimination Law*, p. 181.

<sup>56</sup> *Horvath and Kiss v. Hungary*, 2013 (ECtHR) para. 106; *D.H. and Others*, 2007 (ECtHR) para. 194.

<sup>57</sup> *Bilka-Kaufhaus GmbH v Weber von Hartz*, C-170/84, 1986 (ECJ) para. 37.

<sup>58</sup> *Seymour-Smith and Perez*, 1999 (ECJ) para. 76.

<sup>59</sup> *DH and Others v. Czech Republic*, 2007 (ECtHR) para. 196; *Horvath and Kiss v. Hungary*, 2013 (ECtHR) para. 112.

In 2007, the government alleged that parents gave their consent to the segregation. But the ECtHR was not satisfied because the parents of the Roma children had not received information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools.<sup>60</sup> Even if the consent had been informed, the Grand Chamber held that “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>61</sup>

Another justification usually alleged in cases of educational segregation is that the intelligence tests and their application were capable of determining fairly and objectively the school aptitude and mental capacity of the children, and this was the reason why some Roma children were transferred to special schools. Nevertheless, there is a danger that the tests were culturally biased and cannot be considered to serve as justification for the disproportionate treatment. Thus, the state has to demonstrate that the tests and their application in practice are capable of “fairly and objectively” determining the learning abilities of the applicants.<sup>62</sup>

#### **1.4. Systemic discrimination: a new approach**

As we have seen, the concept of indirect discrimination used in ECtHR case law is based on a thorough consideration of the general societal context in which formally neutral norms and policies are implemented. This context is taken into account at different stages of judicial reasoning: when measuring disparate impacts based on statistical evidence, when evaluating whether existing practices are appropriate and necessary to achieve a legitimate aim, and when weighing the proportionality between the means employed and the aim sought to be realized. Such an analysis inevitably draws on a set of sociological premises on the different processes that contribute to the perpetuation of the disadvantage of ethnic groups like the Roma. Now, theorists of systemic discrimination have laid out these premises from an empirical and normative perspective. According to a report on racial profiling and its consequences by the

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<sup>60</sup> DH and Others v. Czech Republic, 2007 (ECtHR) para. 203.

<sup>61</sup> DH and Others v. Czech Republic, 2007 (ECtHR) para. 204.

<sup>62</sup> Horvath and Kiss v. Hungary, 2013 (ECtHR) para. 117.

Quebec Commission des Droits de la Personne et des Droits de la Jeunesse:<sup>63</sup>

“Systemic discrimination involves both direct and indirect discrimination, but it also goes much further. It is based on the dynamic interaction between decisions and attitudes tainted by prejudice, and on organizational models and institutional practices that have harmful effects, whether intended or not, on groups that are protected by the Charter [...]. Discrimination is then reinforced by the very exclusion of the disadvantaged group, because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces.”<sup>64</sup>

Thus, prejudices and stereotypes are the backdrop for discrimination. That is why the members of the racial minority are treated as a function of a difference that is always ascribed to them.

In 1999, the Stephen Lawrence Inquiry adopted a broader definition of the term, sustaining that “it can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.” It persists because a society or organization has failed to recognize and address its existence and causes by policy, example and leadership.<sup>65</sup>

According to Sen, “the deprived people tend to come to terms with their deprivation because of the sheer necessity of survival, and they may, as a result, lack the courage to demand any radical change, and may even adjust their desires and expectations to what they unambitiously see as feasible. The mental metric of pleasure or desire is just too malleable to be a firm guide to deprivation and disadvantage. It is thus important not only to take note of the fact that in the scale of utilities the deprivation of the persistently deprived may look muffled and muted, but

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<sup>63</sup> COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Racial Profiling and Systemic Discrimination of Racialized Youth*, 2011.

<sup>64</sup> Ibid. p. 14.

<sup>65</sup> MARCPHERSON, W. *The Stephen Lawrence Inquiry: Report of an Inquiry*, London, HMSO, 1999, para. 6.34. Cited in BAMFORTH, N.; MALIK, M.; O' CINNEIDE, C. *Discrimination Law: Theory and Context*, London, Thomson, 2008, p. 336.

also to favour the creation of conditions in which people have real opportunities of judging the kind of lives they would like to lead.”<sup>66</sup>

Social and economic factors such as basic education, elementary health care and secure employment are important on their own and for the role they can play in allowing people to choose the lives they have reason to value.<sup>67</sup> Sen sees freedom “not as absence of coercion, but as agency, or the ability to exercise genuine choice and act on those choices.”<sup>68</sup> According to this view, “what people can achieve is influenced by economic opportunities, political liberties, social powers and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives.”<sup>69</sup> Freedom therefore requires the “removal of major sources of un-freedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over-activity of repressive states.”<sup>70</sup>

Kosko adds that systemic discrimination causes asymmetries in levels of education, in information and in bargaining power. In matters of parental consent, it requires us to ask if parents are able to make fully informed and meaningful decisions, namely, if they possess critical agency. Critical agency is freedom and power to act and to question the prevailing norms and values. An important basis for such power and freedom is education.<sup>71</sup> This relates to Fredman’s account of adaptive preferences:

“Individuals cannot exercise effective choice when social, political, or economic conditions limit their horizons of possibility to such an extent that they are unable to even identify the potential choices in the first place. However, it does not dictate which choices should be

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<sup>66</sup> SEN, A. *Development as Freedom*, Oxford, Oxford University Press, 1999, p. 63.

<sup>67</sup> Ibid.

<sup>68</sup> FREDMAN, S. *Human Rights Transformed*, Oxford, Oxford University Press, 2008, p. 11.

<sup>69</sup> SEN, A. *Development as Freedom*, p. 5.

<sup>70</sup> Ibid. p. 3.

<sup>71</sup> KOSKO, S. J., "Parental Consent and Children's Rights in Europe: A Balancing Act", *Human Development and Capability Association Conference*, Lima, 2009, pp.18-21.

exercised. The way forward is to provide the conditions that make it possible for individuals to form their choices in genuine freedom as well as act on them. The positive obligation on the State is to secure such conditions, without imposing any particular set of choices on individuals.”<sup>72</sup>

Thus, poverty should be seen as the deprivation of basic capabilities and a type of unfreedom.<sup>73</sup> It requires positive action and obligations of the states for removing these differences, because as Fredman sustains the duty-bearer is identified as the body in the best position to perform this duty, regardless of who is responsible for creating the problem in the first place. “To be targeted and effective, proactive programs should be aimed at specified outcomes, such as redressing disadvantage, accommodating difference, increasing participation, or protecting dignity, or a combination of the above.”<sup>74</sup> In a recent article on racial segregation, Simpson concludes that “the racially motivated barriers to movement and integration need to be dismantled and the structural causes of sustained poor inner-city neighbourhoods addressed.”<sup>75</sup>

Certainly, segregation is not the solution for deprived people, because it undermines agency and autonomy. As Fredman argues,<sup>76</sup> “given an understanding of freedom as agency, it is clear that, instead of regarding society as a limitation on individual freedom, it is the social context which itself enhances autonomy. Individuals need society for more than just law and order. Not only is the individual unable to achieve her full potential without social input, in addition, individual identity is essentially based on interpersonal recognition and relationships. This builds on Hegel's foundational view of individual identity as deriving from inter-subjective recognition within the context of social relations.”<sup>77</sup>

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<sup>72</sup> FREDMAN, S. *Human Rights Transformed*, p.15.

<sup>73</sup> FREDMAN, S. *Human Rights Transformed*, p.75.

<sup>74</sup> FREDMAN, S. *Discrimination law*, p. 230-231.

<sup>75</sup> SIMPSON, L. "Statistics of Racial Segregation: Measures, Evidence and Policy", *Urban Studies*, vol. 41:3, 2004, p. 679.

<sup>76</sup> FREDMAN, S. *Human Rights Transformed*, p. 18.

<sup>77</sup> Ibid.

In the education system, discrimination is based in part on individual decisions affected consciously or not by racial prejudice but also on organizational models or institutional structures that, although appearing to be neutral, have harmful effects on certain groups.<sup>78</sup> According to the consultation report mentioned above, “when there are practices and organizational models at work that have disproportionately harmful effects on students from racialized minorities of immigrant origins, even though they appear to be neutral, there is a systemic discrimination involved”. For example, the placement of a student in a particular educational program, such as separated classes or special schools, can be based on prejudices about the student's origin or culture. Such practices limit the range of possibilities offered to the student.<sup>79</sup>

Because of the importance that Roma children are in contact with other children, the “special” classes should only be applied as a last resort and only in cases of real disabilities, not because of socio-cultural disadvantages. Welcome classes seem to be more convenient for these cases so that students can pursue their route to educational and social integration into regular classes as quickly as possible.<sup>80</sup> Another important element is second-language training. Related to this, it is vital that teachers and other school interveners become aware of the challenges faced by students who need to learn a second language, as well as the role they have to play in the integration process.<sup>81</sup>

In summary, the segregated education of Roma children in special schools can be traced back to several basic components of systemic discrimination: language and cultural differences, no participation in pre-school programs, fear of socialization and assimilation, parental background and aspirations, nomadic community life and lack of teacher training, support and expectations. There are also other factors like enrolment and attendance, assignment to special education for reasons other than disability, placement in lower than age-appropriate grades and lack of intercultural school curricula and resources, residential segregation, lack of employment

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<sup>78</sup> COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Racial Profiling and Systemic Discrimination of Racialized Youth*, p. 57.

<sup>79</sup> Ibid. p. 61.

<sup>80</sup> Ibid. p. 69.

<sup>81</sup> Ibid. p. 73.

opportunities and absence of systematic monitoring of key indicators of disadvantage.<sup>82</sup> Moreover, high levels of anti-Roma bullying in mainstream schools can lead some parents to transfer their child to a “special school” for their own wellbeing<sup>83</sup> or because of a lack of confidence in institutions or identification with the wider society.<sup>84</sup>

## **2. Parental consent**

In the previous sections, we have offered a broad picture of the factual and legal dimensions of Czech Roma’s indirect discrimination through their placement into special (currently “practical”) schools. Hereafter we will focus on the Czech government’s claim that “the consent of a student’s parents can be proof that an action was not discriminatory.”<sup>85</sup> Our purpose is to clarify the meaning of parental consent and the requirements for its validity as a justification of school segregation.

### **2.1. Rationality**

If Czech authorities put forward parental consent as a justification for the disproportionate concentration of Roma children in lower-level schools, the first step of a judicial review should consist in assessing the *prima facie* rationality of this argument. In contexts of systemic prejudice and discrimination, scholars have insisted that the ECtHR should “adopt a critical attitude towards the reasons and justifications states put forward for their actions” in order to “render explicit and problematic what society experiences as natural.”<sup>86</sup> More specifically, it should make sure that States base their regulations and actions on rationally defensible grounds and not on mere stereotypes. Vague arguments related to tradition and culture

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<sup>82</sup> EUMC, *Roma and Travellers in Public Education*, 2006, pp. 61-68.

<sup>83</sup> See, for example, ERRC, *Persistent Segregation of Roma in the Czech Education System*, 2009, available at: <http://www.errc.org/cikk.php?cikk=3049>

<sup>84</sup> *Ibid.* p. 15.

<sup>85</sup> KOSKO, S. J. “Parental Consent and Children’s Rights in Europe: A Balancing Act”, p. 1.

<sup>86</sup> TIMMER, A, “Toward an anti-stereotyping approach for the European Court of Human Rights”, *Human Rights Law Review*, 11:4, 2011, p. 725.

should not be considered as sufficient justifications; indeed, they should be considered suspect, since they appeal to the popularity of stereotypes. In *Konstantin Markin v. Russia*, the ECtHR stated that “references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment”<sup>87</sup> and that “gender stereotypes [...] cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.”<sup>88</sup> In *L. and V. v. Austria*, the ECtHR noted that “negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.”<sup>89</sup> In *Inze v. Austria*, the Court also dismissed arguments that were based on “traditional outlooks.”<sup>90</sup> In *Zarb Adami v. Malta*, the Court found that “cultural reasons” could not be considered as a valid justification for discrimination.<sup>91</sup>

The Czech government’s allegation that the school segregation of Roma children can be justified by their parents’ consent seems to offer an example of stereotype-based reasoning. In particular, it reflects the widespread idea that the woes of the Roma community are largely due to their lack of interest in formal education. These perceptions are stated explicitly in *D.H. and others*, where the defending party claims that “there could be no improvement in [Roma’s] situation without the involvement and commitment of all members of the Roma community”<sup>92</sup> and that “the applicants’ parents had on the whole done nothing to spare their children the alleged discriminatory treatment and had played a relatively passive role in their education.”<sup>93</sup> The Government also declared itself “firmly convinced that the applicants had deprived themselves of the possibility of continuing their studies through a lack of interest” and that the unfavourable situation of the applicants “had stemmed mainly from their own lack of interest.”<sup>94</sup>

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<sup>87</sup> *Konstantin Markin v. Russia*, 2012 (ECtHR) para. 127.

<sup>88</sup> *Ibid.* para. 143.

<sup>89</sup> *L. and V. v. Austria*, 2003 (ECtHR) para. 52.

<sup>90</sup> *Inze v. Austria*, 1987 (ECtHR) para. 44.

<sup>91</sup> *Zarb Adami v. Malta*, 2006 (ECtHR) para. 82.

<sup>92</sup> *D.H. and others*, para 146.

<sup>93</sup> *Ibid.* para. 153.

<sup>94</sup> *Ibid.* para. 154.



On the other hand, the insistence on parents' lack of engagement in their children's education directly contradicts the assertion that the segregation "reflected first and foremost the parents' wishes for their children to attend special school" and that "had the parents not expressed such a wish (by giving their consent), the children would not have been placed in a special school."<sup>95</sup> Such a flawed reasoning suggests that rather than respecting the "wishes" of Roma parents, what Czech authorities are doing is to feed on widespread preconceptions about what these wishes are in order to give a gloss of legitimacy to its own segregating agenda.

## **2.2. Validity**

Informed consent is an essential element in the history of law, moral philosophy, the social sciences and the health professions. One of the essential elements in any Roman legal act was the volition<sup>96</sup> expressed by the parties. Volition was the will to conform and it had to be both genuine and expressly manifested. Vices of consent were considered to take place in cases where this manifestation did not match the internal will of the person. General civil law theory establishes that for consent to be valid, it must be made in a conscious, external and intended way, as well as "be freely expressed and in full knowledge of the facts."<sup>97</sup>

Vices of consent are to be understood as stemming from the principle of autonomy, integrated in "the liberal Western tradition of the importance of individual freedom and choice, both for political life and for personal development."<sup>98</sup> It is justified by the freedom of will or "judicial free will", as it aims to ensure "every person's possibility to choose certain behaviour."<sup>99</sup> Therefore, it excludes the idea of force.

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<sup>95</sup> Ibid. para. 148.

<sup>96</sup> BURDICK, W. L., *The Principles of Roman Law: And Their Relation to Modern Law*, New York, The Lawyers Co-Operate Publishing, 2004.

<sup>97</sup> HURBEAN, A., "Comparative analysis of vices of consent", *Revista DREPT - Series Jurisprudentia*, No. 11, 2008, p.139.

<sup>98</sup> FADEN, R. R. & Beauchamp, L. T., *A History and Theory of Informed Consent*, New York, OUP, 1986, p. 7.

<sup>99</sup> HURBEAN, A., "Comparative analysis of vices of consent", p.139.

When applied to the field of special education, the principle of informed consent means that parents have a right to decide on their children's education. This is stated in article 13.3 of the International Covenant of Economic, Social, and Cultural Rights (CESCR)<sup>100</sup> and article 2 of the Additional Protocol to the ECHR.<sup>101</sup> In particular, parents have the right to choose the education their children will receive, in accordance with their religion and moral beliefs. The consent given to teachers or psychologists when decisions are taken on the minor's education is seen as an expression of this right.<sup>102</sup>

Parental consent is especially relevant in the context of special education, as it entails a difference in the curriculum that may affect the overall quality of the education received. "Given the responsibility of parents in the education of their children, there is little doubt that their approval is required for special education planning. The implications of adapting instruction and curriculum to meet the needs of exceptional students raise the stakes for higher accountability to parents. Signed parental consent forms have become an integral part of the documentation process for special education."<sup>103</sup>

This being said, ECtHR case law has established that the waiver of a right guaranteed by the Convention (insofar as such a waiver is permissible) must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent and without constraint.<sup>104</sup> In *D.H. and others*, the Court did not find sufficient evidence that "the parents of Roma children, who were members of a disadvantaged community... were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by

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<sup>100</sup> Article 13.3 CESCR: "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions."

<sup>101</sup> Article 2 Add. Protocol ECHR: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

<sup>102</sup> Article 13.3 CESCR.

<sup>103</sup> PHILPOTT, F. D., "Informed Consent In Special Education: Conceptual Definitions And Implications For Practice", *The Morning Watch*, 32:1, 2004, Available at: <http://www.mun.ca/educ/faculty/mwatch/fall04.htm>

<sup>104</sup> *Pfeifer and Plankl v. Austria*, 1992 (ECtHR) para 37; *Deweert v. Belgium*, 1980 (ECtHR) para 54; *Sampanis v. Greece*, 2008 (ECtHR) para 93.

means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures. It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism, and special schools where the majority of the pupils were Roma."<sup>105</sup>

When assessing the validity of parental consent, two questions must be asked: is this consent informed and independent? Does it reflect a true and meaningful decision?

### 2.2.1. Informed consent

An informed consent must be based upon a clear appreciation and understanding of the facts, implications, and future consequences of an action. "Today special education policies, procedural guides or provincial statutes outline the concept of informed consent and articulate clear methods to ensure that such is followed. The doctrine of informed consent references the recognized right of an individual to consent to treatment or actions which may limit or affect their fundamental constitutional rights of life, liberty and security of the person."<sup>106</sup>

In our case, the parents must be aware of what education in practical schools involves. For this to be achieved, teachers shall inform parents, in an effective communication and written form, which are the reasons why their children are placed in a practical school, what is the curriculum they will be taught and what are the consequences of receiving special education. In any case, they must be aware that their consent to this placement or removal is mandatory;

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<sup>105</sup> D.H. and others v. Czech Republic, 2007 (ECtHR) para 203.

<sup>106</sup> PHILPOTT, F. D., "Informed Consent In Special Education: Conceptual Definitions And Implications For Practice".

thereupon, it has to be voluntary and revocable.

According to the 2004 US Individuals with Disabilities Education Act, informed consent for special education must satisfy the following conditions:

- The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;
- The parent understands and agrees in writing to the carrying out of the activity for which parental consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom;
- The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

This is an example of the requirements parental consent should fulfil in order to be considered as valid. As the Court questioned whether the parents had consented at all, holding that the parents “could not reasonably have made a fully informed, meaningful decision”,<sup>107</sup> we need to analyse if these circumstances obtained.

According to the ECCR,<sup>108</sup> in Ostrava, as in other parts of the Czech Republic, “numerous parents, including parents of some of the plaintiffs herein, have not been adequately informed of numerous facts of great significance, including the following:

- That they have a right not to consent;
- That, in practice, assignments to special school in Ostrava are permanent and irrevocable;
- That special-school graduates are effectively prohibited from entering non-vocational secondary educational institutions, which damages their opportunities to secure adequate employment.

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<sup>107</sup> D.H. and others, para 203.

<sup>108</sup> ERRC, *Legal Strategy to Challenge Racial Segregation and Discrimination in Czech Schools*.

Parents often receive evaluation reports only at the very meeting with officials where their consent is sought - thus giving them little or no opportunity to review and assess the findings - and the reports are frequently communicated summarily, and/or in professional jargon which is unintelligible to the layperson.”<sup>109</sup>

This suggests that Roma parents are not usually well informed of the situation. They do not know their rights, including the right not to consent or to revoke, and they are not aware of the consequences it can have for their children to receive special education.

In the worst cases, parents may not realize that they are authorizing their children to be moved to a special school. In an interview, a Roma parent explained how the consent was given in his case: “My daughter is in the second year of basic school. She is doing all right. One day her teacher came to me saying ‘We will move her to another class which will be better for her’. She gave me a piece of paper to sign. I should have read it but it was long and I didn’t think a teacher would try to cheat us, so I just signed it... The next day I got a letter saying that my daughter had been moved to a remedial special school.”<sup>110</sup>

Trust in the authorities (starting from the teachers and psychologists who test the students up to the Minister of Education) who are supposed to guarantee an adequate curriculum for every student can therefore lead parents to accept segregation without understanding the consequences it entails.

### **2.2.2. Free consent**

Where capacity to consent is disrupted by others, when do consent or refusal decisions become compromised by the pressure exerted by others? According to O’Shea, outright violence or its threatened use would be a clear case but “even without overt pressure, we may think that

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<sup>109</sup> ERRC. *Legal Strategy to Challenge Racial Segregation and Discrimination in Czech Schools*.

<sup>110</sup> Interview collected in RINGOLD, Dena, ORENSTEIN, Mitchell A. y WILKENS, E. *Roma in an Expanding Europe: Breaking the Poverty Cycle*, Washington, World Bank, 2005.

the influence of another person has prevented someone from making their own decision.”<sup>111</sup>

In *Jehovah’s Witnesses of Moscow v. Russia*, the ECtHR has observed that “in some cases doctors will not only have to consider the capacity of the patient to refuse treatment, but also whether the refusal has been vitiated because it resulted not from the patient's will, but from the will of others. It matters not that those others sought, however strongly, to persuade the patient to refuse, so long as in the end the refusal represented the patient's independent decision. If, however, his will was overborne, the refusal will not have represented a true decision.”<sup>112</sup>

We can see that for the Court, when individuals conform to certain things, possibly changing their opinions or values, due to coercion, their decision cannot be considered a free one.

In *D.H. and others*, the Court highlights that “many schools in the Czech Republic are reluctant to accept Roma children. That reluctance is explained by the reaction of the parents of non-Roma children, which, in numerous cases, has been to remove their children from integrated schools because the parents fear that the level of the school will fall following the arrival of Roma children or, quite simply, because of prejudice against the Roma.”<sup>113</sup> This problem is not confined to the Czech Republic. The organization Human Rights House has reported several organized protests where parents of Croatian nationality did not want their children to go to the same class as the Roma, giving arguments such as: “Their children do not speak Croatian, they are more aggressive and do not have hygienic habits like we do. Our children therefore, cannot make any progress with them in the same class.”<sup>114</sup>

Based on these examples, we can say Roma parents plausibly face social pressure when it comes to decide the school their children will attend. They are explicitly rejected in many cases

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<sup>111</sup> O’SHEA, T. “Consent in history theory and practice”, *Essex Autonomy Project Green Paper Report*, University of Essex, 2011, p. 29.

<sup>112</sup> *Jehovah’s Witnesses of Moscow v. Russia*, 2010 (ECtHR) para 86.

<sup>113</sup> *D.H. Others v. Czech Republic*, 2007 (ECtHR) para 48.

<sup>114</sup> HUMAN RIGHTS HOUSE, “Discrimination and segregation of Roma pupils in Croatian schools”, December 2010, available at: <http://humanrightshouse.org/Articles/13796.html>.

by non-Roma parents, who do not want their children to be educated with Roma children. This climate of exclusion can be reason enough for a parent to accept that his child is moved to a special school, especially when this has been “recommended” by the professors and/or psychologists.

To sum up, insufficient or inexact information and a controversial atmosphere in which Roma families do not feel respected or even wanted in mainstream schools can lead parents to accept the segregation of their children as a lesser evil. In cases where Roma parents are not free to balance the situation inasmuch as they feel coerced to take their decision, we cannot talk about a truly free decision. Without the education and information to demand that their child receive the same level of education as other children, parents face what has been called a “daunting power imbalance.”<sup>115</sup> Lacking a full understanding of the situation, they find themselves at a disadvantage and consent to a decision that has already been taken for them.

### **3. The right to education**

Regardless of the validity of parental consent, there is a need to identify a threshold in order to clarify the role it must play in the area of education. The exact location of this threshold must be discovered on a case-by-case basis, rather than relying on a one-size-fits-all judgment about the power of parental consent in justifying segregation.<sup>116</sup>

#### **3.1. Content and normative underpinnings**

Education is closely related to the exercise of other rights, as it affects the development of individuals and their future wellbeing. The right to education has been enshrined in various international conventions, national constitutions and development plans. According to article 26 of the Universal Declaration of Human Rights:

1) Everyone has the right to education. Education shall be free, at least in the elementary and

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<sup>115</sup> KOSKO, S. J. “Parental Consent and Children’s Rights in Europe: A Balancing Act”, p. 20.

<sup>116</sup> Ibid. p. 31.

fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

According to the General Comment on Article 13 of the International Covenant on Economic, Social, and Cultural Rights, education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities... But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence... States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards [these] aims... [T]hese educational objectives reflect the fundamental purposes and principles of the United Nations... [A]rticle 13 (1) adds to the Declaration in three respects: education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups.<sup>117</sup>

Art. 2 Protocol 1 European Convention on Human Rights states that “no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to

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<sup>117</sup> CESCR, *General Comment on Article 13 of the International Covenant on Economic, Social, and Cultural Rights. The right to education (Art.13)*, 08/12/1999. E/C.12/1999/10.



education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.<sup>118</sup>»

Education gives people the skills to access information and acquire knowledge about the rights they hold and governments' obligation to guarantee these rights are fulfilled. It also gives people the power to develop their abilities to demand, exercise and negotiate them during their lives. According to Fredman, “education directly enhances individuals' capabilities to exercise their democratic rights. This is reinforced by the value of solidarity. Positive duties to provide education are not merely to the advantage of the recipient. The community as a whole benefits from an educated population.”<sup>119</sup>

Education plays a crucial role to make society cohesive and to enhance the relations between majorities and minorities. Education is especially important for minorities, in order to protect and guarantee their existence, and also because positive social changes can be achieved by means of education. This has been recognized in the Framework Convention for the Protection of National Minorities.<sup>120</sup>

### **3.2. Obligation to fulfil**

International law recognizes the “liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities”,<sup>121</sup> and asserts that “within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.”<sup>122</sup> However, these rights are limited. Education is still

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<sup>118</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11. Paris, 20.III.1952, art. 2.

<sup>119</sup> FREDMAN, S. *Human Rights Transformed*, p.216.

<sup>120</sup> Framework Convention for the Protection of National Minorities CETS No 157, entered into force in the Czech Republic April 1<sup>st</sup> 1998, articles 4, 5 and 6.

<sup>121</sup> OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, 1966, CESCR, art.13

<sup>122</sup> Framework Convention for the Protection of National Minorities CETS No 157, art. 13, entered into force in the

subject to “such minimum educational standards as may be laid down or approved by the State.”<sup>123</sup>

According to article 13 of the Covenant on Economic and Social Cultural Rights (CESCR), State parties have obligations regarding the right to education such as the guarantee that “the right will be exercised without discrimination of any kind” and the obligation to take steps which must be “deliberate, concrete and targeted”<sup>124</sup> towards the full realization of the right to education. The realization of the right to education “should not be interpreted as depriving [the obligations of] States parties” of all meaningful content. Progressive realization means that States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible”<sup>125</sup> towards the full realization of article 13.2.

Article 13.2 CESCR establishes that States have an obligation to respect, protect and fulfil each of the “essential features” of the right to education. This has been conceptualized in the 4 A’s scheme: availability, accessibility, acceptability and adaptability.<sup>126</sup> Therefore, “a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil (provide) the availability of by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.”<sup>127</sup>

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Czech Republic April 1st 1998.

<sup>123</sup> Office of the High Commissioner for Human Rights 1966, CESCR, art.13.

<sup>124</sup> Office of the High Commissioner for Human Rights 1966, CESCR, art.13.

<sup>125</sup> UN ECONOMIC AND SOCIAL COUNCIL, *The right to education (Art.13)*, General Comment E/C.12/1999/10, 08/12/1999, para. 44.

<sup>126</sup> TOMASEVSKI, K., *Education denied*, Zed Books, 2003.

<sup>127</sup> UN ECONOMIC AND SOCIAL COUNCIL, *The right to education (Art.13)*, General Comment E/C.12/1999/10, 08/12/1999, para. 50.

Based on the 4A scheme, we can state that the Czech Republic is not fulfilling Roma children's right to education in the sense that it does not make education available on a basis of equal opportunity; it does not make it accessible, as school segregation impedes access to high quality education; it does not provide acceptable education, as it severely limits the life opportunities of Roma children; and it does not make it adaptable, by failing to take into account children's individual capacities as well as to implement alternatives to segregation.

As we have said, parents have the right to participate in their children's education, but this right is limited. When the education provided lacks the fundamental components of a fully formative education, the right of parents to choose it (or consent, in our case) has to be restricted. At this point, States have to balance the clash between the right to education of the children and the right of choice of parents. The right to education, because of its great intrinsic importance and because of its instrumental value for the fulfilment of other rights, needs to be integrally protected by States. Indeed, "the role of the government in education, affirmed in international and domestic human rights law, provides a powerful antidote against the risk of depleting education of remaining a public good and schooling of remaining a public service."<sup>128</sup>

### **C. Conclusions**

Legislative initiatives undertaken by Czech authorities since D.H. and others have not put an end to the disproportionate concentration of Roma children in lower-level practical schools that impede their access to higher education and the labour market. In particular, socially and culturally biased tests are still used to assess children's ability to follow a regular curriculum, consolidating a two-track education system that ratifies and increases existing inequalities instead of levelling them out. This takes place in a context of widespread anti-Roma prejudice and discrimination where advocates for change face pressure by parents, school personnel and the political establishment who wish to avoid contact with the Roma and maintain segregation.

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<sup>128</sup> Annual report of the Special Rapporteur on the right to education, K. Tomaševski, submitted in accordance with Commission on Human Rights resolution 2000/9.

These difficulties are compounded by ambivalent attitudes toward segregation within the Roma community itself. As predicted by theories of systemic discrimination, anti-Roma hostility in mainstream schools, lack of information about the repercussions of school segregation on children's opportunities and basic adaptation to long-standing marginalization have led some parents to conform to the existing arrangements. Capitalizing on these attitudes, Czech authorities have alleged that Roma school segregation could be justified by the written consent of parents, understood as an expression of their right to decide on their children's education. In the light of ECtHR case law and general theory on the vices of consent, however, there are strong reasons to doubt that such consent can be considered valid, that is to say, informed and free.

Even if it were so, the extent to which consent could offer a proportionate justification for discrimination in the right to education would be greatly reduced both by the great importance of the right in question and the status of Czech Roma as a disadvantaged group in need of special protection. For all these reasons, post-DH education policies in the Czech Republic would very plausibly be found by the ECtHR to violate article 14 of the European Convention of Human Rights.

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